

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FREMONT UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017021203

DECISION

Fremont Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 27, 2017, naming Parent on behalf of Student.

Administrative Law Judge Rebecca Freie heard this matter in Fremont, California on April 26, and 27, and May 8, 2017.

Alejandra Leon, Attorney at Law, represented Fremont. Karen Russell, Fremont's Director of Special Education, attended the hearing on its behalf.

Parent represented Student. Student did not attend the hearing.

The parties asked to file written closing arguments, and a continuance was granted until May 24, 2017, to allow them to do so. Upon receipt of the written closing arguments, the record was closed and the matter was submitted for decision. On June 6, 2017, the matter was reopened after Fremont's closing argument was stricken from the record because Fremont did not comply with the font size and line spacing requirements in its written argument, as ordered by the ALJ. Fremont filed a compliant written closing argument on June 6, 2017, and the record was then again closed.

ISSUE

Can Fremont complete a psychoeducational assessment of Student absent Parent's consent?

SUMMARY OF DECISION

Fremont claims it needs to assess Student because Student's attendance at school had declined since the beginning of the 2016-2017 school year to the point that she ceased to attend school at the end of October 2016, despite being enrolled in classes for only two periods each school day. At the time of the hearing, she was receiving home instruction from Fremont personnel. Fremont argues that it needs to assess Student so it can accurately determine what placement and services she requires for a free appropriate public education.

Prior to hearing, Student argued that Fremont cannot assess her until January 2019, three years after an individualized education program team reviewed an independent educational assessment report from Dr. Elea Bernou, a psychologist. In Student's written closing argument, however, Student attacked the credibility of Fremont's witnesses, and argued that there was no legal authority for an order that Student need not be provided with special education if an assessment is ordered and Student is not produced for assessment.

Fremont met its burden of proof that it needs to assess Student to determine what is necessary to provide Student with a FAPE. Further, Student's triennial assessment was to have been completed, and an IEP team meeting held, before May 29, 2017, since her initial IEP team meeting was held on May 29, 2014. Accordingly, Fremont may assess Student without Parent's consent. Should Parent fail to produce Student for assessment, Fremont need not provide her with special education until such time as the assessment is completed

FACTUAL FINDINGS

1. Student is 16 years old, and has lived with Parent within Fremont's boundaries at all relevant times. She is enrolled in a high school within Fremont's boundaries.

2. Student qualified for special education during her seventh grade year in May 2014, following assessment by Fremont. Because of her anxiety, she was eligible for special education under the category of emotional disturbance. She has also been medically diagnosed with attention deficit hyperactivity disorder.

3. Student attended a private school when she began kindergarten and continued there until she was enrolled in a Fremont elementary school during her fifth grade year. She also attended sixth grade at that school. Student attended a Fremont middle school for seventh and eighth grades, and began high school in the fall of 2015. She was in the 10th grade for the 2016-2017 school year.

4. Student has a history of school attendance problems for most of her school career, even when she was attending the private elementary school. Student usually does not get up and get ready for school in the morning. She also has a history of developing physical symptoms such as a stomach ache, dizziness or headache, at school. When this has occurred, Parent has come to school and taken her home, or to a physician.

2014 ASSESSMENTS

5. Fremont conducted a psychoeducational assessment of Student in the spring of 2014. The purpose of the assessment was to help determine whether Student

might qualify for special education and related services. She had been on a 504 plan¹ since the fall of 2012, due to her diagnosis of attention deficit hyperactivity disorder, but the accommodations in that plan were not effective in stemming her tardiness and she had failing grades in several classes. The failing grades were attributed to a lack of work completion, and poor test results due to excessive absences.

6. A school psychologist conducted the psychological testing for the psychoeducational assessment in 2014. She administered the Differential Ability Scales, Second Edition, to determine Student's cognitive functioning. Student's intellectual ability was in the average range, and her visual processing scores on the Test of Visual Perceptual Skills, Non-Motor, Third Edition, and the Developmental Test of Visual-Motor Integration, Fifth Edition, were in the average to superior range, showing this as an area of strength. Although Student's scores on the Comprehensive Test of Phonological Processing, Second Edition, were in the borderline to average range, the assessor attributed the borderline scores to Student becoming distracted during the administration of the test.

7. A resource specialist administered the Woodcock-Johnson Test of Academic Achievement, Third Edition, to determine Student's academic achievement. Standard scores between 90 and 110 are in the average range for this instrument. Student's standard scores on the Woodcock-Johnson ranged from 93 (Math Reasoning) to 124 (Oral Expression). On the California Standardized Test in the spring of 2013,

¹ A Section 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a school district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, such as learning.

Student was in the advanced range for English Language Arts, and the basic range for Math. The school psychologist determined that Student did not have a specific learning disability based on all of these scores.

8. The school psychologist observed Student twice, once in the classroom, and once during lunch. Student completed her classroom work before others, although she was not always attentive to instruction. During lunch she socialized with peers and appeared to be happy.

9. Student was interviewed by the school psychologist and complained about stresses at home and at school. One of her complaints was "too much counseling." Student saw an outside therapist weekly (who reported no progress), a psychiatrist every three to four months for medication management, a counselor who worked with Student and Parent weekly from the Truancy Intervention Prevention Program, and a counselor at school whom she sought out for support for social issues. Student complained about Parent not having time for her because he was so focused on her "school problems," and the Truancy Prevention counselor complained about Parent's lack of follow-through, although it was unclear from the report exactly what was being asked of him by the Truancy Prevention counselor and then not completed.

10. Parent, Student, and two of her teachers completed the questionnaires that comprise the Behavior Assessment System for Children, Second Edition. The results of the Behavior Assessment across both school and home settings indicated concerns in the areas of Hyperactivity, Attention Problems, Conduct Problems, Anxiety, Depression, Somatization, Sense of Inadequacy, Self-Esteem, and Relationships with Parents. In addition, Student completed the Revised Children's Manifest Anxiety Scale, Second Edition. Her total Anxiety was in the Moderately Problematic range, with Worry in the Moderately Problematic range, and Social Anxiety in the Extremely Problematic range.

The assessor opined that Student did demonstrate some characteristics of anxiety, although it was not “pervasive in all aspects of her life.”

11. Student’s school counselor completed the Emotional Disturbance Decision Tree. Looking at these results in conjunction with the results of the Behavior Assessment, and the Manifest Anxiety Scale, the school psychologist determined that Student met the criteria for special education under the category of emotional disturbance since social-emotional problems appeared to be impacting her school performance. The assessor also opined that Student, though diagnosed with attention deficit hyperactivity disorder, did not meet the criteria for special education eligibility as other health impaired. Her poor grades were attributed to poor school attendance.

12. Fremont’s psychoeducational assessment was considered at an IEP team meeting on May 29, 2014. Student was found eligible for special education under the category of emotional disturbance.²

13. Student was assessed in the fall of 2014 by Alameda County Mental Health Services which proposed goals to increase her self-awareness and coping skills. The assessor also recommended individual therapy to assist Student in achieving these goals, as well as family therapy to help Parent to respond appropriately to Student’s anxiety and to support school attendance and school success.

DR. BERNOU’S INDEPENDENT EDUCATIONAL EVALUATION

14. Student began attending a Fremont high school in the fall of 2015. School attendance was still an issue. Father asked for an independent educational evaluation at

² None of Student’s IEP’s was introduced and admitted into evidence. Therefore, it is unclear whether she also had secondary eligibility under the category of other health impairment, and what goals, accommodations and related services were offered by Fremont.

public expense, and Fremont contracted with Dr. Elea Bernou, a neuropsychologist, to conduct this evaluation. Dr. Bernou administered several tests to Student to determine her cognition, processing issues, and academic achievement. With the exception of the Visual-Motor Integration Test, Dr. Bernou used different assessment instruments than Fremont in testing Student's cognition, processing, and academic achievement. Her test results were consistent with those reported in Fremont's psychoeducational assessment report. The Behavior Assessment was given to Parent and two teachers, as was the Connors' Rating Scales, Third Edition, which determines whether the test subject shows characteristics of attention deficit hyperactivity disorder, and to what degree.

15. Dr. Bernou observed Student in school. She interviewed several individuals and gave some individuals questionnaires to complete. Individuals who were interviewed or completed questionnaires included Parent, Student, a family friend, teachers, and Student's outside therapist. Like the Fremont school psychologist who assessed Student in 2014, Dr. Bernou found that Student had social relationships with peers, and did not exhibit unusual behavior in the classroom.

16. Dr. Bernou diagnosed Student with attention deficit hyperactivity disorder, generalized anxiety disorder with significant somatization, major depressive disorder (moderate), and a parent-child relational problem. Most of her recommendations focused on Student's school attendance issues as related to her relationship with Parent.

17. Dr. Bernou recommended behavioral services from a nonpublic agency to work in the home with Parent and Student to regularize Student's sleep schedule and assist in getting her up in the morning so she could attend school. It was recommended that Student and Parent receive services from a psychotherapist (possibly through the same nonpublic agency) to address Student's anxiety and school avoidance, and to

control Student's outbursts toward Parent, which were sometimes violent. These types of services in the home are sometimes referred to as "wraparound" services.³

18. Dr. Bernou stressed that Student's current outside therapist should continue to work with Student and Father. Father was urged to spend more time with Student "doing fun and relaxing things" with her, rather than spending much of his time at the computer. He was also encouraged to set firmer limits with Student. Dr. Bernou also recommended intensive parenting classes for Parent that included individualized work for him. She also strongly recommended that all service providers work together and communicate to support Student and Parent in making necessary changes.

19. Dr. Bernou attended an IEP team meeting held in January 2016 to consider her evaluation. The IEP team adopted most, if not all of her recommendations, and they were included in Student's IEP, including a contract with a nonpublic agency to address school attendance issues. Although Parent argued that few of Dr. Bernou's recommendations were included in the IEP developed at this meeting, this was not supported by the testimony of the other witnesses: Tammi Newsom, Student's resource teacher and case manager; Amanda Garcia, school psychologist; and Jonelle Brown, program manager. Each of them have attended several, if not all of Student's IEP team meetings since the beginning of the 2015-2016 school year. All were very credible, as will be discussed below.

20. The IEP team developed a protocol so that school staff could deal consistently with Student's complaints of pain and physical ailments.⁴ When Student

³ Wraparound services are flexible social services tailored to individual families that are intended to provide alternatives to group home care. (See Welf. & Inst. Code, §§ 18250 et seq.)

complained that she felt ill, staff called Parent and sent Student to the office. If medication was needed, the school nurse administered it. Staff then gave Student some time alone or with a counselor, for the medication (if given) to take effect, and if medication was not administered, to relax. She would then return to class. Staff would call Parent to pick her up from school and seek medical attention only if Student did not improve after 30 minutes. Student's attendance began to improve after the IEP team meeting, but deteriorated the last two weeks of the 2015-2016 school year.

2016-2017 SCHOOL YEAR

21. The IEP team decided before the beginning of the 2016-2017 school year, that Student would receive home instruction for four classes, and attend only two classes each day at school during fifth and sixth periods.⁵ However, by the end of October 2016, Student had stopped attending these two classes. She was not going home ill; she simply did not come to school. However, home instruction continued, although most of the time the instruction occurred in a classroom without other students, not in Student's home due to distractions in that environment.⁶

⁴ Although Student's closing brief claimed that the protocol was developed before 2016, this does not change the conclusion that it was consistently followed by Fremont following the January 2016 IEP team meeting.

⁵ There was no evidence as to how this came about.

⁶ Parent testified that some of the home-hospital instruction did not occur, but this is not an issue and no factual findings are made in this regard.

IEP Team Meeting December 16, 2016

22. Fremont held an IEP team meeting on December 16, 2016, to discuss Student's continuing attendance issues. Parent attended the meeting as did Student's academic home instructor, several administrators, and special education personnel assigned to Student. Three general education teachers attended the first part of the meeting. Student's personal therapist was present via telephone. Ms. Leon led the meeting. Student also attended a portion of the meeting.⁷

23. At this meeting Fremont proposed that Student be provided with home instruction by a nonpublic school, which Dr. Bernou had recommended if the wraparound and counseling services of the nonpublic agency did not improve Student's attendance. Student's therapist suggested that the nonpublic school provide home instruction, but not at Student's home due to distractions there. The therapist also suggested that the team consider placing Student in a nonpublic school. The team discussed transitioning Student from home instruction by Fremont personnel to home instruction by the nonpublic school, with the ultimate goal of Student returning to Fremont to attend a comprehensive high school for the 2017-2018 school year, and this was the IEP offer.⁸

24. Towards the end of the IEP team meeting, it was suggested that since Student's triennial assessment was due in the spring of 2017, it might be helpful for an assessment to be done earlier to provide the team with additional information. Parent

⁷ Student came into the meeting after it started to deliver something to Parent. It was unclear whether she stayed for the rest of the meeting.

⁸ Since the IEP was not admitted into evidence, only Parent's recording of the IEP meeting admitted into evidence was available to memorialize the offer. It was not sufficiently clear to support more specific factual findings about the offer.

disagreed, claiming that the triennial assessment was not due in the spring because Dr. Bernou had completed her independent educational evaluation in January 2016. Fremont advised Parent that an assessment plan would be sent to him.

Fremont's Assessment Plan

25. On January 19, 2017, Fremont sent an assessment plan to Parent which was accompanied by a procedural safeguards pamphlet. Both documents were in English, his native language. Fremont proposed to assess Student in the areas of Academic Achievement, Health, Social-Emotional, Adaptive Behavior, and Post-Secondary Transition. The assessment would also include a records review, an interview of Student, an observation of Student during instruction, and Parent reports and teacher reports. Ms. Newsom, or another resource teacher, would conduct the academic achievement testing as well as post-secondary transition planning testing, using standardized instruments that were designed to be used for that purpose and were not discriminatory. Ms. Garcia, or another school psychologist, would assess Student in the areas of social-emotional issues, and adaptive behavior. To do this, standardized test instruments that were nondiscriminatory and designed for this purpose would be used.⁹ A behavior specialist would also work with the school psychologist to address Student's attendance issues.

26. On January 20, 2017, Father returned the assessment plan to the school psychologist, refusing to consent to it. Fremont filed its request for due process to compel an assessment without Parent's consent on February 27, 2017.

⁹ Fremont established that cognitive testing and testing for possible processing disorders was not necessary, since the results in those areas in the 2014 Fremont assessment report and Dr. Bernou's report were very similar, and because it was unlikely there would be changes in these areas, given Student's age and development.

WITNESS CREDIBILITY

27. Three Fremont employees testified at hearing.¹⁰ The first was Ms. Garcia. She is a Fremont school psychologist who is familiar with Student. She has attended most if not all of Student's IEP team meetings since Student began attending high school and provided Student with some counseling during the 2015-2016 school year. Ms. Garcia has a pupil personnel services credential and has been a school psychologist in California beginning in 2014. She was a school psychologist in the New York City School District for the 2013-2014 school year, and completed field work and her internship to become a school psychologist in New York during the two previous school years. Ms. Garcia was open and spontaneous when she testified, and responded to questions thoughtfully. She testified knowledgably about Student and the proposed social-emotional, and adaptive behavior, testing that would be conducted, and why the services of a behaviorist would be helpful. Her testimony was given great weight.

28. Tammy Newsom was Student's resource teacher during the 2015-2016 school year, and has been her case manager since Student began attending high school. Like Ms. Garcia, she has attended most, if not all of the 10 or more IEP team meetings that have been held since Student began attending the high school in the fall of 2015. Ms. Newsom received her Master's degree in special education in 2012. She has held a special education teaching credential since 2010, and has been a resource specialist

¹⁰ In his written closing argument Parent attacks the credibility of these witnesses. However, there have been at least 10 IEP team meetings since Student began attending high school, and it is not expected that members of the IEP team who attended most, if not all of these meetings, would each have a perfect recollection as to what occurred at a particular meeting, especially since IEP documents were not available to refresh their memories.

teacher since that time. When she testified, it was clear that she is concerned about Student and her academic progress. Ms. Newsom responded to questions with ease and transparency. She was a very credible witness.

29. Jonelle Brown is a program specialist for Fremont, a position she has held since August of 2015 or 2016. She was regular classroom teacher from 2003-2006. From 2006-2016, she was a special day class teacher. Ms. Brown taught English in special day classes at Student's high school during her last eight years as a teacher. Ms. Brown has had a special education teaching credential since 2009. Ms. Brown responded to questions in a straightforward manner, with concise, but complete answers. The information she gave concerning Student's progress towards receiving a high school diploma on schedule was unrefuted and credible.

NEED TO ASSESS STUDENT

30. Fremont had many reasons for wishing to assess Student in January 2017, and these reasons were still valid at the time of the due process hearing. First, it was unclear what, if any academic progress Student had made during the 2016-2017 school year. Student was enrolled in two classes at the high school but stopped going to those classes at the end of October 2016. The home instructor reported at the December 2016 IEP team meeting that much of her time with Student was spent working on World History assignments because Student was resistant to instruction in English Language Arts.

31. Student was still receiving home instruction from Fremont at the time of the due process hearing,¹¹ but Ms. Newsom reviewed some of Student's work and talked to the home instructors, and determined that Student was far behind in the

¹¹ It was unclear how many hours of home instruction Student was receiving each week, but it was less than two to three hours each day.

classes that were part of home instruction. It was reported that Student was on her phone much of the time when she was being taught, and she was not completing required work. For example, Student was given a 20 question test in one subject, and in two days she only completed answers for 10 of the questions.

32. At this time, it is unclear whether Student will be able to graduate from high school in 2019, when the rest of her class will be graduating. Student would need to have 120 units of credit at the end of the 2016-2017 school year in order to be on track to graduate in 2019. At the end of the first semester of the 2016-2017 school year, she had 70 units of credit for a year and a half in high school. If Student successfully completed the course work in progress for the spring semester of 2017, she would have 30 more units, but it was unclear during the hearing whether this would occur, especially since she had not attended the two classes she was enrolled in for fifth and sixth periods since the end of October 2016. Academic testing would provide useful guidance in determining Student's schedule for the upcoming year, as well as determining academic areas of need that the IEP will need to address.

33. Vision and hearing screenings need to be administered by the school nurse to ensure that Student does not have vision or hearing deficits that affect her ability to access the curriculum.

34. Student's poor school attendance must be addressed if she is to graduate from high school at the end of her fourth year of high school. As part of the assessment process, a school psychologist and behaviorist will work together to develop a behavior plan to address Student's anxiety, attention deficit hyperactivity disorder, and other issues that appear to be affecting her school attendance. As a team, they will review records, observe Student, and collect information from teachers, Parent, Student, and possibly others. The school psychologist and behaviorist will use this information to determine Student's social-emotional functioning and adaptive behavior, and how these

affect her school attendance. The school psychologist will conduct testing to obtain additional information about Student in the areas of social-emotional functioning and adaptive behavior. This information will help school staff by providing them with guidance as to the most effective means to instruct Student and provide her with a FAPE.

35. Student requires a transition plan, and a resource specialist teacher will complete an assessment in this area and develop a draft transition plan. The resource specialist will administer standardized questionnaires and surveys to Student to determine her interests and preferences, so Student can effectively plan for what will happen after she graduates from high school, whether it is college, or entering the workforce. The results of this testing will help Student and Fremont to determine if enrollment in a job-training program would assist Student in preparing for life after high school. The goal for all special education students is that they are prepared for employment, further education (if appropriate), and independent living. There was no evidence that Student is being appropriately prepared to live independently, enter college, or be successful in employment following high school.

36. Fremont's proposes assessments which will be standardized and normed, and administered in Student's native language, English. Qualified personnel will conduct the testing and will ensure that it is done in a manner that is not racially, culturally or sexually discriminatory. Written reports will be prepared and discussed at an IEP team meeting so that an IEP can be developed to meet Student's unique needs, and provide her with a FAPE for the 2017-2018 school year, as well as putting her back on track to graduate from high school with her peers.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹²

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 et seq. (2006); 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 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 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

¹² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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.

4. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. ___, 137 S.Ct. 988, 996, the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at 999 (citing *Rowley*, at pgs. 203-204).) The Court went on to say that the *Rowley* opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387];.) In this matter, Fremont had the burden of proof on the sole issue decided.

MAY FREMONT ASSESS STUDENT WITHOUT PARENT'S CONSENT

6. Fremont contends that it needs to assess Student because her triennial assessment is now legally required, and will be overdue when this Decision is issued. In addition, Fremont needs current information about Student because she is currently not making much progress in meeting her goals, and she continues to have difficulty going to school. Fremont has asked that if OAH orders Student to be assessed without Parent's consent, and Student is then not made available for testing, it can be permitted to terminate Student's special education services.

7. In her closing argument Student attacked the premise that Fremont could deny her special education services if Parent did not comply with an ALJ's order to allow assessment without parental consent. Student also attacked the accuracy of the testimony of Fremont's three witnesses, citing exhibits that were not admitted into evidence. She also made claims that were not supported by any testimony, or supported by evidence that was not admitted (or in some instances not even introduced) to contradict that testimony. Student also cites several portions of federal regulations in her closing argument in an attempt to support her position that a school district cannot

exit a child from special education if a parent refuses to produce his child for assessment after being ordered by a hearing officer or ALJ to do so. None of these cited provisions support Student's argument, nor does any judicial or administrative decision.¹³

Reassessments

8. 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 purpose 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 Comments 71 Fed. Reg. 46640 (Aug. 14, 2006).)

9. 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

¹³ Before and during the hearing, Student contended that since Dr. Bernou assessed student in the fall of 2015, finalizing her independent educational evaluation report on January 27, 2016, when the IEP team meeting was held to consider the report, Student cannot be assessed by Fremont until January 2019. However, this argument was not made in her closing brief.

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).)

10. The obligation of a school district to assess a student every three years reflects the requirement that IEPs be based on current information, for example the requirement about annual goals and present levels. (Ed. Code § 56345.) See, e.g. *Cloverdale Unified School Dist. v. Student* (OAH, March 21, 2012, No. 2012010507.) 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. A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Corona-Norco Unified School Dist.* (SEHO 1995) 22 IDELR 469, 22 LRP 3205.)

Procedural Requirements and Parental Consent

11. 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 procedural rights under the IDEA and companion State law. (*Id.*) The assessment plan must: appear in language easily understood by the public and in the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must give the parents and/or student 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

12. Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (*Gregory K.*) (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.) In *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*), the court concluded that "a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule."

13. Parents who want their children to receive special education services cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress* 64 F.3d at pp. 178-79; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.) A school district has the right to evaluation by an assessor of its choice. (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160.)

14. 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 parental consent.

15. If a school district makes an offer of a FAPE that a parent refuses to consent to, the school district is required to file a due process hearing request "with

reasonable promptness” pursuant to Education Code section 56346, subdivision (f). (*I. R. v Los Angeles Unified School District* (9th Cir. 2015) 805 F. 3d 1164, 1170 (*I.R.*)). This is true even if the parent consents to a part of an IEP, but not to the entire IEP, and the portions not consented to are necessary for a student to receive a FAPE. (*Id.* at 1167-1168.) What constitutes a reasonable period of time to act is a determination for the ALJ to make. (*Id.* at 1170.) Neither federal or California special education laws or regulations set a specific number of days for a school district to file a due process hearing request after a parent refuses to fully consent to an IEP.

Transition Planning

16. For each student, beginning with the first IEP to be in effect when the student reaches age 16, the IEP must include a statement of the transition service needs of the student. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).) Transition services are defined as a coordinated set of activities that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation. It is based on the student’s needs, taking into consideration the student’s strengths, preferences and interests; and includes instruction, related services community experiences, the development of employment and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and a functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

Analysis

17. Fremont sent an assessment plan to Parent in a timely manner on January 19, 2017. The notice of procedural safeguards was included with the assessment plan,

and both documents were in English, Parent and Student's native language. The plan was sent following an IEP team meeting on December 16, 2016, where Fremont made an offer of placement and services, but Fremont members of the team, and Student's private therapist, raised concerns about whether the offered placement and services would provide her with a FAPE. Parent responded by declining to sign consent for the assessment the day after he received it. Fremont filed its request for due process five weeks later. Fremont needs to assess Student to obtain necessary information so that it can offer her a FAPE in future IEP's. This situation is analogous to that in *I.R.* where the parent provided only partial consent to an IEP, and the school district's delay of more than a year denied the Student a FAPE. The time period between Parent's refusal to consent and the filing of this action is reasonable. Fremont met all procedural requirements in requesting reassessment.

18. Student's school attendance has always been problematic. Fremont has tried many strategies to cope with this problem. For example, following the IEP team meeting on January 27, 2016, Fremont implemented many of Dr. Bernou's recommendations, including contracting with a nonpublic agency to provide in-home behavior services and counseling to Student and Parent to address attendance issues. Although there was a period after that when Student's attendance improved, her attendance during the last two weeks of the 2015-2016 school year reverted back to what it had been in the fall. During that January 2016 IEP team meeting, protocols were developed for Fremont to follow if Student complained of physical ailments during the school day, and these protocols seemed to be somewhat effective in keeping her in school, but eventually they were no longer working.¹⁴

¹⁴ Student's contention in the written closing argument that these protocols were developed in the fall of 2015 is noted, but not supported by the evidence.

19. For the 2016-2017 school year, it was decided that Student would take two classes at the comprehensive high school, for fifth and sixth periods, and home instruction would be given for other required courses. However, Student stopped attending the two classes at the high school at the end of October, so once again another promising strategy to improve her attendance failed.

20. It was clear at the December 16, 2016 IEP team meeting, that the team needed additional information about Student, that could only be obtained by conducting comprehensive assessments, so Fremont could make an IEP offer that would address Student's problematic attendance and offer her a FAPE. Further, Student's sixteenth birthday was approaching and Fremont needed to have a post-secondary transition plan in place when that occurred. Given all of the strategies attempted to improve Student's attendance during the 2015-2016 and 2016-2017 school years, and the lack of success with these strategies, Fremont was clearly obligated to conduct a reassessment of Student. Further, it was two-and-a-half years since it conducted its initial assessment of Student, and the time to conduct a triennial assessment of Student was rapidly approaching.

21. Fremont was also concerned that Student's academic progress was not sufficient to enable her to amass the necessary credits to graduate from high school with her peers. In order to do so she would need 120 units of credit by the end of the 2016-2017 school year. At the end of the first semester of the 2016-2017 school year, Student had only 70 units of credit. At the time of the hearing, there was evidence that she was not attending, and had not attended her fifth and sixth period classes since October 2016, so it was quite unlikely that she would receive credit for those classes.

22. Fremont needed to assess Student in the areas of social-emotional, adaptive behavior, and health to develop strategies to effectively address her attendance problems. Fremont also needed to assess Student's academic achievement

to determine what deficiencies she might have in various areas of study, so that an IEP could be developed to address those deficiencies, and hopefully put her back on schedule to graduate with her peers in 2019. Post-secondary transition planning was also important so that a meaningful transition plan could be developed by the IEP team to ensure that she would be successful after high school graduation, whether she chose to continue her education, or join the workforce. Finally, Fremont was obligated to conduct the triennial assessment of Student in the spring of 2017, and to have an IEP team meeting to discuss the assessment no later than May 29, 2017. Therefore, even if it were to be found (and it is not) that Fremont did not need to assess Student sooner than the time for the triennial assessment, it clearly did need to conduct that triennial assessment.

23. In summary, Fremont met its burden of proof by a preponderance of the evidence that reassessment of Student in the areas of academic achievement, health, social-emotional, adaptive behavior, and post-secondary transition planning was necessary for the IEP team to develop an IEP that would provide Student with a FAPE in the future, and to increase her chances of graduating with her class in 2019. The reassessment of Student was warranted at the time the January 19, 2017 assessment plan, and was presented to Parent. Fremont also proved that it complied with all procedural requirements for obtaining parental consent to the proposed assessments. Therefore, Fremont is entitled to assess Student pursuant to the January 19, 2016 assessment plan, without Parent's consent.

24. If Parent does not cooperate with Fremont's assessors and does not make Student reasonably available for assessment, Fremont has no obligation to provide Student with special education and related services. (*Gregory K., supra*, 811 F.2d at p. 1315.) In her closing argument Student claims that *Gregory K.* should not be controlling because it is a 1987 case, and the IDEA has been changed since that time. But Student

does not identify any particular provision of the IDEA relevant to the duty to assess that has changed in any way relevant here.

25. In *Gregory K., supra*, 811 F.2d 1307, the Ninth Circuit Court of Appeals determined that the predecessor of the IDEA permitted a school district to stop providing special education services if a parent refused to consent to the reassessment of his child. *Gregory K.* continues to be followed and cited throughout the United States by both hearing officers and ALJ's conducting due process hearings pursuant to the IDEA, as well as federal district courts and appellate courts in many circuits. (See *Johnson v. Duneland Sch. Corp., supra*, 92 F.3d 554, 558; *M.L. v El Paso Independent School Dist.* (W.D. Tex. 2009) 610 F.Supp.2d 582, 599; *In re Student with a Disability* (Nevada State Educational Agency 2011) 111 LRP 56157; *Student v. Gwinnett County School District* (Georgia State Educational Agency, January 4, 2010) 53 IDELR 341, 7 ECLPR 72, 6 GASLD 23, 110 LRP 2343.) Fremont is not required to provide special education services to Student if she and Parent do not make her available for assessment and cooperate with the assessor's reasonable requests.

ORDER

1. Fremont is entitled to reassess Student according to its January 19, 2017 assessment plan, without Parent's consent.

2. Fremont shall notify Parent in writing, within 20 business days of the date of this Decision, of the days, times, and places Parent is to present Student for assessment, and Parent shall reasonably cooperate in presenting her for assessment on those days, and times, and in those places. The assessment will take place over the summer of 2017.

3. If Student is unable to appear for assessment, by reason of illness or other such cause unrelated to the parties' disputes, Parent shall promptly communicate this fact to Fremont and the parties shall mutually agree on days and times for the

assessment to be conducted that are no more than 30 days from the dates that Fremont originally proposed.

4. Parent shall timely complete and return any documents reasonably requested by Fremont as a part of the assessments.

5. Parent shall not attempt to attach any conditions to Fremont's assessments, including but not limited to Parent's presence during an assessment, the methods used in an assessment, the assessment instruments to be utilized, or the identity or qualifications of the person conducting an assessment.

6. If Parent does not make Student available for assessment, or fails to agree to reasonable rescheduling if required by paragraph 3, above, or does not timely complete and return any documents in compliance with this Order, Fremont shall not be obligated to provide special education and related services to Student, or otherwise to provide Student the rights of a special education student, until such time as Parent complies with this Order.

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, Fremont prevailed on the sole issue heard in this case.

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: June 16, 2017

/s/

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings