

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

Los Angeles Unified School District.

OAH CASE NO. 2011020188

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 17, 2011, at Los Angeles, California.

Student was represented by Jennifer Guze Campbell, Attorney at Law, and Jim Campbell, Advocate, both of the Special Education Law Firm. Student's mother (Mother) was present throughout the hearing. Ana Maria Garcia, a California certified Spanish language interpreter, was present throughout the hearing to interpret the proceedings for Mother.

Los Angeles Unified School District (District) was represented by Patrick J. Balucan, Assistant General Counsel. Sharon Robertson, a Due Process Specialist for the District, was also present throughout the hearing.

On February 2, 2011, Student filed his Request for Due Process Hearing (Complaint). On motion of the parties, the matter was continued on March 9, 2011.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties requested the opportunity to file closing briefs. The parties were ordered to file and serve closing briefs by no later than 5:00 p.m. on May 31,

2011. The parties timely filed their closing briefs on May 31, 2011. On that date, the record was closed and the matter was submitted.

ISSUE

Whether Student is entitled to an independent educational evaluation (IEE) at public expense in the area of adapted physical education (APE).

REMEDIES REQUESTED

Student requested the following remedies: (1) an APE IEE; (2) training for staff at Student's school regarding the correct procedures for responding to pupils' requests for IEEs; and (3) an Individualized Education Program (IEP) meeting within 30 days of completion of the APE IEE to review the results of the IEE.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a 12-year-old boy who, at all relevant times, has resided in the District with his Mother. During fall 2010, he attended seventh grade in the District at the Lanterman High School Special Education Center (Lanterman). In December 2010, he transferred to John Adams Middle School (John Adams), also in the District. At all relevant times, he has been eligible for special education services as a student with autism.

APE EVALUATION OF OCTOBER 2010

2. District had been providing APE services to Student during fall 2010, in the form of specially designed physical education, and for several years prior to fall 2010. In October 2010, Joel Steingold performed an APE assessment of Student. Mr. Steingold has been employed by the District in various capacities for approximately 22 years, and has been employed as an APE teacher by the District for approximately 12 years. Mr. Steingold

holds a B.A. in religious studies, with a minor in Spanish, from California State University, Northridge. He holds a multiple subjects teaching credential, with a bi-lingual emphasis in Spanish, and with a supplemental authorization to teach physical education (P.E.). He also holds an APE credential, and a visually-handicapped credential.

3. Mr. Steingold has known Student since Student was approximately six years old, as Mr. Steingold was Student's APE instructor for several years while Student was enrolled in Salvin Elementary School (Salvin), the District elementary school Student had attended prior to attending Lanterman. Additionally, Mr. Steingold had seen Student occasionally on the Lanterman campus, because Mr. Steingold was also assigned to Lanterman. However, he was not Student's teacher while Student attended Lanterman.

4. Mr. Steingold wrote a report of his APE assessment of Student dated October 12, 2010. He has had formal training in performing APE assessments. Mr. Steingold's APE assessment consisted of a teacher interview, classroom observations, and a standardized assessment known as the Adapted Physical Education Assessment Scale (APEAS). The APEAS gives an overall perspective of a pupil's motor skills. The APEAS was a central aspect of the District's APE assessment, and the remainder of the assessment consisted largely of Mr. Steingold's observations of Student, which were informed by his experience as Student's teacher at Salvin and his observations of Student at Lanterman.

5. The APEAS is normed against a typical student population. It assesses skills in the areas of Perceptual Motor, Object Control, Locomotor Skills, and Physical Fitness. Mr. Steingold administered the secondary version of the test, as Student, who had just turned 12 years old at the time of testing, had aged out of the elementary version of the test. Mr. Steingold had never previously administered the secondary version of the test. Mr. Steingold administered the APEAS in accordance with the test instructions. He administered the APEAS to Student in approximately one hour, over the course of two days. On the APEAS, standard scores between 90 and 110 are considered to be in the

normal range. A percentile rank means that the pupil is performing the task better than that percentage of typical pupils. In the area of Perceptual Motor, Student's standard scores ranged from a high of 100 (55th percentile) on the Imitation of Postures subtest, to a low of 94 (27th percentile) on the Stand Balance Left Closed subtest. In the area of Object Control, Student's standard scores ranged from a high of 109 (84th percentile) on the Kick for Accuracy subtest, to a low of 93 (25th percentile) on the Catching subtest. In the area of Locomotor Skills, Student's scores ranged from a high of 104 (66th percentile) on the Skipping Form subtest, to a low of 103 (63rd percentile) on the Running Form subtest. In the area of Physical Fitness, Student's standard scores ranged from a high of 113 (91st percentile) on the Agility Run subtest, to a low of 85 (8th percentile) on the Bent Knee Curl-Up subtest. Student's score on the APEAS reflected that he could perform eight standard push-ups, which corresponded to a standard score of 99 (55th percentile). The APEAS assessment automatically calculated Student's Body Mass Index (BMI) as 27.2, based upon Student's height of 63 inches and weight of 153 pounds. Student's BMI placed him outside of the BMI Healthy Zone.

6. Mr. Steingold's report noted that Student required occasional reminders to interact with peers, and that Student occasionally needed a rest break. He was able to comprehend rules and/or strategies with minimal supports, and he was able to manage his behavior during group activities with minimal supports. At the time of the assessment, Mr. Steingold's report stated that Student was receiving specially designed P.E., with no specific goals. Mr. Steingold's report affirmed that Student was cooperative and the assessment results were a valid indicator of his performance. The report noted Student's areas of strength in ambulation, throwing, catching, and kicking, and areas of need as balance and push-ups. Mr. Steingold's report concluded that Student did not require APE services to assist him to benefit from specially designed instruction.

IEP MEETINGS OF OCTOBER 21, 2010 AND NOVEMBER 4, 2010

7. District convened Student's IEP meeting on October 21, 2010. The IEP team included Mother, her advocates Jim Campbell and Wiley Campbell, Christina Cisneros (a District Administrator), a special education teacher, a school nurse, an occupational therapist, Brenda Brand (an APE specialist), a speech and language specialist, and the District's attorney, Susan Winkleman.

8. The IEP team reviewed Student's assessments to determine his present levels of performance. Ms. Brand discussed the APE assessment report, and reported to the IEP team that Student's scores on the APEAS placed him slightly below grade level in general P.E. The team recommended that Student continue in APE, and set an annual goal in APE. The goal required Student to perform three sets of ten repetitions of push-ups from his toes with his head reaching one inch above the mat 80 percent of the time, in four out of five trials. The team set two benchmarks for the goal, one of which required Student to perform one set of six push-ups from his knees with his head reaching one inch above the mat 80 percent of the time, and the second required Student to perform two sets of eight push-ups from his toes with his head reaching one inch above the mat 80 percent of the time.

9. The District's placement offer at this meeting included transferring Student from Lanterman to John Adams. The team decided to reconvene the IEP meeting at a later date so that Mother could visit John Adams. The team also intended to consider the APE assessment again and to discuss other issues at the reconvened IEP meeting.

10. The District reconvened the IEP meeting on November 4, 2010. The November 4, 2010, meeting was attended by Mother, Wiley Campbell (Student's advocate), the District Administrator, a special education teacher, the school psychologist, the occupational therapist, Mr. Steingold (the APE specialist), and Ms. Winkelman (the District's attorney.)

11. During the meeting, Mr. Steingold reported that Student was functioning much higher than his peers at Salvin or Lanterman. Mr. Campbell, Student's advocate, requested an IEE for the APEAS. Ms. Winkelman, the District's attorney, responded that the District would respond to the request in writing. In response to questioning from other IEP team members, Mr. Campbell specified that he did not want the APEAS to be re-administered by District personnel. Mr. Campbell advised the team that Mother was requesting the IEE because it was only the first time that Mr. Steingold had administered the secondary version of the APEAS, and Student did not believe that Mr. Steingold had administered it correctly.¹ At hearing, Mother testified that she did not have confidence in the quality or accuracy of the APE assessment report. She did not believe that Student had the ability to perform the eight standard push-ups that the APE assessment reflected he could perform, or that he had as much physical ability as the APE assessment results demonstrated.

12. The IEP team recommended that Student receive APE at John Adams. The team also recommended other related services, such as counseling, and that Student be placed in a mild/moderate special day class (SDC) at John Adams. Mother consented to the IEP.

¹ Mr. Campbell's comments at the IEP meeting specifically referred to the APEAS, as did the IEP meeting notes regarding Mr. Campbell's request for an IEE. The weight of the evidence at hearing and the parties' arguments at hearing and in closing briefs reflect that both parties understood Student's request for an IEE to encompass a request for an APE IEE, and not a request for an IEE only with respect to the APEAS.

DISTRICT'S CONDUCT SUBSEQUENT TO STUDENT'S REQUEST FOR APE IEE

13. District did not respond to Student's request for an APE IEE after the November 4, 2010, IEP meeting. In December 2010, Student began to attend John Adams, pursuant to the IEP. He received APE there. District convened an IEP meeting on January 26, 2011, to discuss issues Mother, through her attorney and advocates, had presented to District regarding Student's adjustment to John Adams. During the January 26, 2011, IEP meeting, Student's APE teacher, Mr. Martinez, reported that Student performed better than the other pupils in the class. At the meeting, District offered Student another District-performed APE assessment, instead of an IEE. On January 28, 2011, Karolyn Mimura, the Bridge Coordinator and Testing Coordinator at John Adams, faxed to Jennifer Guze Campbell, Mother's attorney, an assessment plan for an APE assessment to be conducted by the District. The assessment plan was written in Spanish. At the time Ms. Mimura sent the assessment plan, she was aware that Mother had requested an APE IEE. Mother did not sign this assessment plan.

14. Between November 4, 2010, when Mr. Campbell requested an IEE, and February 2, 2011, when Student filed his Complaint, the District did not offer Student an APE IEE. By letter dated February 11, 2011, after Student filed his Complaint, Sharon Robertson, the District's due process specialist, wrote to Mother in response to Student's Complaint. The letter specifically stated, "At this time, your request for an IEE in APE is being denied." At no time did District file a due process hearing request to establish that the District's APE assessment was appropriate.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528].)

WHETHER STUDENT IS ENTITLED TO AN IEE

2. Student contends that he disagreed with the District's APE assessment, and he requested the District provide an IEE at public expense. Under those circumstances, Student contends that District was obligated to, without unreasonable delay, either pay for an IEE or file a due process hearing to demonstrate that its APE evaluation was appropriate. Since District took neither of those actions, Student contends that he is entitled to an IEE. Further, Student contends that the District's failure to offer an APE IEE deprived him of a free appropriate public education (FAPE), because Mother could not meaningfully participate in educational decisions regarding Student without an APE IEE.

3. District contends that it demonstrated at hearing that District's assessment was appropriate, and that Student did not demonstrate that the District's APE assessment was not appropriate. District concedes that its failure to offer an APE IEE from November 4, 2010, through the date Student filed his Complaint "likely" constituted an unreasonable delay, but asserted that Student was not prejudiced by the delay. District contends that its failure to offer Student an IEE at public expense did not deprive Student of a FAPE, did not deprive Mother of the opportunity to participate in the development of Student's IEP, and did not deprive Student of any educational benefits.

4. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services

designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the pupil at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.)

5. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range*). Procedural violations only constitute a denial of FAPE if they: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

6. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.)² The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the pupil has a disability or whether the pupil's

² The IDEA uses the term "evaluation," while the California Education Code uses the term "assessment." This Decision will use the term "assessment."

educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds.(e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)³

7. Reassessments of the pupil shall be conducted if the school district determines that a reassessment is warranted, or if the pupil's parents or teacher requests a reassessment. (Ed. Code § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the school district agree otherwise, and shall occur at least once every three years, unless the parent and the school district agree, in writing, that a reassessment is unnecessary. (Ed. Code § 56381, subd. (a)(2).)

8. Both the IDEA and the California Education Code specify the manner in which the assessments must be conducted and the qualifications of the assessors. (20 U.S.C § 1414 (a) and (b); 34 C.F.R. § 300.502; Ed. Code, § 56320.) The Education Code also specifies the contents of the assessment report. (Ed. Code, § 56327.)

9. The IEP team shall meet to review an initial formal assessment, and may meet to review any subsequent formal assessment. The team shall also meet upon the request of a parent to review, develop, or revise the IEP. (Ed. Code, § 56343, subd. (a), (c).)

10. The procedural safeguards of the IDEA provide that under certain conditions a parent is entitled to obtain an IEE of a child at public expense. (20 U.S.C. §1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent may request an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school

³ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise stated.

district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense, unless the school district demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. §300.502(b)(2); Ed. Code, § 56329, subd. (c).) The school district may inquire as to the reason why the parent disagrees with the IEE, but the school district may not require the parent to provide an explanation, and may not unreasonably delay either providing the IEE at public expense or filing its due process complaint to demonstrate the appropriateness of its assessment. (34 C.F.R. § 300.502(b)(4).) Further, except for requiring that an IEE at public expense meet agency criteria regarding evaluations (to the extent those criteria are consistent with the parent's right to an IEE), the district may not impose conditions or timelines related to obtaining an IEE at public expense. (34 C.F.R. § 300.503.)

11. Whether the length of time that has passed before a District initiates a due process hearing or provides the IEE at public expense constitutes "unnecessary delay" is a question of fact, based upon the circumstances of the particular case. (*J.P. v. Ripon Unified School District* (E.D. Cal. 2009) 2009 WL 1034993; 52 IDELR 125.) (*Ripon*.) For example, in *Ripon* the court determined that the school district's due process request filed more than two months after the request for an IEE was timely, as parties were communicating regarding the request for the IEE in the interim, and did not come to an impasse on the issue until less than three weeks before the school district's filing. In contrast, in the case of *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006) 2006 WL 3734289; 47 IDELR 12) (*Pajaro Valley*), the school district did not file its due process complaint to defend its assessment until approximately 11 weeks after Student's request for an IEE. Then, at hearing, the school district offered no explanation as to why it delayed for 11 weeks in filing its complaint, or why that delay was "necessary." The court found that the school district's "unexplained and unnecessary delay in filing for a due process hearing waived its

right to contest Student's request for an independent evaluation at public expense, and *by itself* warranted entry of judgment in favor of Student and [parent]." (Emphasis added.)

12. In this case, the law required that the District do one of two things, without unnecessary delay: (1) initiate a due process hearing to show that its APE assessment was appropriate; or (2) provide an APE IEE at public expense, as requested by Mother. District did not agree to conduct an APE IEE, and did not file a due process complaint to defend the appropriateness of its assessment, during the 90-day period between November 4, 2010, when Student first requested an APE IEE, and February 2, 2011, when Student filed his Complaint. District did not agree to conduct an APE IEE thereafter through at least February 11, 2011. The evidence was uncontradicted that Student, through his advocate, disagreed with the District's APE assessment, and that Student's advocate requested an APE IEE at the November 4, 2010, IEP meeting. The evidence was uncontradicted that the District's counsel, Ms. Winkelman, acknowledged the request and advised that the District would respond to the request in writing. The evidence was uncontradicted that, at the same IEP meeting, the Student's advocate refused the District's offer of another APE assessment to be performed by District personnel. The evidence was uncontradicted that the District did not offer an APE IEE at public expense at any time prior to the time that Student filed his Complaint. Rather, on January 28, 2011, the District offered only an APE assessment to be conducted by District personnel.

13. In their closing briefs, the parties debate whether the District's failure to provide an APE IEE constituted a denial of a FAPE, and deprived Mother of the ability to meaningfully participate in the development of Student's IEPs. The IDEA and the Education Code do not specifically condition the District's obligations regarding requests for IEEs at public expense on a finding that Student required the IEE to receive a FAPE or to allow Mother to meaningfully participate in Student's IEP meetings. However, as was stated in Legal Conclusion 5, above, violations of the IDEA's procedural safeguards that significantly

impede Mother's ability to participate in the decision making process do constitute a denial of a FAPE. In this case, Mother's concerns regarding the quality and accuracy of the District's assessment report, and the total failure of the District to respond to her request for an APE IEE in the manner required by law, significantly impeded her ability to understand her child's unique needs, and therefore significantly impeded her ability to participate in IEP meetings and to be involved in the development of an IEP that met her child's unique needs.

14. District contends that it demonstrated during the due process hearing that its APE assessment was appropriate. District cites no authority that, under the circumstances of this case, any such showing can substitute for the District's specific obligation, as stated in Legal Conclusions 10 through 12, to file its own due process complaint without "unreasonable delay" to demonstrate the appropriateness of its assessment. Finally, the District did not offer any explanation for its failure to file a due process complaint at any time to defend the appropriateness of its assessment, or its failure to offer Student an IEE at public expense at any time during the 90-day period between the time Student requested the IEE and the time Student filed his Complaint. Further, District did not offer any explanation for its failure to offer Student an IEE at public expense through at least February 11, 2011, when it specifically denied Student's request for an IEE. Since District offered no explanation for its delay in offering Student an IEE at public expense or in filing a due process complaint to demonstrate the appropriateness of its own APE assessment, District also failed to demonstrate that the delay was necessary. (*Pajaro, supra.*)

15. Based upon Findings of Fact 1 through 14 and Legal Conclusions 1 through 14, District failed, without unreasonable delay, to (1) offer Student an APE IEE at public expense, or (2) file a due process complaint to defend the appropriateness of its APE assessment. District's conduct deprived Student of a FAPE, because it significantly impeded

Mother's right to meaningfully participate in the IEP process. Consequently, Student is entitled to an APE IEE at public expense, and an IEP meeting thereafter to discuss the results of the IEE.

16. In addition to the APE IEE at public expense, Student's Complaint requested that the District be ordered to train the staff at Student's school regarding the procedures to follow in responding to a pupil's request for an IEE. Student offered no evidence that this remedy was appropriate or necessary for Student to obtain relief in this matter, or that any staff at either Student's former school or current school was unaware of those procedures. In particular, there was no evidence that any such staff member routinely failed to appropriately respond to requests from its pupils for IEEs.

ORDER

1. Student shall receive an APE IEE, to be performed by an assessor selected by Student, at public expense, consistent with District criteria. Within five business days of District's receipt of this Decision, District shall provide Student with agency criteria for conducting the assessment, including agency criteria, if any, concerning the reasonable cost for conducting the assessment.

2. District shall pay for the IEE within 30 calendar days of receipt of the independent assessor's written demand for payment.

3. District shall convene an IEP meeting to discuss the IEE within 30 calendar days of the District's receipt of the assessor's report of the IEE, not counting days between the Student's regular school sessions, terms, or days of school vacation in excess of five school days.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on the only issue heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: July 7, 2011

Elsa H. Jones

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings