

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

UPLAND UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018120181

DECISION

Upland Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on December 5, 2018, naming Parent on behalf of Student. OAH granted Upland's request for a continuance on January 17, 2019.

Administrative Law Judge Alexa J. Hohensee heard this matter in Upland, California on February 21, 2019.

Jonathan P. Read, Attorney at Law, appeared on behalf of Upland. Anthony Farenga, Director of Special Education for Upland, and Royal Lord, Program Manager for the West End Special Education Local Plan Area, attended the hearing on behalf of Upland.

Parent briefly appeared on behalf of Student for prehearing matters on the record. Parent declined to participate further in the hearing, and left prior to opening statements.

Silvia Giordano provided Spanish to English and English to Spanish interpretation while Parent was present. Ms. Giordano was available throughout the hearing to provide

interpretation services.

Upland gave an oral closing argument at the end of the hearing, the record was closed, and the matter was submitted for decision.

ISSUE

Is Upland entitled to conduct the assessments proposed in the March 5, 2018 assessment plan without parental consent?

SUMMARY OF DECISION

Upland seeks permission to conduct comprehensive assessments of Student, without parental consent, to determine whether he continues to need special education and related services. Upland gave Parent an assessment plan for educational assessments of Student on March 5, 2018, according to the terms of a settlement agreement and upon Upland's determination that a reassessment was warranted by Student's improvements in academic achievement and functional performance. However, the assessment plan did not meet all of the requirements for notice of proposed assessment. The assessment plan did not include a copy of parents' rights and procedural safeguards. The assessment plan was not in Parent's native language. Because Upland did not prove that it had complied with all procedural requirements for providing notice of proposed assessment to Parent for purposes of obtaining her consent, Upland is not entitled to assess Student without that consent. Student prevailed on the sole issue presented.

FACTUAL FINDINGS

1. Student was 13 years old at the time of the hearing. He resided with Parent within Upland boundaries, and attended Upland schools, at all relevant times.

SETTLEMENT AGREEMENT

2. On July 11, 2017, Upland and Parent entered into an agreement to settle a previous educational dispute between them regarding whether Student continued to be eligible for special education (settlement agreement). As relevant here, the parties agreed that Student qualified for special education and related services as a student with other health impairment, due to a diagnosis of attention deficit hyperactivity disorder (ADHD) that adversely affected his educational performance. Student would receive one period per day of specialized academic instruction, with 450 minutes per year of occupational therapy consultation. The parties also agreed that Upland would assess Student before the end of the 2017-2018 school year in the areas of health, intellectual development, academics, social emotional functioning, motor development, and adaptive behavior. No proposed assessment plan was attached to the agreement, and Parent did not sign an assessment plan at that time. The settlement agreement did not state that Parent consented to the assessment by agreeing to the settlement agreement.

3. The settlement agreement required Upland to hold an IEP team meeting within 30 days of the beginning of the 2017-2018 school year to develop an IEP for Student with the agreed upon services.

2017-2018 SCHOOL YEAR

4. On September 19, 2017, Upland convened an IEP team meeting. Parent and Upland team members attended. Parent's native language is Spanish, and Upland provided a Spanish language interpreter. Upland sent Parent a copy of parental rights and procedural safeguards with the meeting notice, and gave her another copy of parental rights and procedural safeguards at the meeting. Pursuant to the settlement agreement, Student was placed in seventh grade general education classes, with one

period of specialized academic instruction in Directed Studies, a class for students with mild to moderate disabilities, and 450 minutes per year of occupational therapy consultation.

5. Karen Shelton provided occupational therapy consultation to Student's general education teachers and the special education teacher during the 2017-2018 school year. Ms. Shelton held a master's degree in occupational therapy and had assessed and provided occupational therapy to students in clinical and school-based settings for almost a decade. She testified at hearing with a professional demeanor, and gave thorough and informative responses. Ms. Shelton observed Student during his classes and met monthly with each of Student's teachers, who did not report any concerns. It was Ms. Shelton's opinion based on observations, teacher reports, and a records review, that Student was able to access his educational environment without assistance.

6. Ms. Shelton reviewed Student's December 2016 occupational therapy assessment, which found that Student: did not present with difficulty in participating in classes; had typical sensory processing; had average to above average visual motor, visual spatial, and fine motor skills; had handwriting without difficulty in formation, size, or placement of letters; could keyboard at 45 words per minute; and did not require occupational therapy to access his educational curriculum. Parent had complained about Student's handwriting, which prompted Ms. Shelton to gather writing samples from Student's teachers. It was Ms. Shelton's opinion that Student's handwriting was legible and grade-appropriate.

7. On March 5, 2018, Upland sent Parent an assessment plan. In accordance with the settlement agreement, the assessment plan included proposed assessments in the areas of health, intellectual development, academics, social-emotional functioning, motor development, and adaptive behavior. The plan was written in a manner

understandable to the general public, and described the areas Upland wanted to assess in sufficient detail to inform Parent of the nature and purpose of the assessments. It stated that an IEP would not result from the assessment without the parent's consent.

The assessment plan stated on the first page, in part:

Parents/Guardians have protections under state and federal procedural safeguard provisions. Please refer to the enclosed NOTICE OF PROCEDURAL SAFEGUARDS for an explanation of these rights. If you would like further information about your rights or the proposed action and/or referral, please contact [the school psychologist at the contact information given].

However, a copy of parents' rights and procedural safeguards was not attached to the assessment plan.

8. The assessment plan was written in English. Parent had an extensive history of corresponding with Upland staff and administrators in English. Parent's letters and emails demonstrated a good command of English in general, but included grammatical errors and were sometimes difficult to follow, indicating that English was not Parent's native language.

9. Maurice Levy, Ph.D., was responsible for conducting the psychoeducational portion of Student's assessment, and prepared the assessment plan. Dr. Levy was a well-qualified clinical and school psychologist with 20 years of experience in providing counseling and conducting psychoeducational and functional behavior assessments. Dr. Levy testified credibly and persuasively at hearing.

10. Based upon a review of Student's records, Dr. Levy opined that by March 2018, the information on Student's academic and functional performance indicated that

he might no longer need special education and related services. For the January 2017 multidisciplinary assessment, Student's math teacher had reported that Student rushed through his work and made careless mistakes because he did not check his work, but otherwise could access grade-level curriculum. By the end of the Fall 2017 semester, Student had earned grades of A in History, Directed Studies, and Physical Education, B in English, and C in Math and Science. Reports of Student's participation in class and completion of classwork suggested that Student was no longer demonstrating signs of attention deficit at school that required special education services. Ms. Shelton and Student's teachers reported that Student no longer exhibited writing difficulty or other fine motor issues that interfered with his access to the curriculum.

11. On March 15, 2018, Parent sent Upland a letter, in English, stating that she would not consent to the March 5, 2018 assessment plan. Parent wrote that the assessments were not necessary because Student continued to be eligible for special education due to his diagnosis of ADHD. She also stated that triennial assessments had been conducted and reviewed in January 2017, and that Student's next triennial review was not due until January 2020.

12. Upland scheduled an IEP team meeting for May 11, 2018, for Parent to share her assessment concerns with Upland team members, and for the IEP team to design a program for the 2018-2019 school year. On May 11, 2018, Upland convened an IEP team meeting, but Parent did not attend and the meeting was adjourned without discussion or action.

13. At the end of the 2017-2018 school year, Student earned grades of A in History, Directed Studies, and Physical Education, B in English and Math, and C in Science.

2018-2019 SCHOOL YEAR

14. For the 2018-2019 school year, Student attended eighth grade general

education classes, with his elective period in Directed Studies. Ms. Shelton continued to provide occupational therapy consultation.

15. Robert Perkins, a credentialed teacher with 21 years of experience, taught Student's eighth grade homeroom and general education English and History classes. Mr. Perkins testified at hearing. His demeanor was calm and professional, and he clearly enjoyed having Student in his class. Student was earning B grades without any supports or modifications, had no trouble completing assignments in class, and turned in his homework regularly. Student did not exhibit any maladaptive behaviors. Mr. Perkins did not believe Student needed special education or related services to access the general education curriculum.

