

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL
DISTRICT

OAH Case No. 2015020485

DECISION

On February 3, 2015, Student filed a request for a due process hearing with the Office of Administrative Hearings, naming the Bellflower Unified School District. OAH granted a continuance for good cause on February 25, 2015.

Administrative Law Judge Caroline A. Zuk heard this matter in Bellflower, California, on April 22, 2015.

Patricia R. Valenzuela, Attorney at Law, represented Student, assisted by Margot E. Stevens, J.D., Attorney at Law. Mother attended the entire hearing. Student was not present at the hearing.

Eric Bathen, Attorney at Law, represented District. Tracy McSparren, District's Administrator, Special Education, was present for the entire hearing.¹

At the conclusion of the hearing, the matter was continued to May 12, 2015, at the parties' request to file written closing briefs. The record was closed on May 12, 2015, when the parties filed closing briefs and the matter was submitted for decision.

¹ Ms. McSparren was formerly known as Ms. Rutowski. Since most of the correspondence between the parties refers to Ms. McSparren, and the parties used the last name of McSparren at hearing, that name will be used throughout this Decision.

ISSUE

Did District commit a procedural violation by failing to provide Mother with its criteria for an independent educational evaluation, which unnecessarily delayed the IEE after it agreed to fund an IEE following Mother's July 2014 request, because it did not agree with Mother's choice of evaluator, which impeded the parent's opportunity to participate in the IEP process?²

SUMMARY OF DECISION

This Decision holds that District procedurally denied Student a free appropriate public education because District did not ensure that an agreed upon IEE in the area of psychoeducation was provided to Student without unnecessary delay following Mother's July 2014 request for an IEE.

District failed to ensure that an IEE was timely provided due to its failure to provide Mother with information on its IEE criteria, particularly information on Mother's right to select an independent evaluator that was not on District's preapproved list. While District promptly provided Mother with the names of three preapproved evaluators, it did not establish that Mother was solely responsible for the delay in not obtaining an IEE because she refused to select a preapproved independent evaluator and Student established Mother's preferred assessor met District qualifications.

FACTUAL FINDINGS

1. Student is an 8-year-old second grader who has resided within the boundaries of the District at all relevant times. In June 2014, when he was a first grader, District determined that he was ineligible for special education and related services based on its initial multidisciplinary assessment of him.

District's Initial Multidisciplinary Assessment

2. On March 19, 2014, District prepared an initial Assessment Plan in response to Mother's March 5, 2014 request for a comprehensive assessment to determine Student's eligibility for special education and related services. At that time, Student attended Zoila

² The issue has been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Sanchez's general education First Grade classroom at District's Intensive Learning Center.³ The Assessment Plan offered to assess Student in the areas of academic achievement, health, intellectual development, fine and gross motor skills, and social emotional functioning.

3. On March 27, 2014, Mother's then-attorney, Doug Pettergill, wrote a letter to Ms. McSparren (then Rutkoski), on behalf of Mother, consenting to the entire Assessment Plan. Although Mother did not sign the Assessment Plan, District accepted her attorney's letter as consent to proceed with the initial multidisciplinary assessment.

4. In April 2014, District school psychologist Ivan Varela and special education teacher Terri Zwick assessed Student, then 7 years old, summarizing the results in a detailed, 17-page, Psychoeducational Multidisciplinary Team Report, dated May 9, 2014.

June 4, 2014 IEP Team Meeting

5. On June 4, 2014, the IEP team convened to review District's initial psychoeducational, occupational therapy, speech and language, and health assessments, and to determine whether Student was eligible for special education and related services. Mr. Varela, Ms. Zwick, Ms. Stevens, Ms. Funk, and health services coordinator, LaShonna Jackson, presented their assessment results. Mother, Mr. Pettergill, Ms. Sanchez, principal Isel Taylor, Ms. McSparren, and Mr. Bathen also attended the meeting.

6. After reviewing the assessment results, District team members determined that Student was not a child with a disability under the eligibility categories of specific learning disability, other health impairment and/or speech and language impairment. No other eligibility categories were discussed. Mother disagreed with District's determination that Student was not eligible for special education and related services, because she believed that he had attention deficits, signs of dyslexia, and emotional problems that stemmed from his father's suicide six years ago.

Mother's Request for an Independent Educational Evaluation

7. On July 30, 2014, Mother through her new attorney, Ms. Campbell, informed Ms. McSparren in writing that she disagreed with District's May 9, 2014 Psychoeducational Multidisciplinary Team Report. She requested an IEE at public expense in the area of psychoeducation, but did not request a particular independent psychologist to conduct the evaluation. Mother did not request IEE's in any of the other areas assessed by District.

8. Although Mother was not obligated to explain why she disagreed with District's psychoeducational assessment, she informed District that she did not believe that District had conducted appropriate assessments in all areas of suspected disability, nor had it correctly assessed Student's abilities, or correctly determined his eligibility for special

³ The Intensive Learning Center is one of the District's elementary public schools.

education. Student's attorney's July 30, 2014 correspondence also requested an educationally related mental health services assessment, because Mother remained concerned about Student's emotional development.

DISTRICT'S RESPONSE TO MOTHER'S REQUEST FOR AN IEE

9. On August 1, 2014, District through Ms. McSparren timely responded in writing to Mother, copied to Student's attorney, agreeing to fund an IEE in the area of psychoeducation. However, District's response to Mother's request for an IEE failed to provide complete information on District's criteria for approving an independent assessor.

10. District's August 1, 2014 correspondence, provided the following information to Mother, copied to Student's attorney:

Based on your current written requests, the District is offering the following:

An Independent Psychological/Educational Evaluation (IEE) to address the concerns regarding eligibility for Special Education Services. The District offers to provide an IEE with one of the following Independent Assessors for you to choose from:

Helena Johnson, Ph.D
Robert Patterson, Psy.D
Ann Simun, Psy.D

Once the District receives written notification of your choice of one of the assessors above, we will create an Assessment Plan and Release of Information and send it to you for you to sign indicating your consent to the Assessment Plan and the sharing of your child's confidential information between the Assessor and the District.

The Assessment Plan will not be generated and the Assessment will not occur until we receive the appropriate written selection and consents from you. Please submit your written selection response to my attention at the address above.

11. Each year, District's Special Education Department researches potential independent psychologists in Los Angeles and Orange Counties, and submits the names of recommended evaluators for School Board approval. After Board approval, District relies on its master list of approved psychologists to select at least three evaluators to propose to a parent whose request for an IEE District has approved. District limits its direct funding of independent evaluations to those on its preapproved list, which consisted of eighteen psychologists when Mother requested an IEE. Ms. McSparren did not inform Mother that

District had preapproved other evaluators for psychoeducational IEEs. She offered Dr. Johnson, Patterson, or Simun, because District's direct experience or reviews of their evaluation reports indicated that their reports were thorough, balanced and unbiased.

12. Aside from Ms. McSparren's August 1, 2014 correspondence, District did not provide Mother with any additional information about how or where an IEE could be obtained, and District's specific criteria for funding IEEs. Specifically, District did not explain that the criteria under which an IEE is obtained must be the same as the criteria used by District when it initiates an evaluation, which includes the location of the evaluation, the maximum cost for the evaluation, and the minimum qualifications of the evaluator. District did not provide information on Mother's opportunity to select a qualified evaluator who was not on District's preapproved list, but met District's IEE criteria. District did not provide information on reasonable cost criteria and reimbursement procedures if Mother were to advance the costs of an IEE.

13. Ms. McSparren invited Mother to contact her if she had any questions about District's response to the request for an IEE and mental health services assessment. Mother did not contact Ms. McSparren, because she relied on her attorney to communicate with District, and those written communications are referenced in this Decision.

Mother's Revised Request for an IEE

14. On September 16, 2014, Mother, through Student's attorney, responded in writing to District's agreement to conduct an IEE in the area of psychoeducation. The correspondence restated her agreement to an IEE at public expense, but requested for the first time, without explanation, that she wanted to choose a specific psychologist, Robin Morris, Psy.D., Licensed Marriage Family Therapist, to conduct the IEE. At hearing, Mother explained that she relied on her attorney to select an independent evaluator, because she was not familiar with IEE's. Mother provided District with Dr. Morris's contact information and website address, and requested that District contact Student's attorney if there were any questions regarding her request.

15. Ms. McSparren was familiar with Dr. Morris's private practice and qualifications, because Dr. Morris had previously testified on behalf of students in two due process hearings involving District. As discussed below, Dr. Morris met District's minimum qualifications for an independent evaluator. On September 30, 2014, Ms. McSparren timely responded in writing to Mother, copied to Student's attorney, restating District's agreement to fund an IEE in the area of psychoeducation by Dr. Johnson, Patterson or Simun.

DISTRICT'S RESPONSE

16. Ms. McSparren's response provided the following new information:

The District is not willing to contract with Robin Morris to perform an assessment. If you wish to obtain an Independent Psycho/Educational

Evaluation (IEE) with an assessor or entity other than one of the three offered above [Dr. Johnson, Patterson or Simun], you of course are free to do so and then submit the Assessment Report for the IEP Team's consideration. You may then seek reimbursement for the independently obtained Assessment from the District. The District may or may not provide reimbursement depending on among other things, the validity of the assessment and the credentials/certification of the person or entity performing the assessment.

District did not provide Mother with any additional information about where an IEE may be obtained, District's specific criteria applicable for IEE's, or why it did not want to contract directly with Dr. Morris. Nor did it provide her with any information about the process she would need to follow if she independently paid for an IEE by Dr. Morris and then sought reimbursement.

DISTRICT'S IEE CRITERIA

17. An independent evaluator must be located in either Los Angeles or Orange County. At a minimum, independent evaluators must hold a valid license from the State of California that entitles them to conduct evaluations in the areas of concern and be able to interpret the instructional implications of the evaluation results. An IEE in the area of psychoeducation must not exceed \$7,000, which includes time spent observing the student, administering and scoring tests, writing the assessment report, and attending the IEP team meeting in person or by telephone to review the results of an IEE. An independent evaluator must attend an IEP meeting to explain the results of an IEE.

18. Student established that District's September 30, 2014 response to Mother's request for an IEE did not provide Mother with information about where an IEE may be obtained, and the District's specific criteria applicable for IEEs. For this reason, this response, and the August 1, 2014 response were deficient.

19. Again, Ms. McSparren invited Mother to contact her if she had any questions about District's response to the request for an IEE by Dr. Morris. Mother did not contact Dr. Morris, because she relied on her attorney to communicate with District.

Subsequent Communications Concerning the IEE

20. At hearing, Mother credibly testified that she could not afford to advance the cost of an IEE. Mother was a widow and college student, residing with her parents. Her monthly income was only \$1,500, which she used to pay for Student's extracurricular activities. Therefore, she could not pay Dr. Morris directly for the assessment, and then seek reimbursement. Accordingly, Mother requested on September 16, 2014, that District fund the IEE by contracting directly with Dr. Morris.

21. On October 8, 2014, Student's attorney wrote a letter to Ms. McSparren, again requesting that District contract directly with Dr. Morris for the evaluation. On November 11 and December 11, 2014, Student's attorney wrote a letter to District's attorney, Mr. Bathen, requesting that District provide a copy of a letter, dated November 3, 2014, which purportedly was District's response to Mother's request for an independent evaluation. On December 17, 2014, Ms. McSparren wrote a letter to Student's attorney, copied to Mother, confirming that it had not written a letter to Mother, dated November 3, 2014, regarding the independent evaluation. Ms. McSparren also confirmed that District had not changed its position about not wanting to contract with Dr. Morris for an IEE.

22. Following her receipt of Ms. McSparren's correspondence of August 1, 2014, September 16, 2014, and December 17, 2014 correspondence, Mother did not choose one of District's pre-approved evaluators because she wanted to select an evaluator who was *not* on District's list. Mother did not pay for an IEE, because she could not afford it and, even if she could have paid first, District did not guarantee reimbursement.

23. Based on discussions at the June 4, 2014 IEP team meeting, Mother's July 30, 2014 correspondence, and District's August 1, 2014 correspondence, District knew that there was a disagreement regarding Student's eligibility for special education. District also knew that Mother wanted an IEE to address the disagreement regarding eligibility. While District offered to fund an IEE on August 1, 2014, as of April 22, 2015, the date the hearing began, Student still had not received a psychoeducation IEE. Consequently, Mother and District have not had an opportunity to consider the results of an IEE to discuss Student's eligibility for special education and related services.

District's Subsequently Memorialized IEE Criteria

24. Approximately eight months after Mother first requested an IEE, and approximately three to four weeks before the first day of hearing, Ms. McSparren prepared on behalf of District a three-page, single-spaced document entitled *Independent Educational Evaluations*. The undated document details District's IEE "Policy and Procedures," which were in effect when Mother first requested an IEE although not yet organized and memorialized into a single document. Ms. McSparren admitted that District did not provide Mother with a copy of District's IEE Policy and Procedures, which contained objective IEE criteria regarding the location, minimum qualifications, and cost of an IEE.

Application of IEE Criteria to Dr. Robin Morris

LOCATION

25. Dr. Morris is located in Mission Viejo, Orange County, which satisfies District's IEE criteria concerning location.

MINIMUM QUALIFICATIONS

26. Dr. Morris is a State licensed clinical psychologist and marriage family therapist who specializes in working with infants and children. She earned her bachelor's degree in 1991 from the University of Southern California, her master's degree in 1992 in clinical psychology from Pepperdine University, and her doctorate in psychology in 1997 from the California School of Professional Psychology. Her doctoral dissertation was entitled *A Case Study of Autistic Children Using Physical Play as an Adjunct to Treatment*.

27. Dr. Morris has been in private practice as a clinical psychologist since 2001 through the present, and has extensive experience evaluating and treating children with disabilities. Her practice consists of conducting private assessments and independent educational evaluations, observing students at school to analyze the appropriateness of programs or placements, running social skills groups, and providing therapy to students with executive functioning disorders, attention deficit hyperactivity disorders, high functioning autism, eating disorders and anxiety, and attending IEP team meetings to discuss the results of IEEs. Approximately 60% of her assessments involve students with autism. She has worked with children with emotional disturbances and dyslexia.

28. Dr. Morris has conducted IEEs at the request of several school districts. When Dr. Morris conducts an IEE, she reviews records, observes the student at school, interviews the parent(s) and educational staff, and tests the student in areas of possible weakness and strength. She also attends IEP meetings, interprets the educational implications of her evaluation, and provides copies of test protocols to individuals who can interpret them appropriately. Dr. Morris's qualifications satisfy District's minimum criteria.

COST

29. Dr. Morris's fee for a psychoeducation IEE of Student ranges from \$3,300 to \$3,700, depending on whether she is required to attend an IEP meeting to explain her report. Dr. Morris's fee falls within District's guidelines. Accordingly, Dr. Morris's fee satisfies District's IEE criteria.

30. At hearing, District unpersuasively attempted to prove that Dr. Morris was not a qualified evaluator, because she harbored a bias against District. Dr. Morris has conducted IEEs at the request of students and school districts. She volunteered her time to testify at hearing. She presented as a confident and knowledgeable professional during direct and cross-examination, and her demeanor did not reflect any bias toward District. Rather, the bias flowed from District toward Dr. Morris, because she had testified on behalf of students in two previous due process cases involving District.

31. At hearing, District unpersuasively attempted to prove that Dr. Morris was not qualified, because her recommendations exceeded the legal standard for a free appropriate public education. However, this criterion was not disclosed to Mother, and whether Dr. Morris applied a higher FAPE standard was not relevant as to whether District ensured

that Mother obtained an IEE at public expense without unnecessary delay. District was not bound to accept Dr. Morris's assessment findings, just consider them at an IEP team meeting. Therefore, due to District's actions, no independent assessment has yet been conducted.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, 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)⁵ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, 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 conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. 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) & (f); 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, § 56502, 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); Ed. Code, § 56505, subd. (l).) 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Issue: District’s Failure to Timely Fund the IEE

5. Student contends that District failed to ensure that an IEE was timely provided due to its failure to provide Mother with information on its IEE criteria, particularly information on Mother’s right to select an independent evaluator that was not on District’s

preapproved list. Student further contends that District imposed two conditions related to Mother's request for an IEE, which were inconsistent with a parent's right to an IEE. If Mother wanted an IEE by an evaluator who was not on District's list, then (1) Mother was required to advance the cost of the IEE; and (2) reimbursement depended on whether District unilaterally determined that the completed IEE met its IEE requirements, which were not fully disclosed to Mother.

6. District contends that it had the right to select independent educational evaluators for its preapproved list, and that Mother could not compel District to contract directly with an independent evaluator who was not on District's preapproved list. District contends that it promptly provided Mother with the names of three preapproved evaluators, and that Mother was solely responsible for the delay in not obtaining an IEE because she refused to select a preapproved independent evaluator.

PROCEDURAL VIOLATIONS

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits.⁶ (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

PARTICIPATION IN THE IEP PROCESS

8. Among the most important procedural safeguards are those that protect the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003)

⁶ Because Student does not allege that he is eligible for special education services, and no finding has been made regarding eligibility, no determination can be made if there has been a deprivation of educational benefits. (*R.B., ex rel. F.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942.)

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].)

INDEPENDENT PSYCHOEDUCATIONAL EVALUATIONS

9. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted.⁷ (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, § 56302, 56029, subd. (a), 56506, subd. (b).)

10. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) "Independent educational evaluation means an evaluation 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 independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329(b); 56506(c).)

11. The provision of an independent evaluation 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 independent evaluation, the public agency must, without unnecessary delay, either: (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that an evaluation obtained by the parent did not meet agency criteria. If a parent elects to obtain an independent evaluation by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public agency criteria applicable for independent evaluations, or there is no justification for selecting an evaluator that does not meet agency criteria. (*Letter to Parker*, 41 IDELR 155 (OSEP 2004).) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation may be presented by any party as evidence at a hearing on a due process complaint. (34 C.F.R. § 300.502(c)(2).)

⁷ The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." As used in this decision, the terms "assessment" and "evaluation" mean the same thing, and are used interchangeably.

12. The term “unnecessary delay” as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous* 56 IDELR 175 (OSEP 2010).) Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993.) The determination of “unnecessary delay” is a fact-specific inquiry. (See *Pajaro Valley Unified Sch. Dist v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C06-0380) 2006 WL 3734289 (a delay of almost three months between parent’s request for an independent evaluation and district’s due process filing was unreasonable where district offered no explanation or justification for its delay); *J.P. v. Ripon Unified Sch. Dist.*, *supra*, 2009 WL 1034993 (two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent and district filed for due process less than three weeks after negotiations came to an impasse was not unnecessarily long); *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 2007 WL 2851268 (district’s 10-week delay in filing a due process request was not a per se violation where there was evidence of ongoing efforts during that time to resolve the matters and district, within 27 days of the independent evaluation request, orally told parents the request would be denied).)

13. School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2); see *Letter to Bluhm*, 211 IDELR 2237A (OSEP 1980).) A district may provide parents with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (*Letter to Parker*, *supra*, 41 IDELR 155 (OSEP 2004).) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Id.*)

14. If a school district decides not to take a requested action, including agreement to the independent evaluation requested by parents, the district must provide parents with a prior written notice within a reasonable time. (34 C.F.R. § 300.503.) The notice must include an explanation of why the agency proposes or refuses to take the action.

15. A parent is entitled to only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent disagrees. (Ed. Code § 56329(b).) If an independent evaluation is at public expense, the criteria under which the assessment is obtained, including location of the evaluation and qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an assessment, to the extent those criteria are consistent with the parent’s right to an independent evaluation. (34 C.F.R. § 300.502(e)(1).) Other than establishing these criteria, a district may not impose conditions or timelines relating to a parent’s right to

obtain an independent evaluation at public expense. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).) A district's criteria may not be so narrow as to interfere with a parent's right to obtain an independent evaluation. (*Letter to Petska*, 35 IDELR 191 (OSEP 2001).) If a public educational agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of pupil in pupil's current educational placement and setting. (Ed. Code § 56329(b).)

16. An IEE at public expense means that a school district pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. (34 C.F.R. § 300.502(a)(3)(ii).) If a parent believes that a denial of advance funding of an IEE would effectively deny the parent the right to an IEE at public expense, the parent can request a due process hearing. (*Letter to Heldman*, 20 IDELR 621 (OSEP 1993).)

ANALYSIS

17. Following the IEP team meeting on June 4, 2014, when District team members determined that Student did not meet special education eligibility criteria, Mother requested an IEE. On August 1, 2014, District agreed to fund an IEE. An IEE at public expense means that a school district pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. Once a school district agrees to fund an IEE, it should provide the parent with a list of evaluators who meet its criteria for an IEE, and inform the parent of the criteria that must be met if the parent chooses an evaluator who is not on its list. A parent is not restricted to evaluators on the list, and can choose an evaluator not on the list, if that person meets criteria established by the district for any assessment.

18. In the instant case, instead of providing Mother with a complete list of providers that met its criteria, and informing her of what criteria any independent evaluator needed to meet if it were to fund the IEE, District simply provided Mother with the names of three evaluators on its list. This information fell far short of the information that a school district must provide to a parent upon a request for an IEE. District's response did not provide information on its specific criteria applicable for IEE's. District did not explain that the criteria under which an IEE is obtained must be the same as the criteria used by District when it initiates an evaluation, including the location of the evaluation and the qualifications of the evaluator. District did not provide information on the location and minimum qualifications of any proposed evaluator. District should have given Mother this information.

19. On September 16, 2014, Mother asked that District fund an IEE by Dr. Morris. District's criteria for an IEE require the evaluator be located in either Los Angeles or Orange County, and be licensed to conduct the type of assessment being requested. Further, the cost of a psychoeducational evaluation cannot exceed \$7,000. Student established at hearing that Dr. Morris's location, qualifications and estimated charge for an IEE were consistent with

the objective criteria relied upon by District when it agreed to fund an IEE. Dr. Morris is located Orange County. She is a State licensed psychologist, who specializes in working with infants and children and has conducted IEE's at the request of parents and several school districts. Dr. Morris's assessment process includes reviewing records, observing the student at school, interviewing the parent(s) and educational staff, and testing the student in areas of possible weakness and strength. As part of the IEE process, she attends IEP meetings, interprets the educational implications of her evaluation, and provides copies of test protocols to individuals who can interpret them appropriately. The cost of her IEE ranges from \$3,300 to \$3,700, which falls well within District's reasonable cost criterion of \$7,000. Accordingly, Dr. Morris is a qualified independent evaluator for purposes of conducting a psychoeducational IEE of Student, and District knew she met its objective criteria because she had testified in due process hearings involving District and other Students.

20. When Mother asked that District fund Dr. Morris as an independent evaluator, it became even more important for District to provide Mother with the criteria that needed to be met for an IEE to be funded by the District. District was unwavering in its decision not to contract directly with Dr. Morris due to its belief that she held a bias against District, even though she met all of District's objective criteria for an independent evaluator: qualifications, location, and cost.

21. If District did not want to fund an independent evaluation by an evaluator not on District's preapproved list, then it had the right to initiate a due process hearing to demonstrate that its detailed May 9, 2014 psychoeducational multidisciplinary team report was appropriate. However, District did not do so. This complete failure to request a due process hearing to defend its own evaluation, and refusal to fund an IEE by Dr. Morris, even though she met District criteria for an independent evaluator, significantly impeded Mother's opportunity to meaningfully participate in the IEP process.

22. District argues that Mother could have obtained an IEE from Dr. Morris, paying for it herself and subsequently seeking reimbursement. However, this argument carries no weight. The IDEA and Education Code are silent as to whether such a criterion is consistent with a Mother's right to obtain an IEE. However, if advance funding prohibits a parent for obtaining an IEE of the child, then it may effectively deny a parent the right to obtain an IEE. Here, Mother requested that District contract directly with her preferred independent evaluator, Dr. Morris, because Mother could not afford to advance the cost of an IEE. Dr. Morris's fee for an IEE ranged from \$3,300 to \$3,700 whereas Mother's monthly income was only \$1,500. Since District refused to contract with Dr. Morris, Mother was effectively denied an opportunity to obtain an IEE from Dr. Morris. Therefore, District's criterion was inconsistent with Mother's right to obtain the agreed upon IEE.

23. In addition, District did not guarantee reimbursement for an assessment by Dr. Morris, even if Mother had been able to pay the cost for this IEE out of her own funds. Ms. McSparren informed Mother that District "may or may not provide reimbursement

depending on among other things, the validity of the assessment and the credentials/certification of the person or entity performing the assessment.” Evidence at the hearing established that “the validity of the assessment” meant that District unilaterally determined whether an assessment was appropriate and included recommendations consistent with a FAPE, as interpreted by District. A district must allow parents the opportunity to select a qualified evaluator who meets agency criteria even if that evaluator is not on the list of potential evaluators established by the district. Reimbursement for such an evaluation should not be contingent on a district unilaterally determining the appropriateness of the content of the IEE. Nor should reimbursement be contingent on approval of the School Board, which Ms. McSparren testified was another requirement.

24. District’s criteria stacked the deck in favor of evaluators on District’s preapproved list, and placed Mother at a disadvantage when negotiating for an evaluator not on District’s list. Consequently, District did not ensure that the agreed upon IEE was provided at no cost to Mother, which was inconsistent with a parent’s right to an IEE.

25. Mother did not agree with District’s psychoeducational assessment because it did not result in Student being found eligible for special education. She wanted an IEE because she wanted additional information about Student. Even Ms. McSparren agreed that additional information about Student that could be adduced by an independent assessor would be of assistance to an IEP team. When District then refused to fund an assessor who met its own objective criteria, and did not file for its own due process hearing to affirm the legal appropriateness of its own assessment, it significantly impeded Mother’s opportunity to participate meaningfully in the IEP process.

26. As of April 22, 2015, over six months after the parties reached impasse, District did not initiate a due process hearing to defend its psychoeducational assessment or ensure that an IEE was provided at public expense. While some delay is reasonable to accommodate good faith negotiations between the parties over the need for, and arrangements for, an independent evaluation, there was no justification for a lengthy delay of over six months. As a result, District violated its obligation to, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation was appropriate or ensure that an IEE is provided at public expense.

27. District’s failure to fund a psychoeducational IEE by Dr. Morris resulted in a procedural violation of the IDEA, which was more than a mere technical violation. By failing to ensure that Mother received information on IEE criteria that was consistent with the IDEA, and failing, without unnecessary delay, to either file a due process complaint to prove that its evaluation was appropriate or ensure that an IEE was provided at public expense, District significantly impeded Mother’s opportunity to meaningfully participate in the IEP process.

28. The underlying reason why District did not fund a psychoeducational IEE by Dr. Morris was because it did not like her.

REMEDIES

1. Student prevailed on the single Issue presented in this case. As a remedy, Student asks that District be ordered to fund an IEE by Dr. Morris. District asks that Student take nothing.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Mothers of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

3. Student established that District committed a procedural violation that significantly impeded Mother’s opportunity to meaningfully participate in the IEP development process, when it agreed to fund an IEE and then refused to fund one by Mother’s preferred evaluator, Dr. Morris, even though Dr. Morris met District’s IEE criteria. Once District determined that it did not wish to fund an IEE by Dr. Morris, it should have filed its own complaint with OAH to establish that its own evaluation was legally appropriate. Failure to do so then obligates District to pay for an IEE by Dr. Morris, or another evaluator of Mother’s choosing who satisfies District’s criteria for an IEE.

4. Therefore, District shall fund an Independent Educational Evaluation in the area of psychoeducation by Dr. Robin Morris, or another qualified independent psychologist if Dr. Morris declines, at a cost not to exceed \$7,000. Mother may also choose a psychologist from District’s approved contract list for the 2014-2015 school year. Funding of an IEE shall include payment for the independent evaluator to attend one IEP team meeting, convened within 15 days of District’s receipt of the IEE, to review its results.

ORDER

District shall fund an Independent Educational Evaluation in the area of psychoeducation by Dr. Robin Morris at a cost not to exceed \$7,000. If Dr. Morris declines to enter into a contract with District, then Mother shall select an independent psychologist

who meets District's criteria. Nothing precludes Mother from choosing a psychologist from District's approved contract list for the 2014-2015 school year. District's funding of an IEE shall include payment for the independent evaluator to attend one IEP meeting to review the results of the independent educational evaluation. District shall convene an IEP team meeting within 15 days of its receipt of the IEE to review the evaluation and discuss Student's eligibility for special education, unless the parties agree in writing to an extension.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the only issue heard and decided.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

DATE: June 23, 2015

/s/

CAROLINE A. ZUK
Administrative Law Judge
Office of Administrative Hearings