BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: LAFAYETTE SCHOOL DISTRICT, v. PARENTS on behalf of STUDENT.	OAH CASE NO. 2008120161

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in Lafayette, California, on April 30, May 1, and May 18, 2009.

Sarah L. Daniel, Attorney at Law, represented the Lafayette Elementary School District (District). Dr. Dana Sassone, the District's Director of Student Services, was present throughout the hearing.

Lina Foltz, Attorney at Law, represented Student's parents (Parents). At least one parent was present throughout the hearing, and frequently both were present. Student was not present at the hearing.

On December 3, 2008, the District filed a request for a due process hearing. The matter was continued on December 22, 2008. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to June 8, 2009, for the submission of rebuttal declarations and closing briefs. On that day, the record was closed and the matter was submitted.

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ISSUES[1]

A. DISTRICT'S ISSUES:

(1) Did District's April 2007 assessment of Student comply with the legal requirements?

(2) Is Student eligible to receive an independent educational evaluation (IEE) at District expense as requested on September 18, 2008?

(3) Does the District have the right to assess Student as described in its September 24, 2008, assessment plan in the areas of social/emotional/behavioral status, educational achievement, and intellectual development?

B. STUDENT'S AFFIRMATIVE DEFENSE:

Did the District fail to timely respond to Student's September 18, 2008, request for an IEE?

CONTENTIONS OF THE PARTIES

The District contends that its April 2007 psychoeducational assessment of Student was appropriate because it conformed to applicable statutes and regulations in all respects. The District also argues that it responded timely to Student's request for an IEE by filing a complaint for due process hearing; and that it ought to be allowed to conduct new assessments of Student in the areas of educational achievement, social/emotional/behavioral status, and intellectual development, as proposed in its assessment plan of September 24, 2008.

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[1] The ALJ has slightly reworded the issues for clarity.

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Student contends that the District's April 2007 psychoeducational assessment was not appropriate because it failed to assess him in all areas of suspected disability, specifically audiology, speech and language, motor skills, vision processing, and social-emotional status; failed to use qualified personnel to administer the assessment; failed to administer tests and other assessment materials in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally; failed to use test instruments for the purpose for which those assessment materials were valid and reliable; failed to administer its assessments in accordance with test instructions provided by the producer of the assessments; failed to select and administer its assessments to ensure that results accurately reflected his aptitude and/or achievement levels rather than his deficits in language arts, auditory processing and vision processing, when those deficit areas were not purported to be evaluated by the test instruments; and failed to conduct a sufficiently comprehensive assessment to identify all of his special education and related service needs.

Student also requests reimbursement for an IEE. He contends that the District, which received his request for an IEE on September 18 or 19, 2008, but did not file the instant complaint until December 3, 2008, unnecessarily delayed in responding to his IEE request and is therefore liable to pay for an IEE regardless of the merits of the April 2007 assessment.

BACKGROUND

1. Student is a nine-year-old male who is in the third grade at the District's Lafayette Elementary School. He resides with Parents within the boundaries of the District. Since April 2007 he has been eligible for, and has been receiving, special education and related services due to a specific learning disability (SLD) that results in deficits in reading, writing, and articulation.

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2. Student attended kindergarten and first grade in District schools as a general education student, where he was also a "guest" of the special education program, receiving some individual support in speech and language, and some instructional support from a resource teacher.

3. In February 2007, a Student Study Team referred Student for a determination of eligibility for special education and related services. On February 20, 2007, the District offered Parents an assessment plan that would allow a teacher to assess Student's educational readiness, and a school psychologist to assess Student's social/emotional/behavioral needs, motor/perceptual development, intellectual development, and developmental history. Parents approved the plan. The psychoeducational assessment is the subject of this dispute.

THE PSYCHOEDUCATIONAL ASSESSMENT CONDUCTED BY THE DISTRICT

4. In March and April 2007, Michelle Charpentier, a school psychologist intern, conducted a psychoeducational assessment of Student. Because Ms. Charpentier was an intern, and licensed to conduct the assessment only under supervision, school psychologist Patrick Gargiuolo supervised the assessment. He helped her select the test instruments, consulted with her during the testing, and participated in scoring the results.

5. Under Mr. Gargiuolo's direction, Ms. Charpentier administered to Student the fourth edition of the Wechsler Intelligence Scale for Children (WISC-IV), the Comprehensive Test of Phonological Processing (CTOPP), the Wide Range Assessment of Memory and Learning (WRAML-2), and the parent rating portion of the second edition of the Behavior Assessment System for Children (BASC-2 PRS). She also interviewed Student's Parents and his teachers, and observed him in class. The two school psychologists submitted a detailed report on their findings for an IEP meeting on April 18, 2007, and Ms. Charpentier presented the report to Parents at the meeting.

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Some of the essential findings were that Student was a friendly, well-behaved, gregarious, and cooperative child. He was in the low to below average range in phonological processing, had difficulty in reading and writing, and displayed signs of anxiety about his academic performance. His full scale Intelligence Quotient (IQ) was 91, which placed him in the 27th percentile and near the bottom of the test's average range, which is from 90 to 110.

6. Parents received a copy of the psychoeducational assessment the day before the April 18, 2007 IEP meeting, and heard Ms. Charpentier describe it at the meeting. The IEP team members agreed that Student was eligible for special education in the category of SLD. The IEP team also agreed on an educational program for Student, and Parents approved it. Parents did not express any disagreement with the psychoeducational report at the April 2007 meeting, or at a subsequent IEP meeting in February 2008, at which they also agreed with the program proposed by the IEP team.

7. At an IEP meeting on September 17, 2008, Parents informed the District for the first time that they disagreed with the April 2007 psychoeducational assessment, and requested that the District fund an IEE. Parents' educational advocate Linda Geller confirmed the request in writing the next day.

THE IEE REQUEST AND THE DISTRICT'S DELAY IN RESPONDING TO THE REQUEST

8. One of the procedural safeguards in the Individuals with Disabilities in Education Act (IDEA) and state law is that, under certain circumstances, a student is entitled to obtain an IEE at public expense. The IEE must be conducted by a qualified examiner who is not employed by the public agency responsible for the Student's education. In order to receive an IEE, the parents must disagree with an assessment obtained by the public agency and request an IEE. The agency may ask for the parents' reason for disagreeing with the assessment, but may not require or wait for an explanation. Upon receipt of the request, the public agency must, without unnecessary

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delay, either ensure that the IEE is provided at public expense, or file a due process complaint to request a hearing to show that its assessment is appropriate. If the agency unnecessarily delays in its response, it must fund the IEE without regard to the appropriateness of the disputed assessment.

9. Here, it is undisputed that the District received Parents' IEE request on September 18 or 19, 2008, but did not file a complaint seeking a due process hearing until December 3, 2008, a minimum period of 74 days. The District contends that the delay was necessary because there was uncertainty about the nature of the request, and because good faith negotiations were ongoing.

UNCERTAINTY OF THE IEE REQUEST AS A JUSTIFICATION FOR THE DISTRICT'S DELAY

10. The alleged uncertainty arose at the IEP team meeting on September 17, 2008, when school psychologist Gargiuolo loosely described one of the findings of the April 2007 psychoeducational assessment. He stated that, according to the April 2007 assessment, Student "had low cognitive functioning, he's within the average range." When Parents and Ms. Geller disagreed, Mr. Gargiuolo stated that the assessment showed "low cognitive ability ...within the lower end of the average range.[2] Ms. Geller then stated that Parents disagreed with the assessment.

11. Events at the September 17, 2008, IEP meeting corroborate the testimony of Parents and Ms. Geller that they disagreed with the April 2007 assessment. In the course of disagreeing with Mr. Garguiolo about the proper interpretation of that assessment, Ms. Geller stated: "We're in disagreement with the assessment anyway." Mr. Garguiolo asked: "[I]s that just coming out now, that you're in disagreement with it?" Ms.

[2] An audio recording of the September 17, 2008 IEP meeting was admitted in evidence.

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Geller replied: "[N]o, actually, we've discussed it, we've been discussing it." Parents and their advocate all credibly testified that, when they met before the September 17, 2008 IEP meeting, they discussed the April 2007 assessment and decided to disagree with it. Ms. Geller testified that, in order to preserve harmony at the meeting, she chose not to make the IEE request until the end of the meeting, but she arrived at the meeting with a draft of the letter requesting the IEE.

12. At the end of the September 17, 2008 IEP meeting, Ms. Geller twice insisted that the phrase, "There is disagreement with the District's psychoed evaluation," be recorded in the notes of the meeting, and District staff complied. The notes state: "Disagreement with district's psych/ed. evaluation particularly fact that he has low average cognitive ability."

13. The next day Ms. Geller sent to the District a letter dated September 17, 2008, requesting an IEE, and setting forth several reasons for Parents' disagreement with the assessment:

> … [Parents] are in disagreement with the District's psychoeducational evaluation … for several reasons. First, the assessment was not comprehensive. The February 20, 2007 assessment plan indicates that motor and perceptual development would be assessed … [Student's] teacher reported that [Student] has difficulty with reading, writing, and visual motor activities, yet the assessors did not administer visual perceptual or visual motor testing. Although there were indications to suspect auditory processing deficits the evaluators did not administer testing in this area. Additionally, the social and emotional component was not comprehensive as only [Mother's] input

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> was sought and not [Student's] teacher. The educational implications and/or the relevance of the DAP were not indicated. Furthermore, the assessors made no recommendations related to eligibility in their report.

As an additional ground for the request, Ms. Geller's letter also set forth Parents' disagreement with Mr. Gargiuolo's characterization of Student's cognitive ability:

> Finally, the family learned today that there is a discrepancy between the District's own assessors regarding [Student's] cognitive functioning. Mr. Gargiuolo and Ms. Charpentier had indicated that [Student's] "cognitive skills are mostly within the Average Range" in their report. Today, however, Mr. Gargiuolo repeatedly advised us that [Student's] cognitive skills are in the low average range.

The letter closed by restating the request for an IEE, and proposed that it be conducted by Dr. Tina Guterman of Oakland.

14. Dr. Dana Sassone, the District's Director of Student Services, testified that, within a few days of the September 17, 2008 IEP meeting, she spoke to nearly all the District team members and listened to the recording of the meeting. From that, she testified, she formed the conclusion that Parents did not disagree with the assessment itself, but only with Mr. Garguiolo's characterization of it.

15. In a letter dated September 25, 2008, Dr. Sassone mentioned the IEE request and then stated:

> It appears you believe conditions have changed which warrant an assessment .... The District is therefore proposing

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> an assessment, which also includes a vision and OT assessment, which we understand you have also requested. The district requests your permission to conduct a current assessment.

With her letter, Dr. Sassone sent an assessment plan proposing that the District assess Student in several areas. The letter said nothing about whether the District would fund an IEE, nor did it otherwise respond directly to Parents' IEE request.

16. Ms. Geller wrote back to Dr. Sassone on October 2, 2008, stating that Parents were perplexed by Dr. Sassone's unilateral decision that conditions had changed and new assessments were warranted. Restating Parents' "disagreement with the District's inadequate assessment," Ms. Geller reminded the District that under the IDEA, the District was required, without unnecessary delay, either to fund the IEE or file for due process to defend its assessment. She wrote further that Parents found the District's request for new assessments inappropriate, and reported that Parents "respectfully ask that you reread their September 17, 2008 request for an IEE at District expense."

17. Dr. Sassone responded to Ms. Geller's October 2, 2008 letter on October 15. Under the heading "Request for IEE and District request for assessment," Dr. Sassone wrote:

> You have indicated that the district did not include family input in the request for district assessment. We have sent the family an assessment plan to solicit their feedback. It also is the District's position that the psychologist did not indicate that there was a change in [Student's] level or description of cognitive functioning. The district also believes that the previous assessments are adequate but not current. For that

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reason we have requested permission to re-assess. *It is the district's impression that you are disagreeing with interpretation of the district's current statements not the past assessments.* Therefore these conditions warrant reassessment.

(Emphasis added.) Thus, the District reinterpreted Parents' disagreement with the April 2007 assessment by claiming that Parents disagreed only with Mr. Gargiuolo's description of that assessment, not the assessment itself. Once again, the District did not state whether it would fund an IEE.

18. After sending the October 15, 2008 letter, the District took no further action on the IEE request. It interpreted Parents' silence as agreement with its reinterpretation of the request, and there was no evidence that the District intended during that time to respond further to the request. On November 18, 2008, the IEP team met again, but the request was not discussed. Finally, on November 18 or 19, Ms. Geller mailed a compliance complaint to the California Department of Education (CDE). The complaint alleged that the District had unnecessarily delayed in responding to Parents' IEE request, and failed either to fund an IEE or file for a due process hearing. On December 3, 2008, the District filed the complaint herein. By then at least 74 days had passed since the District received the request.

19. The testimony of Parents and Ms. Geller, the exchanges at the IEP meeting of September 17, 2008, the notes of the meeting, the IEE request letter sent by Ms. Geller the following day, and the October 2, 2008 letter in which Ms. Geller repeated the IEE request all showed that Parents disagreed with the April 2007 assessment on several grounds, only one of which was Mr. Garguiolo's description of Student's cognitive ability. As Dr. Sassone conceded in her testimony, the letters from Ms. Geller were not ambiguous. The District's reduction of Parents' disagreement to the only ground that

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would allow it to avoid responding to the IEE request was not supported by the facts, and the events surrounding it did not justify the District's delay.

GOOD FAITH NEGOTIATIONS AS A JUSTIFICATION FOR THE DISTRICT'S DELAY

20. The District argues that its delay in responding to Parents' IEE request was necessary because it was engaged in good faith negotiations with Parents concerning the IEE request. The evidence showed that, between the time of Parents' IEE request and the District's filing of a request for hearing, there were substantial negotiations between the parties. However, the evidence established that those negotiations did not pertain to the IEE request itself. Instead, the negotiations concerned numerous other assessment issues between the parties.

21. For example, at the outset of the September 17, 2008 IEP meeting, Parents informed the District that they wanted new District assessments in the areas of binocular vision, occupational therapy (OT), and speech and language. The District had prepared a plan for a speech and language assessment, which Parents signed during the meeting. The parties discussed preliminary details of the vision and OT assessments, such as the timing of the assessments, the identity of the assessors, and the dates of IEP meetings needed to follow up on the assessments. They agreed to continue those discussions. Throughout late September, October, and November 2008, the parties had numerous contacts about the speech and language, OT, and vision assessments. Mother testified that, during that period, she received approximately 98 emails on those issues from District staff relating to various assessment issues, but none of them concerned the pending IEE request. The District encouraged her to talk privately to Mr. Garguiolo, but no one asked her whether she was disagreeing with the April 2007 psychoeducational assessment, or just Mr. Garguiolo's description of its findings. No one asked her whether Parents still wanted an IEE, or brought up the pending IEE request. Mother never informed the District that the request was withdrawn.