16. Cristal Palma, a credentialed special education teacher, taught Student's Directed Studies class. She testified credibly at hearing, and spoke very highly of Student. Ms. Palma provided the students in her class with support to complete their homework from other classes, verified that assignments from all of their classes were recorded in their planners, and checked online class records to ensure that her students had completed and turned in assignments. She described Student as quiet, always on task, and performing well. Student worked on his assignments from the start of class to the finish, rarely asked Ms. Palma questions, and never needed re-direction. Ms. Palma worked with many children with a diagnosis of ADHD, but unlike most of those students, Student was always focused. Ms. Palma considered Student a role model for the other students, who were often off-task, unable to maintain focus, and required frequent re-direction and assistance. Ms. Palma had the opinion that Student should be reassessed to determine if he still needed special education and related services. She believed that Student could excel without her class, and did not think that Student should be spending his elective period in special education.

17. On September 25, 2018, Upland sent Parent a notice of IEP team meeting

scheduled for October 3, 2018.

18. On September 26, 2018, Parent responded in writing, in English, that she would attend. The one-page letter requested that certain IEP team members attend, that Parent be provided with any documents ahead of the meeting, and that a Spanish language interpreter be provided.

19. On October 3, 2018, Upland convened an IEP team. Parent and Upland team members attended, and Upland provided a Spanish language interpreter. Upland gave Parent a copy of parental rights and procedural safeguards at the meeting, and offered to explain them. Upland wanted the IEP team to address Parent's assessment concerns, and to review Student's educational program and progress.

20. Parent told the team that Student was slow to put his thoughts on paper, and she wanted accommodations such as extra time for assignments, help with homework, and a quiet place and extra time for tests, including Statewide testing. She complained that Student held his pencil incorrectly, and insisted that Student remain eligible for special education due to his ADHD. Parent wanted modifications and accommodations in all classes, although Upland IEP team members disagreed that such modifications and accommodations were necessary.

21. Ms. Shelton was at the October 3, 2018 meeting. She explained to Parent that Student had a functional pencil grasp, and had improved his fine motor skills over the past few years. She reviewed work samples with Parent and other team members to show that Student could produce legible written work. Ms. Shelton encouraged Parent to consent to having Student assessed for the continued need for occupational therapy.

22. Mr. Perkins reported that Student was doing well in his English and History classes. Student was capable of timely completing classwork, including essay writing, and able to independently access grade-level curriculum. He also showed samples of Student's classwork to the team to demonstrate that Student was capable of grade-level

work.

23. Dr. Levy and another Upland school psychologist discussed the need to obtain updated assessment data on Student to inform the IEP team, so that team members could develop an educational program for Student, who would be attending high school the following year. Upland team members were willing to address any concerns Parent had about the assessment, but Parent continued to decline to sign the assessment plan.

24. On October 9, 2018, Parent emailed Mr. Farenga and other IEP team members, in English, her consent to implementation of the October 3, 2018 IEP. Parent expressly reserved her right to challenge Upland's failure to offer additional accommodations that Parent had requested, and asked for changes to be made to the language in parts of the IEP.

25. On October 11, 2018, Upland's special education director, Anthony Farenga, wrote Parent a letter asking her to consent to the assessment plan. He noted that Parent had agreed to assessment in the July 2017 settlement agreement. He addressed Student's medical diagnosis of ADHD by explaining that only an IEP team could determine eligibility for special education. He wrote that although the IEP team considered outside assessments and diagnoses, that information did not replace the formal assessment process conducted by Upland's educational assessors for the purposes of determining continued eligibility for special education services. Mr. Farenga offered to meet with Parent to see if they could resolve her concerns informally. The letter included a copy of parents' rights and procedural safeguards in English.

26. On October 12, 2018, Parent responded to Mr. Farenga in a detailed two-page letter in English. She summarized the recent IEP team meeting, and disagreed with the team's refusal to include her requested accommodations in the IEP. She disagreed with the IEP team members who concluded that Student's ADHD did not interfere with

his learning, as she had seen Student rush through his work and make careless mistakes. Parent noted that after the 2017 triennial assessments Upland determined that Student was no longer eligible for special education. She stated that assessments were not due to be conducted for another three years, and would not consent to an earlier assessment. Parent requested another IEP team meeting, that Upland file for due process, and that Upland provide her with a Spanish language translation of Mr. Farenga's letter. She declined to meet with Mr. Farenga.

27. On November 6, 2018, Upland convened an IEP team meeting as requested by Parent. Parent and Upland team members attended, and Upland provided a Spanish language interpreter. Parent was given a copy of parents' rights and procedural safeguards, and an explanation of those rights, at the meeting.

28. Parent reiterated to the IEP team that Student had an ADHD diagnosis, and his continued eligibility for special education should not be questioned. She told the IEP team that Student was assessed in 2017, and asserted that he could not be assessed again until 2020. Parent conceded that Student might not require special education services, but insisted that he needed accommodations to account for his ADHD and difficulty writing.

29. Mr. Perkins told the team that Student was earning B grades in English and History and accessing grade-level curriculum. Ms. Shelton provided an update on occupational therapy consultation, and both she and Mr. Perkins agreed that the legibility of Student's handwriting was not an issue. Parent disagreed that Student was doing well in school, or could write legibly, and requested that Upland file for due process.

30. On November 26, 2018, Mr. Farenga emailed Parent to ask her if she would be willing to meet with him before Upland filed for due process.

31. On November 27, 2018, Parent emailed in response that she had tried to

work with Upland at the IEP team meetings of October 3, 2018, and November 6, 2018, and saw no reason to meet further.

32. On November 28, 2018, Mr. Farenga arranged for an Upland Spanish language interpreter to telephone Parent and offer a meeting with Mr. Farenga. Mr. Farenga asked the interpreter to call because he wanted to be sure that Parent understood his request. Parent declined to meet with Mr. Farenga, and told the interpreter that Upland should file for due process.

33. Upland filed a due process hearing request on December 5, 2018.

34. At the end of the fall semester of the 2018-2019 school year, Student earned an A in Directed Studies and Physical Education, B's in English, History and, Science, and a C in Math.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹

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) et seq.;² 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 free appropriate public education that emphasizes special education and related services designed to meet their unique

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

² All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

needs and prepare them for 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 IEP. (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).) 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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a

child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, *supra*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Andrew F.*, *supra*, 137 S.Ct. at p. 1001.) The Ninth Circuit has affirmed that its FAPE standard comports with *Andrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535 [nonpub. opn].)

4. 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. 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].) In this matter, Upland had the burden of proof on the issue decided.

SCHOOL DISTRICT'S DUTY TO ASSESS

5. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur

throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

6. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

7. Without updated information from a reevaluation, it may be difficult to develop an educational program that would ensure a student's continued receipt of a FAPE. (*Cloverdale Unified School Dist. v. Student* (March 21, 2012) OAH Case No. 2012010507.) A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Gilroy Unified School Dist. v. Student* (June 5, 2018) OAH Case No. 2018031204.)

8. Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (*Id.*) The assessment plan must: be in language easily understood by the general public; be provided in the native language of the parent; explain the types of assessments the

district proposes to conduct; and state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that “if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing.” (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; see also, *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557- 58.)

10. If a parent does not consent to a reassessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Therefore, a school district must establish that (1) the educational or related services needs of the child warrant reassessment of the child, and that (2) the district has complied with all procedural requirements to obtain the parent’s informed consent. The school district must also demonstrate that it has taken reasonable measures to obtain informed consent, but the parent has failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) “Consent,” as defined in title 34 of the Code of Federal Regulations, part 300.9(a), means the parent has been fully informed, in the parent’s native language, of all information relevant to the activity for which consent is sought.

ISSUE 1: UPLAND’S RIGHT TO ASSESS

11. Upland contends that it has a duty to reassess Student. Student’s teachers

and Upland staff agree that Student's needs have changed, as evidenced by his academic progress and lack of behaviors that interfere with learning in the classroom. Upland asserts that these changed circumstances warrant reassessment to determine if Student continues to need special education and related services, and if so, what educational program would support those needs.

Circumstances Warranting Reassessment

12. The weight of the evidence established that Student's improved academic achievement and functional performance warranted reassessment in March 2018.

13. Throughout the 2017-2018 school year, Student earned good grades of A's and B's in all of his classes except Math and Science, in which he earned passing grades of C's. Student's performance was consistent with the January 2017 triennial assessment results, which suggested that Student could independently access grade-level curriculum, and the assessors' recommendations that Student no longer qualified for special education and related services. Student's seventh grade teachers did not report any disruptive behaviors in the classroom, and Ms. Shelton observed that Student did not exhibit difficulty with writing, and no longer appeared to require occupational therapy consultation to access the curriculum or the school environment. Student's improvements in academic and functional performance despite his ADHD diagnosis reasonably supported Upland's determination that Student's educational or related services needs should be reassessed in the areas of health, academic achievement, intellectual development, motor development, social emotional behavior and adaptive behavior. Once Upland made the determination that a reassessment was warranted, it was mandated to begin the reassessment process.

14. Student continued to exhibit improvements in academic achievement and functional behavior in the 2018-2019 school year, which further warranted reassessment. Mr. Perkins testified convincingly that Student was independently able to access the

eighth grade English and History curriculum, without the need for special education supports. Ms. Palma testified persuasively that Student did not need the specialized instruction offered in her class, and exhibited no difficulty in focusing on his assignments and completing grade-level homework without assistance. Her testimony was convincing that Student did not belong in her mild to moderate specialized academic instruction class, and should be taking electives of interest to him in high school. Student's apparent lack of need for academic or behavioral support during the 2018-2019 school year continued to warrant reassessment through the date of the hearing.

Timing of Reassessment

15. The weight of the evidence established that the January 2017 triennial assessments were not a bar to reassessment in March 2018.

16. The March 5, 2018 assessment plan was created more than one year after the January 2017 triennial multidisciplinary assessment was completed and reviewed. Therefore, the assessment plan did not run afoul of the IDEA's prohibition against conducting reevaluations more often than once a year.

17. Parent's assertion that it was unlawful to assess Student more than once every three years is not supported by law. The IDEA and California special education law require that a student with special needs be evaluated *at least* every three years, unless the parent and school district agree that reevaluation is not necessary. Neither the IDEA nor California law prohibit reassessment for a three-year period. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

18. In addition, Parent agreed in the settlement agreement to a reassessment of Student before the end of the 2017-2018 school year in the areas of intellectual development, motor development, social emotional functioning and behavior and adaptive functioning. Although Parent's subsequent refusal to consent to the proposed

assessment plan was inconsistent with the settlement agreement, that conduct occurred after the assessment plan was developed, and Parent's assertion that Upland was unfairly seeking to accelerate Student's triennial assessment with the March 5, 2018 assessment plan appears disingenuous.

Failure to Comply with Notice Requirements

19. Upland gave Parent the requisite 15 days to review, sign and return the March 5, 2018 assessment plan, but did not prove by the weight of the evidence that it complied with all other notice requirements.

20. Upland did not provide a copy of parents' rights and procedural safeguards with the March 5, 2018 assessment plan. A copy of parents' procedural safeguards was not attached to the assessment plan admitted into evidence, and language referencing attached parental rights and procedural safeguards was insufficient to establish that procedural rights were properly included.

21. Additionally, Upland failed to provide Parent with a copy of the assessment plan in her native language of Spanish. There was testimony that it would have been "best practice" for Upland to give Parent a copy of the assessment plan in Spanish. However, California law states that the proposed assessment plan "shall" be provided in the parent's native language; that requirement is mandatory, not discretionary. (Ed. Code, § 56321, subd. (b)(2).)

22. Upland cannot be excused from providing Parent an assessment plan in her native language on the basis that Parent attempted to communicate with the school district in English. Parent's letters and emails to Upland demonstrated a good command of English in general, but grammatical errors and difficult-to-follow sentences indicated to Upland that English was not Parent's native, or even primary, language. The written communications from Parent were also insufficient to establish that Parent could fluently read and write English, particularly as Parent did not participate at the hearing

and could not explain if she had written those communications herself, received assistance in writing the communications, arranged for someone else to write the communications on her behalf, or had her words translated by someone fluent in Spanish and English. Parent's September 26, 2018 request to receive documents to be reviewed at an IEP team meeting in advance suggested that Parent required additional time to review (and perhaps have interpreted) materials written in English. Parent could have requested the assessment plan be translated into Spanish, but it was Upland's duty to ensure that Parent received an assessment plan in her native language. This Decision declines to shift the burden to a parent to request legally mandated notices be in her native language because she had made previous attempts to communicate with the school district in English.

23. Upland provided Parent with multiple copies of parents' rights and procedural safeguards at IEP team meetings. The only copy of parents' rights and procedural safeguards entered into evidence, attached to Upland's October 11, 2018 letter, was in English, suggesting that the copies of parents' rights and procedural safeguards given Parent at IEP team meetings were also in English. Provision of parents' rights and procedural safeguards to Parent at IEP team meetings did not meet the statutory requirement that these rights and safeguards be attached to the assessment plan, and even if provided in Spanish, would not have complied with the requirement that the assessment plan itself be in Parent's native language.

24. Upland argued at the close of the hearing that any failure to comply with assessment plan requirements was harmless error. Upland provided Parent with copies of parents' rights and procedural safeguards both before and after the March 5, 2018 assessment plan was developed. Upland also provided a Spanish language interpreter at the IEP team meetings on October 3, 2018, and November 6, 2018, and offered or gave interpreted explanations of parental rights and procedural safeguards at those

meetings, and sought to discuss Parent's objection to the assessment plan. Prior to filing for due process on the right to assess, Mr. Farenga wrote a letter to Parent that summarized Upland's position, and that letter included a copy of parental rights and procedural safeguards. These actions can only be viewed as reasonable measures to obtain Parent's informed consent if Upland first complied with mandatory notice requirements, which it had not. Reasonable measures to obtain informed parental consent are a supplement to, and do not replace, a school district's obligation to comply with California law's express reassessment plan requirements. The March 5, 2018 assessment plan was required to be in Parent's native language, with a copy of parents' rights and procedural safeguards, and Upland is not exempted from this requirement by subsequent efforts to obtain consent that were less than those required.³

25. Upland did not remedy the failure to give Parent an assessment plan in her native language. Upland was on notice that Parent's native language was Spanish when she required an interpreter to participate in the October 3, 2018, and November 6, 2018 IEP team meetings, and requested a translation of Mr. Farenga's letter on October 16, 2018, and could have given Parent a Spanish language version of the assessment plan, including a copy of parents' rights and procedural safeguards, at any time. Nine months passed between the March 5, 2018 assessment plan and the filing for due process, but Upland made no attempt to correct its initial error.

³ Even if OAH had the authority to find it sufficient for Upland to substantially, rather than actually, comply with the requirement of written notice in Parent's native language by holding IEP team meetings with an interpreter to discuss the assessment plan and explain procedural rights, there was insufficient evidence that the March 5, 2018 assessment plan or parents' rights and procedural safeguards were interpreted in their entirety at those meetings.

26. Had Upland given Parent the March 5, 2018 assessment plan in her native language, with an attached copy of parents' rights and procedural safeguards, the assessment plan was otherwise sufficient. The assessment plan was written in language easily understood by the general public, explained the types of assessments Upland proposed to conduct, and stated that an IEP would not result from the assessment without the consent of Parent. However, the failure to provide the March 5, 2018 assessment plan in Parent's native language, with necessary attachments, constituted fatal flaws in notice that Upland did not cure prior to filing for due process.

27. In summary, Upland failed to meet its burden of proving by a preponderance of the evidence that it took all necessary steps to provide Parent with proper notice of the proposed assessments and to obtain consent to those assessments. Upland cannot obtain an order allowing reassessment without parental consent absent compliance with all proposed assessment notice requirements.

28. Accordingly, Upland is not entitled to conduct a reassessment of Student in the areas of academic achievement, health, intellectual development, social-emotional functioning, and visual motor functioning pursuant to the March 5, 2018 assessment plan without parental consent.

ORDER

Upland is not entitled to proceed with the assessments proposed in the March 5, 2018 assessment plan without the consent of Parent.

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, Student prevailed on the sole issue at hearing.

RIGHT TO APPEAL THIS DECISION

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: March 14, 2019

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings