

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

ANAHEIM ELEMENTARY SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2019031068

DECISION

Anaheim Elementary School District filed a due process hearing request with the Office of Administrative Hearings on March 26, 2019, naming Parents on behalf of Student.

Administrative Law Judge Linda Johnson heard this matter in Anaheim, California on April 23, 2019. Attorney Lauri Arrowsmith represented Anaheim. Kristin Cinco, Anaheim's Senior Director of Special Services, attended the hearing on Anaheim's behalf. Father represented Student and participated in the hearing by telephone on Student's behalf.

At the parties' request, OAH continued this matter to April 30, 2019, for the filing of written closing arguments. The parties timely filed written closing arguments. The record closed on April 30, 2019, and the matter was submitted for decision.<sup>1</sup>

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<sup>1</sup> On May 8, 2019, Student filed a request to submit an additional document into evidence. The evidentiary portion of the hearing closed on April 23, 2019, although the

## ISSUE

Is Anaheim entitled to conduct assessments pursuant to the January 14, 2019 assessment plan without Parents' consent and without the limitations and conditions placed on the assessment by Parents?

## SUMMARY OF DECISION

Anaheim proved that it complied with the procedural requirements for assessing Student under the Individuals with Disabilities Education Act. The evidence established that Anaheim was required by its child find obligations under the IDEA to assess Student for special education when Father informed Anaheim that Student lived within its boundaries, had an autism spectrum disorder diagnosis, and requested a special education assessment. Anaheim provided an appropriate proposed assessment plan to Parents and sought their consent for an initial assessment of Student. Father signed the January 14, 2019 assessment plan, but withheld consent to a physical examination of Student by Anaheim. Father delayed and rescheduled 23 assessment appointments without presenting Student for any assessment for over 60 days. Anaheim may assess Student in accordance with its January 14, 2019 assessment plan without parental consent. Further, Anaheim shall not be required to offer a Student free and appropriate public education until Parents make Student available for Anaheim to complete its assessment according to the January 14, 2019 assessment plan.

Anaheim did not offer any testimony, evidence, or argument that Parents' exemption of Student from a physical examination did not extend to special education assessments. Consequently, Anaheim's school nurse may not conduct a physical

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record was left open for the parties to submit closing arguments, no additional evidence would be considered. Student's request is denied and his evidence was not considered.

examination of Student.

## FACTUAL FINDINGS

1. Student was a four-year-old boy who resided with his Parents within Anaheim's boundaries at all relevant times. Student was not enrolled in school and had not been assessed for special education. Student participated in a homeschool preschool program.

2. During prior litigation in OAH Case No. 2017060570, Parents and Anaheim agreed to a stipulation that Parents were not seeking special education and related services for Student, and in the event Parents changed their position and requested special education and related services for Student, Anaheim would be permitted to assess Student before Anaheim provided him with special education and related services.

### THE JANUARY 14, 2019 PROPOSED ASSESSMENT PLAN AND CORRESPONDENCE

3. On January 9, 2019, Student's Father sent an e-mail to Ms. Cinco asking for an assessment for special education for Student and notified Anaheim that Student had an autism spectrum disorder diagnosis from Orange County Mental Health. Anaheim's Senior Director of Special Services, Kristin Cinco sent a reply to Father notifying him that its program specialist, Holly Shubin, would contact him regarding the assessment and schedule a time for Parents to meet with Ms. Shubin.

4. On January 14, 2019, Ms. Shubin sent an e-mail to Father confirming a previously agreed to appointment on January 15, 2019, to discuss the proposed assessment plan and discuss any questions and concerns he had about the assessment. Ms. Shubin sent Father a copy of the assessment plan, procedural safeguards, and a release of information.

5. Anaheim's January 14, 2019 assessment plan was written in English, the

language Parents used to communicate with Anaheim. The plan explained that it was developed in response to Parents' request for a special education assessment for Student. The plan described the possible tests and procedures to be conducted. Anaheim proposed to assess Student in the areas of academic achievement; health; intellectual development; language and speech communication development; motor development; social emotional behavior; and adaptive behavior. It also explained the information sought through the evaluation of the various areas. The plan was written clearly and in terms understandable by the general public. The plan was clear in that no special education services would be provided to Student without Parents' written consent. The school psychologist was responsible for evaluating the areas of intellectual development, social emotional behavior, and adaptive behavior; the specialized academic instructor would assess Student's academic achievement; the school nurse would evaluate Student's health needs; the occupational therapist would evaluate Student's motor development; and the speech and language pathologist would evaluate Student's language and speech communication development. The assessment plan did not specify that the nurse would conduct a physical examination of Student, but it did specify that the nurse would gather health information and testing to determine how Student's health affected his school performance.

