

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

In the Matter of:

MANHATTAN BEACH UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2007030412

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 30 through 31, 2007, and June 18, 2007, in Manhattan Beach, California.

Manhattan Beach Unified School District (District) was represented by Christopher J. Fernandes, Attorney at Law, of Fagen Friedman & Fulfrost, LLP. Ellyn Schneider, Director, Special Education, District, was present throughout the hearing.

Student was represented by her Father, Attorney at Law.¹ Student's Mother (Mother), was present throughout the hearing.²

District's due process hearing request was filed on March 13, 2007. On April 12,

¹Father is a member of the California Bar. He acted as Student's legal counsel. To protect Student's privacy, Father's name and law firm affiliation have not been disclosed in this decision

²Student's Mother and Father shall be collectively referenced as Parents in this decision

2007, OAH granted a continuance of the due process hearing. Sworn testimony and documentary evidence were received at hearing. At the conclusion of the hearing, the parties stipulated on the record that closing briefs would be filed by July 10, 2007, and waived the 45-day period for issuance of a final decision.³ The parties further stipulated that the decision would be issued on July 31, 2007. The parties filed their closing briefs on July 10, 2007, and the matter was submitted.

ISSUES

1. Whether District is entitled to conduct a reassessment of Student pursuant to its January 22, 2007, assessment plan?
2. Whether District offered Student a free and appropriate public education (FAPE) in the October 9, 2006, individualized education program (IEP)?

CONTENTIONS OF THE PARTIES

District alleges that it was duty-bound to reassess Student during the 2006-2007 school year for two reasons. First, District maintains that a reassessment of Student was necessitated by reports of Student's current levels of performance by members of Student's IEP team. Second, District avers that it was legally required to reassess Student once Parents requested to exit Student from special education.

District further alleges that the October 9, 2006, IEP constituted an offer of FAPE.

Student contends that District was not entitled to conduct an assessment of Student for several reasons. Student argues that Parents' unequivocal revocation of their consent can not be challenged. District further failed to obtain Parents' informed consent to its assessment plan. Finally, Student denies that District was entitled to

³The parties also agreed that Student could submit a photograph of herself as Exhibit 144, which Student did

reassess her on the ground that Parents had notified District of their intent to exit Student from special education.

Student further maintains that District denied Student a FAPE in the October 9, 2006, IEP as a result of procedural defects in the composition of the IEP team. Specifically, Student alleges that individuals responsible for conducting the proposed assessments were not in attendance, and her regular education teacher left the IEP meeting early without Parents' permission. Finally, Student maintains that Parents were denied meaningful participation as members of the IEP team.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student lives with Parents in the District's geographical boundaries. District conducted an initial assessment of Student in 2001, when she was three years old, and determined that she was eligible for special education and related services as speech and language impaired (SLI). Student was initially referred for special education and related services in November 2001 and remains enrolled in District's elementary school as a pupil eligible for special education and related services under the category of SLI. During the 2006-2007 school year, Student was eight years old and attending second grade in District's elementary school. District last assessed Student in October 2004 when it conducted its triennial speech and language assessment.

REASSESSMENT

2. School districts must assess the educational needs of disabled pupils in order to meet their continuing duty to develop and maintain appropriate IEPs. School districts must also conduct reassessments of special education pupils not more frequently than once a year, but at least once every three years. Reassessments are conducted when school districts determine that the educational or related service needs of the child, including the need to improve academic achievement and functional

performance, warrant a reassessment. Moreover, to exit a child from special education, a school district must reassess a child to determine that the child is no longer eligible for special education services. Parents are permitted to revoke their consent, but when they do, districts are expressly authorized to seek judicial intervention to require the pupil to present for reassessment despite Parents' objection.

3. Student's reassessment was warranted by her age and deficient receptive and expressive language performance. On October 9, 2006, Student's annual IEP was held. Parents were notified in writing of the meeting and informed that a District administrator, speech and language pathologist and general education teacher, would be in attendance. Father attended the IEP. He was joined by Nancy Doyle, Principal and District's administrative designee, Lynn McIver, Student's second grade general education teacher, and Dana Briggeman, Student's speech and language pathologist (SLP) and District's special education designee.

4. The IEP team discussed Student's educational challenges in her second grade general education class. Lynn McIver (Ms. McIver) began the meeting with a discussion of Student's classroom progress. According to Ms. McIver, Student was having difficulty comprehending classroom material and required frequent reminders to remain on task during class. Ms. McIver reported that Student's reading fluency was slow and that she had trouble incorporating high frequency words according to the expectations of her age group. Father contributed to Ms. McIver's report of Student's classroom progress by informing team members about Student's difficulty with a recent spelling test, her distress with her performance, and Parents' efforts to work with Student at home.

5. Ms. McIver recommended that Student be reassessed, although the decision to reassess was made by the IEP team. At the hearing Ms. McIver testified that in fall 2006 she administered a "monster" spelling test to all pupils in her class so that she

could get a general understanding of their reading skills.⁴ She observed that Student was having difficulty with vowel patterns, particularly short vowel sounds, and vowel “teams.” Student was trying to express herself without success. She would misuse words, use the wrong vowels, and had great difficulty with multi-syllabic words. It was Ms. McIver’s practice to organize children in her classroom into small reading and language groups based upon their skills and personal challenges as it was her experience that pupils work best with other similarly skilled pupils. After the assessment, Ms. McIver placed Student in a small classroom reading and language group with other children who needed work decoding words, i.e., breaking down each word, and understanding what they were reading. It was also Ms. McIver’s practice to work individually with the “neediest readers.” Ms. McIver spent a lot of time working with Student one-on-one to assist her with word order and to encourage her to rephrase her poorly organized statements. By breaking down reading into steps starting with decoding, and then working on comprehension, Ms. McIver hoped to improve Student’s speech and language skills.

6. With Mrs. McIver’s intensive instruction, Student should have been able to consistently use words correctly to make a coherent sentence, unassisted by Ms. McIver, but she could not. Ms. McIver spoke confidently about her ability to connect to pupils with special challenges. She referred several times to her “bag of tricks” as a general education teacher. She admitted that early in the school year, by the time of the IEP team meeting, it was clear that regular education strategies alone were not helping Student and that she needed help. To further assist Student, Ms. McIver needed to know “what was going on inside [Student’s] head.” She needed to have a better understanding of how she was processing, what she was hearing and seeing, and what was it that prevented her from applying the skills she learned one day to her lessons one

⁴Ms. McIver also administered a standardized math assessment to her Students as required of all second graders in the District. Despite the generous time allotment, Student had difficulty with the test and needed special attention

day later.

7. Ms. McIver spoke candidly and with deep feeling about Student's struggle to communicate and to succeed academically and socially. She empathized with Student's need for friendship and the obstacles she faced connecting to peers on the playground where the unstructured setting made it even more difficult for her to express herself coherently. Ms. McIver has been teaching for 36 years. She was self-assured about her abilities, yet realistic about the limits of her training as a regular education teacher. She spent a great deal of time thinking of ways to reach Student, but recognized that she could not reach Student without her reassessment. From Mrs. McIver's words and demeanor it was plain that despite the dispute between District and Parents during the 2006-2007 school year, Ms. McIver remained focused on Student's educational and emotional welfare. Ms. McIver's credibility as a teacher was not disputed at the due process hearing. On the contrary, Mother expressed deep respect for Mrs. McIver's talent as a regular education teacher. For these reasons, Mrs. McIver's testimony was given great weight.

8. Dana Briggeman (Ms. Briggeman), Student's SLP, also recognized that Student exhibited speech and language deficits that required further assessments. She observed Student in her classroom and discussed Student's challenges with Ms. McIver before the IEP team meeting. As required for a reassessment, she reviewed Student's 2004 speech and language assessment.

9. Ms. Briggeman was primarily concerned with Student's difficulty engaging in conversation. At the time of the IEP, Ms. Briggeman, had been providing small group pull-out speech and language support to Student. Student had not met her expressive language goal of telling a story in sequence. Between kindergarten, when Student was last assessed, and second grade, most pupils' conversations typically evolve along with their comprehension so that by second grade they can tell stories and more easily engage in conversation involving longer utterances. According to Ms. Briggeman, a reassessment was indicated by Student's age and the receptive and expressive language

problems she was exhibiting in the classroom. Ms. Briggeman recalled discussing the need for speech and language and academic assessments at the IEP team meeting. Careful consideration was given to Ms. Briggeman's testimony regarding assessments and Student's unique speech and language needs due to her academic and licensing credentials, professional expertise, and her direct involvement with Student as her SLP. Overall, Ms. Briggeman testified credibly by responding directly to questions and freely admitting the limitations of her recollection.

10. The IEP report memorialized the collective concerns of the IEP team as follows:

[Student's] speech and language goals were discussed. She met 3 of her 4 annual goals. She continues to demonstrate difficulties in both receptive and expressive language abilities, particularly when tasks are unstructured or unfamiliar. She is motivated and participates in all activities, however, she has difficulty organizing thoughts and remaining on topic.

[Student] has difficulty formulating complete sentences with correct word order and grammar. She continues to be eligible for speech and language therapy 2 times per week for 30 minutes per session.

11. Student's triennial assessment was scheduled for October 2007, one year after the IEP team meeting. Nevertheless, the IEP team recommended a comprehensive reassessment one year earlier "in order to explore areas of learning." District was entitled to reassess Student based upon Ms. McIver's referral and the IEP team's determination that Student's educational or related service needs, including the need to improve her academic achievement and functional performance, warranted a reassessment.

12. Parents do not contest the need to reassess Student because in March and April, 2007, they utilized the services of Dr. Nancy Harjani-Muirhead, a clinical

psychologist, to conduct a private neuropsychoeeducational assessment of Student. Dr. Harjani-Muirhead used many of the same testing tools identified by District as part of its January 22, 2007, assessment plan. Parents notified District of their intent to privately test Student in February 2007. District cooperated with Dr. Harjani-Muirhead by providing confidential Student information for her assessment. Dr. Harjani-Muirhead consulted with Ms. McIver. Parents were entitled to secure an independent reassessment of Student at their expense. Student's privately-funded independent reassessment could supplement, but could not substitute, for District's reassessment.⁵

13. Parents contend that they are entitled to revoke their consent to the reassessment and their revocation is an absolute bar to District's reassessment of Student.⁶ One week after the IEP team meeting, on October 16, 2006, District provided

⁵Parents are entitled to obtain private assessments at their own expense. (Ed. Code §§ 56329, subd. (c), 56506, subd. (c); 34 C.F.R. § 300.502.) If a parent obtains an independent educational evaluation at private expense, the results of the evaluation must be considered by the public agency if the evaluation meets agency criteria in any decision regarding the provision of FAPE, and may be presented as evidence at a due process hearing. (34C.F.R. § 300.502(c)(1)(2).) Parents did not introduce their private assessment to contradict District's offer of FAPE in the October 9, 2006, IEP

⁶Student contends that Parents' revocation rights are irrefutable based upon California Education Code section 51101(a)(13) which prohibits psychological testing without parental consent. In a due process hearing under the IDEA, statutes and regulations governing special education take precedence over general statutes and regulations governing education. Under well-established principles of statutory interpretation, the more specific provision takes precedence over the more general regardless of the order in which the provisions were enacted. (Padilla v. Neary (9th Cir. 2000.) 222 F.3d 1184, 1192; Salazar v. Eastin (1995) 9 Cal.4th 836, 857.) Well-accepted rules of statutory construction further prohibit interpretations that would produce

Father an assessment plan which he signed that same day. Father's signature was positioned within a box entitled "Parental Consent for Pupil Assessment" and directly under the following declaration: "Yes, I give permission to conduct the assessment described [.] [m]y parent rights were included in the notification."

14. Shortly after Father signed the assessment, Sandra Ottaway (Ms. Ottaway), District's school psychologist, began Student's assessment by reviewing her records. She provided teacher and Father behavioral rating scales to complete. Ms. Ottaway works at Student's school two days a week and must manage her assessment appointments accordingly. After Father signed the assessment, Ms. Ottaway, removed Student from her physical education class so that she could begin assessing Student. Ms. Ottaway began assessing Student's general abilities, with the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV) but did not complete the test.

15. Apparently Father had failed to inform Mother that he consented to District's assessment plan. Mother first learned of District's assessment plan when Student reported to her that she was removed from her physical education class. Mother had never heard of Ms. Ottaway and was upset that the District had not previously identified the assessors, notified her of the specific tests being administered, or arranged Student's appointments in advance with Mother and with the assessors outside of instructional hours so that Student did not have to be removed from class. Mother was also concerned about the identity of the assessors as she had prohibited the District from leaving Student alone with any male at any time.

absurd results. (Compton Unified School Dist. v. Addison (C.D. Cal, April 20, 2007, No. CV06-4717) 2007 U.S. Dist. Lexis 29828, *26, n.5.) The fundamental rule of statutory construction is that the court should ascertain the legislative intent so as to effectuate the purpose of the law. To this end, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. (Moore v. Panish (1982) 32 Cal.3d 535, 541.)

16. District and Mother exchanged a flurry of oral and written communications about District's assessment plan. Principal Nancy P. Doyle identified by name all assessors and assured Mother that they were all female. She notified Mother that it would be difficult to accommodate her request that assessments be scheduled outside of class time because of staff schedules and school meetings. Nevertheless Ms. Doyle offered some accommodations to Mother. She explained that the school would coordinate with Student's teacher to avoid removing her from class during critical instruction. She stated that the assessors would respect Mother's request that Student not be removed from physical education. She identified one assessor that might be available outside of class time.

17. Mother also spoke to Ms. Ottaway for about 30 minutes concerning Student's reassessment and concluded that the planned testing was "not appropriate and did not meet [Student's] unique needs."

18. At the conclusion of a series of oral and written communications between Mother and District, Parents revoked their consent for Student's reassessments.

19. Parents contest District's right to assess Student without their informed consent. Parents claim they were not sufficiently informed of District's proposed assessment plan. Districts are required to provide proper notice of proposed assessment plans. Proper notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and companion state law. The assessment plan must appear in a language easily understood by the public and the native language of the pupil, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. The district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan.

20. Months passed before District and Parents would meet again as part of an IEP team on January 11, 2007. In the interim, District and Parents exchanged a battery of written communications in furtherance of their disparate agendas. District continued to

press Parents to attend an IEP meeting and resisted Mother's attempts to meet privately with Student's second-grade general education teacher, Mrs. McIver, apart from the full IEP team. Mother balked at District's attempts to convene an IEP team meeting prior to her one-on-one with Ms. McIver. Virtually every interaction between Mother and District was documented in a written communication. The relationship between District and Parents was clearly strained.⁷

21. At the January 11, 2007, IEP team meeting, the District repeated its request to reassess Student. Ms. McIver summarized some of the tests which would be administered to Student. Parents requested a new assessment plan with the names of the individuals performing assessments and the names of the assessment tools that would be used. Parents cautioned District that it would have to seek their permission if additional assessment tools were required that have not been disclosed in the assessment plan. One day later, Mother wrote to Ms. McIver asking her to provide a "more detailed description and explanation of the tests [she] discussed" at the IEP team meeting.

22. On January 23, 2007, District provided Parents a new form assessment plan, dated, January 22, 2007, which was virtually identical to the assessment plan provided to

⁷When Mother finally did get to observe Student's class, she was shadowed by Ms. Doyle. In a written communication to Ms. McIver, copied via e-mail to the Board of Education, Mother wrote: "These last two years of incessant and unpleasant statements, messages and actions by Nancy Doyle directed at me have become a dark storm hovering over me at my child's school. No other parent or child is treated in this manner." Mother successfully pursued a compliance complaint with the California Department of Education (CDE) about District's failure to provide all speech and language services required by Student's IEPs during the 2004-2005 and 2005-2006 school years. Parents' CDE complaint could account for some of the discomfort between Mother and District

Father after the October 9, 2006, IEP team meeting.

23. The January 22, 2007, assessment plan briefly reiterated the reasons the IEP team recommended that Student be reassessed. The assessment plan contained a paragraph notifying Parents that, among other things, the results of the assessments would be shared with them at an IEP team meeting, and that the assessment materials selected by the assessor(s) would be appropriate to the level of their child. The assessment plan identified in general terms the types of assessments that would be performed with an abbreviated description of what the assessments were designed to measure. Included alongside the description of the assessment was the identity by profession, not the individual's name, of the assessor.

The assessment plan indicated that the following types of assessments would be performed by the appropriate professional:

Academic/Preacademic Achievement, special education teacher; Social and emotional development, school psychologist, general education teacher, parent;

Motor ability, school psychologist;

Language/speech/communication, language/speech therapist;

General ability, school psychologist; and Health and

Developmental, school nurse.

24. Ms. Ellyn Schneider, District's Director of Special Education delivered District's form assessment plan to Parents with a detailed cover letter identifying the assessors by name, describing in more detail the types of assessments that would be performed and naming the assessment tools or tests the assessors would be administering for each type of assessment.

25. Student claims that the absence from District's form assessment plan of any mention of the specific tests to be performed establishes that District did not provide

Parents informed consent according to District practices. Ms. Ottaway explained that it was not common for District's assessors to commit to specific tests prior to the assessment as the assessors need flexibility to modify testing instruments after they have had an opportunity to work with Student. District's special education parent manual states as follows:

Generally, a parent must give signed consent to an assessment plan before the school can begin an initial evaluation of a child or begin a triennial assessment (reassessment every three years). Parents must be informed about the type of assessment, its purpose, the methods or techniques which will be used, and the professionals (by title) who will be conducting the assessment.

District's manual, however, does not view the assessment plan as a static document. The manual also advises parents to ask for additional information and/or clarification if needed information is lacking. District did supply information to Parents regarding its testing in Ms. Schneider's letter.⁸ District provided proper notice to Parents.

⁸Parents may be entitled to ask about the identity of the assessors, or the specific assessment tools, but they are not entitled to select the testing instruments or the assessors conducting District assessments. Districts must abide by strict statutory guidelines when conducting assessments, and Parents may not interfere with District's obligations by placing conditions on the qualifications of the assessors or the conduct of the assessment which are contrary to the governing law. Obviously, when Parents notified District that they did not want their child alone with a male assessor, the District accommodated Parents. Parents' safety concerns are important although not relevant to the adjudication of District's claims. Moreover, under the IDEA, these concerns do not give Parents the right to reject assessors based upon their qualification and experience

26. Parents also deny that District is entitled to reassess Student based upon District's claim that they exited Student from speech and language services. Once a pupil is enrolled in a publicly-funded special education program, Parents may not exit a pupil before District conducts a reassessment and determines whether pupil still remains eligible. (Legal Conclusion 10.) On October 30, 2006, two and a half months prior to the January 11, 2007, IEP team meeting, Father notified Ms. Doyle that Parents were discontinuing District's speech and language program. Father conceded that "Dana [Briggeman] has done a great job" but stopped her twice weekly, 30 minute, small group pull-out speech and language sessions, because Parents "believe[d] that [Student's] classroom time [was] too valuable and productive to be interrupted."

27. By letter dated December 18, 2006, Parents notified Ellyn Schneider, Director of Special Education for the District, of their "wish to discontinue all special education services for [Student]" and of their intent to "attend an Exit IEP" on January 11, 2007.

28. The stated purpose of the January 11, 2007, IEP team meeting was [t]o discuss Parents' request to exit Student from speech services. Parents attended accompanied by an advocate. Also in attendance were Ellyn Schneider, District's Director of Special Education, Principal Doyle, Ms. McIver, Ms. Briggeman, Ms. Ottaway and Ms. Dana Croatt, District's special education teacher. With their family advocate, Parents insisted that the IEP team meeting was an exit IEP. They refused to allow District to resume special education speech and language services for Student and cautioned District not to remove Student from class.

29. Parents clearly communicated to the District their desire that Student be exited from District's special education program. However, at the hearing Mother refused to admit that Parents had in fact intended to exit Student from special education. Instead, Mother deflected responsibility for Parents' choice of word to the Department of Education and to Parents' special education advocate. Mother testified that the Department of Education advised her that she could exit Student from special education

if she was dissatisfied with District's program. When Mother was questioned about Parents' communications to the District about the "exit" IEP, Mother maintained that it was Parents' advocate that asserted this argument. She reasoned that her goal in retaining a private assessor and tutor was to avoid further conflict with the District.

30. Mother's testimony was contradicted by Parents' letters and statements to the District. District respected Parents' request and stopped providing speech and language services, the only special education resource services provided to Student in conformity with her IEP. It was clear from the plethora of written communications generated by Parents that they took great care to clearly and accurately present their positions to District. Mother's contrary statements at the hearing were not credible. Accordingly, based upon Parents' request to exit Student from special education and the IEP team's discussion regarding Student's lack of progress, District was entitled to reassess Student.

THE OCTOBER 9, 2006 IEP OFFER

31. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of each district's proposed program. If the District's program was designed to address Student's unique educational needs, comported with his IEP, and was reasonably calculated to provide him some educational benefit in the least restrictive environment then the District provided a FAPE, even if Parents preferred another program and even if Parents' preferred program would have resulted in greater educational benefit.

32. Every school district must develop an IEP for each child with a disability and update it on a yearly basis to effectuate the primary goal of the IDEA to ensure the provision of a FAPE. The IEP must include, in pertinent part, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's progress toward the annual goals will be measured. An IEP is evaluated

in light of the information available at the time it was developed, and is not to be evaluated in hindsight.

UNIQUE NEEDS

33. At the time of the October 9, 2006, IEP it had been two years since Student's last assessment. Nevertheless, the IEP team, including Father, was acutely aware of Student's expressive and receptive language delays and fully exchanged information on her unique needs and present levels of performance, as set forth in Factual Findings 1, 3 through 11, and 13. Father signed the IEP, but later revoked his consent for the speech and language services offered. No other needs were identified.

34. The IEP team developed two annual goals, one for receptive and one for expressive speech. For receptive speech, Student, when presented with three-step directions, was expected to sequentially follow the three-step direction with 80 percent accuracy on four out of five trials, given minimum prompts, as measured by SLP observations. For receptive speech, Student was expected to use correct word order and grammar when retelling a five- part story with minimum cues, demonstrating 80 percent accuracy in four out of five opportunities as measured by the SLP. The goals were designed to address Student's unique needs, placement and services.

35. The IEP team also recommended that Student remain in general education for all activities except speech and language resource services. The IEP contemplated that Student would continue to participate in group speech and language services with the District's SLP, in 30 minute sessions, twice weekly. The IEP report noted that Student was a "friendly, verbal child who readily participates in tasks during her speech therapy sessions." Student appeared to enjoy her resource sessions.

36. Pull-out speech therapy reduced Student's participation in the general education environment by four percent. According to the IEP team report, Student participated in the general education environment, including physical education, the remainder of her time at school, or 96 percent of her school time. District's offer of

placement in the general education environment 96 percent of the time served Student's unique needs in the least restrictive environment.

ALLEGED PROCEDURAL DEFECTS

37. Parents do not quarrel with the IEP team's estimation of Student's unique needs or the goals and objectives designed for her. Father's observations were consistent with the observations of other members of the team. Rather, Parents contend that the October 9, 2006, IEP offer is fatally defective because Parents' concerns were ignored by the District and their right to meaningfully participate in the IEP process was thwarted. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. Due process decisions, however, must be made on substantive grounds. A pupil is denied a FAPE only where parents' right to meaningfully participate impeded the pupil's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child, or caused a deprivation of educational benefits.

38. Parents maintain that the IEP is defective because District failed to address Parents repeated requests that Student's speech and language services be scheduled so as not to interfere with Student's regular education class time.⁹ Father participated in the IEP team meeting and had an opportunity to raise all his concerns, as indicated throughout these Factual Findings. Father, as a member of the IEP team, was not ignored and contributed to the dialogue about Student's unique needs. From the

⁹Parents also claimed that District should have addressed their CDE complaint and District's failure to provide speech and language services in previous years in the October 9, 2006, IEP team meeting. Student was provided compensatory speech and language services from District. The CDE complaint is irrelevant to the offer of FAPE in 2006-2007

abundance of correspondence exchanged between District and Parents and made part of the record, it was clear that neither Parent hesitated to express their concerns about Student's education and to advocate on behalf of their child. The October 9, 2006, IEP team meeting was not Father's first IEP team meeting. A previous IEP team report of February 2006 indicated that he participated and consented to the same pull-out speech and language services offered in the October 9, 2006, IEP. At the October 9, 2006, IEP team meeting, Father understood the services offered and had an opportunity to raise his concerns. Father knew that speech and language services required Student's removal from her general education class and did not object.

39. Parents appear to assert that it is District's responsibility to raise all topics of concern between District and parents at the IEP team meeting. Parents' participation as IEP team members was not restricted to the IEP team meeting. Parents' concerns about Student's pull-out services were communicated to District outside the IEP team meeting. Mother characterized District's attitude as "my way or the highway." District refused to accommodate Parents' request that Student's pull-out services be arranged outside of regular classroom times. District explained that due to staff and District scheduling and safety issues, it would be impossible to offer services before or after class. Mother considered District's response indicative of its failure to properly address the needs of its pupils before accommodating the interests of its staff.¹⁰ While District disagreed with Parents, and Parents had to advocate for Student to obtain accommodations, Parents did have a significant role as IEP team members. District

¹⁰ Mother claimed that District treated her rudely and disrespectfully. She claimed that she was told by Principal Doyle that she wouldn't be able to participate in classroom activities like other parents. There is evidence that District thwarted Mother's efforts to meet one-on-one with Student's teacher apart from other IEP team members. Unfortunately, rude behavior can not be remedied under the IDEA, unless it results in a denial of FAPE

accepted Parents' revocation of Father's consent to speech and language services and stopped providing them. District stopped its reassessment of Student.

40. Parents further argue that the IEP offer of October 9, 2006, was fatally defective due to other procedural violations. Parents claim that essential members of the IEP team were absent for all or part of the October 9 IEP team meeting. The IDEA requires the attendance of a regular education teacher. Father testified that the meeting lasted only 30 to 45 minutes and that Student's regular education teacher, Ms. McIver, a necessary part of the IEP team, left minutes after the meeting started without his permission. Ms. McIver recalled a 45 minute meeting and did not recall leaving early. Although she admitted that it was possible that she left to get back to her "kids" in her classroom, she knew she did not leave before all the issues reflected in the IEP report were discussed, including the assessments. Ms. McIver clearly was in attendance at the IEP meeting and made substantive contributions to the IEP, as indicated in previous Factual Findings. Ms. McIver signed the IEP. There is no evidence in the IEP report that Ms. McIver departed early or that such early departure impacted the development of the IEP.

41. Parents also maintain that individuals responsible for performing the proposed assessments of Students were essential participants in the October 9, 2006, IEP team meeting and their absence was a fatal procedural flaw of the October 9 2006, IEP. The IEP team members discussed the necessity of further reassessments and determined that an assessment plan should be sent to Father. The IEP offer acknowledged that Student needed to be reassessed and services revised depending on the outcome of the assessments. The assessment plan notified Parents that the results of the assessments would be discussed at a future IEP team meeting. Father's review, approval, and subsequent revocation of the assessment plan were not a necessary part of the IEP team meeting, although it was a critical part of the IEP process. Once District's reassessments were completed, it would have had to convene an IEP team meeting with at least "one individual who can interpret the instructional implications of the assessment results" and

"at the discretion of" the Parents or District, "other individuals with special expertise." For these reasons, since the assessments had not yet been conducted, the persons performing the assessments were not required to be present at the October 9, 2006, IEP team meeting.

42. Parents are clearly devoted to Student. They both spent countless hours advocating on her behalf with District, which is their right. Parents submitted Student's picture as an exhibit so that the participants would appreciate that her interests are center-stage to this proceeding. Mother wants Student to be productive and happy and is naturally frustrated by her inability to insulate her from circumstances that may affect her sense of security or cause her upset. Parents resolved to privatize Student's special education assessments and services so that Student would not have to be pulled from her regular education program and be subject to the various schedules of assessors she did not know. However, District has met its burden of proving that it offered Student a FAPE.

LEGAL CONCLUSIONS

APPLICABLE LAW

Burden of Proof

1. District has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.)

THE GENERAL PRINCIPLES OF THE IDEA

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A district must provide a basic floor of opportunity consisting of access to

specialized instruction and related services that are individually designed to provide educational benefit to the child with a disability. (*Bd. of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, (1982) 458 U.S. 176. 200-201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp.198-199.)

3. FAPE consists of special education and related services that are available to the student in conformity with the individual education plan (IEP), under public supervision and direction, pursuant to State educational standards, and includes an appropriate preschool, elementary school, or secondary school education in the state involved. (20 U.S.C. § 1402(9).) (*Winkelman v. Parma City School Dist.* (2007) U.S. [127 S. Ct. 1994,*2000- 2001,167 L.Ed. 2d 904].) Special education is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).) Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.)

4. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. In *Gregory, supra*, the pupil's parents believed "emphatically" that his private tutor helped him learn. The court concluded that "[e]ven if the tutoring were better for Gregory than the District's proposed placement, that would not necessarily mean that placement was inappropriate. We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide Gregory with educational benefits." (*Ibid.*)

5. In addition, federal and state law requires school districts to provide a program in the least restrictive environment (LRE) to each special education student. (See 34 C.F.R. § 300.114, et. seq. (2006).) A special education student must be educated with non disabled peers “to the maximum extent appropriate,” and may be removed from the regular education environment only when the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)(ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, §56031.)

ASSESSMENTS AND REASSESSMENTS

6. In order to meet the continuing duty to develop and maintain an appropriate IEP, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) In addition, the school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) The district must conduct a reassessment if the district “determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation.” (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a).)

7. Once a parent has consented to pupil’s initial assessment and has enrolled pupil in special education instruction and related services provided at public expense, districts may bring a due process complaint seeking an order that requires the child to present for reassessment in the event parents withhold consent. (20 U.S.C. § 1415(b)(6)(A); Ed. Code, § 56501, subd. (a)(3); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated.”].) The IDEA does not allow districts to initiate proceedings to compel assessments or reassessments where the parents of the pupil have waived all rights to

special education and related services and have elected to home school or enroll their child in private school at their personal expense. (*Durke v. Livonia Central School Dist.* (W.D. New York February 28, 2007) 2007 U.S. Dist. Lexis 13600) *8-10 [citing *Fitzgerald v. Camdenton R-III* (8th Cir. 2006) 439 F.3d 773, 776; 34 C.F.R. § 300.300(d)(4)(1).)

8. School districts have the right to conduct assessments and reassessments of students who request and receive special education and related services. A student who does not permit such testing is not entitled to receive benefits under the IDEA and related state law. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 ["If the parents want [their child] to receive special education under the Act, they are obligated to permit such testing."]; *Wesley Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178.)

9. To exit a child from special education, a school district must reassess a child to determine that the child is no longer eligible for special education services, unless the child has graduated from high school with a regular diploma, or has reached the age of 22, at which time the child is no longer eligible for special education services. (Ed. Code, §§ 56381, subds. (h) & (i), § 56026, subds. (c)(4)(A), (B) & (C).)

10. Once a pupil receives special education services, the parent cannot unilaterally withdraw the child from special education. This is so despite the provisions of 34 Code of Federal Regulations, part 300.9(c)(1), and Education Code section 56021.1, which state that a parent can revoke informed consent "at any time." (Office of Special Education Programs, interpretative letter, 18 IDELR 534, September 20, 1991.)¹¹ If a

¹¹The United States Department of Education has recently stated that it is considering whether a parent should have a right to withdraw a child from special education, and that it anticipates publishing a notice of proposed rulemaking to seek public comment on this issue. (71 Fed.Reg. 46633 (August 14, 2006).) At this time, however, the law remains that a parent cannot unilaterally remove the child from special education

parent refuses all special education services after having consented to those services in the past, the school district is to file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

11. To perform a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subds. (b)(2)(B) & (D).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

NOTICE OF ASSESSMENT

12. In order to start the process of assessment or reassessment, the school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

13. Informed consent means that the parent has been fully advised of all

information relevant to the activity for which consent is sought, that the parent understands and agrees in writing to the activity for which the consent is sought, and the consent describes that activity and lists any required records that are to be released, and to whom they will be released. Further, the consenting parent understands that consent is voluntary, and may be revoked at any time. (34 C.F.R. § 300.9(c)(1); Ed. Code, § 56021.1)

PROCEDURAL AND SUBSTANTIVE COMPONENTS OF FAPE

14. Under *Rowley, supra* at pp.179, 204, a challenge to an individual education program requires resolution of two issues: (1) whether the school district complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide some educational benefit, and comported with the IEP, then the district provided a FAPE. (See also, *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.)

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

at p. 1482.)

PARENTAL PARTICIPATION IN THE IEP PROCESS

16. Parents play a “significant role” in the development of the IEP and are required and vital members of the IEP team. (*Winkelman, supra*, 127 S.Ct. 1994 at pp. 2000- 2001; 20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd.(b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education throughout the child's education. *Ibid*; (20 U.S.C. §§ 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(C) (2)(III) [during IEP meetings], 300.533(a)(1)(i) [during assessments]; Ed. Code, § 56341.I subds. (a)(1) [during development of IEP], (d)(3) [during revision of IEP], & (e) [right to participate in an IEP].) The central purpose of the parental protections embedded in the IDEA is to “facilitate” the provision of FAPE in conformity with the IEP. (Id. § 1401(d)(D).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *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].)

IEP TEAM COMPOSITION

17. Education Code section 56341, subdivision (b)(2), provides that the IEP team shall include not less than one regular education teacher of the pupil, “if the pupil is, or may be, participating in the regular education environment.” The regular education teacher shall, “to the extent appropriate,” participate in the development, review, and revision of the pupil’s IEP, “including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil and supplementary aids and services and program modifications or supports” pursuant to 20 U.S.C. § 1414(d). The

Ninth Circuit interpreting the most recent revisions to the IDEA concluded that as long as a regular education teacher was present, the procedural requirements of the IDEA were satisfied. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. July 16, 2007, No. 05-16404) 2007 U.S. App. Lexis 16840,*14.) Where a school district improperly constitutes an IEP team, the procedural error may be held harmless. (*Id.*, at pp. *11, 18-29[citing *M.L. v. Fed. Way School Dist.* (9th Cir 2005) 394 F.3d 634,652].)

DETERMINATION OF ISSUES

Based on the Factual Findings and applicable law, it is determined as follows:

WHETHER DISTRICT IS ENTITLED TO CONDUCT A REASSESSMENT OF STUDENT PURSUANT TO THE JANUARY 22, 2007, ASSESSMENT PLAN.

18. As set forth in Factual Findings 1 through 30, and Legal Conclusions 1, and 6 through 13, the October 9, 2006, District has met its burden of proving that it is entitled to reassess Student. Student had not been assessed for two years, since she was in kindergarten. Student's triennial reassessment was scheduled for October 2007, one year later. After a careful review of Student's progress and performance, the IEP team, including Father, determined that a reassessment was warranted. District was also legally required to reassess Student based upon Parents' request to exit Student from speech and language services.

19. Parents' contention that District failed to provide informed consent to the assessments was not supported by the evidence. District provided proper notice of the January 22, 2007, assessment plan. Finally, Parents' contention that their consent is irrefutable is without merit. Under the statutes and regulations governing special education disputes, District was expressly authorized to file a due process request to override Parents' refusal to consent to the January 22, 2007, assessment plan.

WHETHER DISTRICT OFFERED STUDENT A FAPE IN THE IEP OF OCTOBER 9, 2006.

20. As set forth in Factual Findings 33 through 42, and Legal Conclusions 1

through 5, and 14 through 17, the October 9, 2006, IEP constituted an offer of FAPE. Simply, District's offer of placement in a regular education class with pull-out speech and language services, addressed Student's unique educational needs, and was reasonably calculated to provide her some educational benefit, in the least restrictive environment. Student was able to participate in the regular education program 96 percent of the time; special education services resulted in her removal from general education a mere four percent of her school time. Parents preferred their own program, but the IDEA does not defer to the preferences of Parents. District met its burden of proving that its program was an offer of FAPE.

21. Parents' contention that the IEP suffered fatal procedural defects was not supported by the evidentiary record. Parents played a significant role as IEP team members. District's rejection of their requests to modify Student's schedule for speech and language services so that she could participate in general education 100 percent of her school time did not signify that Parents were denied the opportunity to participate as IEP team members. There is no evidence that Student's educational program was affected by any of the claimed procedural violations. Student's regular education teacher was fully engaged in the IEP meeting and helped design the IEP. She made a complete presentation and her proposals were incorporated into the IEP. Finally, Student's claim that the October 9, 2006, IEP team meeting was deficient without the assessors responsible for implementing the assessment plan is unsupportable. The assessors were required to participate in an IEP team meeting to discuss the completed assessments, not proposed assessments.

ORDER

1. District is entitled to reassess Student and Parents must present Student for reassessment pursuant to the January 22, 2007, assessment plan.
2. District is entitled to implement the October 9, 2006, IEP until Parents and District consent to an amended or new IEP.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

DATED: July 31, 2007

_____/s/_____
EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division