

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
PARENT ON BEHALF OF STUDENT,
v.
SAN DIEGO UNIFIED SCHOOL DISTRICT,
SAN DIEGO UNIFIED SCHOOL DISTRICT
SPECIAL EDUCATION LOCAL PLAN AREA,
SAN DIEGO COUNTY OFFICE OF
EDUCATION.

OAH Case No. 2017020361

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 7, 2017, naming San Diego Unified School District, San Diego Unified School District Special Education Local Plan Area (collectively "District"¹), and San Diego County Office of Education. The matter was continued for good cause on March 16, 2017.

Administrative Law Judge Rommel Cruz heard this matter in San Diego, California, on June 13, 14, and 20, 2017.

Seth Schwartz and Corrin Johnson, Attorneys at Law, represented Student. Student's Mother attended the hearing on all days. Student did not attend the hearing.

Sarah Sutherland and Amy Rogers, Attorneys at Law, represented District and County. Jennifer Parks-Orozco, Special Education Program Director of Due Process Hearings and Mediation, attended the hearing on behalf of District on June 13 and 14, 2017. Deann Ragsdale, Executive Director of Special Education and SELPA Director,

¹ San Diego Unified School District operates as its own SELPA.

attended the hearing on June 20, 2017 on behalf of District. Carolyn Nunes, Special Education Director, attended the hearing on all days on behalf of County.

OAH granted a continuance at the parties' request for the parties to file written closing arguments. On July 10, 2017, upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE

Did San Diego Unified School District, San Diego Unified School District Special Education Local Plan Area, and San Diego County Office of Education, individually or collectively, deny Student a free appropriate public education by failing to determine and/or provide an appropriate cost criterion for a speech and language independent educational evaluation, thereby interfering with Parent's choice of assessor?

SUMMARY OF DECISION

The Decision holds that District's cost criteria policy for an independent educational evaluation in the area of speech and language interfered with Mother's ability to utilize her chosen assessor. Specifically, the policy's cost limitation was too restrictive, which limited Mother's ability to choose among the qualified speech and language evaluators in the area. Mother's chosen assessor, Crimson Center for Speech & Language, possessed the necessary credentials and licenses, was located within the boundaries of San Diego County, and charged a fee that was not unreasonably excessive. District's failure to fund Mother's IEE request through Crimson Center was a violation of Mother's procedural rights, which significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to Student. Therefore, District denied Student a FAPE.

However, County's involvement in the development of District's IEE cost criteria did not violate Mother's right to an IEE. County was not a decision-maker in the

development of District's IEE policy nor did County have any oversight responsibility over the process. Furthermore, County did not provide Student with special education or related services and was not involved in the approval or denial of Mother's IEE request. Therefore, County did not deny Student a FAPE.

FACTUAL FINDINGS

1. Student was an 8-year-old female at the time of the hearing, who resided with Mother within the boundaries of District at all relevant times. Student was eligible for special education under the categories of autism and speech and language impairment. She first qualified for special education and related services at the age of three under those same categories. Autism is a disability that significantly affects a child's verbal and nonverbal communication and social interaction, generally evident before the age of 3 years, that adversely affects his or her educational performance.²

2. In May 2016, an individualized education program team meeting was convened to review Student's triennial evaluations, which included a speech and language assessment. On September 7, 2016, Mother emailed District advising District of her disagreement with its speech and language assessment and requesting a publicly funded IEE in the area speech and language.³

3. On September 8, 2016, District emailed its response to Mother's IEE request, agreeing to fund a speech and language IEE not to exceed \$900 in cost. Attached to District's email was an authorization letter, a list of approved providers and

²(Sattler, Jerome M., *Assessment of Children, Cognitive Foundations* (5th ed. 2008) p. 24.)

³ Mother also requested IEEs in the areas of psycho-educational, occupational therapy, and academics, all of which District agreed to fund.

District's IEE policy. The authorization letter provided that if Mother chose a "different provider from those on the attached lists, the District will either reimburse the parent up to . . . \$900.00 for the speech and language evaluation . . . or pay the provider directly up to the above ranges if s/he is known to the District."The range provided for a speech and language IEE was \$750 to \$900. The list of approved speech and language IEE assessors included only one assessor. Mother did not contact that assessor.

4. Mother reached out to other parents of children with special needs with whom she and Student spent time with for recommendations for a speech and language IEE assessor. Crimson Center for Speech & Language was recommended. Mother did not choose Crimson Center to provide a specialized service nor did Student present with unique needs that would require a specialized assessor.

5. On February 2, 2017, Crimson Center informed Mother that its fee for a speech and language IEE would be \$1,500. The \$1,500 was calculated at \$150 per hour for a minimum of 10 hours. The fee included an initial consultation by Crimson Center's director, Karyn Searcy, two to three hours of testing at the clinic, observations by Ms. Searcy at the school, a written report, and attendance at an IEP team meeting.

6. That same day, Mother emailed District that she had decided to have Crimson Center conduct the speech and language IEE. She informed District of Crimson Center's rate of \$150 per hour, with a minimum of 10 hours, for a total fee of \$1,500. Mother did not provide an explanation for choosing an evaluator who did not meet all of District's IEE policy criteria. Mother requested that District pay for the additional cost exceeding District's cost limit of \$900, raising the authorization limit to \$1,500. Though Mother could have paid the \$1,500 and sought reimbursement, seeking reimbursement would have been financially burdensome and the uncertainty of receiving a reimbursement too risky.

7. On February 6, 2017, District emailed Mother a prior written notice of its refusal to raise its authorization limit for a speech and language IEE beyond \$900. District explained that the cost of an IEE shall be comparable to those costs that the Local Educational Agency incurs when it uses its own employees or the going rate in the area for contractors to perform similar assessments. District stated that the "governing board of the SELPA has agreed upon the \$750-\$900 cost limitation for a Speech and Language IEE." District considered Student's current and previous assessments, school records, progress towards goals, current and past IEPs, staff data and Mother's input in making its decision. A new list of approved speech and language IEE providers was given to Mother, listing a total of nine assessors. Mother did not contact any of these assessors, having already solidified her decision to work with Crimson Center.