6. Father responded to Ms. Shubin via e-mail on January 14, 2019, stating he did not need a meeting to discuss the assessment plan and would return the signed documents. Father also notified Anaheim that, pursuant to Ed. Code, § 49451, he would not consent to a physical examination of Student. Parents did not attend the meeting on January 15, 2019, however, Father went to the district office and signed the assessment plan.

7. On January 17, 2019, Father and Ms. Shubin exchanged e-mails regarding the assessment plan, assessment timeline, assessment schedule, and additional

documentation. Father signed the assessment plan on January 15, 2019, which started the assessment timeline. Ms. Shubin explained to Father that Anaheim would hold an IEP team meeting to discuss the results of the assessment on or before March 15, 2019. Father did not make any additions or modifications to the assessment plan. However, Father placed a question mark next to the health section. Father informed Anaheim that in lieu of signing the authorization to release information he would share Student's hearing and vision results.

8. Also on January 17, 2019, Ms. Shubin sent Father the first assessment schedule. Father disagreed with that assessment schedule and requested afternoon assessment appointments. Ms. Cinco followed up with Father and confirmed Student's availability for assessments between 12:00 p.m. and 4:00 p.m.

9. On January 22, 2019, Ms. Shubin sent a second assessment schedule with afternoon appointments. Father confirmed Student would attend all the appointments on the assessment schedule. However, on January 27, 2019, Father informed Ms. Cinco that Student would not be able to attend the first appointment on Monday, January 28, 2019, as Student had an appointment with Children's Hospital of Orange County regarding his cleft lip and palate. Father confirmed Student would be at next the appointment on January 30, 2019. However, on January 29, 2019, Father sent another e-mail to Ms. Shubin and Ms. Cinco, asking that Anaheim reschedule all the appointments and shorten the time Anaheim scheduled assessment sessions.

10. On February 4, 2019, Ms. Shubin sent Father a third assessment schedule. The third assessment schedule proposed three appointments that were each one hour in duration on February 6, 2019, February 8, 2019, and February 12, 2019. Ms. Shubin also reminded Father to provide Student's hearing and vision results and the Orange County Mental Health report to Anaheim. Father responded that he needed a couple of days to confirm the schedule as Student's Mother had recently been hospitalized.

11. Student did not appear for the assessment on February 6, 2019.
12. On February 7, 2019, Father sent an e-mail to Ms. Shubin and requested that Anaheim also assess Student for special education eligibility under the category of other health impairment. Father also asked if Anaheim still needed Student's evaluation from Orange County Mental Health.
13. Student did not appear for the assessment on February 8, 2019.
14. On February 12, 2019, Ms. Shubin sent Father an e-mail and reminded him of Student's assessment appointment that afternoon. Because, Student did not appear for his February 6, 2019, and February 8, 2019, scheduled appointments, Ms. Shubin also included a fourth assessment schedule proposing two additional dates of February 14, 2019, and February 15, 2019. On February 12, 2019, Father responded that Student could not attend the February 12, 2019 assessment appointment that day as he was at Children's Hospital of Orange County because he had tubes in his ears and one of his ears had been bleeding.
15. On February 14, 2019, Ms. Shubin sent Father an e-mail reminding him of Student's assessment appointment that afternoon and asked him to bring copies of Student's hearing and vision results and the report from Orange County Mental Health. Father responded to the e-mail that Student was sleeping, but he did not confirm one way or the other if Student would attend the assessment appointment.
16. Student did not appear for assessment on February 14, 2019.
17. On February 15, 2019, Ms. Shubin again sent an e-mail to Father and asked if Student would attend the scheduled assessment appointment that afternoon. Father did not respond and Student did not appear for the assessment on February 15, 2019.
18. Because Student had not attended any of the scheduled assessment appointments, on February 19, 2019, Ms. Shubin sent Father a fifth assessment schedule.

The fifth schedule proposed five appointments, each one hour in duration, on February 20, 2019, February 21, 2019, February 22, 2019, February 25, 2019, and February 26, 2019. Ms. Shubin also asked Father to provide Student's hearing and vision results and the report from Orange County Mental Health.

19. Student did not appear for the assessments on February 20, 2019, February 21, 2019, or February 22, 2019.

20. On February 25, 2019, Ms. Shubin sent Father a reminder that Student had an appointment that afternoon and again asked for Student's medical documents. Ms. Shubin included a second copy of the fifth revised schedule she previously sent on February 19, 2019. Father responded to Ms. Shubin later in the day on February 25, 2019, that he was not aware of the latest assessment schedule and that Student was on bedrest with antibiotics for a respiratory infection.

21. Student did not appear for the assessments on February 25, 2019, or February 26, 2019.

22. On February 28, 2019, Ms. Shubin sent Father a sixth assessment schedule. The sixth schedule proposed five appointments, each one hour in duration, on March 4, 2019, March 5, 2019, March 6, 2019, March 7, 2019, and March 8, 2019. Ms. Shubin also asked Father to provide Student's hearing and vision results as well as the assessment from Orange County Mental Health. Ms. Shubin reminded Father about the assessment timeline and the importance of keeping the assessment appointments.

23. On March 3, 2019, Father sent Ms. Shubin an e-mail asking to reschedule some of the assessment dates. Father explained that his older son recently had a baby and would be staying with him for a few days. Father did not specifically state which assessment dates needed to be rescheduled.

24. Student did not appear for the assessments on March 4, 2019.

25. On March 5, 2019, Ms. Shubin sent Father a prior written notice explaining

the reason for the proposed assessment, that Father requested that Anaheim assess Student for special education, and that Anaheim needed to complete the assessment by March 15, 2019. Ms. Shubin explained that she could not reschedule the assessment appointments for that week as Student had not yet been assessed at all despite Anaheim's multiple attempts to complete the assessment.

26. Father replied to Anaheim's prior written notice on March 5, 2019, by sending a letter via e-mail to Ms. Shubin. Father explained the complications in getting Student to the proposed assessment appointments and reiterated that Parents still desired that Anaheim assess Student for special education.

27. Student did not appear for the assessments on March 5, 2019, March 6, 2019, March 7, 2019, or March 8, 2019.

28. On March 12, 2019, Ms. Shubin sent an e-mail to Father offering an assessment appointment for March 13, 2019. Father responded to the e-mail stating his older daughter was on spring break and wanted to continue the assessment process after March 15, 2019. Student did not appear for the assessments on March 13, 2019.

29. On March 26, 2019, Ms. Shubin sent an e-mail to Father with a seventh proposed assessment schedule. The seventh schedule proposed five appointments, each one hour in duration, on March 27, 2109, March 28, 2019, March 29, 2019, April 1, 2019, and April 3, 2019. Father responded that everyone in the home was sick and he would let Ms. Shubin know when they were feeling better.

30. Student did not appear for the assessments on March 27, 2109, March 28, 2019, March 29, 2019, April 1, 2019, or April 3, 2019.

31. Between January 28, 2019, and April 3, 2019, Anaheim proposed 23 assessment appointments for Student. Despite having agreed to present Student for assessment, Father did not present Student for assessment on any day. Despite having agreed to provide Anaheim with Student's hearing and vision results and the report



from Orange County Mental Health, Father did not provide them to Anaheim.

32. Although Student did not attend any of the assessment appointments, Parents did not revoke consent to the assessment in any of their written communications to Anaheim.

33. On April 16, 2019, Ms. Shubin had a phone conversation with Father. Father wanted to set up a time to discuss the benefits of special education services and wanted to review the records Anaheim had for Student. Ms. Shubin offered several times to meet, however, Father said he was not available. Father requested that Ms. Shubin leave the documents at a location where he could pick them up, which Ms. Shubin did. Ms. Shubin asked Father to let her know what days and times he was available for a meeting. Father testified that he revoked consent for the assessment during that phone conversation. Ms. Shubin did not recall that Father revoked consent to the assessment during that phone conversation; her understanding of the conversation was that Father wanted a meeting to discuss the benefits of special education prior to the assessment, which she offered.

#### PARENTS' OBJECTION TO THE ASSESSMENT PLAN

34. Parents had several objections to the assessment plan. The first objection was that because Student was not yet six years old Anaheim could not require him to enroll in school. Student did not present any evidence that Anaheim tried to force him to enroll in school as a result of the assessment plan for special education services. The second objection was that Student was in a homeschool program and Anaheim could not force him out of the program to enroll in an Anaheim school. Again, Student did not present any evidence that Anaheim tried to force him out of his homeschool program and into a district program. The third objection was that Anaheim could not conduct a physical examination of Student. The fourth objection was that Anaheim did not hold a meeting to discuss the assessments and potential benefit to Student if he was assessed

for special education prior to the assessment. However, it was only after Anaheim filed its request for due process, more than 60 days after Father told Anaheim he did not need a meeting prior to consenting to the assessment, did Father contend that he wanted to have a meeting to discuss the benefits of special education prior to Student being assessed.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

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)<sup>3</sup> 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

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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).) In general, an IEP 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 nondisabled 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 Dist. 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 pp. 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.) 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, 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 pp. 950, fn. 10.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S.\_\_\_\_ [137 S.Ct. 988] (*Endrew F.*) the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Id.*) The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

5. 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).) 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].) By this standard, Anaheim, as the petitioning party, had the burden of proof for the issues alleged in this matter.

#### ISSUE 1: ASSESSMENT WITHOUT PARENTAL CONSENT AND LIMITATIONS

6. Anaheim contends that it has the right and obligation to assess Student

pursuant to its January 14, 2019 assessment plan because Parents requested a special education assessment and because Anaheim was on notice that Student lived within its boundaries, had a suspected disability, and might require special education services. Anaheim further contends that it should be able to assess Student without the limitations placed upon it by Parents. Student contends he is not yet of school age and Anaheim cannot force him out of his home school program. Student further contends he should not have to submit to a physical examination by the school nurse.

#### Assessment without Parental Consent

7. Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(D)(i)(I); Ed. Code, § 56321, subd. (c)(1).) A school district can overcome a lack of parental consent for an initial assessment if it prevails at a due process hearing regarding the need to conduct the assessment. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I) & 1415(b)(6)(A); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated.”]; Ed. Code, §§ 56501, subds. (a)(1)-(a)(3), 56506, subd. (e), 56321, subd. (c).) If a parent does not consent to an initial assessment, the school District may, but is not required to, file a request for a due process hearing. (34 C.F.R § 300.300(a)(3)(i); Ed. Code, § 56321, subd. (c)(2).)

8. To obtain parental consent, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3),(c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the student; explain the types of assessments to be conducted; and notify parents that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); see

also 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state that are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) This duty is commonly referred to as “child find.” California law specifically incorporates child find in Education Code section 56301, subdivision (a). A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*)) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at pp. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

10. Here, Anaheim was on notice that Student resided within its boundaries and had reason to suspect that he was a child with a disability who might require special education services. Not only did Anaheim have information that Student had an autism spectrum disorder diagnosis, Parents specifically requested an assessment for special education. Consequently, Anaheim’s child find duty was triggered and it had a duty to assess Student.

11. Anaheim complied with all IDEA procedural requirements to assess Student under the IDEA. Anaheim prepared an assessment plan within five days of Parents’ request for an assessment for special education for Student. The assessment plan met all legal requirements. The assessment plan was written in English, the language Parents used to communicate with Anaheim. The plan described the possible tests and procedures to be conducted and listed the person responsible for

administering tests in each area. It also explained the information being sought through the evaluation of the various areas. The plan was written clearly and in terms understandable by the general public. The plan was clear in that no special education services would be provided to Student without Parents' written consent.

12. Parents signed the assessment plan on January 15, 2019, without any additions or modifications to the assessment plan other than placing a question mark next to the health section. Anaheim promptly set up an assessment schedule and attempted to assess Student a total of 23 times. Between January 15, 2019, and March 15, 2019, the end of the 60-day timeline for the assessment, Anaheim proposed 18 assessment appointments. Each time Parents missed an appointment or requested to reschedule the appointments Anaheim accommodated the request until March 5, 2019, 10 days prior to the end of the 60-day timeline for the assessment. However, even after March 15, 2019, Anaheim still proposed five additional assessment appointments. Parents had a myriad of excuses why Student could not make any of the assessment appointments. However, Parents never voiced any concern with the actual assessments other than the length of time for the appointments. Parents also never provided any vision and hearing test results or the report from the Orange County Mental Health that Anaheim needed to have a comprehensive understanding of Student's profile and properly assess Student. Because Student was only enrolled in a home-school program, Anaheim could not assess Student unless Parents cooperated and brought Student to the assessment appointments.

13. Although Student did not allege he revoked consent until the April 16, 2019, phone conversation with Ms. Shubin, his refusal to participate in the assessment process effectively revoked consent to the assessment. However, Student did not articulate a single reason why he should not be assessed for special education. Father was clear that Student had health impairments and an autism spectrum disorder

diagnosis, and had requested the assessment. Father seemed to allege that Anaheim was trying to force Student out of his home hospital program. However, the assessment plan was clear that no services would be provided without parental consent. Before Anaheim could make an offer of special education services it first needed to assess Student.

14. Anaheim proved, even if Parents' refused to consent to initial special education services, that it had a legal obligation under child find to assess Student and if eligible make an IEP offer that Parents could reject. Therefore, Anaheim may assess Student for special education pursuant to the January 14, 2019 assessment plan without parental consent. If Parents do not make Student available for the assessments, or do not cooperate in the assessment process by continually missing or rescheduling appointments, Anaheim is not required to make an offer of FAPE to Student or convene an IEP team meeting.

#### Assessment without Parental Limitations

15. As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments; "selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous* (OSEP 1993) 20 IDELR 542.) It is well settled that parents may not place conditions on a school district's ability to assess. Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent. In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, *affd.* (11th Cir. 2012) 668 F.3d 1258, for example, parents purported to agree to a reassessment. However, they attached conditions to their approval, including requiring particular assessors, meetings with parents before and after the assessments, and limitations on the use of the assessments. The District Court deemed this a refusal to consent, noting, "With such restrictions, Plaintiffs' purported



consent is not consent at all.” (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit found that parents’ conditions “vitiating any rights the school district had under the IDEA for the reevaluation process . . . .” (*Id.*, 668 F.3d at p. 1264.)

16. Similarly, in *Student R.A. v. West Contra Costa Unified Sch. Dist.* (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.], affirmed (9th Cir. 2017) 696 Fed.Appx. 171 (*R.A.*), a parent approved an assessment plan on the modest condition that she be allowed to observe the assessment when conducted. The District Court found that condition vitiated the mother’s consent: “[t]he request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate.” (*Id.* at pp. 3.)

17. Parents may exempt a student from a physical examination by submitting an annual written statement to the principal of the school the student is enrolled in stating that parents will not consent to a physical examination of the student. (Ed. Code, § 49451.) A school’s ability to conduct hearing or vision testing is subject to the parental exemption. (Ed. Code, § 49452.)

18. Here, the only limitation Parents placed on the assessment was the restriction that Student not be subjected to a physical examination by the school nurse. Although he never produced the documents for Anaheim, Father offered to provide copies of Student’s most recent hearing and vision results. Anaheim did not offer any testimony, evidence, or argument that Parents’ exemption of Student from a physical examination did not extend to special education assessments. Consequently, Anaheim’s school nurse may not conduct a physical examination of Student.

## ORDER

1. Anaheim is entitled to assess Student according to the January 14, 2019 assessment plan, without parental consent. However, Anaheim’s school nurse is not

entitled to conduct a physical examination of Student.

2. Anaheim shall notify Parents, within 10 business days of the date of this decision, of the days, times, and locations Parents are to present Student for assessment. Parents shall present Student for assessment on those days, times and locations.

3. Parents shall complete and return any documents reasonably requested by Anaheim as a part of the assessments, including rating scales, hearing and vision results, and the Orange County Mental Health report, within five business days of the request.

4. If Parents do not present Student for assessment in accordance with Anaheim's proposed schedule as specified above, or do not complete, return, or produce documents as specified above, Anaheim shall not be obligated to provide a FAPE offer to Student, or convene an IEP team meeting.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Anaheim was the prevailing party on the sole issue presented.

## 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: May 15, 2019

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*/S/*

LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings