

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT on behalf of STUDENT,

vs.

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

OAH CASE NO. 2009060940

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

vs.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009071109

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in Sacramento, California, on November 30, and December 1, 2, 8, 9, and 10, 2009.

Student's Father, an Attorney at Law, and Student's Mother represented Student. Both parents were present throughout the hearing. Michael Rosenberg, Advocate, assisted Parents and was present throughout the hearing. Student was not present at the hearing.

Marcy Gutierrez, Attorney at Law, represented the Dry Creek Joint Elementary School District (District), sometimes assisted by Joseph Spector, Attorney at Law. Lynn Barbaria, the District's Director of Special Education, was present on behalf of the District

throughout the hearing. Kathy Blenn was also present for the District for part of the hearing.

On June 11, 2009, Student filed a request for due process hearing (complaint) in OAH Case No. 2009060940. On July 30, 2009, the District filed its complaint in OAH Case No. 2009071109, which was consolidated with OAH Case No. 2009060940. On July 31, 2009, the matter was continued. On August 12, 2009, the District filed an amended complaint subject to the continuance previously granted. At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to January 11, 2010, for the submission of closing briefs. On that day, the briefs were filed, the record was closed, and the matter was submitted.

ISSUES

STUDENT'S ISSUES (OAH CASE NO. 2009060940):

- 1) Whether the District failed to accord Parents meaningful participation in the IEP process at and after the May 28, 2009 IEP meeting because it failed to deliver a written IEP offer by June 5, 2009, as it had promised, or by a reasonable time thereafter;
- 2) Whether the District failed to accord Parents meaningful participation in the IEP process at the May 28, 2009 IEP meeting because several members of the IEP team were unfamiliar with Student; and
- 3) Whether the District denied Student a FAPE by failing to make a timely offer of a free appropriate public education (FAPE) for the school year (SY) 2009-2010.¹

¹ Student's issue number three has been slightly reworded to reflect the necessity of deciding whether, in the timing of the District's offer, Student was denied a FAPE.

DISTRICT'S ISSUES (OAH CASE No. 2009071109):

- 1) Whether the District may assess Student in accordance with the assessment plan and related correspondence presented to Parents on or about April 2009 and July 2009; and
- 2) Whether the District's most recent IEP offer constituted an offer of a FAPE for Student for the SY 2009-2010.²

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 13-year-old male who lives with Parents within the boundaries of the District. He receives special education and related services because of a specific learning disorder (dyslexia). He has deficits in reading, writing, math, and working memory. He is cooperative, polite, well-behaved, and interested in his school work.
2. Student attended District schools from kindergarten through fifth grade. The parties were unable to agree on an IEP for Student for his sixth grade year (SY 2008-2009), so parents filed a request for due process hearing. In October 2008, the matter was settled by a written agreement that placed Student, for his sixth grade year, with an outside reading tutor for three hours a day at District expense, and in physical education (PE) for one hour a day at the District's Creekview Ranch Middle School. The agreement did not provide for any other instruction. Student has been in that placement ever since.

² The District's second issue, as set forth in the Order Following Prehearing Conference, was: "Whether the District's IEP offer resulting from the IEP meetings of May 28, August 5, and August 28, 2009 constituted an offer of FAPE for Student for the SY 2009-2010." It was amended to its current form during the hearing.

3. In May and August 2009, the parties met three times but were unable to agree on an IEP for Student. Parents believe that Student's reading deficit is so serious he should remain in his current placement until he reaches grade level in reading. The District believes that Student should return to public school for reading tutoring and also to study math, science, and other core academic subjects he has been missing in his current placement.

RIGHT TO REASSESS

4. A district may reassess a student if it determines that his educational or related services needs warrant a reevaluation. If parents do not consent to reassessments, the district may obtain an order from an ALJ authorizing the reassessments if the district can demonstrate that it has taken reasonable measures to obtain parental consent, and parents have failed to respond. A district is entitled to conduct its own assessments of a special education student; it need not rely on independent assessments or assessments obtained by parents. However, a district that has assessed a student may not reassess him within a year unless parents permit it.

The One-Year Rule

5. District employees last assessed Student in spring 2008 for his triennial review. In April 2009, the District proposed an assessment plan to Parents, and sought Parents' permission for academic reassessments of Student in the areas of reading and comprehension, written expression, math calculation and reasoning, oral expression, and/or listening comprehension. Parents have not agreed to the assessment plan. Instead, Suzanne Coutchié, Student's reading tutor under the settlement agreement, conducted academic assessments of Student in late April and early May 2009. Student contends those assessments are District assessments and argues that they cannot be repeated within a year without Parents' consent. The District contends that the Coutchié

assessments were obtained by Parents, not the District, and seeks an order permitting its own employees to conduct the assessments it proposed.

6. The day after Father received the April 2009 assessment plan, Mother discussed it with Ms. Coutchié, who proposed to do the assessments herself. Parents consented. Mother and Ms. Coutchié did not discuss payment for the assessments because Mother assumed that Ms. Coutchié would bill the assessments to the District. Ms. Coutchié billed the District for the assessments, but as ordinary instructional time, not as time for assessments, and the District paid the bill, not knowing it was for assessments. The District did not learn that it had paid Ms. Coutchié for her assessments until the hearing.

7. In late April and early May 2009, pursuant to her agreement with Parents, Ms. Coutchié administered to Student the Woodcock Johnson Test of Achievement (3d edition)(WJ-III), the Test of Word Reading Efficiency, the Peabody Picture Vocabulary Test (3d edition), the Expressive Vocabulary Test, and the Gray Oral Reading Tests (4th edition). After these assessments Ms. Coutchié, Parents, and Student's advocate, Michael Rosenberg, had many subsequent contacts with District staff, but did not reveal the existence or the results of Ms. Coutchié's assessments to the District. The District did not obtain the assessment results until late August 2009, when Ms. Coutchié produced them in response to a subpoena duces tecum, too late for use in developing an IEP for Student for SY 2009-2010.

8. Student's claim that Ms. Coutchié's assessments were "actually administered and paid for by the District at the District's request by the District's provider" (Student's Closing Brief, p. 12) is not supported by the evidence. Ms. Coutchié was chosen as Student's tutor by Parents. The District paid her only because the settlement agreement required it. Ms. Coutchié is an independent contractor who works for several districts, and was not the District's provider for the purpose of conducting

annual academic assessments of Student. The District's assessment plan of April 2009 states that its RSP teacher would be responsible for assessing Student. The District did not ask or employ Ms. Coutchié to conduct the assessments it had proposed, did not know beforehand that she would assess Student, did not learn that she had assessed Student until after production of her records was compelled by subpoena, and only paid for the assessments because they were deceptively billed as instructional time. For all purposes relevant here, Ms. Coutchié's assessments were obtained by Parents, not the District. The District is not, therefore, seeking to reassess Student within a year of its previous assessments.

The Need for New Assessments

9. Student's next annual IEP meeting is set for May 2010. At that time the IEP team will require current information about Student's present levels of performance (PLOPs) to create an appropriate IEP.

10. Since August 2008, Student's school day has consisted of being driven to Ms. Coutchié's home in Davis for three hours of reading tutoring, and then to school for one hour of PE. Since Student is not in a school setting except for PE, District assessors cannot observe him in an academic class. He has not been instructed or tested in any academic subject since August 2008, so there are none of the usual test scores, report cards, or teacher reports by which his PLOPs can be measured. He has no current academic goals against which progress can be measured. In the absence of the kinds of academic information that usually supplement or substitute for assessments, the District's need for assessment information is acute. The only tools available to the District, aside from reports by Ms. Coutchié and the PE teacher, are assessments.

11. The most recent assessment information about Student is obsolete. Ms. Coutchié assessed Student in late April and early May 2009. By Student's next annual IEP

meeting, that information will be a year old. PLOPs, by definition, require current information.

12. Each party presented the testimony of a well-credentialed expert at hearing. Both experts testified credibly that Ms. Coutchié's spring 2009 information is now obsolete, and that newer baseline information is necessary to write adequate goals for Student. The District's expert was Dr. Catherine Cristo, a licensed and nationally certified educational psychologist and partially retired professor at California State University at Sacramento. Dr. Cristo has had a private practice for ten years in which she consults with school districts, conducts reading and cognitive assessments, and advises on response to intervention. She specializes in helping students with learning disorders, especially reading disorders, and has extensive experience in evaluating and designing programs for them.

13. Dr. Cristo displayed extensive knowledge of Student's educational records at hearing. She credibly testified that current baseline data are necessary in order to design a program for Student. The most recent data are in reports from Ms. Coutchié about Student's reading in July 2009. He has been receiving intensive reading intervention since then, so the July 2009 measurements are obsolete.

14. Student's expert was Dr. Joseph Torgesen, a reading scientist with a doctorate in developmental and clinical psychology. Dr. Torgesen is an emeritus professor of psychology and education at Florida State University and a member of the board of the International Dyslexia Association. He has published many articles and received numerous awards in his field, and has been involved for many years in the study of reading disabilities. Like Dr. Cristo, he formed his opinions of Student by examining his educational records. He also talked at length with Parents.

15. Dr. Torgesen also testified that information newer than Ms. Coutchié's assessments and reports is needed to design adequate reading goals for Student. He

identified various reading assessments that would be useful, encouraged further testing of Student's working memory, and stressed that it is critical to determine Student's present accuracy in reading text. Nothing in the information from Ms. Coutchié shows the current grade level of Student's comprehension of text, because Ms. Coutchié measured gains, not grade levels. Dr. Torgesen testified that in order to form a judgment about the adequacy of the goals in the District's IEP offer, he would need more baseline information than Student's records now contain.

16. With new assessments the parties could address several of their disputes regarding Student's disability and needs. The parties agree, for example, that Student is dyslexic. But Dr. Torgesen believes that Student is classically dyslexic, in part due to a serious deficit in phonological processing, while Dr. Cristo believes that Student does not display such a deficit and, therefore, does not fit the classic profile of a dyslexic. The parties also disagree over whether Student has a deficit in audiological processing, and whether and to what extent he has Attention Deficit Hyperactivity Disorder (ADHD). These disputes are based primarily on tests and experiences that are now years old. The parties also dispute how successful Ms. Coutchié's reading program has been. Several District witnesses observed, after finally studying Ms. Coutchié's assessment results in November 2009, that Student had made about a year's progress in reading in a year's time, which is far less than could be expected given the intensity of his instruction.

17. Ms. Coutchié's spring 2009 academic assessment of Student may not be accurate. On the form required for reporting Student's performance on the WJ-III, Ms. Coutchié answered "Yes" to the question whether she had any reason to believe that "this testing session may not represent a fair sample of the subject's abilities?" She wrote that Student was "distracted / appeared anxious / tired at times – yawning – but not at others – ."

18. The only opposition to new assessments was expressed by Ms. Coutchié, who stated in passing that further assessments would make no difference. Since no reasoning or explanation accompanied her conclusory statement, it is given no weight here.

19. For the reasons above, the District has demonstrated that Student's educational and related services needs warrant a reevaluation of Student, as proposed by the District in the April 2009 assessment plan and related documents, including its correspondence in July 2009. The District has demonstrated that it has taken reasonable measures to obtain consent from Parents, and that they have failed to respond. The assessments will be allowed.

PROCEDURAL VALIDITY OF IEP OFFER

20. The IEP offer at issue was developed over the course of three meetings on May 28, August 5, and August 28, 2009. Student alleges that each of these meetings was procedurally deficient, and therefore did not produce a valid offer.

THE IEP MEETING OF MAY 28, 2009

Meaningful Parental Participation

21. A district must afford the parents of a child with a disability an opportunity to participate meaningfully in IEP meetings. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, has an opportunity to discuss a proposed IEP, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. The IEP team must consider her views.

22. The District convened Student's regularly scheduled annual IEP meeting on May 28, 2009. Parents, Mr. Rosenberg, and Ms. Coutchié attended, as did several District representatives. Mother testified that she felt intimidated by the District's members,

especially the attorney who chaired the meeting, and therefore could not meaningfully participate.

23. The evidence showed that Mother participated in the May 28 meeting meaningfully and at length, and that Father and Mr. Rosenberg participated to some degree as well. Lynn Barbaria, the District's Director of Special Education, took the official notes of the three IEP meetings on her laptop computer and made them part of the final IEP document. She testified that her notes were true and accurate, and Student did not disagree. Those notes show that Parents told the May 28, 2009 IEP team that Student was making progress in reading, which Parents hoped to continue. Parents reported numerous details of that progress, such as that Student giggled as he read; could read Garfield comics; and independently listened to and enjoyed grade-level literature. Parents stated that Student was much more confident and told them he feels "like a regular kid." He no longer required a certain medication. He had been elected patrol leader in the Boy Scouts. Parents proposed that Student continue with Ms. Coutchié's tutoring for at least another year, or be placed in a special school for dyslexics such as the Charles Armstrong School. In support of Parents' position, Ms. Coutchié then made a lengthy presentation of the progress Student was making under her tutelage.

24. Several District witnesses confirmed at hearing that Mother participated extensively in the May 28 meeting. For example, Megan Williams, the RSP teacher who was Student's case manager, testified that Mother spoke for the first half hour. Ms. Barbaria testified that Parents—mostly Mother—talked "a lot" at the meeting, and provided input "continually" by asking questions and making comments.

25. Mother did not dispute these descriptions of her participation in the May 28, 2009 IEP meeting. She testified that she began by talking about some of the great things Student was doing. She agreed that she was able to offer her opinion at the

meeting, and admitted that “maybe” Parents’ presentation, together with Ms. Coutchié’s, “took a lot of time.” The meeting lasted for approximately two and a half hours.

26. There was no evidence that the attorney who chaired the meeting said or did anything to intimidate Parents at the May 28, 2009 IEP meeting; that any restriction was placed on their participation; or that they were unable to say anything they wanted to say. The evidence showed that Parents participated meaningfully in the May 28, 2009 IEP meeting.

Composition of the May IEP Team

27. An IEP team must include at least one parent, one regular education teacher of the student, one special education teacher of the student (or, where appropriate, a special education provider), a representative of the local educational agency, an individual who can interpret the instructional implications of assessment results, and other individuals invited at the discretion of the parent or the district who have knowledge or special expertise regarding the student.

28. Mother testified that her participation in the May 28, 2009 IEP meeting was not meaningful because several IEP team members had not met or observed her son. However, there is no legal requirement that every IEP team member meet or observe the student. At the time, Student had only two teachers: Ms. Coutchié, a special education provider, for reading; and Laura Benjamin, a regular education teacher, for PE. Both attended the meeting and reported on their observations of Student. Since Student was not taking academic classes and was only on the campus for one period of PE a day, there were no other school contexts in which he could be observed. Student does not identify anything that observation of Student by other team members might have accomplished.

29. District staff may constructively participate in an IEP team meeting after reviewing the student's educational records, and all present at the May 2009 IEP

meeting had done so. Student does not argue that any member's lack of familiarity with him resulted in any shortcoming in the meeting. Student's expert Dr. Torgesen has not met Student either.

30. The law did not prohibit the attendance or participation of Jacqueline McHaney, then the District's attorney, at the May 2009 IEP meeting. Her presence was unremarkable since Father is an attorney and the parties have a history of litigation.

31. All legally required IEP team members attended the May 28, 2009 IEP meeting. The composition of the IEP team at that meeting had no effect on Parents' meaningful participation in it.

PREDETERMINATION

32. A district may not decide on its offer before an IEP meeting and arrive with a "take it or leave it" attitude. However, district staff may discuss the issues in advance, as long as they keep open minds and fairly consider parents' views.

33. Mother testified that she felt the school's offer at the May 28, 2009 IEP meeting was predetermined; that the District was entrenched in its position that Student should return to public school; and that the District's attorney was there to keep them entrenched. There was no evidence to support her view. The IEP team did not have a draft IEP, or even draft goals. A day or two before the meeting, the RSP teacher, Ms. Williams, drafted goals, but there was no evidence that they were distributed to the team members before or during the meeting. Ms. Coutchié brought her own proposed goals, and may have distributed them at the meeting, but all agree that neither set of proposed goals was discussed or adopted.

34. Mother testified that, before the May meeting, the District predetermined an offer to bring Student back to public school and give him a full curriculum. However, on cross-examination Mother admitted that no one told her what the placement would

be, and at the end of the meeting she did not know whether the District would offer to place Student with Ms. Coutchié, at one of its schools, or somewhere else.

35. Mother testified that, by the end of the May 28, 2009 IEP meeting, she believed that the District's offer was "electronically complete." The preponderance of evidence showed, however, that by the end of the May meeting the District team members did not know what they would recommend. Ms. Barbaria was working on an IEP on her laptop during the meeting, but there is no evidence that her draft was complete when the meeting ended. She testified that no offer was presented at the meeting because the team did not have enough information, and that it was still necessary for Parents to review and discuss goals. At the end of the meeting Mother asked for the District's written proposal, but the District was unable to produce one. Ms. Barbaria told Parents she did not have immediate access to a printer, but there was no evidence that Ms. Barbaria said that was the only reason the District could not produce an offer. Mother admitted that she "was not paying that much attention" to Ms. Barbaria's response to her request for the offer.

36. The preponderance of evidence showed that the May IEP team did not predetermine an offer at or before the May 28, 2009 IEP meeting. It showed instead that, by the end of the meeting, the District had not decided what placement or services it wanted to offer Student for the coming school year.³

³ This conclusion disposes of Student's argument that the May 28, 2009 IEP meeting was final and produced an offer, and therefore subsequent IEP meetings were improperly labeled continuations of the May 28 meeting. It also disposes of all his contentions based on the premise that the District had a completed offer prepared on May 28, 2009.

The Promise to Deliver an Offer by June 5, 2009

37. The parties agree that, at the end of the May 28, 2009 meeting, the District promised to deliver a written IEP offer to Mr. Rosenberg on June 5, 2009; that the District failed to do so; and that it did not deliver such an offer to Parents until July 27, 2009. On June 11, 2009, Student filed his complaint in this matter, alleging *inter alia* that the District's failure to deliver an offer by June 5 denied him a FAPE.

38. Whether the District's breach of promise violated contract law is not at issue here. Special education law only required the District to deliver a valid offer of a FAPE by August 10, 2009, the beginning of the school year. The law also requires that a district deliver an educational program in conformity with an IEP, but the promise to deliver an offer by June 5 was not included in an IEP. It is therefore unnecessary to decide whether the promise was made before the end of the IEP meeting, as Student argues, or at a settlement meeting afterward, as the District argues. In either event, it was not the sort of promise that, by itself, is enforceable in due process. Nor did the District's extensive delay in delivering a draft of the IEP cause any damage to Parents' participatory rights, or to Student, who was in the placement Parents preferred. Since a draft IEP was sent to Parents on July 27, 2009, well before the start of the school year on August 10, Parents had adequate time to review it and comment on it.

39. Student does not identify a special education law that the District's breach of promise might have violated. Instead, in his closing brief, Student contends that the District IEP team members had privately decided on an offer (perhaps to leave Student with Ms. Coutchié); the Superintendent then objected to the offer; and District staff then decided to have an IEP meeting on August 5, 2009, in Parents' absence. This, Student now argues, was an unlawful interference with the IEP team.

40. The evidence, however, showed only that the District did not deliver an offer by June 5, 2009, because it changed attorneys in June 2009. The District's

Superintendent told Ms. Barbaria not to deliver the offer to Parents until Marcy Gutierrez, the District's new attorney, had an opportunity to review it. Ms. Gutierrez did so, and advised the District that it should not present an offer of a FAPE without holding an IEP meeting. The District then asked Parents for dates on which such a meeting would be held. When Parents did not respond to those requests or make themselves available for an IEP meeting, the District held one without them. There was no evidence of interference with the IEP team by the Superintendent or others. The District's failure to deliver an IEP offer by June 5, 2009, did not deprive Parents of the right to meaningful participation in the IEP process, and did not deny Student a FAPE.

The August 5, 2009 IEP Meeting

LACK OF ADEQUATE NOTICE AND PARENTAL PARTICIPATION

41. A district must notify parents of an IEP meeting early enough to arrange a mutually convenient date and ensure that they will have an opportunity to attend. It may not conduct an IEP team meeting in the absence of parents unless the district is unable to convince the parents that they should attend, in which case it must keep a record of its attempts to arrange a mutually agreed-on time and place for the meeting.

42. A district must also take steps to ensure that all IEP team members, including parents, attend an IEP meeting, and that parents have an adequate opportunity to participate and to present information to the IEP team.

43. On July 2, 2009, the District began to make a series of requests of Parents that they identify dates on which they would be available for an IEP meeting to make the District's offer final. The requests did not propose a specific date or include a notice of a proposed meeting. Neither Parents nor Mr. Rosenberg responded to those requests.

44. On July 27, 2009, Ms. Barbaria mailed a draft IEP to Parents, along with a new assessment proposal. Although she stated in her letter that she wanted to arrange an IEP meeting as soon as possible, she did not propose a specific date.

45. On Thursday, July 30, 2009, Ms. Barbaria sent a notice of IEP meeting to Parents by mail. The meeting was noticed for the next Wednesday, August 5, 2009. Parents received Ms. Barbiera's notice after business hours on Friday, July 31, 2009.

46. On Tuesday, August 4, 2009, Parents informed the District that they would not attend the August 5 meeting. The District knew it was required to make a valid offer of a FAPE by August 10, the start of the school year, so it proceeded with the meeting on August 5 without Parents. The IEP team slightly modified the draft IEP Ms. Barbaria had sent Parents on July 27, 2009, adopted the modified IEP as the District's offer, and mailed it to Parents the next day.

47. The District did not notify Parents of the IEP meeting far enough in advance to ensure their presence. A period of five calendar days, over a weekend, was insufficient for that purpose. There is nothing in the record that explains or justifies the District's failure to send a notice of a specific date for an IEP meeting until July 30, 2009. The District had long known that the school year would start on August 10, and that Parents were making it difficult to arrange an IEP meeting.

48. The District's attempts to persuade Parents to attend the meeting were inadequate, and did not approach the level of effort required before an IEP meeting can lawfully be held without parents. Although the District repeatedly asked Parents for possible meeting dates, it gave Parents notice of an IEP meeting on a specific date only three business days before the meeting was held. On July 30, 2009, Ms. Barbaria sent an email to Mr. Rosenberg about the meeting, and on August 4, Ms. Gutierrez mailed a letter to Parents, but the record does not show that the District made any other efforts to obtain Parents' presence at the meeting after the meeting had been announced. At

hearing, the District did not produce any records of repeated letters, telephone calls, and visits to Parents to persuade them to attend on August 5, because the District did not make those efforts.

49. By failing to give Parents adequate notice of the August 5, 2009 IEP meeting and make adequate efforts to convince them to attend, and by proceeding without them, the District committed four violations of the Individuals with Disabilities in Education Act (IDEA): it failed to give Parents enough notice of the meeting to ensure their presence; it proceeded to hold the meeting unlawfully in Parents' absence; it failed to ensure that all required members of the IEP team were present; and it failed to ensure that Parents had an adequate opportunity to present information to the other members of the IEP team. Because the evidence of the District's procedural violations was persuasive, Student's remaining contentions concerning the procedural validity of the August 5, 2009 IEP meeting need not be resolved here.⁴

⁴ On November 6 and 9, 2009, in response to one of Parents' compliance complaints, the California Department of Education (CDE) found that the District failed to notify Parents of the August 5, 2009 IEP meeting early enough to ensure they could attend; failed to make sufficient efforts to ensure Parents' participation in that meeting; and failed to include all required members on the IEP team for that meeting. (CDE Compliance Case No. S-0139-09/10.) Student argues that these findings are binding on OAH, but they are only entitled to some weight. (See, *People v. Sims* (1982) 32 Cal.3d 468, 479; *Student v. Los Angeles Unified School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009010712 (Order Granting Motion to Dismiss); *Student v. Bellflower Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs Case No. 2005110764; *Student v. San Diego Unified School Dist.* (2004) Special Education Hearing Office Case No. 2739.) The ALJ independently agrees with those findings.

50. The IEP offer that emerged from the August 5, 2009 IEP meeting was procedurally invalid because it was decided upon at an IEP team meeting that was fundamentally flawed. When the school year started on August 10, 2009, the District committed a fifth violation of the IDEA by not having a valid IEP offer outstanding by the beginning of the school year.

The August 28, 2009 IEP Meeting

51. After the August 5, 2009 IEP meeting, the District decided to hold another IEP meeting that Parents could attend. On August 14, the District sent Parents a notice of an IEP meeting on August 28. Parents, Mr. Rosenberg, and Ms. Coutchié attended, as did all District staff required by statute. The District contends that any procedural violations relating to the August 5, 2009 IEP meeting were cured on August 28, and that the offer made at the later meeting was procedurally valid.

52. Parents assert that they were denied meaningful participation in the August 28 meeting. Mother testified that she felt humiliated and intimidated, and therefore could not participate. But the evidence showed that Parents participated extensively in the meeting. According to Ms. Barbaria's meeting notes and the testimony of several witnesses, Father began by stating that Student's program was in litigation and would be going to court, and that a meaningful meeting could not be held while litigation was pending. Mother announced that all the District team members would be called as witnesses.

53. Parents then reported extensively on Student's current condition and progress, including his social life in Boy Scouts and a martial arts program, as well as his success in ceasing certain medications. Father stated that Student could now read the headlines in the *Wall Street Journal*, and mentioned that Student was adopted from a family with a history of dyslexia and had an uncle who is illiterate. Parents summarized Student's progress with Ms. Coutchié, and urged the IEP team to extend Student's

current program for another year. They requested that a math tutor be provided by the District. Ms. Coutchié made an extensive presentation, describing Student's progress under her tutelage since the May IEP meeting. She distributed work samples, and urged the IEP team to leave Student in his current placement.

54. Mother also told the IEP team that Student could not adequately learn in a school setting, and that school staff were trying to rush him back to school. She stated that Student had been hit by another student in PE, and argued that supervision at the school site was inadequate. She stated that placement at a private school for dyslexics was an option. Parents questioned whether school staff had adequate training in teaching dyslexic students, and asked what the thinking was behind the August 5, 2009 offer. Various District team members explained their view that Student needed to return to school to enjoy its social benefits and receive the academic curriculum he does not now receive, including science, math, social studies, and history. They argued that a return to school would place Student in the least restrictive environment (LRE). Parents and Ms. Coutchié maintained that Student should not return to school until his reading was closer to grade level.

55. Parents do not dispute that they made the statements described above. However, Parents refused to discuss the details of the District's offer, stating that they believed such a discussion was inappropriate while the matter was in litigation. They adhered to this refusal even though Tom Neary, the outside facilitator of the meeting, repeatedly asked them for input on the offer, particularly its goals, and although other team members attempted to discuss the offer and the goals with Parents.

56. Parents' argument that a meaningful IEP meeting cannot be held during litigation about an IEP offer has no support in law, and is contrary to the provisions and purpose of the IDEA. IEP team members may feel restrained in expressing their views while litigation is pending, but that is an unavoidable side effect of the due process

system. The IDEA sets out a mandatory schedule for IEP meetings that makes no exception for litigation, and districts must comply with that schedule. Students grow and change whether litigation is pending or not. Freezing a student's program during lengthy litigation would undermine the IDEA's statutory scheme for annual goals, periodic review, and adaptation to a student's changing needs. Congress specifically addressed the problem of pending litigation by enacting the stay put rule, but it did not otherwise alter the mandatory requirements for annual and triennial IEP meetings. IEP meetings are routinely held while litigation is pending.

57. The evidence showed that both Parents participated meaningfully and extensively in the August 28, 2009 IEP meeting, except they refused to discuss the District's offer. That restraint was self-imposed and not the act of the District, which did not limit Parents' participation at the August 28 IEP meeting.

PREDETERMINATION

58. At the end of the August 28, 2009 IEP meeting, Dr. Cristo orally re-presented the District's offer, and that offer was mailed or given to Parents shortly after the meeting. Coleen Clark, an assistant principal who attended the August 28, 2009 meeting, testified that at the end of the meeting she did not feel that the meeting was complete, or that an offer was made. However, Special Education Director Barbaria and special day class teacher Meghan Kerins testified that the offer was re-stated at the meeting, and the record showed that Parents received it shortly after the meeting, so the weight of the evidence showed that the District made the offer again on August 28. Student argues that the District predetermined the offer that emerged from the August 28, 2009 IEP meeting, noting that it did not change from the August 5, 2009 offer.

59. The evidence did not support Student's claim. Several District team members credibly testified that they felt free at the August 28, 2009 meeting to make any changes that seemed appropriate. There was no evidence to the contrary. As Ms.

Barbaria and special day class (SDC) teacher Meghan Kerins testified, an IEP offer can always be improved, and alteration of an IEP offer made at a previous meeting is not unusual. On this record, the fact that the offer was not altered at the August 28 meeting was a consequence of Parents' refusal to discuss it, not the result of predetermination by the District. District witnesses credibly testified that the offer did not change because Parents would not discuss it, or state any reason to change any of its specific provisions. The District did not predetermine the IEP offer it re-promulgated on August 28, 2009.

60. The evidence showed that the August 28, 2009 IEP meeting complied with the procedural requirements of law. The District gave Parents ample notice of the meeting, and Parents attended and participated as much as they desired. The District therefore remedied the procedural shortcomings surrounding the August 5 meeting and revived its IEP offer, which was procedurally valid from and after August 28, 2009.

Prejudice from the Procedural Violations Concerning the August 5, 2009 IEP Meeting

61. A procedural violation of the IDEA and related laws results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits.

62. There was no evidence, and Student does not contend, that the flaws in the District's August 5, 2009 IEP meeting impeded his right to a FAPE or deprived him of educational benefits. At all relevant times, Student remained with Ms. Coutchié in the placement required by the October 2008 settlement agreement.

63. The preponderance of evidence showed that Parents were unwilling to participate in the August 5, 2009 IEP meeting for reasons having nothing to do with adequate notice. Throughout these events Parents have steadfastly maintained that continuation of Student's placement with Ms. Coutchié is the only program that can

provide him a FAPE for SY 2009-2010. Parents remain adamant in their conviction that Student is not ready to return to public school or be exposed to the usual curriculum of middle school until his reading approaches grade level, and that for now his education should concentrate solely on that goal.

64. Accordingly, at all times relevant here, Parents have been unwilling to cooperate with the District in the development of any offer of a FAPE that competes with their own vision of what is required. Parents have had no interest in helping the District develop any offer that would separate Student from Ms. Coutchié or return him to public school, and have actively obstructed that effort by denying the District useful information about Student's present levels of academic performance.

65. The stated purpose of the August 5, 2009 IEP meeting was to finalize the District's offer of a FAPE. Parents knew or suspected, from the draft sent to them on July 27, 2009, that the offer would propose that Student return to public school. The evidence showed that Parents avoided attending the meeting, giving various explanations of their unavailability to the District. Notwithstanding the inadequate notice of the August 5 meeting, Parents could have attended the August 5 IEP meeting but chose not to attend.

66. On August 4, 2009, Parents wrote in a letter to the District that the most important reason they would not attend the August 5 meeting was that Parents and the District were in litigation. They argued that open discussion would be impossible; that the meeting would have an impact on the litigation; and that they "will be denied due process rights and sustain harm if the District attempts to schedule an IEP meeting while due process litigation is pending."

67. Parents' limited participation in the May 28 and August 28, 2009 IEP meetings confirmed their unwillingness to participate in developing any IEP offer that competed with their own position. On May 28, Parents argued extensively for continued

placement with Ms. Coutchié, but showed no interest in discussing any alternative to that placement. District team members explained why they believed Student should return to school and receive a full curriculum, but there is no evidence that Parents responded to those views. And at the August 28, 2009 IEP meeting, Parents rebuffed all attempts to bring them into a discussion of the District's proposal on the ground that litigation was pending.

68. Parents' hostility to the development of a competing IEP offer is most apparent in their concealment from the District of the existence and results of the assessments Ms. Coutchié conducted in late April and early May 2009, and their simultaneous refusal to authorize assessments by the District. When Ms. Williams handed Father an assessment plan in mid-April, she explained that her purpose was to obtain current information for use in drafting new goals for Student. Parents never informed the District that Ms. Coutchié would conduct, or had conducted, any assessments, and refused to sign any assessment plan the District presented.⁵ At the May 29, 2009 IEP meeting, District staff reiterated the need for new assessments. Throughout that discussion, Parents, Ms. Coutchié, and Mr. Rosenberg remained silent about the assessments Ms. Coutchié had just conducted.

69. Thus the evidence showed that Parents were entrenched in their position that there was only one appropriate placement for Student (with Ms. Coutchié); they declined to cooperate with the development of any competing proposal; they evaded attending any IEP meeting addressing such a proposal; they refused to discuss the

⁵ Parents' stated ground for rejecting Ms. Barbara's July 27, 2009 proposal that Dr. Cristo conduct the assessments was that they had learned Dr. Cristo would testify for the District at hearing. But Parents did not request another assessor, and had been refusing to authorize assessments by any District employee since April 2009.

District's proposal; and they actively obstructed the District's proposal by withholding information about Student's then-present levels of academic performance. The evidence showed that Parents would not have participated in the August 5, 2009 IEP meeting no matter how much notice they had.

70. For the foregoing reasons, Parents' participation in the IEP process was not substantially impeded by the District's procedural violations related to the August 5, 2009 IEP meeting. Those violations did not deny Student a FAPE.

SUBSTANTIVE VALIDITY OF THE DISTRICT'S IEP OFFER

71. The IEP offer that emerged from the August 28, 2009 IEP meeting would have placed Student for SY 2009-2010 at the District's Silverado Middle School for his seventh grade year. The offered program consisted of: two periods a day of one-to-one language arts instruction with a District special education teacher trained and experienced in addressing significant reading deficits, including dyslexia; two periods a day of small group math instruction by the SDC teacher; one period a day of sixth grade science in a general education class with the support of an instructional assistant (IA); one period a day of PE; one Advisory period a day; ten 30-minute sessions a year of speech and language therapy to address social skills; ten 30-minute consultations a year by an occupational therapist to support keyboarding instruction; and an extended school year.

72. The offer included an extensive list of accommodations and modifications. It also included use of, and training for, a Kurzweil 300, a computer device for people with dyslexia and other reading deficits that simultaneously highlights text from scanned books or electronic text and reads it aloud using synthetic speech.

73. The IEP offer proposed that Student's reading teacher, Lesley Ludwig, would consult with Dr. Cristo in the development of the specifics of Student's reading

program as soon as his present performance and limitations could be determined. It also offered monthly IEP team meetings to monitor Student's progress.

74. Several qualified District witnesses, including Dr. Cristo, RSP teacher Leslie Ludwig, and Ms. Barbaria testified credibly that this program was appropriate for Student and would allow him to progress in the middle school curriculum.

Access to Core Curriculum

75. The parties dispute the grade level of reading ability required to access other subjects in the curriculum such as science and history. Parents and Ms. Coutchié argue that, since Student is currently reading fourth grade materials, he can only access other subjects at that level. The District argues that, with proper accommodations and supports, including intensive reading intervention, Student can access seventh grade level subjects.

76. The only witness who squarely testified that Student could not access seventh grade curriculum materials was Ms. Coutchié. Earlier, however, she seemed to say the opposite. Student was a sixth grader in the last school year. At one point, Student attempted to establish that he was receiving the functional equivalent of science and history from Ms. Coutchié. Asked whether she was using "grade level texts and materials" in her teaching, she responded that in March 2009:

...we began to use his science and his history books, selectively, with a tremendous amount of support, but to show him that he actually could understand the contents, which are perfectly within his intellectual capacities.

So even according to Ms. Coutchié, Student could, in the sixth grade, access the contents of sixth grade science and history with sufficient support. The notes of the May 28, 2009 IEP meeting confirm that Parents had been provided with core textbooks, and

that the science textbook had been used in instruction. Mother told the IEP team at that meeting that Student independently listened to and enjoyed grade-level literature.

77. The District justified its offer to place Student in sixth grade science for his seventh grade year. Corey Coble, who has been a fifth grade general education science teacher for the District since 1999, also has significant earlier experience in teaching sixth grade math and science. He has a master's degree in educational administration and a multiple subject teaching credential. He testified that he has several students with IEPs in his classes every year, and is used to working with IAs. He is familiar with Student's history and attended the IEP meetings on August 5 and August 28, 2009.

78. Mr. Coble testified that Student needed to learn some of the foundational concepts of sixth grade science before he studied seventh grade material. He testified that someone at a fourth grade reading level, like Student, could access sixth grade science material. He identified several ways in which Student could be supported in understanding the curriculum, including online support, visual aids from publishers, and other methods in class and at home. He testified that science would be accessible to Student because it is a hands-on subject involving matters he can experience directly.

79. Ms. Barbaria credibly testified that Student's proposed mathematics program, which would provide individual instruction for two periods a day, is structured specifically to assist Student in handling grade-level material. The first hour would expose him to seventh grade material; the second would address the specific difficulties he had with those materials. He would also be able to access grade-level material using the text-to-speech Kurzweil 300 device.

80. The offered IEP contains several provisions designed to assist Student in accessing grade-level material. It includes many accommodations and modifications proposed for that purpose, including the adjustment of assignments in math, language arts, and science to Student's grade level; shortened and special science assignments;

advance copies of teachers' notes, overheads and PowerPoint presentations; highlighted texts; visual place holders; on-line audio science text; a calculator; math cue cards; a planner to be monitored by Parents and teachers; access to a computer on campus; peer or tutor assistance; presentation of a single task at a time; a digital recorder to record homework or notes, if needed; preferential seating; repeated instructions; checks for understanding; testing periods shorter than normal; and extended time to complete assignments. Student does not argue that these provisions are inadequate.

81. The preponderance of evidence showed that Student would be able to access sixth and seventh grade curriculum with the support proposed in the District's IEP, even though he currently reads at a fourth grade instructional level.

Appropriateness of the Offered Language Arts Program

RATE OF PROGRESS

82. The fundamental dispute between the parties relates to the rate at which Student should be expected to progress in language arts. Parents believe that Student cannot have access to grade-level curriculum until his reading is brought up to, or near, grade level; that all other subjects should be put aside until he does so; and that Student's reading will not improve adequately with less than three hours a day of individual instruction. The District believes that two hours a day of individual reading instruction is enough to enable Student to access the rest of the middle school curriculum, which he should now be doing. The opinion evidence was in conflict.

83. Several District witnesses testified credibly that the language arts (reading and writing) portion of the District's offer is appropriate.

84. Dr. Cristo is expected to work with Lesley Ludwig, who will be Student's reading teacher under the proposed IEP, in designing specific methods and strategies for teaching him. Dr. Cristo testified that the reading goals in the proposed IEP were appropriate for Student and would allow him to make appropriate progress. She opined

that two hours a day of one-on-one reading instruction was sufficient for providing the kind of reading intervention Student needs. She testified persuasively and without contradiction that there is a "utility curve" to the value of individual reading instruction, and that a lot of data show that after two hours a day, the benefit of such instruction levels off. In other words, after two hours the usefulness of that method provides diminishing returns.

85. Lesley Ludwig would be Student's primary reading teacher under the IEP offer. Ms. Ludwig is in her second year as an RSP teacher for the District. She has a master's degree in education with an emphasis on learning disabilities from California State University at Sacramento, a special education credential, and a preliminary multiple subject credential. She has taught as an IA at several charter schools, has worked with students with learning disabilities in private organizations, and has worked in education for 15 years. She has substantial specialized training in teaching dyslexic children and has experience using a number of specialized teaching programs for that purpose. At present, she works with and assesses learning-disabled students for the District, and collaborates with general education teachers in their instruction. She is qualified to teach Student to read.

86. In her testimony, Ms. Ludwig showed considerable familiarity with Student's educational history. She testified that two hours of individual reading instruction a day would enable Student to make progress in his areas of deficit, bridge any gaps in his reading skills, and apply those skills in core curriculum areas.

87. Lynn Barbaria has been the District's Director of Special Education since 2004. She has master's degrees in organization and education leadership and in speech pathology and audiology. She is a State-licensed speech and language pathologist, and has worked for the District in that role as well. She has credentials in clinical

rehabilitative services and administrative services, and has been working with disabled students since 1979.

88. Ms. Barbaria opined that the District's offer is appropriate for Student and would allow him to achieve adequate progress in language arts and other subjects. She agreed with Dr. Cristo that Student does not need three hours a day of intensive reading intervention to make progress, and that two hours a day would be sufficient.

89. Megan Williams is in her second year as an RSP teacher for the District and is Student's case manager. She has a Level II special education credential (mild to moderate) and has worked with disabled children for 12 years. She has taught in a juvenile detention center, a transition high school for emotionally impaired students, and in a junior high school as an RSP teacher. Ms. Williams testified that she believed the District's offer was appropriate, and that two hours of one-to-one language arts instruction every day would be a "fantastic program" for Student.

90. Two professionals testified that the reading portion of the District's offer was inadequate. The first was Ms. Coutchié, who opined that the reading program in the IEP offer was inappropriate primarily because it would not allow Student to advance fast enough to reach grade-level skills in a year or two.

91. Ms. Coutchié's opinion about the District's offer is not given any weight. Ms. Coutchié has a significant financial interest in the failure of the District's IEP offer and the continuation of her own tutoring of Student. She tutors him three hours every school day at the rate of \$90 an hour, and is also paid for periodic reports. She stands to lose at least \$270 every school day (more than \$5,000 a month) in income if the District prevails.

92. Ms. Coutchié was strongly biased in favor of Parents and against the District. Her animus toward the District was evident in her testimony. She answered

questions from Parents helpfully, but responded to questioning by District counsel abruptly, evasively, and sometimes with evident scorn.

93. Ms. Coutchié's bias is also evident from her conduct. She proposed to Parents that she, rather than anyone selected by the District, conduct the academic assessments the District wanted Ms. Williams to conduct. She deceptively billed those assessments to the District in a way that ensured she would be paid for them but the District would not know that she had conducted them. Shortly before the May 28, 2009 IEP meeting, Ms. Coutchié received an email from Ms. Barbaria asking for "written reports" about Student, but Ms. Coutchié did not mention the results of her assessments in her response. Nor did she reveal them at the May 28, 2009 IEP meeting, where District team members spoke of their need for the assessments she had just conducted. She continued to withhold the results from the District until compelled to produce them under subpoena. Like Parents, she declined to discuss the District's offer at the August 28, 2009 IEP meeting because it was in litigation. This behavior evidences a hostility to the District and a willingness to manipulate information that make her testimony unreliable.⁶

⁶ Student defends Ms. Coutchié's deceptive billing of her academic assessments by pointing out that, in the course of her tutoring of Student, she routinely administered reading tests and billed them as instructional time. However, as Ms. Barbaria testified without contradiction, these two kinds of testing cannot be conflated. Routine curriculum-based measures of a Student's progress are part of any class and are quite unlike annual academic assessments intended for use by an IEP team. Moreover, the routine reading tests Ms. Coutchié billed to the District were reported to the District, not withheld from it.

94. Since Ms. Coutchié did not mention her criticisms of the District's offer to the District until the hearing, her opinions about the District's offer were not part of the snapshot of information before the IEP team on August 28 or earlier.

95. Dr. Torgesen's testimony did not suffer from any of the defects of Ms. Coutchié's; he was an honest and forthright witness who is well qualified in his field. His opinions were not persuasive for different reasons.

96. Dr. Torgesen based his opinions on an unspecified range of testing materials selected for him by Parents, and on extensive discussions with Parents. He did not contact the District or Dr. Cristo. Thus, it is not clear that his opinion was based on an objective range of data.

97. Dr. Torgesen testified that Student's reading must be brought up to grade level by the end of the eighth grade, that Student ought to have a program that results in two years' progress in reading for every year of instruction, and that the District's IEP offer was therefore flawed because it did not promise to close that gap at that rate. However, he admitted his view reflected a preference, and agreed that his preference was not the only way to provide Student a FAPE. Dr. Torgesen's testimony centered on his belief, which Parents share, that a more rapid rate of reading progress is worth the sacrifice of all other benefits of middle school. While reasonable people may hold that belief, they may also hold the opposite view. The District was not required to agree with Dr. Torgesen's perspective.

98. Dr. Torgesen was concerned only with progress in reading. He discounted Student's need to learn such subjects as math and science as less important than reading. However, California requires a broader range of instruction and curriculum in middle school and for graduation.

99. Dr. Torgesen testified that he doubted public school special education teachers are capable of teaching Student well enough to achieve the rate of progress he

prefers. He based this view on "average conditions across the United States", not on any specific knowledge of the skills or qualifications of the District's teachers. He agreed that it was possible that the District could fashion a reading intervention program for Student that would produce accelerated progress. Ms. Ludwig and Dr. Cristo hold the appropriate credentials for delivering Student's reading program and appear well qualified to do so. Student does not argue, and the evidence did not show, that they are unqualified to do so.

100. Dr. Torgesen's testimony was based in large part on a sense of caution. He stated that the current intervention was working, and that it was therefore an undesirable risk to substitute another program. However, the District knows its teachers and capabilities; Dr. Torgesen does not. The District is in a better position to assess the risk of changing programs.

101. Dr. Torgesen testified that Ms. Coutchié's intervention should be continued because it was "a Cadillac" and the "best possible" program for Student. But a district is not obliged under the IDEA to provide a Student with the best possible program; it is required to provide a program that meets a student's needs and allows him an opportunity to make meaningful progress.

102. Dr. Torgesen did not testify that the District's offer was inappropriate, or that it did not address Student's unique needs. He did not testify that two hours a day of individual reading instruction by a qualified teacher was not enough to allow Student to make meaningful progress under the District's offer. He did not testify that Student could not access the other elements of the middle school curriculum unless he achieved a rate of progress in reading as rapid as Dr. Torgesen preferred. Therefore, even taken at face value, Dr. Torgesen's testimony did not establish that the reading element of the District's offer would fail to provide Student a FAPE.

103. The preponderance of evidence showed that the language arts program offered to Student would meet his needs, and was reasonably calculated to allow him to achieve meaningful progress in reading and writing.

GOALS

104. An annual IEP must contain a statement of measurable annual goals designed meet the student's needs that result from his disability to enable him to be involved in and make progress in the general curriculum, and meet each of his other educational needs that result from his disability. It must also contain a statement of the student's PLOPs. These levels establish baselines for measuring the child's progress throughout the year so that adequate new goals can be written.

105. Student argues that all the goals in the District's proposed offer lack adequate baselines (PLOPs). Generally, the baselines in the proposed goals were derived from information given to the District by Ms. Coutchié, or, in the absence of such information, from results from the District's triennial assessments in spring 2008. The District argues that Parents are responsible for any defects in the PLOPs because they withheld information about Ms. Coutchié's more recent assessments.

106. The validity of an IEP is measured by what was objectively reasonable at the time the IEP was written and in light of a "snapshot" of the information available to the IEP team when its decisions were made. The "snapshot rule" means that information that was unavailable to the District when the IEP was written, such as the Coutchié assessments in spring 2009, cannot be used to undermine the team's decisions. And because the snapshot rule requires only an inquiry into whether the assessments were reasonably available to the District, there is no need to evaluate the explanations Parents and Ms. Coutchié offered at hearing for withholding the assessment information. Therefore, it is not necessary to decide whether Parents are equitably

estopped from asserting that the goals lacked current information, since a more specific rule of law applies.

107. Student argues that the District had the Coutchié assessment results before the August 28 meeting, but stops short of asserting that the District had them in time to use them in the formulation of its IEP offer. The record would not support such a claim. Ms. Coutchié testified that she produced records concerning Student in response to the subpoena, including her 2009 assessment results, on or about August 21 or 22, 2009, four or five business days before the August 28 IEP meeting. Ms. Coutchié's testimony was explained and supplemented by the testimony of Ms. Barbaria, taken without objection, that she had been told by a staff member at Ms. Gutierrez's law firm that Ms. Coutchié's records had arrived in a disorganized fashion, were "in no condition to be reviewed", and would have to be sorted and analyzed. Ms. Gutierrez's best memory is that her office received the records on or about August 27, and that they were so voluminous that they would take some time to review. Moreover, Ms. Coutchié produced the records to employees of the District's new law firm, who were not likely to immediately recognize the significance of the assessment results, not to the District. District employees did not actually receive the records of Ms. Coutchié's assessments until well after the August 28, 2009 IEP meeting. The evidence showed, therefore, that the Coutchié assessment results were not reasonably available to the IEP team by the time it met on August 28.

108. Ms. Williams drafted the goals in the District's offer. Having failed to persuade Parents to authorize new assessments, Ms. Williams started drafting the goals using information from Student's previous goals and 2008 triennial assessments. She sent an email to Ms. Coutchié seeking newer information, but it was returned undelivered. However, Ms. Williams took notes at the May 28, 2009 IEP meeting when

Ms. Coutchié reported on Student's PLOPs, and she found that most of Ms. Coutchié's opinions about Student's present performance coincided with her own.

109. Student's attacks on the proposed goals depend heavily on the opinion testimony of Ms. Coutchié and Dr. Torgesen. These opinions were not part of the snapshot of information before the IEP team at any of its meetings. Moreover, Ms. Coutchié's testimony is generally discounted for the reasons set forth above. Dr. Torgesen's testimony was repeatedly qualified by the observation that he would need more current information to decide whether the goals were adequate or not. He testified that in order to judge the goals he needed more, and more recent, baseline information. For these reasons, the testimony of Student's experts about the goals was generally unpersuasive.

Language Arts Goals

READING FLUENCY

110. The evidence showed that Student's greatest need is in reading fluency, which is the speed at which someone can read with comprehension. The baseline information Ms. Williams used for that goal came from Ms. Coutchié:

On 5/21/09 [Student] read 2d grade DIBELS at 90, 101, 90 cwpm with 98.3% overall accuracy. On 5/01/09 [Student] read 3d grade DIBELS at 67, 70, 88 cwpm with 97.5% accuracy.⁷

⁷ The DIBELS (Dynamic Indicators of Basic Early Literacy Skills) is a standardized reading test widely used in reading courses to measure literacy skills. "[C]wpm" means correct words per minute.

Thus Student's assertion that the fluency goal "had no baseline" is incorrect.⁸ (Student's Closing Brief, p. 8.)

111. Since Student was reading at a third grade level with high accuracy in May 2009, the new fluency goal proposed that by May 2010, Student would make about a year's progress by reading aloud a fourth grade passage at a rate of 95 correct words per minute in two of three trials.

112. Student does not identify any specific flaw in the fluency goal or its baseline. Ms. Coutchié testified that the baseline was accurate as of May 2009, and Student does not argue that the baseline was inaccurate, or that there was any other available information the District could have used to make the baseline more current. On its face, the baseline is specific and was based on the most current information the District had. The goal is measurable and would have allowed Student to make meaningful progress in reading. Its specific short-term objectives would assist in measuring progress. Dr. Torgesen testified that the goal was reasonable based on the information the District had at the time.

113. The preponderance of evidence showed that the reading fluency goal was specific, measurable from a precise baseline, met Student's needs, and would allow him to make meaningful progress.

Vocabulary and Concept Development Goal

114. The District's offer included a vocabulary and concept development goal with the following baseline:

⁸ In his closing brief, Student makes several similar assertions about the goals that are not supported by any evidence. They have been considered but are not discussed here.

[Student] can read, define and spell the prefixes un, re, in, dis, en, non, over, mis, sub, pre, script, struct, rupt, spec with 100% accuracy. Recites and spells days of the weeks. Now recites the months of the year and is able to identify holidays and his birthday.

115. This baseline was provided by Ms. Coutchié at the May 28, 2009 IEP meeting, and was current at that time. Student does not challenge the accuracy of this description of his performance. Student does not identify, and the record does not reveal, any more recent information about his vocabulary that was available to the District on May 28, 2009, or at later IEP meetings.

116. The vocabulary and concept development goal projected that, in one year, when given an individual reading level sample of prose and poetry, Student would identify idioms, analogies, metaphors and similes by highlighting examples with 90 percent accuracy in two of three trials. These are standards required for seventh grade, and since the parties agree that Student's vocabulary is average, they appear to accurately represent what he could reasonably be expected to achieve in a year. The goal's specific short-term objectives would assist in measuring progress.

117. Dr. Torgesen testified that his only problem with this goal was that he did not understand what the vocabulary goal had to do with reading comprehension. However, the goal is entitled "Vocabulary and Concept Development", not just vocabulary. Dr. Cristo credibly explained that the goal was not just addressed to deficits in vocabulary; it was also intended as a part of reading instruction, and would assist Student's growth in reading. The evidence showed that the goal was properly addressed to Student's reading needs. Student's argument that it was not directed to identifying common literary terms is irrelevant.

118. The preponderance of evidence showed that the vocabulary and concept development goal was specific, measurable from a precise baseline, met Student's needs, and would allow him to make meaningful progress.

Written Language

119. The first of two written language goals in the offered IEP states as a baseline that, in a teacher-led writing activity, Student "wrote a multi-paragraph essay and score[d] a 2.7 on the District writing assessment" That baseline came from one of Student's 2008 goals, but Student does not identify, and the record does not reveal, any more recent information about his writing of multiple paragraphs that was available to the District at the relevant IEP meetings. The goal's specific short-term objectives would assist in measuring progress from that baseline.

120. The resultant goal proposed that in a year Student would write a specifically described kind of multiple-paragraph essay derived from fifth grade standards, and appears to expect Student to accomplish more than a year's growth. Student does not argue that the goal was unattainable or overly ambitious, nor does he make any other specific criticism of it.

121. The other proposed written language goal involves keyboarding. It uses a fifth grade baseline stating that Student "is able to type 9-10 words per minute utilizing bilateral typing skills", and must look at keys, but his keystrokes are accurate 97 percent of the time. This information has the precision required for a baseline. There is no evidence that Student was taught keyboarding in the sixth grade, or that any more recent information was available.

122. The resultant goal would, in a year, have advanced Student's keyboarding skills to editing with 80 percent accuracy four out of five written language arts assignments. Student does not specifically criticize the keyboarding goal in his closing brief.

123. The evidence showed that the written language goals were specific, measurable from adequate baselines, met Student's needs, and would allow him to make meaningful progress.

MATH GOALS

124. In his closing brief, Student relies on testimony about the goals by Ms. Coutchié and Dr. Torgeson. However, Ms. Coutchié has a master's degree in education and a certificate in educational therapy, but no apparent training or expertise in math. Dr. Torgeson did not offer an opinion on the math goals because it was not his area of expertise. Neither was qualified to offer an opinion on the math goals.

125. The IEP offer would place Student in small group math instruction by the SDC teacher for two periods a day. That teacher, Ms. Kerins, credibly testified that the math goals for Student were appropriate, and Dr. Cristo agreed.

126. The IEP offer contains three math goals, all of which are detailed and precise. Their baselines contain or reference test results from Student's triennial review in 2008, including Student's math results from the WJ-III and the Key Math test. These were the latest math scores the District had, since Student had no math instruction after August 2008. The parties were aware of these results. The short-term objectives also set forth precise steps of progress; one, for example, would require Student to solve ten single-step problems with 80 percent accuracy in two of three trials, and, three months later, to solve ten multi-step problems with the same accuracy. The problems were derived from fifth grade standards, which is what Student was studying before he left school. The other math goals were similarly clear.

127. The preponderance of evidence showed that the math goals were specific, measurable from an adequate baseline, met Student's needs, and would allow him to make meaningful progress.

SOCIAL GOAL

128. Mother and Ms. Coutchié testified that Student did not need a social goal. However, Ms. Benjamin, Student's PE teacher, told the May 28, 2009 IEP team that Student sometimes did not come to her for help with social conflict, and that he had had about five "incidents" with other students, in part because he "is not in school all day and the other students do not know him." The most specific information available to the IEP team indicated that Student would need support in his transition back to school.

129. The District's IEP offer contained a goal for social interaction on campus, proposing that, within a year, Student "will demonstrate peer interactions (communicative exchanges) given the opportunity with 80% accuracy on 4/5 observations" However, the baseline for that goal states only that Student "will be transitioning back into a school placement and may need some assistance in building new friendships." Otherwise, the social goal lacks any reference to Student's current performance in social situations on campus except for Ms. Benjamin's report. It does report social and emotional findings from his triennial assessment in 2008.

130. At hearing, the District acknowledged the absence of current information in the baseline of the social goal. Amy Bello has been a speech and language pathologist for the District for 14 years. She holds a master's degree in science, speech pathology and audiology, and is licensed as a speech-language pathologist by the State. She knows Student well because she provided direct speech and language therapy to him between 2001 and 2007. She agreed that the missing baseline in the social goal was inadequate because there was "no baseline to measure."

131. Student argues that the District should have established a social baseline by observing him at his martial arts class or in the Boy Scouts, but does not explain how observation of him in those highly structured settings could yield a baseline for his social interactions on a public school campus. Ms. Bello testified that the school setting

is socially unique. Ms. Williams established that observing Student in martial arts practice or Boy Scouts was an inadequate substitute for observing him on a campus, since the former are sheltered atmospheres that do not include many girls and do not furnish a full peer experience. This testimony was persuasive and unchallenged.

132. The evidence showed that there was no current baseline information to put in the social goal, since Student had not been in a school setting, except for PE, since August 2008. It showed that the District in its IEP offer did the next best things: it reported the social aspects of Student's 2008 triennial assessments and the current information about his social interactions in PE, and it included a provision in the goal that data for measuring his progress against his short-term social objectives would be "collected and tallied by special education staff after baseline of interactions has been determined in August 2009." It also provided for monthly IEP meetings to monitor Student's progress. The goal, therefore, contained mechanisms to gather the missing baseline information in the first month of school. The District did what it could with the information it had. The IDEA requires no more.

133. The preponderance of evidence showed that the social goal was specific, would be measurable from an adequate baseline as soon as data were collected, met Student's needs, and would allow him to make meaningful progress.

THE PLANNER GOAL

134. The final goal in the IEP offer related to Student's use of a planner. The baseline was simple: he did not now use a middle school planner. The goal was clear and reasonable: in a year he would list his homework, due dates, and upcoming events in the planner on his own at a rate of 90 percent completion. Student does not challenge this goal.

135. The preponderance of evidence showed that the planner goal was specific, measurable from an adequate baseline, met Student's needs, and would allow him to make meaningful progress.

Individualization of Goals

136. Goals must be individualized. Student argues that all of the goals in the offered IEP were "canned" and "out-of-the-box" and "literally taken out of the standard goal resource guide (identified by numbers assigned to them as a reference)."

137. The only evidence that supported Student's assertion was Ms. Coutchié's claim that one language arts goal "comes straight out of the California language arts standards for seventh grade." Nothing corroborated this testimony; Student did not introduce the alleged source of the goal for comparison.

138. Student reads too much into the numbers that accompany the goals. Ms. Williams and Ms. Barbaria testified credibly that the goals were based on State curriculum standards, as indicated by numeric references (such as "7.1.1" for a seventh grade goal). The numbers Student notes are references to State standards, not draft goals. Goals must be grounded in state curriculum standards. Each goal shows on its face that it has been individualized, since the baselines were derived from information specifically about Student. Drawing from suggested goals that have been found useful in the past is consistent with law, as long as the goals are individualized. There was no evidence that the goals were copied out of any source, or otherwise failed to reflect Student's individual needs. The evidence showed that the goals addressed Student's individual needs.

Validity of Goals in General

139. The only significant defect in the offered goals was that some of them lacked current information on the levels of Student's skill and achievement, which was in

part a consequence of Student's absence from a campus. It was also, in part, a consequence of Parents' withholding of Ms. Coutchié's spring 2009 assessment data, coupled with their refusal to allow new assessments by the District. The District was not responsible for those shortcomings.

140. The evidence showed that all of the goals in the offered IEP were directly related to Student's needs. Their baselines were derived from the latest information furnished by Ms. Coutchié if available, or from the District's last known measurements. The use of short-term objectives in the academic goals clarified the progress Student would be expected to make. The goals were reasonable, measurable, and contained adequate baselines based on the limited information the District had available to it at the time the IEP was drafted. The goals complied with all legal requirements.

Plan for Transition Back to Public School

141. The offered IEP planned for Student's transition back to public school by proposing that staff be trained for that purpose by Dr. Cristo and Ms. Coutchié for ten hours during the first two months of instruction. Ms. Coutchié refused to participate in that transition plan, saying that it would take her at least two years to train staff adequately. Student claims that her statement alone establishes that the transition plan was inadequate. However, Ms. Coutchié's statement was not credible for the reasons stated above. Dr. Cristo and Ms. Barbaria credibly testified that training by Dr. Cristo would be sufficient to allow Student to make the transition back to school. Dr. Cristo testified thoughtfully and at length about how she would assist in that transition. The preponderance of evidence showed that the transition plan was adequate.

Graduation Plan

142. If appropriate, a seventh grader's IEP must include any alternative means and modes necessary for the pupil to complete the prescribed course of study of the

district, and to meet or exceed proficiency standards for high school graduation.