DISTRICT'S IEE POLICY

Development of the IEE Policy

8. Carolyn Nunes was County's executive director since 2006. She practiced in special education for 38 years as a special education teacher, a resource specialist, and a special education program manager. Ms. Nunes earned a bachelor's degree in sociology and a master's degree in education. She was District's director of special education for six years before joining County.

9. As County's executive director, Ms. Nunes coordinated special education services for students enrolled in the county's Friendship School and the Juvenile Court and Community Schools.⁴ Additionally, she coordinated county-wide professional

⁴ Friendship School serves medically fragile and moderate to severe students. Juvenile Court and Community Schools serves students who are wards of the court or who have been referred by other school districts.

development trainings with the county's 42 school districts, which were organized into six SELPAs.⁵

10. Ms. Nunes established that County operated as its own local education agency, but it was not a school district or SELPA. County was a member of the South County SELPA. Each of the six local SELPAs had its own SELPA director. Furthermore, District operated as its own SELPA, and the executive director of special education for District was also its SELPA director.

11. Understanding that families relocate across districts and SELPAs throughout the county, Ms. Nunes worked closely with the six SELPA directors to develop consistent policies and procedures among the school districts. County's role in these collaborative settings was to help facilitate the conversation between the SELPA directors. County had no oversight responsibilities over the six SELPAs nor did County act as a decision-maker in those discussions.

12. County's executive director and the six SELPA directors met every other week, a practice that had been in place for 20 years. In those 20 years, an annual retreat in July was held among the members to discuss various topics. Ms. Nunes' responsibility in those retreats was to assemble the agenda items and to facilitate the conversation.

13. Sheila Weinberg was a temporary project specialist with County, a position she assumed in June 2012. In the preceding two years, Ms. Weinberg was the director of the South County SELPA. From September 1983 to February 2008, Ms. Weinberg was District's special education program manager for compliance, monitoring, and training.

⁵ The six SELPAs within the county of San Diego are San Diego Unified School District, Poway Unified School District, North Coastal, North Inland, East County and South County.

14. As a project specialist, Ms. Weinberg was tasked with working with the six SELPA directors to develop an IEE policy. She worked on the project from July 2015 to August 2016. The development of the IEE policy began in July 2015 and finalized in March 2016.

15. Ms. Weinberg was responsible for contacting potential IEE assessors to gauge their interest in joining an IEE provider list. She contacted potential assessors identified on an existing list as well as assessors suggested by the SELPA directors. Aside from those assessors, Ms. Weinberg did not contact any other private assessors in the area. Ms. Weinberg did reach out to SELPAs in the contiguous counties to inquire about their IEE policies and rates.

16. If an assessor expressed an interest on being on the IEE provider list, Ms. Weinberg then asked him or her about their rates. Some assessors provided an hourly rate and others a flat rate. Ms. Weinberg did not ask for an estimate as to how much time each assessor spent to complete an assessment. The information was entered into a database and provided to the SELPA directors.

17. The SELPA directors met, discussed the rates, and reached a consensus about the cost criteria, taking into account what the SELPAs pay their own speech-language pathologists to conduct an assessment, what they believed to be the going rate for a speech and language assessment, and what the SELPA directors believed to be fair and equitable. Ms. Weinberg was present for these deliberations, but she did not recall what the SELPA directors understood the going rate was for a speech and language assessment. Furthermore, due to being out on medical leave from August to October 2015, Ms. Nunes had not participated in the discussion regarding the IEE cost criteria and therefore, she did not know what the final IEE cost criteria was based on.

18. In March 2016, the final version of the IEE policy, along with the cost criteria for speech and language IEEs, was adopted by the SELPA directors, including

County had no authority or control over the finalization of the speech and language IEE cost criteria, nor did it independently adopt the IEE policy.

19. County was a point of contact for individuals interested in being on the IEE provider list. Those who expressed an interest were sent a cover letter, the IEE policy and an enrollment form. County managed a master list of IEE assessors, which was accessible by the six local SELPAs. The SELPAs could utilize the master list to generate their own individual IEE assessor lists. County did not prescribe how the SELPAs were to use the master list.

20. Ms. Nunes and Ms. Weinberg provided thoughtful, precise, and uncontradicted testimony. They were both credible witnesses.

21. Ms. Nunes and Ms. Weinberg established that County's role in developing the IEE policy was limited to facilitating the discussion between the six SELPA directors. County had no oversight responsibility over the decision-making process nor was it a decision-maker in the development of the IEE policy and the speech and language IEE cost criteria. Additionally, neither Ms. Weinberg nor Ms. Nunes had any contact with Student or Mother and were not involved in granting or denying Mother's speech and language IEE request. Furthermore, County did not provide special education or related services to Student.

The IEE Policy Regarding Speech and Language IEEs

22. The IEE policy required evaluators to be located within the boundaries of San Diego County. Evaluators also had to be credentialed or licensed speech/language pathologists. If District agreed to fund an IEE, it would seek additional information from the proposed assessor to include the assessor's qualifications, credentials, and/or licensure, geographic location, and the assessor's fees. As to the fees, the policy noted that the fees should include an all-inclusive rate, to consist of the assessment, written report, travel, protocols, and attendance at the IEP team meeting. The policy further

noted that proposed “fees must be both reasonable and customary, similar to those performed by qualified professional in the local area.”

23. The IEE policy stated, “The cost of an IEE shall be comparable to those costs that the [Local Educational Agency] incurs when it uses its own employees or the going rate in the area for contractors to perform a similar assessment. Costs include: observations, record review, administration and scoring of tests, report writing, and attendance in person or by phone at an IEP team meeting.”As agreed upon by the governing Board of the SELPA, District’s IEE policy established a cost limitation, with a range of \$750 to \$900 for a speech and language IEE.

24. The policy provided that District would supply a parent with a list of potential IEE evaluators. The list was not intended to be exhaustive. Parents were not obligated to choose among the list of evaluators. If a parent chose an evaluator who was not on the list, the parent would be provided with an opportunity to demonstrate the presence of unique circumstances to justify the selection of the evaluator. District would then determine if the use of that selected evaluator that did not meet the IEE policy criteria was warranted. Prior written notice would then be issued to the parent.

COSTS OF SPEECH AND LANGUAGE ASSESSMENTS WITHIN SAN DIEGO COUNTY

25. Student called eight speech-language pathologists to testify. The first was Marci Greim, a speech-language pathologist employed by Solana Beach School District for the past 17 years. In her spare time, she independently contracted with San Diego Center for Speech Therapy and Templeton Neuro Academic Clinic to provide speech and language assessments for other school districts within San Diego County. Ms. Greim estimated conducting 30 to 70 speech and language assessments per year, approximately 10 of which were privately funded. She estimated she conducted 40 assessments for Solana Beach in 2016.

26. Ms. Greim charged \$150 an hour to conduct a speech and language IEE, but limited her fee to \$1,500 for school districts. She had maintained this hourly rate for the past seven years.

27. Ms. Greim conducted an assessment by first spending one to three hours interviewing parents and school personnel. An observation of the student in the educational setting typically required a minimum of 30 minutes, upwards to 90 minutes. Reviewing educational records typically took her a minimum of three hours to complete. Administering tests took anywhere between six and eight hours on average, usually broken down to three to four, two-hour sessions. Writing the assessment report took anywhere from five to 15 hours, depending on the volume of records and the complexity of the case. IEP team meeting attendance accounted for another hour. She estimated she spent an average of 20 hours to complete an educationally related speech and language assessment. Ms. Greim established that IEEs, unlike school district speech and language assessments, typically involved multiple domain testing, with single domain assessments being uncommon. Ms. Greim described domains as "areas of skills." In regards to communication, four commonly tested domains include language processing, expressive language, speech production, and pragmatic language.

28. Joanne Hein had been a licensed speech-language pathologist in California since 1978. In 1976, Ms. Hein earned a master's degree in speech pathology. She had been in private practice since 1986 and, at the time of the hearing, practiced in San Diego County. Ms. Hein estimated she conducted dozens of speech and language assessments each year and had completed hundreds in the past 10 years. Since 2016, she had conducted two speech and language IEEs.

29. Ms. Hein had a unique approach to her billing practice, which she established to allow her to spend more time on data analysis and report writing, without the concern of overbilling. She spent as much as 30 hours writing a report. She charged

\$350 per hour to conduct an educationally related speech and language assessment. She only charged for the time she actually spent with the child during the assessment, which was estimated to average five hours. Her standard speech and language assessment normally cost \$1,750. The hourly rate accounted for the time she spent analyzing data and writing the assessment report. An observation of the student at the school and her attendance at an IEP team meeting required additional charges of \$200 per hour. An assessment that included a school observation and attendance at an IEP team meeting cost roughly \$2,150 to \$2,350. Due to Ms. Hein's unique billing practice and exceptionally lengthy writing time, her testimony was not helpful in understanding the customary time and effort assessors typically spent on an educationally related speech and language assessment.

30. Andrea Judge-Weinberg had been a licensed speech-language pathologist for over 25 years. She earned a bachelor's degree in speech pathology and audiology in 1990. In 1992, she earned a master's degree in speech and hearing sciences. She was the owner and clinical director of Southern California Collaborative Therapy, which opened in 2013 and operated in San Diego County. Prior to establishing a full-time private practice, Ms. Judge-Weinberg was a speech-language pathologist for three school districts within San Diego County: Bonsall Union, Rancho Santa Fe, and San Diego City Schools.

31. Ms. Judge-Weinberg had completed four IEEs and was working on her fifth at the time of hearing. She described those IEEs as more complex compared to others. Her rate for an assessment was \$160 an hour. For IEEs, she charged school districts a flat rate of \$1,500, but accepted payments of \$900. She estimated she spent at least 30 hours to complete a speech and language IEE. However, due to the limited number of IEEs she had completed and the complexity of those cases, she was openly uncomfortable about providing average time estimates; she repeatedly pointed out that

her limited sample of less than five completed IEEs was too small to generate a reliable average. As a result, her testimony was given little weight.

32. Geri Brown was a licensed speech-language pathologist in San Diego County. She earned her bachelor and master of sciences degrees in speech and language pathology in 1972 and 1973, respectively. Ms. Brown estimated conducting one or two speech and language IEEs a year, having done two or three in the past three years. In her career, she estimated conducting over 300 assessments.

33. Ms. Brown charged \$100 per hour to perform a speech and language assessment. She had maintained this rate for the past six years. Ms. Brown explained that an IEE required "quite a bit" of work, to research and review information, meet with parents and other personnel, conduct observations, administer tests, analyze the collected data, write an assessment report and attend an IEP team meeting. Ms. Brown had not encountered a speech and language IEE that was limited to just an articulation issue. In her experience, IEEs were more complex than a single domain assessment. She opined that \$900 did not fairly compensate an evaluator, nor was it a reasonable starting price point for a speech and language IEE due to the amount of time needed to accomplish all the tasks associated with the assessment.

34. Ms. Brown spent roughly one hour speaking to parents to gather background information and to ascertain their concerns. She at times spoke with school personnel. Ms. Brown also made it a point to review the child's educational records, which she believed to be a necessary part of the practice, and would request such records from the school. The time to complete a record review varied depending on the volume of the records, averaging two hours but no more than three. An observation of the child at school accounted for one hour. Administering tests averaged three to four hours and typically occurred over multiple sessions.

35. Ms. Brown estimated spending an average of two to three hours scoring and analyzing tests results and three to four hours writing her assessment reports. Her assessment reports ranged between eight and 15 pages. She also attended IEP team meetings if requested. Ms. Brown established that IEEs required considerable time and effort to perform a host of steps in the process, and typically involved addressing multiple domains.

36. Karyn Searcy was a licensed speech-language pathologist in San Diego County. She was the founder and clinical director of Crimson Center for Speech & Language, which opened in San Diego County in 2003. Ms. Searcy was also a current faculty member at San Diego State University's Speech Language Hearing Clinic.

37. Crimson Center staffed seven full-time and three part-time speech-language pathologists. It conducted three to four IEEs per month for various school districts in San Diego County and had been doing IEEs since 2010. Crimson Center's hourly rate for a speech and language IEE was \$150. In arriving at that rate, Ms. Searcy took into account the expenses associated with operating Crimson Center, such as the office space, employee salaries, acquiring up-to-date assessment tools and materials, and providing for continuing education for her staff. Crimson Center limited the number of hours it charged for a speech and language IEE to 10; however Ms. Searcy opined that it ordinarily took 12 to 15 hours to complete them. In her experience, Ms. Searcy had never taken less than 10 hours to complete a speech and language IEE. At one point, Ms. Searcy was on an IEE provider list and accepted \$900 for an IEE. In 2015, she removed Crimson Center from that list. However, school districts continued to reach out to Crimson Center for evaluations.

38. Crimson Center's assessment process included a parent consultation with Ms. Searcy. During the consultation, Ms. Searcy made a list of recommended tests. Records were requested from the child's school. The child's educational records were

organized and a staff speech-language pathologist sorted through and retrieved the most relevant records. Sorting and reviewing the records took an average of two hours, depending on the volume of records. An observation of the child at school typically accounted for one hour, unless a school district limited the time. Half the time was spent observing the child in a structured setting and the other half in an unstructured setting such as recess and lunch periods. Report writing was capped at five hours. Ms. Searcy supervised the process by reviewing the relevant records, incorporating her observations, reviewing targets and recommendations, and doing a full edit of the report. Her time spent on editing was not included in the total fee. Ms. Searcy also attended IEP team meetings, if invited.

39. Janet Dudley had been a licensed speech-language pathologist since 1997. She was a speech-language pathologist for Sweetwater Union High School District⁶ and a member of Sweetwater Union's autism team. She had been with Sweetwater Union since 2007. In 2008, Ms. Dudley opened Social Communication Specialists, a private practice with two offices in San Diego County. She employed one part-time speech therapist. Ms. Dudley estimated conducting 15 to 25 speech and language assessments annually, both in private practice and through Sweetwater Union.

40. Ms. Dudley charged \$125 per hour in private practice to conduct a speech and language assessment, a rate she had for about a year. Ms. Dudley did not rely on what other speech-language pathologists in the community charged for assessments in determining her own hourly rate. It was a rate that allowed her to maintain a private practice, though not making much of a profit. She had accepted fees ranging from \$850 to \$1,000 for an IEE, but she did not consider the fees to be fair compensation for the

⁶ Sweetwater Union High School District is located within San Diego County.

time and work she put into those assessments. She had been on an IEE provider list, but was no longer on such a list.

41. In conducting an IEE, Ms. Dudley estimated spending anywhere from 45 to 90 minutes speaking to parents and school personnel, one to three hours reviewing records, one hour observing the child at school, three to four hours administering tests, and 10 to 15 hours writing a report. She attended an IEP team meeting if invited. She opined that testing for two domains was average for an IEE.

42. As both a private practitioner and a school district speech-language pathologist, Ms. Dudley credibly established that IEEs are typically not limited to testing for one domain. She further established \$125 per hour for a speech and language IEE to be a reasonable rate. She did not compare rates of other speech-language pathologists in the community in determining her own rate, but rather, she settled on a rate that allowed her to keep her private practice running, despite not being very profitable.

43. Miguel Montiel was a licensed speech-language pathologist in San Diego County. He had been licensed for 14 years. Mr. Montiel had a bachelor's degree in speech and hearing sciences and a master's degree in speech and language pathology. He had been in private practice for the past five years, employing one part-time staff. Mr. Montiel had conducted approximately 300 speech and language assessments; roughly 100 of those assessments involved children with autism. He estimated he conducted 25 educationally related assessments a year.

44. Mr. Montiel first interviewed parents at the onset of an assessment. He then reviewed educational records, generally provided by parents. He did not request records from the school. He spent between one and one and a half hours observing the child at school. Testing administration took two to four sessions. He then scored the tests, analyzed the data, and prepared a written report. Report writing took three to five hours. His IEE reports ordinarily ranged from 10 to 15 pages in length. He followed up

by meeting with parents for about half an hour to an hour to discuss his findings. He attended an IEP team meeting if invited.

45. Mr. Montiel opined the amount of time to complete a speech and language assessment varied depending on the number of domains to be addressed. If articulation was the only concern being assessed, the assessment took five to seven hours to complete. However, he had not encountered an IEE that was limited to just an articulation issue. If a combination of articulation and language issues was present, it took closer to 10 hours to complete the assessment. Articulation and language issues tended to be the minimum areas of concern in his IEEs. If the child was bilingual, that assessment took between 13 and 15 hours to complete. He estimated that a typical speech and language assessment could be completed in about 12 hours. In comparison to school district speech and language assessments, Mr. Montiel opined that because a second opinion is being sought through an IEE, IEEs tended to be more involved, requiring more time to look over additional information.

46. For the past two years, Mr. Montiel had charged an hourly rate of \$125 for educationally related speech and language assessments. His hourly rate took into consideration the cost of running his private practice. Those costs included such things as office space, utilities, part-time administrative staff salary, marketing, and materials. Mr. Montiel accepted \$900 from school districts for IEEs. He considered participating as an IEE assessor to be a great experience that provided him with an additional source of income.

47. Mr. Montiel provided unbiased, credible testimony. Though being on an IEE provider list had its advantages, he candidly acknowledged that the \$900 compensation was low for the time he spent on IEEs. He established that \$125 an hour was a reasonable rate, taking into consideration the time and effort associated with an

IEE, along with the cost of running a private practice. He also established 10 to 12 hours was a fair amount of time to complete an assessment.

48. Erica Lawson had been a licensed speech-language pathologist in San Diego County for 14 years. She earned a bachelor's degree in speech and hearing sciences in 2001 and a master's degree in communicative disorders in 2003. She was a lead speech-language pathologist for Chula Vista Elementary School District from July 2005 to December 2012. Ms. Lawson was in private practice from July 2005 until December 2011, at which time she co-founded Speech Tree Therapy Center. As president of Speech Tree, she negotiated and executed contracts with insurance companies and other providers. Additionally, she continued to provide treatment and conduct educationally related assessments of children with articulation and language disorders, who may also have had other conditions such as autism, Down syndrome, and cerebral palsy. Ms. Lawson estimated conducting one school-district-related assessment a year and about 30 speech and language assessments through Speech Tree annually.

49. Ms. Lawson charged \$150 an hour with a minimum of three hours for an educationally related speech and language assessment. This was her rate since 2014. She did not consider the rates of other speech-language pathologists in the area in arriving at her hourly rate. She understood conducting market research of rates violated the American Speech-Language-Hearing Association's code of ethics. Her hourly rate accounted for the cost of operating her private practice, such as expenses associated with office space, materials, employee salaries and benefits, marketing, and liability insurance. Her rate reflected what she believed to be a fair price based on the amount of time and effort she put into her practice.

50. Ms. Lawson testified confidently throughout her examination. Her responses were measured and thoughtful, and her testimony was credible.

51. In the past two years, Ms. Lawson conducted two IEEs for two other school districts in San Diego County, one in 2015 for \$1,300 and another in 2017 for about \$1,600. However, those bills were discounted to reflect the contracted rate of \$850 and \$900. Ms. Lawson opined that the \$900 rate made it difficult to continue to do IEEs and for that reason she had chosen to exclude herself from any IEE provider list.

52. Ms. Lawson estimated spending half an hour to one hour speaking with parents and school personnel in preparation for an assessment. She also spent a minimum of one hour reviewing records, but typically no more than three hours. An observation in multiple settings in school required at least one hour. Ms. Lawson opined that testing for only one domain, such as articulation, was uncommon. Those tests took only one and a half hours to administer. On average, test administration took three and a half to four hours to complete. The length of time for testing depended on a number of factors such as the number of standardized tests being administered, whether a language sample was taken, and how effectively the child was able to process information during testing. In some situations, testing took up to five hours.

53. An analysis of the collected data took a few hours to complete. Writing the report averaged two and a half hours, with reports averaging 10 pages. Ms. Lawson also attended an IEP team meeting if invited. She opined that an average of eight to 10 hours was a reasonable amount of time to complete an IEE. However, a tally of her estimates totaled roughly 10 to 12 hours.

54. As a private practitioner with seven years of experience as a former school district speech-language pathologist, Ms. Lawson persuasively established that IEEs and school district assessments generally followed the same process. However, IEE's required more time and preparation, and assessment reports were more detailed and longer. She also established eight to 12 hours was a reasonable range to complete an educationally related speech and language assessment.

55. Claudia Dunaway was a licensed and credentialed school speech-language pathologist in San Diego County. She was the only assessor called to testify on behalf of District and County. She earned a bachelor's degree in anthropology in 1974 and a master's degree in speech pathology and audiology in 1978. From 1987 to 2012, Ms. Dunaway was a speech-language pathologist for District, acting as lead speech-language pathologist beginning in 2002. Ms. Dunaway was also a faculty member at San Diego State University's Communicative Disorders Department, instructing in behavior management, school-age language disorders, articulation, fluency and family communication dynamics. From 1982 to 1999, Ms. Dunaway was in private practice providing assessments and interventions for a variety of communication disorders.

56. Ms. Dunaway owns a private consulting business, which she started six years ago. Her consulting firm provided professional development to local, state, and national departments of education and agencies. Her consultations focused on improving best practices for speech-language pathologist in the areas of academic, language, critical thinking, and collaborative conversations. She estimated having conducted between 600 and 800 speech and language assessments during her employment with District and about 150 assessments in private practice.

57. Ms. Dunaway found only minor differences between a private and a school district speech and language assessment. One such difference was that school district assessors had the advantage of being able to access the child readily in the school setting. A private assessor did not have the same level of access, so they had to be creative in collecting the same data. One such method was simulating a classroom setting in a private clinic or a play setting in the home to get a sense of how the child behaved in those environments.

58. For an assessment, Ms. Dunaway explained that a record review was first performed and an assessment plan was then developed. That was followed by the

collection of data using multiple tools, in multiple contexts, with multiple informants, with the goal of identifying the child's strengths and weaknesses. Assessment reports averaged between four and a half to five pages, with a low to upper range of two to 10 pages, not accounting for any appendices. Ms. Dunaway estimated that an educationally related speech and language assessment could be completed in one and a half to 10 hours, depending on the complexity of the case. She was aware of private assessors charging from \$75 to \$150 an hour and flat rates ranging from \$350 to \$700 in the private sector.

59. At hearing, Ms. Dunaway reviewed the Evidence of Information section of Student's May 9, 2016 speech and language assessment report, and opined that 45 minutes was a reasonable amount of time to conduct an observation and that two hours was a reasonable amount of time to administer tests. Only one standardized test was administered in Student's assessment by District, the Structured Photographic Expressive Language Test-3.

60. Deann Ragsdale was District's Executive Director of Special Education and the SELPA's Director. She assumed those roles in January 2017. Before 2017, she was the Executive Director of Special Education at Chula Vista Elementary School District. She held that role for about three years. Between June 2008 and July 2011, she was the Director of Special Education at Alpine Union School District.

61. Ms. Ragsdale was not a licensed speech-language pathologist and had never conducted a speech and language assessment, but she did from time to time review district speech and language assessments as part of her supervisory responsibilities over program managers and special education site administrators. At hearing, she reviewed Student's May 9, 2016 speech and language assessment report. She opined the report resembled atypical school district speech and language assessment report. She described the report as 11 pages long with information related

to Student's background, the basis for the referral, observational assessments, present levels of functioning in many different areas, standardized assessment scores and a summary with recommendations, components typically found in a school district speech and language assessment.

62. Ms. Ragsdale's testimony challenged the accuracy of Ms. Dunaway's estimated costs and time associated with a speech and language assessment. Ms. Dunaway opined that an educationally related speech and language assessment could be completed in just one and a half hours, and, at most, 10 hours, and typically was four and a half to five pages in length, with an upper range of 10 pages. In contrast, Student's May 2016 speech and language assessment, which Ms. Ragsdale opined to be typical of a school district assessment, was 11 pages long and the testing and observation alone accounted for nearly three hours.

63. Additionally, Ms. Dunaway opined that a private assessment ordinarily cost between \$350 and \$700. Ms. Dunaway may have been referring to a less comprehensive assessment, unlike an IEE. Regardless, no other testimony or any documentary evidence supported a conclusion that an assessment as thorough as a speech and language IEE would ordinarily cost \$700 or less. District had not paid less than \$850 for a speech and language IEE since March 2016, and no assessor testified to charging for an IEE within that range. Ms. Dunaway's estimations were overly conservative.

64. Ms. Dunaway's under-estimation became more evident when compared to Ms. Lawson's testimony. Ms. Lawson was also a school district lead speech-language pathologist. Both witnesses had substantial experience conducting educationally related assessments. However, Ms. Lawson opined that on average, assessment reports ranged between 10 to 12 pages and ordinarily took 10 hours to complete. Her average report lengths were more than twice as long as Ms. Dunaway's estimates, and what Ms. Dunaway considered an upper range of hours to complete an assessment, 10, was what

Ms. Lawson opined to be the average. Furthermore, the testimony of other assessors aligned with Ms. Lawson's, which established 10 to 12 hours on average to be a reasonable amount of time to complete an IEE, with some assessors estimating much more time being needed. For these reasons, Ms. Dunaway's estimates were found to be overly conservative and did not represent accurate estimates of time and costs. Consequently, her testimony was not persuasive.

65. Jennifer Parks-Orozco was District's Special Education Program Manager of Due Process Hearings and Mediation. She had held that position for two years. Her role required her to supervise staff regarding appropriate courses of action to resolve special education-related issues identified in due process filings or complaints filed with the California Department of Education. Ms. Parks-Orozco also provided support and training to District staff regarding compliance, IEP legal timelines, mandates, and updates and the implementation of legal agreements arising from mediation and resolution sessions, as well as hearing decisions.

66. Throughout her career with District, Ms. Parks-Orozco held positions as Special Education Administrator of Due Process Hearings and Mediations, Coordinator of Nonpublic Schools and STARS elementary and middle Programs,⁷ Resource Teacher, Program Diagnostic Resource Teacher, Lead Speech-Language Pathologist, and Senior Speech-Language Pathologist. She was a speech-language pathologist for District for eight years.

67. Ms. Parks-Orozco did not participate in the development of District's IEE policy and had no knowledge of how it was created. Specifically, she had no knowledge as to how the speech and language IEE cost criteria was determined. The extent of her

⁷STARS stands for "Successful Transitions Achieved through Responsive Supports."

involvement was limited to being contacted by Ms. Weinberg, at which time she informed Ms. Weinberg that she knew some speech-language pathologists who may be interested on being on an IEE provider list.

68. Ms. Parks-Orozco opined that one cost rate may not be reasonable for every single child. She explained that each IEE request was evaluated on a case-by-case basis and District turned to its IEE policy for guidance. Students who had complex medical issues, who presented with a number of needs requiring additional time to evaluate, or required alternative assessments tools were examples of circumstances which may have required a higher payment rate than the IEE policy's cost criteria. She opined that the IEE policy's cost criteria for a speech and language IEE was a reasonable range. District had paid for IEEs within that the cost range and at times it had paid more, depending on the circumstances.

69. Ms. Parks-Orozco established that interviewing parents, reviewing records, administering tests, conducting observations, and writing a report were all recommended components of a comprehensive assessment.

A REASONABLE RATE OF TIME AND FEES FOR SPEECH AND LANGUAGE IEEs WITHIN SAN DIEGO COUNTY

70. In determining fair compensation, the witnesses' testimony established a common practice among speech-language pathologists of taking their hourly rate and multiplying it by the amount of time they estimated spending on an educationally related speech and language assessment. This method allowed an assessor to gauge whether accepting an IEE assignment was financially feasible. This also factored into the decision to join or not join a SELPA's IEE provider list. Some practitioners reduced their fee to an amount they believed to be fair and reasonable. Whatever their reason for reducing their fee, it was a practice speech-language pathologists commonly employed

to provide a service to children and families who may not otherwise have been able to afford it.

71. Testimony from five of the speech-language pathologists established that speech and language IEEs ordinarily involved testing at least two domains. A single domain, such as articulation, was rare, and some of the assessors testified to having never conducted an IEE that was limited to just one domain.

72. A multitude of tasks were associated with producing a quality speech and language IEE: interviewing parents and school personnel; gathering, organizing, and reviewing educational records; observing the child at school; administering and scoring tests; analyzing tests data; writing an assessment report; and attending an IEP team meeting. District's IEE policy asked for much of the same, with an expectation that an assessor's cost to include "observations, record review, administration and scoring of tests, report writing, and attendance in person or by phone at an IEP team meeting." These customary assessment tasks came into play regardless of whether the case presented with unique circumstances.

73. Also, additional time could be expended by private assessors to become familiar with a case. This was due to not having the same level of access to students and teachers as compared to school district assessors, and also not working regularly with the child like a school district provider. Thus, IEEs on average took more time to complete than school district assessments. Though the time estimates varied greatly among the speech-language pathologists, the most persuasive witnesses' testimony taken as a whole established a reasonable estimate of 10 to 12 hours to complete all the tasks entailed in a speech and language IEE, absent unique circumstances.

74. Private assessment providers also needed to account for the cost of running their businesses in determining a financially sound fee for their service. The cost of office space, testing materials, insurance, and employee salary and benefits were just

some of the necessary expenses to consider, which reflected sound business practice. Though the hourly rates provided through testimony and documents varied greatly between \$75 and \$350, \$125 per hour was established by the weight of the evidence to be the most reasonable rate.

SPEECH AND LANGUAGE IEEs PAID BY DISTRICT TO ASSESSORS SINCE MARCH 2016

75. District presented a number of speech and language IEE invoices from 2016 through 2017, along with a detailed list of IEEs submitted for funding approval to District's school board. The documents established that since finalizing the IEE policy's cost criteria in March 2016, setting a cost limitation range of \$750 to \$900 for a speech and language IEE, District paid \$850 for five such IEEs. Of the remaining invoices, District paid \$900 for three IEEs, and three more at \$1,500.⁸ The average of these payments was \$1,040.⁹

⁸No credible explanation was contained in the invoices or provided through testimony as to the circumstances surrounding District's payments of \$1,500 for the three IEEs that exceeded the IEE policy's cost limit.

⁹ If two payments of \$850 that were both paid in February 2016 were added to the equation, the average payment is reduced to \$1,011.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹⁰

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)¹¹ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a)

¹⁰ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

[In California, related services are also called designated instruction and services].) In general, an individualized education program is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational

benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child's "educational program must be appropriately ambitious in light of his circumstance." "[E]very child should have a chance to meet challenging objectives." (*Ibid.*) *Endrew F.* explained that "[t]his standard is markedly more demanding than the 'merely more than de minimis' test [¶] The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* At pp. 1000-1001.)

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)& (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

BURDEN OF PROOF

7. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student requested the hearing and, therefore, Student has the burden of proof related to the issue for hearing.

PROCEDURAL VIOLATIONS

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

PARTICIPATION IN THE IEP PROCESS

9. Among the most important procedural safeguards are those that protect the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

INDEPENDENT EDUCATIONAL EVALUATIONS

10. The procedural safeguards of the IDEA provide that under certain conditions, a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329, subd. (b), 56506, subd. (c).)

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

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

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

14. A parent is entitled to only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent disagrees. (Ed. Code, § 56329, subd. (b).) If an independent evaluation is at public expense, the criteria under which the assessment is obtained, including location of the evaluation and qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent evaluation. (34 C.F.R. § 300.502(e)(1).) Other than establishing these criteria, a district may not impose conditions or timelines relating to a parent's right to obtain an independent evaluation at public expense. (*Letter to Parker, supra*, 41 IDELR 155 (OSEP 2004).) A district's criteria may not be so narrow as to interfere with a parent's right to obtain an independent evaluation. (*Letter to Petska*, 35 IDELR 191 (OSEP 2001).) If a public educational agency

observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of pupil in pupil's current educational placement and setting. (Ed. Code, § 56329, subd. (b).)

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

ISSUE: DID DISTRICT'S REFUSAL TO FULLY FUND STUDENT'S IEE THROUGH CRIMSON CENTER DENY STUDENT A FAPE?

16. Student contends that District's speech and language IEE criteria cost limit of \$900 was unreasonably low and interfered with Mother's ability to utilize her chosen assessor. Student argues this to be the case even in this situation where no unique circumstances support the selection of an IEE evaluator who did not meet District IEE policy cost criteria. Student further argues that District's reliance on the cost criteria in refusing to fund Mother's IEE through Crimson Center violated Mother's right to meaningfully participate in developing Student's IEP, a violation which denied Student a FAPE.

17. District contends that its IEE policy cost criteria for a speech and language IEE is appropriate and its denial to fund an additional costs exceeding \$900 was legally justified. Hence, Mother's right to participate in the development of Student's individualized education program was not violated and Student was not denied a FAPE as a result.

Was \$900 for a Speech and Language IEE an Appropriate Maximum Allowable Charge?

18. To avoid unreasonable charges for IEEs, a district may establish maximum allowable charges for specific tests. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) If a district does establish maximum allowable charges for specific tests, the maximum cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific tests. (*Id.*) Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. (*Id.*)

19. Mother's IEE request and District's response were procedurally proper. District agreed to fund the IEE, limiting their cost to \$900 as prescribed by District's IEE policy. Mother selected Crimson Center as her IEE assessor, who was not on District's IEE provider list and whose fee exceeded District's maximum allowable charge by \$600. Mother requested District advance the total amount of \$1,500. Mother did not provide justification for selecting an evaluator who did not meet District's IEE policy cost criteria. District timely provided Mother prior written notice of its refusal to fund the IEE in the amount above \$900. In response, Mother filed a request for a due process hearing.

20. A maximum allowable charge is too low if it is simply an average of the fees customarily charged, and therefore, for District's maximum allowable charge of \$900 to be appropriate, that maximum must exceed the average of reasonable fees customarily charged. That is not the case here. Since finalizing the IEE policy cost criteria in March 2016, establishing a cost limitation range of \$750 to \$900, District has paid an average of \$1,040 for a speech and language IEE. District's cost limitation of \$900 failed to exceed the average fees District had customarily paid since it adopted the speech and language IEE cost criteria.

21. Examining District's payments alongside a reasonable hourly rate and a fair time estimate to complete a speech and language IEE, demonstrates that \$900 is not

an appropriate maximum allowable charge. If a typical IEE takes 10 hours to complete, at a rate of \$125 an hour, the fee would amount to \$1,250. Calculating the cost with a more conservative time estimate of eight hours, amounting to a fee of \$1,000, also arrives at the same conclusion, that \$900 is far too low to be considered a reasonable maximum allowable charge. By establishing a maximum allowable charge of \$900 for a speech and language IEE, District's IEE policy failed to eliminate only unreasonably excessive fees as it also eliminated reasonable IEE fees. Therefore, by a preponderance of the evidence, \$900 was not an appropriate maximum allowable charge for a speech and language IEE.

Was Student's Chosen Assessor, Crimson Center's Fee to Conduct a Speech and Language Assessment of Student Unreasonably Excessive?

22. District's IEE policy required an assessor's costs to include observations, record review, administration and scoring of tests, report writing, and attendance in person or by phone at an IEP team meeting. The policy further stated that the "cost of an IEE shall be comparable to those costs that the LEA incurs when it uses its own employees or the going rate in the area for contractors to perform a similar assessment." The policy noted that proposed fees "must be both reasonable and customary, similar to those performed by qualified professional in the local area."

23. District argued that IEEs are just evaluations done by an independent evaluator on par with the assessment done by the school district. However, an IEE is not simply an opportunity to mimic school district assessment, using the same tests and relying on the same data. An IEE is a second opinion, where a parent has access to "an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion." (*Shaffer, supra*, 54 U.S. at pp. 60-61.) The independence of that opinion centers on an IEE evaluator's ability to approach an assessment from a fresh perspective, taking into consideration information that may

have been neglected, administering tests possibly overlooked by the school district, and interpreting the data in a different light.

24. Crimson Center's speech and language IEE fee was \$1,500, calculated at \$150 an hour, for a minimum of 10 hours. Crimson Center's fee accounted for parent interviews, record review, observations, administration and scoring of tests, report writing, and attendance at an IEP team meeting. These tasks were customary in the assessment process. An assessor's time and expertise related to those tasks had a monetary value, a value that was fairly calculated at \$125 per hour.

25. Having concluded \$1,250 to be reasonable, the question then is whether an additional \$250 for fees is unreasonably excessive. It is not. Twelve hours is a fair estimate of the time required to conduct a speech and language IEE. An IEE that takes twelve hours to complete, at \$125 an hour, would cost \$1,500; District had paid \$1,500 each for three speech and language IEEs since March 2016. Accordingly, the weight of the evidence established that \$1,500 was not an unreasonably excessive fee, especially for an assessment that will likely require the testing of more than one domain, such as the case with Student who is both autistic and speech and language impaired.

Did Crimson Center Meet All Other IEE Policy Criteria to Qualify as an IEE Speech and Language Assessor?

26. District's IEE policy required a speech and language IEE assessor to be a credentialed or licensed speech-language pathologist who was located within the boundaries of San Diego County. The policy did not require Mother to choose from District's list of pre-approved evaluators.

27. Crimson Center provided speech and language therapy and assessments within the county of San Diego since opening its doors in 2003. Crimson Center conducted speech and language IEEs since 2010, and conducted three to four IEEs monthly. Executive director Karyn Searcy was a licensed speech-language pathologist,

trained and experienced in conducting speech and language IEEs. Crimson Center had a staff of seven full-time and three part-time speech-language pathologists. Aside from Crimson Center's fee, District did not question Crimson Center's qualifications under any other part of its IEE policy.

28. Crimson Center clearly met the qualification and location criteria of District's IEE policy. Student and Mother were entitled to choose a qualified speech and language IEE evaluator whose assessment fee was not unreasonably excessive. Crimson Center was qualified and its fee of \$1,500 was not unreasonably excessive. Therefore, by a preponderance of the evidence, District's speech and language IEE policy cost criteria was too narrowly constructed and interfered with Mother's ability choose from among the qualified speech-language pathologists in the area.

29. District's refusal to fund Student's IEE through Crimson Center in the amount of \$1,500 was a procedural violation of the IDEA. District's speech and language IEE cost criteria was too narrowly constructed, which interfered with Mother's right to obtain an independent evaluation. The violation significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Therefore, District's refusal to fund Student's IEE through Crimson Center at a cost of \$1,500 denied Student a FAPE.

ISSUE: DID COUNTY'S PARTICIPATION IN THE DEVELOPMENT OF DISTRICT'S SPEECH AND LANGUAGE IEE COST CRITERIA DENY STUDENT A FAPE?

30. Student argues that County shares responsibility in the denial of a FAPE, claiming County's faulty investigation into the community rates for speech and language assessments produced the inadequate information relied upon by District in developing its speech and language IEE cost criteria.

31. County contends that its role in the development of the IEE policy was to merely facilitate the conversation among the six SELPA directors. It was not a

decision-maker in the development of the IEE policy cost criteria, nor did it have oversight responsibilities over the SELPA directors and the IEE policy development process. County further argues it was not a decision-maker in the approval or denial of Mother's IEE request. County did not provide special education and related services to Student and did not make any decisions relating to Student. Therefore, County argues it did not violate Mother's right to an IEE and to meaningfully participate in the decision-making process regarding the provision of a FAPE to Student.

Analysis

32. Special education due process hearing procedures extend to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) A "public agency" is defined as "a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.)

33. The weight of the evidence established County's role in the development of District's IEE policy cost criteria did not interfere with Mother's choice of an assessor. County merely facilitated the discussion between the six SELPA directors. County gathered information as to hourly and flat rates for the SELPA directors to consider, but County did not dictate how that information should have been used and how much weight the directors should have given it. County had no oversight responsibility over the SELPA directors and did not approve the IEE policy cost criteria. Ultimately, District made the final determination as to the appropriate speech and language IEE cost criteria.

34. Additionally, County did not provide special education or related services to Student, nor was County involved in any decisions regarding Student. Student failed to meet her burden in proving County was involved in the identification, evaluation, or

educational placement of Student, or the provision of a FAPE to Student. Therefore, County did not violate Mother's right to a publicly funded IEE and did not deny Student a FAPE.

REMEDIES

1. Student did not prevail on the issue as it related to County. Accordingly, Student's requested remedies as to County are denied.

2. Student prevailed on the issue against District. As a remedy, Student requested an order for a publicly funded speech and language IEE for Student's chosen assessor or another qualified assessor in an amount not to exceed a reasonable cost cap. Student also requested training for District personnel in determining a cost cap to avoid unreasonably excessive fees and the appropriate process for developing a cost cap based on a reasonable rate in the community. Lastly, Student requested an order for District to adjust its cost criteria to account for reasonable rates in the community.

3. District contends no remedies are appropriate because Student did not meet her burden of persuasion on any issue.

4. This Decision makes no determination as to the appropriate maximum allowable charge for a speech and language IEE, or an appropriate method of determining that maximum. Such a determination was not necessary in deciding the sole issue at hand and concluding District denied Student a FAPE. Therefore, Student's requests to train District's staff and to adjust District's cost criteria are denied.

5. Student established she was denied a FAPE due to the limitations of the IEE policy's cost criteria for a speech and language IEE. Mother chose Crimson Center as her IEE assessor, and was quoted \$1,500 for the IEE. Mother expressed no desire to work with any other assessor. Additionally, Student did not present unique circumstances, necessitating the need for additional costs for an IEE. Nothing was presented at hearing to suggest Crimson Center could not conduct a comprehensive IEE of Student for

\$1,500. Therefore, Student is entitled to a publicly funded speech and language IEE not to exceed \$1,500, to be conducted by Crimson Center or another qualified assessor of Mother's choice.

ORDER

1. District shall schedule a speech and language IEE of Student with Crimson Center for Speech & Language, or another qualified assessor of Mother's choice, to take place within 45 days of this order.
2. District shall fund a speech and language IEE in an amount not to exceed \$1,500.
3. District shall convene an IEP team meeting within 21 days upon receipt of the speech and language IEE report.
4. All other requests for relief are denied.

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. Student prevailed on the issue against District. County prevailed on the issue against it.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: August 10, 2017

/s/

ROMMEL P. CRUZ

Administrative Law Judge

Office of Administrative Hearings