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22. The District's version of the negotiations was not squarely in conflict with Mother's. Dr. Sassone testified that, during the same period, there were at least two dozen communications between Parents and her or her staff regarding "various aspects of all of the assessment issues." There were many issues about the assessments that needed discussion. A speech and language assessment was underway, but Mother requested at some point that it be stopped. It was later resumed. A District OT screening suggested that no further OT assessment was necessary, but after discussions with Mother, Dr. Sassone authorized the OT assessment anyway. Dr. Sassone felt at the time that the District and Parents were having an ongoing dialogue about "the appropriate way" of resolving all the issues between them.

23. Dr. Sassone further testified that she had a lengthy and very good telephone conversation with Mother on November 3, 2008, in which she and Mother discussed a wide range of issues. Dr. Sassone had received an email from Ms. Geller about the binocular vision assessment. Mother expressed concern about Student's auditory processing. The two discussed the merits of the Lindamood Bell reading program, the timing and agenda for the next IEP meeting, and the use of a facilitator for that meeting. Dr. Sassone had been encouraging Mother to have a private conversation with Mr. Gargiuolo about his characterization of the results of the April 2007 assessment. Mother informed Dr. Sassone in their November 3, 2008, conversation that she was not interested in having that conversation. Dr. Sassone testified that she inferred from that statement that Parents no longer wanted an IEE. However, based on the evidence, that inference was unjustified. Mother could just as well have concluded the conversation would serve no purpose.

24. Dr. Sassone also testified that, in their November 3, 2008 conversation, Mother stated Parents were not sure whether they were going to obtain a private psychoeducational assessment. Dr. Sassone inferred from that statement that Parents

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were no longer seeking reimbursement for an IEE. Again, based on the evidence, that inference was not justified. Dr. Sassone testified that the source of financing for such an assessment was not discussed. Mother's statement proved no more than that Parents might pay for a private assessment first, and then seek reimbursement from the District, which is what they did.

25. There was no evidence in the record that Parents ever gave the District reason to believe they were abandoning, or even reconsidering, their IEE request. There was no evidence that the extensive negotiations between the parties during the relevant period had anything directly to do with the IEE request. Although Mother estimated she received 98 emails, and Dr. Sassone testified that there were at least one or two dozen contacts between Parents and her staff, the District did not produce a single letter, email, telephone note or other record indicating that there was active negotiation about the pending IEE request.

26. Thus, the evidence from both parties showed that their negotiations concerned other assessments, but not Parents' pending request for an IEE. Dr. Sassone was asked directly whether, during all her discussions with Mother during October and November 2008, she inquired whether the family was still continuing to pursue their request for an IEE. She responded that she did not recall having that specific discussion. Dr. Sassone testified further that "the only communications regarding the IEE during this time period were the letters from Ms. Geller." The letters from Ms. Geller, as discussed above, clearly requested the IEE.

27. In light of all the evidence, the District's 74-day delay in responding to Parents' IEE request cannot be justified either by any uncertainty about Parents' motivations for the request, or by evidence that good faith negotiations about the request were ongoing. The request was repeatedly and clearly made. Parents never retreated from it. Parents were not obliged continually to remind the District that the

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request was pending. The District's reinterpretation of the request was not supported by the facts, and Parents were not required to refute it as a condition of proceeding with their IEE request. The extensive negotiations between the parties concerned other assessment issues, but not the pending IEE request. The District hoped that, if agreement could be reached on the other assessments, Parents would abandon their IEE request. But hope that Parents will not pursue an IEE request does not justify delay in responding to it. There was no evidence that the District would ever have responded to the request except for the compliance complaint Parents filed with CDE.

28. For all the above reasons, the District's delay in responding to Parents' IEE request was unnecessary, unreasonable, and unjustifiable. The District is therefore liable to fund an IEE.

29. The evidence showed that Parents spent $4800 on an IEE conducted by Dr. Tina Guterman, an experienced psychologist. The District does not challenge Dr. Guterman's credentials or her evaluation. The District is therefore liable for $4800 in expenses for the IEE, unless equitable principles call for a reduction of that amount.[3]

EQUITABLE CONSIDERATIONS IN DETERMINING THE AMOUNT OF REIMBURSEMENT FOR THE IEE

30. Reimbursement for an IEE may be reduced or denied for equitable reasons, including delay by parents in requesting the IEE.

31. The evidence did not show that Parents delayed 17 months in disagreeing with the April 2007 assessment out of any lack of knowledge of their rights. Student argues vaguely in his closing brief that, during the 17-month period of delay, Parents

[3] Parents also seek reimbursement for $800 they paid Dr. Guterman to attend an IEP meeting and discuss her assessment. However, the District's liability is only for the cost of the assessment, not its later presentation by the assessor.

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needed to educate themselves about their rights. No evidence supported that assertion. At least as early as April 2007, Parents were advised in writing of their right to an IEE, and were repeatedly advised of it in subsequent months. It appears from Parents' communications with the District, and their testimony at hearing, that they are educated, articulate, well-informed, and deeply involved in the education of their child, and are unlikely to be ignorant of their IDEA rights. In their testimony, Parents stopped well short of claiming that they were unaware of their right to disagree with the April 2007 assessment and request an IEE.

32. Parents' right to an IEE is intended to equip them with a competing expert opinion to counter an assessment with which they disagree, and to ensure that both assessments are considered in crafting an IEP for their child. Parents' delay of 17 months in stating their disagreement with the April 2007 psychoeducational assessment defeated most of that purpose. The now-challenged assessment is nearly obsolete, and will be superseded by the assessments this Decision authorizes. As Dr. Guterman herself recognized, the passage of time between the District's assessment and her own may account at least in part for the differing results of the two assessments.

33. The District relied to its detriment on the April 2007 assessment because Parents did not contest it at or near the time it was considered in educational programming. Instead, Parents cooperated with the District in framing IEPs for Student based in part upon the now-challenged assessment, both in the IEP meeting in April 2007 and a subsequent IEP meeting in February 2008. Parents agreed to the IEPs at the time, but have since initiated litigation challenging the April 2007 IEP, which might have been different had Parents sought an IEE in a timely manner.[4]

[4] Official notice is taken of the contents of OAH's file in the pending matter of Student v. Lafeyette Elementary School Dist., OAH Case No. 2009040640, in which

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34. Parents have coupled their tardy IEE request with their refusal to permit the District to conduct current assessments in the same areas. This strategy constitutes a use of the assessment process that Congress did not intend. If successful, it would substantially reduce the amount and quality of current information about Student that will be used in his future educational programming.

35. In light of all the considerations above, it is appropriate to reduce Parents' reimbursement by half, and to require the District to reimburse Parents in the amount of $2400, half of the cost of Dr. Guterman's IEE.

APPROPRIATENESS OF THE APRIL 2007 ASSESSMENT

36. Because the District is liable to reimburse Parents for the IEE they obtained regardless of the merits of the April 2007 assessment, it is unnecessary to decide here whether that assessment was appropriate.[5]

AUTHORIZATION OF NEW ASSESSMENTS PROPOSED BY THE DISTRICT

37. A reassessment normally requires parental consent. To obtain consent, a school district must develop and propose to the parents a reassessment plan. If the parents do not consent to the plan, the district can conduct the reassessment only by

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Parents allege that the IEP of April 2007 denied Student a FAPE, and seek compensatory education and other relief.

[5] With leave of the ALJ, the parties filed rebuttal declarations after the hearing that primarily addressed the appropriateness of the April 2007 psychoeducational assessment. Each party then moved to strike various parts of the opposing declarations. Since that issue is not decided here, the cross-motions to strike are denied as moot, with the minor exception noted in footnote 6.

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showing at a due process hearing (1) that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, and (2) that the student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment.

38. On September 24, 2008, the District presented to Parents an assessment plan proposing new District assessments in the areas of educational achievement, social/emotional/behavioral status, motor/perceptual development, communication development, and intellectual development. Parents had already consented to a speech and language assessment, which has since been completed. After negotiations, assessments have also been completed in the areas of OT, vision, and communications. Parents have refused to consent to new assessments of educational achievement, social/emotional/behavioral status, and intellectual development. The District argues that conditions now warrant new assessments in those areas, and seeks an order authorizing such assessments over Parents' objection.

39. Several factors weigh in favor of allowing the new assessments. The psychoeducational and academic assessments of Student conducted in March and April 2007 are now more than two years old, a considerable period of time in the life of a nine-year-old child. Parents' experts consistently testified that Student's capacities may have changed since those assessments were conducted. Dr. Deborah Ross-Swain, an experienced speech and language pathologist, testified that she could not predict whether Student's processing deficits would have changed in the interim, because such change varies from child to child. Some are static; some get worse. Dr. Dimitra Loomos, an experienced audiologist, conducted an audiological assessment of Student in November 2007. She found that Student has deficits in the integration of audio information, as well as in binaural integration and separation. She could not determine whether these deficits were of long standing or recently developed because that is "a

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maturational issue." As stated above, Dr. Guterman, who conducted her assessment in December 2008 and January 2009, testified that at least some of the differences between the scores she recorded and those of the old assessments could be the results of language development over time. The evidence showed that new assessments would assist in determining the nature and extent of such changes.

40. In addition, Parents challenge the validity of the District's 2007 assessments, and Dr. Guterman's IEE contains several results at odds with the results of the old assessments. New assessments would substantially assist in resolving the disputes that have arisen in light of those differing assessment results. A new cognitive assessment might contribute to resolution of the dispute between the parties about Student's cognitive abilities, and thus aid in his educational planning.

41. Another factor weighing in favor of allowing the new assessments is that, since Student was assessed in March and April 2007, his progress in school has slackened. Parents are convinced that he is not progressing as well as he should, and District witnesses agree that his progress has been very slow. The parties dispute the reasons for his lack of progress, and the educational steps that should be taken to improve it. District witnesses testified without contradiction that new assessments are commonly used, and useful, to resolve disputes concerning the nature and causes of a child's unsatisfactory progress.

42. In addition, the development of adequate annual goals for Student's IEPs requires accurate information about his present levels of performance. The requirement that goals be measurable assumes an accurate starting point. District witnesses testified without contradiction that new assessments would assist them in writing better goals.

43. Moreover, Parents assert that Student is increasingly emotionally troubled, and engages in undesirable behaviors. The District does not disagree. Student has never been separately assessed by the District specifically for social and emotional needs. He

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has been in therapy, and his therapist will have a substantial contribution to make to such an assessment that was unavailable in April 2007.

44. Finally, although Student received some personalized assistance as a "guest" of the District's special education program before he was found eligible for special education in April 2007, he has never been assessed in the areas in dispute after receiving an IEP. New assessments of Student would be the first to measure how he has responded to the special education programs set forth in his IEPs.

45. Student does not question any of the above reasons why new assessments would be useful. Nor did he produce any evidence that additional assessments would harm him in any way.[6] Student's sole argument is that the District failed to give Parents adequate prior written notice of the reasons for re-evaluation.

46. The IDEA requires a school district to provide written notice to parents before it initiates or refuses a change in a student's identification, evaluation, or educational placement. The written notice must describe the action proposed or refused, explain why the district proposes or refuses to take the action, describe the

[6] At hearing, Mother testified that Student's therapist advised her by letter that new assessments might adversely affect Student's emotional condition. However, the letter was not produced before or at the hearing, and Mother further testified that Parents were not relying on the letter in this matter. Well after the hearing, OAH received a copy of such a letter in the mail, unaccompanied by a proof of service on the District. The District had no opportunity to respond to its contents. Because 1) the letter was not properly produced before or at hearing, 2) Parents disclaimed reliance on it, 3) it was not proper rebuttal, and 4) it was untimely produced and not served on the District, the District's motion to strike the letter from the file is granted, and the letter is stricken. Parents' attorney did not rely on the letter in Student's closing brief.

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documents underlying the decision, describe the factors relevant to the decision, explain why other options were rejected, and inform parents of their procedural rights with respect to the decision.

47. The assessment plan dated September 24, 2008, states that the purposes of the proposed assessments are to review progress and respond to parent request. The latter statement was not correct, because Parents did not request that the District conduct the proposed assessments. However, the statement that the assessments are intended to help review Student's progress is accurate. The September 25, 2008 letter to Parents from Dr. Sassone that accompanied the assessment plan informed them of several additional justifications for the assessments, including Parents' disagreement with the April 2007 assessments, the age of those assessments, and the need to write new goals. Student claims those justifications are inadequate. However, for the reasons above, the District had justification for conducting the new assessments when it requested Parents' permission to conduct them. In addition, the requirement of prior written notice is intended to provide notice only. The adequacy of the justifications for reassessment are measured under the separate legal test applied here.

48. Even if the District's prior written notice was inadequate, it does not follow that the proposed assessments should not be done. Nothing in the law so provides. The argument Student makes and the result he seeks are unconnected. Moreover, Parents suffered no prejudice from any inadequacy in the notice. They engaged in dozens of contacts during October and November 2008 concerning the details of most of the assessments, and had ample opportunity in those contacts to probe the District's justifications. They retained the right to withhold consent for the assessments if they were not satisfied with the District's explanations, and presented evidence at hearing about their dissatisfaction with those explanations. The record does not support the

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conclusion that they lacked any necessary information to make decisions about the assessments.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The District, as the petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].) The parties dispute whether the District has the burden to show that its delay was necessary, or whether Student must show unnecessary delay as an affirmative defense. It is unnecessary to decide that issue here since the evidence clearly showed that the District's delay was unnecessary, no matter who has the burden of proof on the issue.

DISTRICT'S DUTY TO ASSESS

2. A local educational agency (LEA) must reassess a special education pupil at least once every three years, unless the parent and the LEA agree otherwise. (Ed. Code, § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2006); Ed. Code, § 56320, subds. (e), (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g); 56322.)

INDEPENDENT EDUCATIONAL EVALUATION (IEE)

3. Under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd.

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(b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i)(2006).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2)(2006).)

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

UNNECESSARY DELAY

5. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2)(2006); Ed. Code, § 56329, subd. (c).) The federal regulation provides that:

> ... the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation

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> and may not unreasonably delay either providing the [IEE] at public expense or filing a due process complaint ...

(34 C.F.R. § 300.502(b)(4)(2006).) The plain import of this language is that, although the district may ask for a parent's reasons for disagreeing with an assessment, it may not require, and may not wait for, the statement of any reason by parents. Nor may a district impose conditions or timelines on a request for an IEE. (34 C.F.R. § 300.502(e)(2)(2006).) There is no room in these provisions for a district to question, evaluate, or probe the motives behind Parents' reasons for requesting an IEE. Parents are free to give no reason at all beyond their disagreement with the assessment.

6. Whether an LEA files a due process complaint without unnecessary delay is a fact-specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380) 47 IDELR 12, the court determined that the school district unnecessarily delayed filing its due process request. The school district first waited three weeks and then demanded that the parents reiterate their request within nine days, warning the parents that silence would be interpreted as withdrawal of the request, and that it was prepared to go to due process to defend its assessments. After the parents complied with the district's demands, the district then waited another eight weeks, without explanation, before filing its request. In total, the school district waited three months after the pupil first requested an IEE at public expense to file its request. The court held that the school district had thereby waived its right to contest the IEE. (See also, *Fremont Unified School Dist. v. Student* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009040633 [unexplained two-month delay without negotiations held unnecessary]; *Student v. Los Angeles Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs. Case No. 2006120420 [74-day delay held 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.

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Sept. 30, 2007, No. 06-5172) 48 IDELR 244, 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. Similarly, in *J.P. v. Ripon Unified School Dist.* (E.D.Cal. April 14, 2009, No. 2:07-cv-02084) 52 IDELR 125, 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.

> Issues A(2) and B: Is Student eligible to receive an independent educational evaluation (IEE) at District expense as requested on September 18, 2008? Did the District fail to timely respond to Student's September 18, 2008, request for an IEE?

8. Based on Factual Findings 1-3 and 8-29, and Legal Conclusions 1, 3, and 5-7, the District failed timely to respond to Student's September 18, 2008 request for an IEE, and Student is therefore eligible to be reimbursed for the IEE Parents obtained. The District's delay cannot be justified by its unilateral reinterpretation of Parents' request, which was unsupported by the facts. The District's insistence that parents had a reason for requesting the IEE other than the reasons Parents stated in their letters, and its decision to wait until Parents responded to that claim, were equivalent to requiring an explanation for the request and then waiting for it, which the law forbids. Nor can the District's delay be justified by the existence of good faith negotiations about the IEE request, since such negotiations did not occur. Just as in *Pajaro Valley, supra*, the District wrote a non-responsive letter to Parents, waited for Parents to reiterate their request, and interpreted their silence as withdrawal of the request. The District's action was no

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different in substance than the action of the district in *Pajaro Valley* in imposing an impermissible condition on responding to the request.

STATUTE OF LIMITATIONS

9. The IDEA allows states to determine the time by which a request for due process hearing must be filed. (20 U.S.C. § 1415(b)(6)(B.) California law provides that a request for a due process hearing "shall 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." (Ed. Code, § 56505, subd. (l).) There is no more specific statutory limitation on the time in which a request for an IEE must be made.

EQUITABLE PRINCIPLES AND REIMBURSEMENT FOR AN IEE

10. The Supreme Court has stated that the purpose of an IEE is to ensure that parents, in contesting an evaluation, "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 p. 60.) The requirements that a district act on an IEE request without unnecessary delay, and that the district then consider the IEE, demonstrate that the IEE process contemplates that a second opinion will be available at about the same time as the challenged assessment, so the two can be compared in designing an IEP. The IDEA does not contemplate that the challenged assessment be the only one available for educational programming for a period of years.

11. Courts do not agree on whether equitable principles apply to reimbursement for an IEE. In *Warren G. v. Cumberland Cty. School Dist.* (3d Cir. 1999) 190 F.3d 80, 87, the Third Circuit held that they do not. However, several courts have appeared to apply equitable principles in IEE reimbursement cases. In a case strikingly similar to this one, *J.H. v. Manheim Township School Dist.* (E.D.Pa. Nov. 29, 2005, No. 05-

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1113) 45 IDELR 38, the court refused to allow reimbursement because parents attempted to circumvent the District's evaluation process by requesting an IEE and at the same time refusing to allow the District to assess: "[P]arents may not obtain their 'second opinion' free of charge where they prevented the District from performing its evaluation." In *Cumberland Valley Sch. Dist. v. Lynn T.*, 725 A.2d 215, 219 (Pa. Commw. Ct. 1999), the court ordered the district to reimburse parents for "a fair portion" of the IEE cost where parents had not disagreed with the assessment, but the district failed to include one of the required members on the evaluation team, and the district used the IEE in developing the child's IEP. And in *Los Angeles Unified School Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 823, the court found that the school district was not legally bound to fund an IEE but that "equitable concerns" required the district to pay for it.

12. In *School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359 [85 L.Ed.2d 385](*Burlington*), the Supreme Court held that equitable principles apply in granting or denying reimbursement for a parent's expenses in unilaterally placing a child in a private school when the public school fails to provide a FAPE to the child. Citing subdivision (e)(2) of section 1415 of title 20 of the United States Code, the Court noted that the IDEA allows district courts to "grant such relief as [it] determines is appropriate." The Court stated:

> The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act.

(*Burlington, supra,* 471 U.S. at p. 369.) In the context of reimbursement, the Supreme Court has held that equity may require reduction of an award for reasons other

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than those enumerated by statute. (*Forest Grove School Dist. v. T.A.* (June 22, 2009, No. 08-305) ___ U.S. ___ [2009 WL 1738644, p. 7].) The same principle would seem applicable to reimbursement for an IEE. The ALJ will therefore follow the majority of courts in holding that equitable principles apply to the grant or denial of reimbursement for an IEE.

13. Based on Factual Findings 31-35, and Legal Conclusions 10-12, equity requires a substantial reduction in the amount that Parents should be reimbursed for the IEE they obtained. Parents waited 17 months to express disagreement with the April 2007 assessment. The intended usefulness of an IEE is in comparing it to the disputed district assessment so that IEP decisions can be made on the basis of both. Here, the time for that use of the IEE is long past, and the evidence at hearing established that disputed assessment is of limited use in making educational decisions regarding Student because of its age. Because of Parents' delay, the IEE fails to serve most of the purpose for which it is intended. While Parents delayed, the District relied to its detriment on the assessment in crafting IEPs which Parents now challenge in litigation. Parents seek to "circumvent the District's evaluation process" (*J.H. v. Manheim Township School Dist., supra*) by coupling their IEE request with a refusal to allow the District to conduct similar assessments. Parents will therefore be awarded reimbursement in the amount of $2400, half the cost of the IEE.

DISTRICT'S AUTHORITY TO CONDUCT NEW ASSESSMENTS

14. Reassessment of a student eligible for special education must be conducted at least every three years, or more frequently if the local educational agency determines that conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subds. (a)(1), (2).)

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15. A reassessment usually requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain consent, a school district must develop and propose to the parents a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) If the parents do not consent to the plan, the district can conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (34 C.F.R. §§ 300.300(3)(i), 300.300(4)(c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3); 56501, subd. (a)(3); 56506, subd. (e).) Accordingly, to proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing (1) that the parent has been provided an appropriate written reassessment plan to which the parent has not consented, and (2) that the student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code, § 56381, subd. (a).)

16. A parent who wishes that his or her child receive special education services must allow reassessment if conditions warrant it. In Gregory K. v. Longview School Dist. (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (See, e.g., Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200 (7th Cir. 2000) 203 F.3d 462, 468; see also, Johnson v. Duneland School Corp. (7th Cir. 1996) 92 F.3d 554, 557-558.) In Andress v. Cleveland Independent. School Dist. (5th Cir. 1995) 64 F.3d 176, 178, the court concluded that "a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule."

PRIOR WRITTEN NOTICE

17. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the

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identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)(2006); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action refused by the agency; (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal; (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; (4) sources of assistance for parents to contact; (5) a description of other options that the IEP team considered, with the reasons those options were rejected; and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b)(2006); Ed. Code, § 56500.4, subd. (b).)

18. A district's failure to provide adequate prior written notice is a procedural violation of the IDEA, but nothing in the law provides that inadequate prior written notice prevents an ALJ from allowing assessments to be conducted in a case in which a district filed the request for due process and there is a proper showing that circumstances warrant the assessments.

> Issue A(3): Does the District have the right to assess Student as described in its September 24, 2008, assessment plan in the areas of social/emotional/behavioral status, educational achievement, and intellectual development?

19. Based on Factual Findings 38-48, and Legal Conclusions 1 and 14-18, the District has the right to assess Student in the areas of social/emotional/behavioral status, educational achievement, and intellectual development pursuant to its September 24, 2008 assessment plan. The plan is appropriate, and circumstances warrant the new assessments.

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ORDER

1. Within 60 days of this Order, the District shall reimburse Parents in the amount of $2400 for half the cost expended by Parents for the independent educational evaluation by Dr. Tina Guterman.

2. The District may proceed with assessments in the areas of social/emotional/behavioral status, academic achievement, and intellectual development, as proposed in the September 24, 2008 assessment plan.

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, Issue A(1), the appropriateness of the April 2007 assessment, was not decided. Parents prevailed in part on Issue A(2), their entitlement to reimbursement for the IEE conducted by Dr. Guterman, and on Issue B. The District prevailed on Issue A(3), its right to proceed with new assessments.

RIGHT TO APPEAL THIS DECISION

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

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DATED: July 1, 2009

_____

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings

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