Student contends that the offered IEP violates that requirement.

143. As shown above, circumstances warrant new assessments of Student because current information about his levels of achievement and skills is lacking. No statement of means and modes necessary for Student to complete his prescribed course of study was appropriate in the District's offer, since sound planning toward graduation would have required considerably more current information than the District had when it wrote the offer. The offer did not violate this requirement.

Alleged Failure of Past IEPs

144. Student contends that he made little or no progress in District schools under his previous IEPs, except when receiving outside services, and therefore any program "similar" to those previous IEPs is bound to fail. He asserts, for example, that he did poorly in fifth grade with one-to-one instruction on campus by a special education teacher, and that any similar program must therefore fail.

145. Aside from self-serving assertions by Ms. Coutchié, the record does not support the sweeping claim that Student previously made little or no progress in District programs. That claim was not an issue at hearing, and the record does not contain adequate evidence to consider it. The assumption that because one-to-one instruction on campus allegedly failed in the past it will fail again is too general to be persuasive. Not all one-to-one instruction is alike.

146. In any event, the District's offer is quite different from Student's previous programs. Student has grown and changed since those programs were used. He has a new foundation in reading. He would be given intensive instruction in reading by a different teacher, under the direction of Dr. Cristo, in a middle school, not an elementary school. He would have intensive intervention in math. He would be exposed to new curriculum such as science, history, and social studies. Monthly IEP meetings would

monitor his progress. The alleged similarities of the offer to Student's previous District programs do not show that the IEP offer was not reasonably calculated to allow Student to make meaningful progress.

Student's Alleged Attention Deficit

147. Student claims his ADHD prevents him from learning in a large class. Only Ms. Coutchié so testified. More persuasive District witnesses disagreed, noting that the offer provides an IA for Student in science class. The evidence showed that Student could make progress in a large class under the IEP offer, with proper support. Until new assessments are conducted, the nature and extent of his ADHD cannot be accurately measured.

Least Restrictive Environment

148. The IDEA requires that a student with a disability be placed in the LRE in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers.

149. Student's current program is extremely restrictive because it is limited to one-to-one instruction except for PE. The parties agree that Student needs individual instruction in language arts, special instruction in math, and individualized speech and language, and occupational therapy. The District's offer maximizes Student's exposure to typical peers by placing him in the general education environment for science, PE, lunch, recess, and passing time. Since Student can be educated satisfactorily in that environment, it is the LRE for him.

150. For the reasons stated above, the District's IEP offer addressed all of Student's unique needs, and was reasonably calculated to allow him to make meaningful progress in the general curriculum.

MOTION FOR SANCTIONS

151. In special education due process matters, an ALJ may order a party, a party's representative or both, to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. The District seeks an order that Student pay its reasonable expenses, including attorneys' fees, for filing five frivolous prehearing motions, and its expenses for making its motion for fees.

152. At all relevant times, Father acted as Student's attorney. He filed pleadings, made most of Student's legal arguments at the prehearing conference and at hearing, designated himself as Student's lead representative at hearing, and, from all appearances, was in charge of deciding whether and when to make legal arguments. This conclusion is not altered simply because Father failed to file a formal appearance and failed to use the word "attorney" in the caption of his pleadings.

153. The District does not expressly seek sanctions from Mr. Rosenberg or Mother. Although both were present throughout the hearing, and Mother examined witnesses, they deferred to Father for legal argument. Although Mr. Rosenberg sometimes filed separate pleadings, none of those is at issue here. Father filed all the pleadings alleged by the District to be frivolous.

154. In October 2008, the parties settled two matters before OAH involving Student. Their settlement agreement required Student's placement with Ms. Coutchié for SY 2008-2009. It provided in relevant part that Student released and discharged the District from any and all claims which had been, or could have been, raised in the two matters arising out of the time period from May 5, 2006, through the October 2008 execution of the agreement, and that Student's claims in that matter could not later be raised in any forum, court, or administrative proceeding. It also provided that the parties

would develop an IEP (the settlement IEP) that conformed to the settlement agreement. Subsequently, the parties agreed on a settlement IEP.

Student's Original Complaint

155. On June 11, 2009, Father filed Student's original Demand for Hearing and Mediation (complaint) in OAH Case No. 2009060940. The complaint alleged that Student had been denied a FAPE in four ways. The third claim was that the District had failed to implement Student's settlement IEP by failing to provide math instruction. The fourth was that the District failed to pay Ms. Coutchié fully or on time. The District moved to dismiss the third and fourth claims, and a related portion of the first claim, as barred by the settlement agreement. On September 17, 2009, OAH dismissed the third and fourth claims on that ground. The District now asserts that because those claims were barred by the settlement agreement, Student's inclusion of them in the complaint was frivolous, and that any reasonable attorney would have known that the claims were barred by the settlement agreement.

156. At the time Father filed the complaint, it was settled that the proper avenue for enforcement of a settlement agreement was by administrative complaint to CDE, and that OAH had no jurisdiction to hear the case. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) However, in *Pedraza v. Alameda Unified Sch. Dist.* (N.D.Cal., March 27, 2007, No. 05-04977) 2007 WL 949603, a district court later held that OAH has jurisdiction to adjudicate claims alleging breach of a mediated settlement agreement that resulted in denial of a FAPE. (*Id.*, pp. 6-7.) In this matter, Student's original complaint asserted that all Student's claims amounted to denials of a FAPE. The law concerning the relationship of mediated or other settlement agreements to later allegations of a denial of a FAPE in due process hearings was not so clear that Father's filing of claims three and four was totally and completely without merit.

157. Although claims three and four, and part of claim one, were barred by the settlement agreement, the matter was not so clear that any reasonable attorney would have refrained from arguing to the contrary. The record was clouded because the settlement IEP misstated its date, and misstated the date of the next annual IEP meeting. The parties disputed whether the settlement IEP contained math goals, which were not required by the settlement agreement. After the settlement agreement, the District sought an additional waiver of liability from Student relating to those math goals, unnecessarily suggesting that Student had not already waived the claim. Thus, whether the settlement agreement precluded claims three and four was not free from all doubt, and sanctions for filing the complaint are not appropriate.

The "Sudden Death" Argument

158. Federal and State law require that, within ten days of receiving a due process complaint, a district must "send to a parent" a "response" to the complaint that includes detailed information about the reasons the district made the decisions that are addressed in the complaint, unless it has previously sent the parent a prior written notice with the same information. There is no requirement that the response to the parent be filed as part of a due process proceeding, and no statute, regulation, or decision provides for a specific sanction by an ALJ when a district fails to send the response or is tardy in doing so.

159. The District did not send Parents a response to their June 11, 2009, complaint until July 28, 2009. Shortly after the ten-day time period for sending the response expired, Parents began asserting in a series of filings that the failure of the District to "file" the response with OAH entitled them to immediate judgment on their complaint, barred the District from pursuing its own complaint, and even prohibited OAH from accepting any further papers from the District. Parents argued, in other words, that the District's delay in filing a response meant "sudden death" to the District's

position in any litigation concerning Student before OAH. Parents' pursuit of this argument continued over several months in various procedural forms, and caused the District to expend substantial funds on attorneys' fees and related expenses.

160. Parents first advanced the sudden death argument in a document entitled "Demand for Hearing and Mediation", filed July 23, 2009, which purported to be a second due process complaint. In that filing, Parents sought an immediate judgment in Student's favor because the District had not timely "filed" a response to Parents. It argued that the response to a parent was the equivalent of an answer in civil litigation, and because the District had not filed one, there was nothing "at issue" and a default judgment was required.

161. Father's sudden death argument was frivolous because it was totally and completely without merit. Any reasonable attorney would have recognized its fatal flaws:

- a) A statute that says "send to the parent" does not mean "file." Since the statute only requires a response to a parent if a prior written notice has not been sent, its apparent purpose is to ensure that parent is informed, not that litigation is furthered.
- b) An answer serves a central role in civil litigation and is required by statute, court rule, and decisional law, which authorize dismissal if an answer is not filed. The response to a parent plays no role in due process litigation, and an ALJ is not authorized to act on a failure to send one.
- c) No authority remotely supports the sudden death argument, and Father cited none. Although an attorney may make a good faith argument for change in the law, Father did not make such an argument, or advance any policy reason in support of his claim.
- d) There is a complete and adequate administrative remedy in the IDEA for failure to send a parent a response. A parent may file an administrative

complaint with the California Department of Education (CDE) to remedy any violation of Part B of the Act, which contains the laws the District must follow. Any reasonable lawyer in Father's position would have felt obliged to offer at least some reason why that remedy might be inadequate. Father did not make that attempt, or acknowledge in asserting the sudden death argument that he was simultaneously pursuing that remedy with CDE.

- e) An administrative hearing under IDEA is designed to be much less formal than a civil case. A party whose complaint states a plausible, reasonably detailed claim under IDEA is generally entitled to a hearing. The broad remedial purpose of the IDEA is to encourage sound educational programming for disabled children, not to set fatal procedural traps for the parties.

Circumstances Justifying the Inference of Improper Motive

162. The preponderance of evidence showed that circumstances exist to support the inference that Father made and pursued the sudden death argument for an improper purpose. They show that he acted solely with the intent to harass the District by filing voluminous, unnecessary, and frivolous pleadings, thereby causing the District to incur substantial additional litigation costs. These circumstances include, but are not limited to, the following:

- a) The sudden death argument is frivolous on its face, and would not have been made by any reasonable attorney acting in good faith.
- b) When Father first filed his sudden death argument in these matters, he already knew the argument had no merit. In his 2008 proceeding on behalf of Student, OAH Case No. 2008040206, the District was also tardy in sending parents a response. On May 16, 2008, Father filed a motion for default

judgment against the District, but on May 22, OAH denied the motion, ruling it had no authority to grant it.⁹

- c) Having once lost the argument, any reasonable attorney would have abandoned it. Instead Father repeated it, not waiting for rulings on early efforts before filing later ones:
 - 1) Although the sudden death argument was asserted in Student's second complaint filed on July 23, 2009, Father quickly asserted it twice more, tripling the District's work load by requiring responses to three pleadings instead of one. On July 28, the District filed with OAH a copy of its belated response, although it was under no obligation to do so. On July 30, 2009, Student filed a motion to strike the response from the file and also filed a separate motion for summary adjudication or partial summary adjudication. Both motions repeated the sudden death argument. The motion for summary adjudication, which was not accompanied by declarations, claimed that there existed no triable issue of material fact in Student's case against the District, and simply ignored the fact that OAH has no authority to enter summary adjudications.
 - 2) On July 30, 2009, the District filed a notice of insufficiency (NOI) of Student's second complaint. On August 3, 2009, Father filed an Opposition to the NOI reasserting the sudden death argument at length, for the fourth time in two weeks.
 - 3) In an order dated August 3, 2009, OAH deemed the second complaint to be a motion to amend the original complaint, denied the motion to amend, and dismissed the NOI as moot because the filing of a response to parent was not

⁹ Official notice is taken of the pleadings and papers on file in OAH Case No. 2008040206.

required. The ruling was clearly a ruling on the merits of the sudden death argument.

- 4) In Student's opposition to the District's later motion to dismiss, Father again pursued the sudden death argument. When the motion to dismiss was granted in part, Father filed a request for clarification, claiming that OAH had not responded to the sudden death argument, and rearguing it at length. On October 5, OAH treated that request as a motion for reconsideration and denied it.
- d) The pleadings for which the District seeks sanctions are part of a larger record in these matters of repeated, unnecessary, and arguably frivolous filings, motions, and objections by Father that substantially increased the District's litigation costs.¹⁰
- e) Having run up the District's legal bills, Father attempted to exploit those expenses to obtain victory in the litigation. On October 1, 2009, he wrote to the District's School Board, stating that the two issues OAH had dismissed "will be submitted to other agencies for investigation." He then wrote:

Another prediction we made has also come true. It is clear that the District has used more time and dollars than it would have cost for a year of services for our son. This is bad

¹⁰ There is still pending a motion to reconsider the following rulings made at hearing: 1) that Mr. Rosenberg, a layman, was not entitled to assert the attorney-client privilege; 2) that the ALJ did not force Mother to testify against Father in violation of the spousal privilege; and 3) that the ALJ did not add an issue to the hearing by allowing evidence of the August 28, 2009 IEP meeting. The motion is denied on the merits and because it merely reiterates arguments already made.

policy and can be stopped by the Board. There are several investigations by both State and Federal entities pending.

The Office of Civil Rights is investigating

- f) In his letter to the School Board, Father then threatened that Parents would "submit several issues for criminal investigation", and predicted that the hearing before OAH would take as many as 20 days and involve 37 witnesses, which it did not. He reiterated that "[w]in or lose the costs involved will exceed an additional year of services for our son", and stated that the District's continuing resistance would be "an outrage to taxpayers" and "fiduciary irresponsibility" on the part of the Board. He closed by stating that the dispute "may take years to resolve." The unmistakable meaning of Father's letter was that Parents had already caused the District to spend an inordinate amount of money, and that, if the District did not abandon its position, Parents would ensure that the cost of resistance would be greater still.

163. Father now argues that he only learned piecemeal that OAH would not sanction the District for failing to send parents a response, when OAH rejected each of his procedural efforts to raise the argument. From the beginning, however, the argument was frivolous on the merits, regardless of the procedural vehicle chosen to advance it. Any reasonable attorney would have known from OAH's ruling on August 3, 2009, on the motion to amend, that the argument had been rejected on the merits.

164. Father also argues that he could not be expected to understand these complexities because he is a business attorney. However, these are Father's third and fourth special education cases with OAH. At hearing, he demonstrated familiarity with special education law. Professional ethics required that Father avoid the representation of his son unless he was competent to undertake it. (Rule 3-110, California Rules of Professional Conduct.)

Amount of Award of Fees

165. The District is not entitled to fees and expenses for opposing claims in Student's original complaint on the ground that they were precluded by the settlement agreement. The District is entitled to reasonable expenses, including attorneys' fees, for opposing the second due process complaint, filed July 23, 2009; a portion of Student's opposition to the District's NOI, filed August 31, 2009; and the request for clarification filed September 28, 2009. It is also entitled to a portion of the expenses involved in seeking fees.¹¹ Ms. Gutierrez has filed a declaration setting forth the expenses incurred by the District for opposing those pleadings and motions. The District seeks a total award of \$8,700 in fees and expenses.

166. Student does not contest the amounts of the expenses claimed in Ms. Gutierrez's declaration. He argues only that no fees should be awarded because the District has not given him copies of its legal bills. Since the ALJ is specifically authorized by regulation to determine the amount of fees on the basis of a declaration, his argument is unpersuasive.

167. According to her uncontested declaration, Ms. Gutierrez has practiced special education law since 2002 and has handled more than 100 special education matters. Her hourly rate of \$175 is reasonable in light of her skill and experience. Her rate of \$75 an hour for paralegals and law clerks is also reasonable. The ALJ has reviewed the pleadings for which the District is entitled to sanctions, and has considered how much time and effort an attorney experienced in special education law would require to read and consider the frivolous pleadings, file appropriate pleadings in response, and engage in related research, correspondence, and client contact. The ALJ

¹¹ The District does not seek fees in connection with the motion for summary adjudication or partial summary adjudication.

has also considered the extent of staff support those efforts would involve. Based on these considerations, fees and expenses are awarded as follows:

- a) \$2,080 in fees and expenses for opposing Student's second complaint, which was deemed a motion to amend.
- b) \$175 for opposing that portion of Student's opposition to the District's NOI relating to the sudden death argument. The District's claim for \$1,775 is discounted because the bulk of the opposition addressed other matters.
- c) \$625 for opposing the request for clarification, which was deemed a motion for reconsideration.
- d) \$1,000 for researching, preparing, and filing the District's motion for attorneys' fees and its reply to Student's opposition to that motion. The District's claim of \$1,870 for those two pleadings is discounted because a substantial portion of the motion related to the allegedly frivolous first complaint, on which argument the District did not prevail.

168. In all, the District expended the reasonable amount of \$3,880 in opposing Student's frivolous filings, and is awarded \$3,880 in attorneys' fees and expenses for opposing them. The rest of the District's claim for \$8,700 is denied.

LEGAL CONCLUSIONS

BURDENS OF PROOF

1. Student and the District, by seeking relief in their respective cases, assumed the burden of proving the essential elements of their claims. (*Shaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].) On some issues these burdens overlapped, but that had no practical consequence since on each issue resolved here, the proof was sufficiently clear that it did not matter which party bore the burden.

ISSUES, PLEADINGS, AND EVIDENCE

2. A party who requests a due process hearing may not raise issues at the hearing that were not raised in its request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) The IDEA imposes only "minimal pleading standards." (*Shaffer v. Weast, supra*, 546 U.S. at p. 54.) Technical rules pertaining to evidence and witnesses do not apply. (Cal. Code Regs., tit. 5, § 3082, subd. (b).)

DISTRICT'S ISSUE NO. 1: WHETHER THE DISTRICT MAY ASSESS STUDENT IN ACCORDANCE WITH THE ASSESSMENT PLAN AND RELATED CORRESPONDENCE PRESENTED TO PARENTS ON OR ABOUT APRIL 2009 AND JULY 2009:

Right to Reassess

3. In evaluating a child for special education eligibility, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B)(i); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).) Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain that consent, the District must develop and present an assessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).)

4. If parents do not consent to a reassessment plan, the District may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. §

300.300(a)(3)(i), (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Parents who want their children to receive special education services must allow reassessment by the district, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

5. *District's Issue No. 1:* Based on Factual Findings 1-19, and Legal Conclusions 1, 3, and 4, the District has demonstrated that Student's educational and related services needs warrant a reevaluation of Student, as proposed by the District in its April 2009 assessment plan and related documents, including its correspondence in July 2009. The District has demonstrated that it has taken reasonable measures to obtain consent from Parents, and that they have failed to respond. Reassessment will be allowed.

STUDENT'S ISSUE NO. 1: WHETHER THE DISTRICT FAILED TO ACCORD PARENTS MEANINGFUL PARTICIPATION IN THE IEP PROCESS AT AND AFTER THE MAY 28, 2009 IEP MEETING BECAUSE IT FAILED TO DELIVER A WRITTEN IEP OFFER BY JUNE 5, 2009, AS IT HAD PROMISED, OR BY A REASONABLE TIME THEREAFTER:

STUDENT'S ISSUE NO. 2: WHETHER THE DISTRICT FAILED TO ACCORD PARENTS MEANINGFUL PARTICIPATION IN THE IEP PROCESS AT THE MAY 28, 2009 IEP MEETING BECAUSE SEVERAL MEMBERS OF THE IEP TEAM WERE UNFAMILIAR WITH STUDENT:

Parental Participation in the Decision-making Process

MEANINGFUL PARTICIPATION IN IEP MEETINGS

6. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her

disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A 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. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

PREDETERMINATION OF OFFER

7. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

8. However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs., supra*, 315 F.3d at p. 693, fn. 3.) Parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized, but school district personnel may bring a draft of the IEP to the meeting. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)

REQUIRED MEMBERS OF AN IEP TEAM

9. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of the assessment results, and other individuals who have knowledge or special expertise

regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

PRESENCE OF PARENTS AT IEP MEETINGS

10. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

11. A district must notify parents of an IEP meeting "early enough to ensure that they will have an opportunity to attend", and it must schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a)(2)(2006); Ed. Code, §§ 56043, subd. (e); 56341.5, subds. (b),(c).) A district may not conduct an IEP team meeting in the absence of parents unless it is "unable to convince the parents that they should attend", in which case it must:

... keep a record of its attempts to arrange a mutually agreed
on time and place, such as--

- (1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received;
and

(3) Detailed records of visits made to the parents' home or place of employment
and the results of those visits.

(34 C.F.R. § 300.322(d)(2006); Ed. Code, § 56341.5, subd. (h); see, *Shapiro v. Paradise Valley Unified School Dist.*, No. 69 (9th Cir. 2003) 317 F.3d 1072, 1077-1078.)

STUDENT'S ISSUE NO. 3: WHETHER THE DISTRICT DENIED STUDENT A FAPE BY
FAILING TO MAKE A TIMELY OFFER OF A FREE APPROPRIATE PUBLIC EDUCATION
(FAPE) FOR THE SCHOOL YEAR (SY) 2009-2010:

12. A district must have an IEP in effect for each child with exceptional needs
at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. §
300.323(a)(2006); Ed. Code, § 56344, subd. (b).)

Consequences of Procedural Error

13. The Supreme Court has recognized the importance of adherence to the
procedural requirements of the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 205-
206 [73 L.Ed.2d 690](*Rowley*).) However, a procedural error does not automatically
require a finding that a FAPE was denied. A procedural violation results in a denial of a
FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents'
opportunity to participate in the decision-making process regarding the provision of a
FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. §
1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range
School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

Curing Procedural Error

14. Student contends that the procedurally correct August 28, 2009 IEP
meeting could not revive or rescue the August 5, 2009 IEP offer because that offer,

being a product of a procedurally invalid meeting, was "the fruit of the poisonous tree" (Student's Closing Brief, p. 11) and was therefore forever tainted and void. However, courts allow a district to cure its procedural default with a subsequent meeting. In *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115 (*Vashon Island*), a district had waited until October 27 to give notice of an October 31 IEP meeting. The Court held that the error was cured by adequate notice of a subsequent meeting: " ... [N]o harm was done because the [District's] November 9 notice complied with procedural requirements of the IDEA." (*Vashon Island, supra*, 337 F.3d at p. 1136; see also, *S.J. v. Issaquah School Dist. No. 411* (9th Cir. 2009) 326 Fed.Appx. 423, p. 3 [nonpub. opn.][subsequent IEP meeting cured defects in previous meeting notwithstanding absence of change in IEP]; *J.W. v. Fresno Unified School Dist.* (E.D.Cal. 2009) 611 F.Supp.2d 1097, 1127-1128 [failure to make IEP offer by start of school year cured by IEP meeting shortly after school year began].)

Parental Non-cooperation and Lack of Prejudice

15. The Supreme Court has noted that the IDEA assumes parents, as well as districts, will cooperate in the IEP process. (*Shaffer v. Weast, supra*, 546 U.S. at p. 53 [noting that "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools", and describing the "significant role" that "[p]arents and guardians play ... in the IEP process"]; see also, *John M. v. Board of Educ. of Evanston Tp. High School Dist. 202* (7th Cir. 2007) 502 F.3d 708, 711, fn. 2; *Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 486; *Clyde K. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1400, fn. 5[rejecting a "my way or the highway" approach by parents' attorney].)

16. Courts frequently hold that parents who refuse to cooperate in a district's efforts to formulate an IEP are not entitled to full or partial reimbursement or compensatory education. (See, e.g., *Loren F. v. Atlanta Indep. Sch. Sys.* (11th Cir.2003)

349 F.3d 1309, 1312; *MM v. Sch. Dist. of Greenville Cty.* (4th Cir.2002) 303 F.3d 523, 535; *M.S. v. Mullica Tp. Bd. of Educ.* (D.N.J. 2007) 485 F.Supp.2d 555, 568 [denying reimbursement because parents failed to cooperate in completion of IEP]; *E.P. v. San Ramon Valley Unified School Dist.* (N.D.Cal., June 21, 2007, Case No. C05-01390) 2007 WL 1795747, pp. 10-11 [nonpub. opn.]

17. Several courts have declined to grant relief to parents who conceal assessment results from the IEP team or prevent the district from assessing. (See, e.g., *Robert M. v. Hawaii* (D.Hawaii, Dec. 19, 2008, No. 07-00432) 2008 WL 5272779 [nonpub. opn.][parents withheld private assessment information, stopped district assessments]; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1109-1110 [parent withheld private assessment information].)

18. At least one court has denied reimbursement relief because parents, like Parents here, were fixed on a particular private placement and refused to cooperate on the ground that litigation was pending. In *Matthew L. v. Department of Educ.* (D.Hawaii, Nov. 9, 2007, No. 07-00009) 2007 WL 3331663, p. 12 [nonpub. opn.], the court noted "parents' predetermination to keep Matthew in his ... private placement" and found that "by refusing to participate in the IEP process (pending a completion of the due process hearing), [parent] was in effect refusing any offer of FAPE."

19. When parental non-cooperation obstructs the IEP process, courts usually hold that procedural violations in that process do not deny the student a FAPE. In *C.G. v. Five Town Community School Dist.* (1st Cir. 2008) 513 F.3d 279, for example, the Court of Appeals held that an IEP was incomplete only because of parents' obstruction of the IEP process, and if parents had cooperated, the IEP would have been adequate. There, as here, parents were convinced that a private placement was the only suitable option for their child and refused to help the District develop its own proposal. The procedural

error was held harmless because parents took an attitude identical to that of Parents here:

... parents harbored a fixed purpose: to effect a residential placement for their daughter at the School District's expense, come what may Once the parents realized that the School District was focused on a non-residential placement, they essentially lost interest in the IEP process.

(*Id.* at 287.) As the court put it:

... the cause of the disruption was the parents' single-minded refusal to consider any placement other than a residential one. [Citation omitted.] Such Boulwarism, whether or not well-intentioned, constitutes an unreasonable approach to the collaborative process envisioned by the IDEA.

(*Id.* at p. 288.)

20. In *M.M. v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 503, 535, a school district's failure to have an IEP in place at the beginning of the school year was held harmless, in part because there was "no evidence that [student's] parents would have accepted any FAPE offered by the District that did not include reimbursement for [parents' preferred] program." (See also, *Miller v. San Mateo-Foster City Unified School Dist.* (N.D.Ca. 2004) 318 F.Supp.2d 851, 863 [no compensable injury from child find violation where parents had no intention of returning student to public school].)

21. *Student's Issue No. 1: Based on Factual Findings 37-40, and Legal Conclusions 1, 6, and 12*, Parents meaningfully participated in the IEP process at the May

28, 2009 meeting and until they received the District's offer on or about July 27, 2009, notwithstanding the District's failure to deliver the document earlier. The offer was delivered well before the beginning of the school year on August 10, 2009, and Parents had ample opportunity to consider and respond to it.

22. *Student's Issue No. 2:* Based on Factual Findings 21-36, and Legal Conclusions 1 and 6-9, Parents participated meaningfully in the IEP process at the May 28 and August 28, 2009 IEP meetings. The District's offer was not predetermined at those meetings. All required members of the team were present, and District IEP team members were sufficiently familiar with Student's records and history to participate adequately in the meetings.

23. *Student's Issue No. 3:* Based on Factual Findings 1-4, 37-40, and 61-70, and Legal Conclusions 1 and 13-19, the District failed to make a timely offer of a FAPE for Student for the SY 2009-2010, but its delay in doing so did not deny Student a FAPE. Student was unaffected because he remained in the placement required by the settlement agreement. Parents' participatory rights were unaffected because they had only a single placement in mind; had no interest in assisting the District to develop another proposal; never participated in that effort when they had opportunities to do so; and were obstructing the development of the District's proposal by withholding needed information. They would have refused the District's offer whenever it was made.

DISTRICT'S ISSUE NO. 2: WHETHER THE DISTRICT'S MOST RECENT IEP OFFER CONSTITUTED AN OFFER OF A FAPE FOR STUDENT FOR THE SY 2009-2010:

Elements of a FAPE

24. Under the IDEA and State law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the

standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of Title 20 of the United States Code. (20 U.S.C. § 1401(9)). "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

25. In *Rowley, supra*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

26. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist., supra*, 552 F.3d at p. 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Least Restrictive Environment

27. Federal and State law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate", and may be removed from the general education

environment only when the nature or severity of the student's disabilities is such that education in general classes with 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)(ii)(2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student.

Requirements for IEPs

PRESENT LEVELS OF PERFORMANCE, GOALS, AND OBJECTIVES

28. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345.) An annual IEP must contain, *inter alia*, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1)(2006); Ed. Code, § 56345, subd. (a)(1).) The statement of present levels of performance essentially creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

29. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals

are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).) Those goals are then broken down into short-term objectives, if objectives are used.¹²

GRADUATION PLANNING

30. Starting with seventh grade students, an IEP must contain, if appropriate, a statement concerning the student's planned path to graduation. Education Code section 56345, subdivision (b), provides in relevant part:

(b) If appropriate, the [IEP] shall also include ... :

(1) For pupils in grades 7 to 12, inclusive, any alternative means and modes necessary for the pupil to complete the prescribed course of study of the district and to meet or exceed proficiency standards for graduation.

(See also, Ed. Code, § 56043, subd. (g)(2).)

31. *District's Issue No. 2:* Based on Factual Findings 41-50, and Legal Conclusions 1 and 10-19, the District violated the IDEA when it failed to give enough notice of the August 5, 2009 IEP meeting to ensure Parents' presence; proceeded

¹² Since the 2004 amendments to the IDEA, the requirement to develop short-term objectives or benchmarks only concerns children with disabilities who are assessed using alternate assessments aligned to alternate achievement standards. (See, 20 USC § 1414 (d)(1)(A)(i)(I)(cc).) However, states have the option to use objectives in other IEPs as well.

unlawfully in Parents' absence; failed to ensure that all required members of the IEP team were present; failed to ensure that Parents had an adequate opportunity to present information to the other members of the IEP team; and failed to have a valid IEP offer outstanding at the beginning of the school year.

32. Based on Factual Findings 51-60, and Legal Conclusions 1 and 13-14, the procedural violations surrounding the August 5, 2009 IEP meeting were cured by the procedurally valid August 28, 2009 IEP meeting.

33. Based on Factual Findings 41-70, and Legal Conclusions 1 and 13-19, between August 5 and August 28, 2009, the District's procedural errors surrounding the August 5, 2009 IEP meeting did not deny Student a FAPE. They did not impede Student's right to a FAPE or deprive him of educational benefits because he remained in the placement Parents assert provides him a FAPE. Nor did those errors significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Parents were uninterested in and hostile to the District's effort at the August 5, 2009 meeting to develop an offer of a FAPE, and were obstructing it. Even if the District had given adequate notice of the August 5 meeting, Parents in all likelihood would not have attended it. If they had attended the meeting, they would have refused to discuss the District's offer, as they did on August 28.

34. Based on Factual Findings 71-150, and Legal Conclusions 1, 19, and 24-30, the District's most recent offer of a FAPE, reiterated at the August 28, 2009 IEP meeting, addressed all of Student's unique needs, was reasonably calculated to allow him to make meaningful educational progress, and therefore would provide him a FAPE. The two hours a day of one-to-one language arts instruction would be enough to allow Student to make substantial progress. Under the offered IEP, including its modifications,

accommodations, and supports, he would be able to access other parts of the general curriculum.

35. Based on Factual Findings 104-140, and Legal Conclusions 1 and 24-30, the proposed goals in the IEP offer met Student's needs and would have allowed him to make meaningful progress. The social goal had an inadequate baseline, but no current information was available for establishing that baseline, and the District made a provision for gathering sufficient data to establish it in the first month of school. The other goals had baselines based on the information the District reasonably had available to it. The goals represented what Student could reasonably be expected to achieve in a year. The District was not required to ensure that Student made even faster progress in language arts at the expense of all the other benefits of middle school.

36. Based on Factual Findings 1-19 and 142-143, and Legal Conclusions 1 and 30, it was not appropriate for the offered IEP to set forth alternative means and modes required to ensure that Student would graduate. Without current assessments, the District lacked sufficient information to determine those means and modes.

37. Based on Factual Findings 71-141, and Legal Conclusions 1, 5, and 24-30, the plan for Student's transition back to public school proposed in the IEP offer was appropriate. The IEP offer included staff training by Dr. Cristo and monthly review by the IEP team. Ms. Coutchié's participation was not essential to its success.

38. Based on Factual Findings 71-146, and Legal Conclusions 24-26, the alleged lack of success of Student's earlier IEPs does not render the District's recent offer inappropriate. Student has grown and changed, and the offered IEP is substantially different from his earlier IEPs.

SANCTIONS

Authority to Impose Sanctions

39. The District seeks attorneys' fees under subdivision (i)(3)(B) of Section 1415 of Title 20 of the United States Code, but that subsection only allows an attorneys' fees award by a district court, not an ALJ. Student opposes the District's fees claim based on Education Code section 56507, subdivision (b)(2), which also grants power to award attorneys' fees only to "a court." However, an ALJ does have the authority to award attorneys' fees under the Government Code and the California Code of Regulations.

40. Government Code section 11455.30 provides:

- (a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.
- (b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

That section is implemented by California Code of Regulations, title 1, section 1040, which provides:

- (a) The ALJ may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.
- (1) 'Actions or tactics' include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ.
- (2) 'Frivolous' means

- (A) totally and completely without merit or
- (B) for the sole purpose of harassing an opposing party.
- (b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.
- (c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

Under the applicable statute and regulation, no prevailing party determination is required.

41. A comprehensive discussion of the grounds for sanctions under Code of Civil Procedure section 128.5 is set forth in *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637. A trial court may impose sanctions under Code of Civil Procedure section 128.5 against a party, a party's attorney, or both, for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." A bad faith action or tactic is frivolous if it is "totally and completely without merit" or if it is instituted "for the sole purpose of harassing an opposing party." (Id., subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: whether any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose; i.e., subjective bad faith on the part of the attorney or party to be sanctioned.

42. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) As the Court of Appeal held in that case:

... the bad faith requirement of section 128.5 [of the Code of Civil Procedure] does not impose a determination of evil

motive. The concept of "harassment" includes vexatious tactics which, although literally authorized by statute or rule, go beyond that which is by any standard appropriate under the circumstances. We appear to be approaching a consensus on the morality of litigation tactics which requires that counsel, even if on technically correct legal ground, not take action which unreasonably or unnecessarily injures the opposing counsel or party.

43. Sanctions have been upheld when an attorney has made a frivolous pretrial motion by inventing a remedy that does not exist under the IDEA. (*K.S. v. Fremont Unified School Dist.* (N.D.Cal. 2008) 545 F.Supp.2d 995, 1009-1010.)

Parent as Attorney

44. A parent who is an attorney does not act in a *pro se* capacity when suing on behalf of his child under the IDEA. (*S.N. v. Pittsford Cent. School Dist.* (2d Cir. 2006) 448 F.3d 601, 604; *Woodside v. School Dist. of Philadelphia Bd. of Educ.* (3d Cir. 2001) 248 F.3d 129, 131; *Doe v. Board of Educ. of Baltimore County* (4th Cir. 1998) 165 F.3d 260, 262-263.) The doctrine that a prevailing attorney-parent may not obtain attorney's fees under the IDEA is distinguishable, because it exists for the different purpose of discouraging attorney-parents from representing their children, lest they provide inadequate and overly emotional representation and deprive their children of the independent judgment to which a client is entitled. (*Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2006) 461 F.3d 1087, 1090-1091.)

Duty to Send Response to Parents

45. Federal and State law require that, within 10 days of receiving a due process complaint, a district must "send to a parent a response" to the complaint that

includes detailed information about the reasons the district made the decisions that are addressed in the complaint. (20 U.S.C. § 1415(c)(2)(B); see, Ed. Code, § 56502, subd. (d)(2).) A district need not send a response to parents if it has previously provided prior written notice of the same information, and the response need only be sent to parents, not filed as part of a due process proceeding. (*Ibid.*)

Administrative Remedy

46. The IDEA requires states that accept federal education money to have in place an administrative complaint procedure to remedy any violation of Part B of the Act. (20 U.S.C. §§ 1412(a)(11), 1416; 34 C.F.R. §§ 300.149 et seq. (2006); see, Cal.Code Regs., tit. 5, §§ 4600 et seq.) The requirement that a district send a response to parent is in Part B of the Act.

Sanctions: Based on Factual Findings 151-168, and Legal Conclusions 39-46, Father filed four frivolous pleadings advancing the sudden death argument for the improper purpose of escalating the District's litigation costs. The District reasonably incurred \$3,880.00 in attorneys' fees and related expenses in resisting the three frivolous pleadings for which it sought sanctions, and for making the related portions of its attorneys' fees motion, and will be awarded that amount.

ORDER

1. The District may assess Student in accordance with the assessment plan and related correspondence presented to Parents on or about April 2009 and July 2009. It may, but need not, employ Dr. Cristo for that purpose.

2. The District's most recent IEP offer, validly presented on or about August 28, 2009, constituted an offer of a FAPE for Student for the SY 2009-2010.

3. Student's requests for resolution are denied.

4. Father is liable for, and shall pay, \$3,880.00 to the District within 60 days to compensate it for attorneys' fees and related expenses incurred in opposing the motions and pleadings ruled frivolous herein.

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, the District prevailed on all issues.

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).)

Dated: February 18, 2010

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings