BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: GILROY UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2018031204

DECISION

Gilroy Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 28, 2018, naming Student.

Administrative Law Judge Rebecca Freie heard this matter in Gilroy, California on April 24, 25, and 26, 2018.

Leah Smith and Gorev Ahuja, Attorneys at Law, represented Gilroy. Anna Pulido, Director of Student Services, attended the hearing as Gilroy's representative.

Parents represented Student. Father attended the hearing on all days, with the exception of the afternoon of April 26, 2018. Mother attended the entire hearing, with the exception of a portion of the morning of April 25, 2018. Student was present during the hearing when Mother attended.

At the parties' request, a continuance was granted to May 21, 2018, to allow them to file written closing briefs. An order was issued and sent to the parties on May 2, 2018, setting the parameters for written closing arguments. Gilroy and Parents timely filed written closing arguments. The record was closed and the matter was submitted for

decision on May 21, 2018.

ISSUES

1. Does Gilroy's November 29, 2016, individualized education program offer, as subsequently amended, constitute a free appropriate public education in the least restrictive environment, such that the IEP can be implemented without parental consent? [1]

2. May Gilroy assess Student pursuant to the assessment plan dated January 30, 2018, without parental consent?

SUMMARY OF DECISION

In this Decision, it is found that Gilroy did not make a clear formal written offer of a FAPE as required by law. Gilroy never completed the IEP team meeting that began on November 29, 2016, with the presentation of a formal offer. There were several subsequent meetings where a number of documents were developed. Gilroy contends

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[1] This issue was worded differently in the order following the prehearing conference. In the order following the PHC, the issue was worded "Does Gilroy's offer of placement and services contained in the Individualized Education Program Amendment of November 16, 2017 constitute a free appropriate public education in the least restrictive environment?" The issue was worded similarly in the complaint. However, during the hearing the undersigned ALJ and the parties held discussions on the record further clarifying the issue. The issue contained herein is consistent with those discussions. The ALJ has authority to redefine a party's issue so long as no substantive changes are made. (*J.W. v. FresnoUnified School Dist*. (9th Cir 2010) 626 F.3d 431, 442-443.)

these documents, combined with the November 29, 2016 IEP, constitute an offer of a FAPE that can be implemented without parental consent. However, the IEP process never concluded, and no clear formal written offer was developed by the full IEP team in a meeting. Because the IEP process was significantly procedurally deficient, Student's levels of performance and functioning, the adequacy or appropriateness of the goals, any of the written purported offers of FAPE, and other IEP components contained in some of those documents are not addressed in this Decision. Gilroy may not implement the IEP dated November 29, 2016, as subsequently amended, without parental consent.

Gilroy established that it requires current assessment data concerning Student to make an IEP offer of a FAPE. This Decision holds that Gilroy met the procedural requirements for obtaining parental consent to assess Student, and that it has qualified personnel to assess Student. Therefore, Gilroy may assess Student without parental consent.

FACTUAL FINDINGS

JURISDICTION

1. Student is a handsome boy, described by many witnesses as "sweet," who is 10 years old, and has resided with Parents within Gilroy's boundaries at all times at issue. Student did not attend preschool or kindergarten. He was found eligible for special education and related services on December 3, 2014, when he was in first grade..

2. Student's last consented-to IEP was developed on November 10, 2015, and amended on May 25, 2016. Student's primary disability is autism, with a secondary disability of speech and language impairment. At that time Student was enrolled at Las Animas Elementary School in a special day class for children with autism. At the IEP team meeting on May 25, 2016, Parents complained that Student was not receiving proper instruction, and stated they would home school Student unless he was enrolled in a

noncategorical special day class program for the following school year. A noncategorical special day class consists of students who have IEPs, but are eligible for special education due to a variety of disabilities, rather than just autism. It was unclear whether Student attended school for his entire first-grade year, which was the 2014-2015 school year, or his entire second grade year, which was the 2015-2016 school year.

2016-2017 SCHOOL YEAR

3. The 2016-2017 school year was Student's third-grade year. He was eight and a half years old when it began. There was no evidence as to whether Student attended school when the school year started, or was being home schooled. He was enrolled at Luigi Aprea Elementary School in a noncategorical special day class in late October 2016. When the IEP team met on November 29, 2016, for an annual IEP team meeting, Student had been enrolled for 19 school days at Luigi Aprea, but he attended school for only 12 of the 19 school days. He presented as very anxious and shy in the school setting.

IEP Team Meeting November 29, 2016

4. Parents and Student attended the November 29, 2016 IEP team meeting, as did the special day class teacher, Student's occupational therapist, the school psychologist, and Student's speech and language therapist. Parents excused, in writing, the presence of a general education teacher. Parents were provided with the notice of procedural safeguards. Parents agreed with the district team members that Student's primary eligibility category was autism, with a secondary eligibility category of speech and language impairment. Although the IEP reported Student's native language was Italian, there was no evidence he did not speak English at school, and no one attributed his speech and language difficulties to him being bilingual.

5. The team discussed Student's present levels of academic achievement and

functional performance at school. There was disagreement between Parents and the Gilroy team members about Student's levels of performance with Parents contending that Student had much higher levels at home. However, this was understandable since the Luigi Aprea staff had very little time with Student to be able to accurately assess his skill levels before the IEP team meeting on November 29, 2016.

6. The document from this meeting appears to be a complete IEP. However, although the IEP contains two pages that start with a heading "South East Consortium SELPA [Special Education Local Plan Area] Offer of FAPE—Services," the notes pages do not reflect any discussion of this offer at the IEP team meeting on November 29, 2016, and it is found that there was none. The IEP document contains the goals from previous IEP's that Gilroy was implementing, and proposed new goals. The team reviewed progress on occupational therapy goals, although the IEP notes do not reflect that progress was reviewed on all goals. Nor do the notes reflect that the new proposed goals were reviewed. The notes state, cryptically, that "The meeting needed to be paused and team agreed to reconvene to finish IEP." Student never returned to school that school year.

7. In January 2017, Gilroy attempted to reconvene the IEP team meeting. It held a meeting on January 31, 2017, to which Parents were invited but did not attend. The school team members discussed apparent safety concerns of the family and that the matter had been referred to the district's attorney because Student was not attending school. There is mention in the notes from that meeting that Student was undergoing an independent educational assessment.

IEP Team Meeting March 20, 2017

8. Student's IEP team met again on March 20, 2017. Mother attended the meeting, but did not sign the attendance page. She was provided with the notice of procedural safeguards. An attorney representing the family also attended, as did a

Gilroy attorney. School team members included the special day class teacher, Student's occupational therapist, his speech and language therapist, and the school principal. There was an unidentified administrator, and another unnamed participant who signed the attendance page and was identified as "Coordinator."

9. The meeting was very contentious. Again there was a discussion of Student's levels of performance as reported by school personnel in the November 29, 2016 IEP. Again, Mother and her attorney were concerned that the reported levels were much lower than those Student exhibited at home, as reported by Mother and the family attorney. Mother became so upset she left the meeting, although she later returned. At the end of the meeting Mother questioned the team about her concerns, but did not allow them to respond. A break was taken due to Mother's frustration, and then the meeting was adjourned.

10. During the meeting the team discussed the possibility of Student returning to school, pending results of an independent assessment Gilroy had offered to fund following the November 29, 2016 IEP team meeting.[2] Gilroy offered Student a modified schedule, as well as the possibility that Student could attend a special day class at another school site. The document produced at this meeting consisted of notes beginning on a page titled "IEP Amendment(s) / Addendum." The notes do not reflect any discussion of an offer of a FAPE and services, and it is found that none occurred. Student did not return to school after the meeting. However, Gilroy personnel were to develop new, more challenging goals to replace the proposed goals contained in the IEP document from November 29, 2016. On or about March 31, 2017, Gilroy sent nine new

[2] Although Gilroy offered to fund an independent educational evaluation there was no evidence that this assessment was completed or presented to Gilroy during the 2016-2017 school year.

proposed IEP goals to Parents.[3]

IEP Team Meeting May 12, 2017

11. Gilroy convened another IEP team meeting on May 12, 2017. Father attended the meeting as did the special day class teacher, Student's occupational therapist, Student's speech and language therapist, the school principal, a Gilroy attorney, and an unidentified administrator. Father was provided with the notice of procedural safeguards. He presented the team with a letter explaining why Parents disagreed with the school's statement of Student's present levels. Father reported that Student was reading, writing, and spelling words with five or more letters, was reading at a late second grade to early third grade level, and could count to 100, not 20 as stated in the IEP document of November 29, 2016. These levels were significantly higher than previously reported by the Gilroy members of Student's IEP team the prior November. Father also presented the team with a Kaiser assessment that diagnosed Student with Autism Spectrum Disorder.

12. Father asked that speech and language impairment be removed from the IEP as a secondary eligibility category. The speech and language therapist explained the different types of conditions that could qualify a student for special education due to speech and language impairment, including pragmatic language deficits. She explained that Student needed to be assessed before changing his eligibility category of speech and language impairment. The team discussed the need to conduct triennial evaluations, and also asked that Student be returned to school. It was suggested that Student attend school for a partial day, and that the family provide the special day class

[3] It was unclear whether the goals were sent directly to Parents, or to their attorney.

teacher with a detailed list of the present levels he was showing at home, prompts that were effective in getting him to complete work, and samples of work that was presented to him at home.

13. Father then shared the family's concern about Student's safety at school, because he was alone at recess, and the playground area supposedly lacked gates. He also asked that an adult prompt Student to engage and interact with other children, and the school team members agreed to this request. Gilroy team members informed Father that goals could be modified to reflect Student's demonstrated abilities at home when they were also reflected in the school setting. Father signed the attendance sheet and the meeting ended. The document produced at this meeting began with another IEP amendments page with notes, followed by two documents Father submitted to the team concerning Student's levels of performance and the family's disagreement with Gilroy's levels as reported in the IEP of November 29, 2016. There is nothing in the notes that reflect a discussion of an offer of a FAPE and services for Student at this meeting, and it is found that there was none. Student did not return to school after this meeting.

14. On May 22, 2017, Gilroy sent a prior written notice letter to Parents with a proposed offer of services and placement that would provide Student with a FAPE, and summarizing the family's involvement with Gilroy from the time Student was enrolled in 2014. However, this proposed offer of services and placement had never been part of the IEP team meeting discussions. Gilroy made the following offer in the prior written notice: placement in the noncategorical special day class at Luigi Aprea, speech and language services twice a week in 25 minute sessions, occupational therapy once weekly for 30 minutes, and extended school year services. Gilroy informed Parents that if Student did not return to school, Gilroy would file a request for due process with OAH. Parents informed Gilroy that Student was not returning, and Gilroy filed a request for due process with OAH on May 30, 2017.

2017-2018 SCHOOL YEAR

Settlement Agreement

15. In early September 2017, Parents and Gilroy entered into a settlement agreement to resolve the dispute that had arisen between them. Gilroy dismissed its request for due process. The settlement agreement called for Student to be placed in a noncategorical special day class at Rucker Elementary School, which Mother had recently observed. A plan was made for Student to be gradually transitioned back to school. The transition plan called for Student to be assigned a one-to-one paraeducator until October 13, 2018, to provide him with pre-teaching and tutoring, and to assist him with socialization. Student was to receive the speech and language and occupational therapy services as outlined in the May 22, 2017 prior written notice. The parties agreed that the goals developed after the IEP team meeting on March 20, 2017, were to be implemented. The parties believed an independent assessment funded by Gilroy would be completed by October 13, 2017, and an IEP team meeting was scheduled for that date. The parties agreed that Student's triennial assessments, due to be completed by early December, with a corresponding IEP team meeting, would be deferred to February 2018, with an assessment plan to be sent to Parents no later than December 6, 2017.

16. The settlement agreement was not developed at an IEP team meeting, and is not an IEP. It specifically states is not an offer of a FAPE and services. Gilroy contends this settlement agreement constituted part of its IEP offer, to the extent it calls for the goals from March 2017 to be implemented.

The Rucker Special Day Classroom

17. Student returned to school at Rucker on September 8, 2017. The Rucker special day classroom in which Student was placed was taught by two halftime teachers,

Christine Boles and Beth Enos.[4] Each taught the class for a week, and then had the next week off. However, the classroom schedule, structure, and program were the same from week to week. The classroom consisted of 10 to 12 students taught by one of the two credentialed special education teachers, assisted by three paraprofessionals. Students worked at levels ranging from kindergarten to grade five. The class was composed of children who, in general education, would be in grades three through five. For academic subjects, such as reading, written expression, and mathematics, students worked in small groups, determined by skill levels. Student was in the highest reading group, and the mid-level math group. Paraprofessionals worked with the small groups, with the teacher checking in with each group. Students moved from station to station, depending on the subject being taught at that time of day, and the group they were in. There was a token economy in the classroom, and all of the accommodations in Student's IEP from 2015, as amended in May 2016, were embedded in the classroom.[5] The class joined general education students for physical education.

18. Initially Student communicated only with adults, and did not seek out

[4] Ms. Boles has been a teacher for over 20 years, and has been a special education teacher for 13 years. She has a mild to moderate educational specialist credential, and an autism spectrum disorders authorization certificate. She has been a Gilroy employee for three years. Ms. Enos has been a teacher since 2013. She has a special education credential, and this is her first year as a special education teacher.

[5] A token economy is a system where students are rewarded for being compliant and completing work with tokens such as stickers or a tally kept on a chart. Tokens can later be exchanged for a small reward such as a toy, or allowing the student to engage in a preferred activity.

peers. However, by the time he stopped attending Rucker in mid-November he was making friends and playing with others during recess, sometimes initiating the interaction by asking others, including general education students, to run with him; running was one of his favorite activities.

19. Student worked much more slowly than other children in the special day classroom, so when everyone else in the small group was done with a worksheet, Student would have only completed half the worksheet. He also became anxious if he did not know what was going to happen next, or if he saw Mother's car in the parking lot when walking back from computer class towards the end of the day.

20. Each Monday students took home a packet of homework. They were required to study their spelling words, and complete spelling worksheets during the week. They were also required to read at home for 15 minutes each evening, and write a sentence about what they had read. Student had a good vocabulary. Parents felt the work they saw Student bring home was below the level they believed he was capable of doing, based on their experience with him at home. They asked that Student be given more challenging work, and as a result Student moved up to the third grade spelling list, and was reading books that were above first grade level. Parents also asked for math homework to be sent home, but this was refused because the teachers sent the same type of homework home with each student (although spelling words would come from different grade level lists), and they did not want to send home additional homework for Student especially since he was not always turning in a completed packet on Friday.

Independent Educational Evaluation

21. During the summer of 2017, the parties agreed that Gilroy would fund an independent psychoeducational evaluation of Student. The purpose of the assessment was to determine Student's special education eligibility category, and to determine what type of learning/processing disorder he might have that was impeding his educational

progress.

22. Jeffrey Bettencourt conducted the assessment. Mr. Bettencourt is a school psychologist who works three days a week for a public high school district in Santa Clara County, with the remainder of his week spent in private practice. He did not work for Gilroy. He holds licenses as an educational psychologist, a marriage and family therapist, and a professional clinical counselor. He has been licensed as a marriage and family therapist since 1992, and obtained his license as an educational therapist in approximately 2000. He holds a master's degree in marriage and family therapy, and also holds a pupil personnel services credential. He had conducted hundreds of psychoeducational assessments as school psychologist, at the time of hearing, and was qualified to administer an independent educational assessment of Student. As is the customary practice, he was required to enter into a contract with Gilroy to ensure payment for the assessment. This did not make him an employee or agent of Gilroy, and he testified credibly that he envisioned his role in conducting an assessment of this kind to consider what was best for the student he was assessing, irrespective of what others might want.

23. Mr. Bettencourt initially met with Parents and Student in his office. He tried to administer the Wechsler Intelligence Scale for Children, Fifth Edition, but Student was so anxious he could not be tested. Therefore, Mr. Bettencourt determined that Student should be assessed at home. Mr. Bettencourt went to Student's home on 15 separate dates between August 17, 2017, and September 30, 2017, and attempted to administer instruments to measure Student's cognition and academic achievement. He spent approximately one hour at Student's home each time.

24. During the first eight appointments Mr. Bettencourt tried to administer subtests from the Wechsler to measure Student's cognition. However, although Student was able to complete the sample subtests, he could not complete the formal subtests.

This was due to his slow processing speed, and memory deficits, as well as distractibility. To complete the sample testing, Student needed to have instructions repeated frequently. Although instructions could be repeated during the sample testing, they could not be repeated during formal testing as doing so would violate test protocols and invalidate the results. Further, Student struggled to maintain attention during the testing. He would frequently become distracted from the task at hand, lose focus, and stare away from the test, looking out a window, for example. This was particularly concerning during timed tests.

25. During the last seven appointments Mr. Bettencourt attempted to administer the Kaufman Test of Educational Achievement, Third Edition. Again, although Student was able to complete sample subtests, he could not complete the formal subtests due to slow processing speed, difficulty maintaining attention, and the inability of Mr. Bettencourt to repeat instructions as that would violate the test protocols. Again, Student had great difficulty with timed tests.

26. Because Student was unable to complete the Wechsler, Mr. Bettencourt could not determine Student's intelligence quotient, or cognitive abilities. Because Student was unable to complete the Kaufman, Mr. Bettencourt could not determine Student's level of academic achievement in any subject area, or his academic strengths and weaknesses.[6]

[6] Mr. Bettencourt also gave Parents several instruments to complete: the Gilliam Asperger Syndrome Diagnostic Scale; the Gilliam Autism Rating Scale, Second Edition; the Autism Spectrum Rating Scales; the Adaptive Behavior Assessment System, Third Edition; the Vineland Adaptive Behavior Scales, Third Edition; and the Behavior Assessment System for Children, Third Edition. Mr. Bettencourt reported the scores of these tests in his written report, but otherwise did not discuss them in either the report

27. Mr. Bettencourt observed Student at school on two separate days. His first visit began shortly after 8:00 a.m. and ended at noon. Ms. Enos was teaching that day. Mr. Bettencourt's second observation began on another day at noon and ended at 2:15 p.m. when the school day ended. Ms. Boles was teaching that day. Mr. Bettencourt was very impressed with the arrangement of the classroom, the structure and scheduling of activities, and the warmth and skill level of both teachers and paraeducators. In his opinion, the special day class in which Student was placed was an appropriate placement for Student.

28. In his written assessment report Mr. Bettencourt went through the special education eligibility criteria for several categories. Although Student was unable to complete standardized tests, Mr. Bettencourt did not believe Student was intellectually disabled. This was based on the way Student presented, including the fact that he demonstrated an eagerness to learn. Instead Mr. Bettencourt believed Student's inability to complete standardized testing was due to a profound communication disability in the areas of both receptive and expressive language. Mr. Bettencourt also ruled out specific learning disability, in part because of Student's inability to complete standardized testing. Mr. Bettencourt found Student to be easily distracted, both during his attempts to administer tests to Student and in the classroom setting, due more to internal stimuli rather than to external factors. Mr. Bettencourt found Student met the criteria for special education due to autism.

29. Mr. Bettencourt recommended that Student be thoroughly assessed in the areas of speech and language, and occupational therapy. He then recommended that after those assessments were complete, Student be assessed for assistive technology.

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or his testimony, so they were not considered for the purposes of this Decision, and it is not necessary to do so.

Mr. Bettencourt believed Student's difficulties in school might be due to profound deficits in both receptive and expressive language, and that Student might also have deficits in auditory and/or visual processing. He believed an occupational therapy assessment was needed because Student, when he observed him, exhibited unusual fine and gross motor skills, and possible deficits in those areas.

30. Mr. Bettencourt completed his report on October 12, 2017. He met with Parents at their home that evening to explain it to them so they would not be surprised at the IEP meeting that was scheduled for the next day. Mother, in particular, was very upset with Mr. Bettencourt's findings and recommendations.

IEP Team Meeting of October 13, 2017

31. Ms. Boles attended the IEP meeting of October 13, 2017, as did a general education teacher, Ms. Pulido, a program specialist, a school psychologist, an occupational therapist, Mr. Bettencourt, the family's attorney, and Gilroy's attorney. Parents did not attend. Their attorney would not proceed without them, other than request that the one-to-one paraeducator support continue. Gilroy agreed to do this, at least until October 19, 2017, at which time Gilroy would formally respond to the request. The IEP team agreed to meet again on November 16, 2017. The document produced at this meeting is a page titled "South East Consortium SELPA IEP Meeting Notes." Nothing in this document reflects a discussion of an offer of a FAPE and services, and it is found that none occurred. On October 23, 2017, Ms. Pulido sent prior written notice to Parents advising them that the one-to-one paraeducator support for Student would continue until the IEP team meeting of November 16, 2017.

IEP Team Meeting of November 16, 2017

32. On November 16, 2017, Mr. Bettencourt presented his report to the IEP team. Parents attended accompanied by the family's attorney. A general education

teacher was present, as were Ms. Boles, Ms. Pulido, a school psychologist, a program specialist, Student's occupational therapist, a school administrator, and an attorney representing Gilroy. Parents were presented with the notice of procedural safeguards. As Mr. Bettencourt was presenting his report, it did not appear Parents understood that academic testing could not be completed and they kept asking to see results. Mother expressed that she believed the classwork in the special day class was too easy for Student.

33. The IEP team discussed Student's need for triennial assessments. Parents shared that Student had had an outside speech and language assessment done, but they did not have a report to share with the team. Parents did not want cognitive testing to be conducted, but asked for a speech and language assessment, as well as an occupational therapy assessment. Later during the meeting the team decided that an adaptive physical education assessment should be completed.

34. The team reviewed Student's progress on the goals consented to as part of the September 2017 settlement agreement. Parents advised the team that Student might need time away from school for a social skills class, and a Gilroy team member said Gilroy would work with Parents. Parents asked that Student be provided with additional speech and language services, and were advised that it would be a consideration in the speech and language triennial assessment. The speech therapist pointed out that Student had missed 47 percent of his speech and language therapy sessions. Student's attorney asked if the speech therapist was collaborating with the teacher, and this was confirmed. The family attorney shared with the team that Mother was "happy with the current classroom." If there were concerns, Parents were to discuss them with the teacher. There already was a journal that went home with Student where concerns could be documented, although Parents did not always send it back to school with Student.

35. The IEP document dated November 16, 2017, that was introduced into evidence at hearing consists of three pages of notes beginning on a page titled "IEP Amendments/Addendum Page." At the end of the notes is a section called "Offer of FAPE." The offer was 1,320 minutes weekly of specialized academic instruction; 50 weekly minutes of speech and language therapy in a group, divided into two sessions; 30 minutes weekly of occupational therapy in a group; and 180 minutes daily intensive individual service (paraeducator services) with teacher to decide when these were to be provided. At hearing Ms. Pulido testified that Student was receiving individual occupational therapy, and use of the word "group" in the offer of occupational therapy was a typographical error. The third page of the IEP document from November 16, 2017, states that Parents were given a copy of the notes, and this is followed by an unsigned release of information which allowed Gilroy to release information if necessary for state health care or health insurance reimbursement if covered.

36. Based on what was reported in the notes and the testimony of witnesses, after the report of Student's progress on goals, Parents' request that Student be excused from school to attend social skills group, and communication between school and Parents, there was no discussion of changes to goals. There was no discussion about accommodations and modifications. There was no discussion of placement and services. However, as discussed above, an offer of a FAPE is written at the end of the notes section.

37. Student never returned to school after November 16, 2017. On December 11, 2017, Mother sent an email saying Student was not returning to school "until his baselines and goals are updated as the district agreed in September."

TRIENNIAL ASSESSMENT

38. Student was due to be assessed in the fall of 2017, since it was three years since Gilroy had assessed him. Those assessments would then be reviewed at an IEP

team meeting in December 2017. The September 2017 settlement agreement changed this schedule. The settlement agreement stated that Gilroy would send Parents an assessment plan by December 6, 2017, and an IEP team meeting would be convened the first or second week of February 2018.

39. On December 12, 2017, Ms. Pulido wrote Mother in response to several emails and urged her to return Student to school. She advised Mother that the case would be referred to the Student Attendance Review Board should this not happen. Ms. Pulido also enclosed an assessment plan offering to assess Student in the following areas: academic achievement, health, intellectual development, language/speech communication development, motor development, and social emotional/behavior. Ms. Boles developed the assessment plan. The assessment plan made it clear that Student would not participate in special education without parental consent, and was accompanied by the notice of procedural safeguards.

40. The assessment plan was written in English, and was in plain language, easily understandable. Although Parents' native language(s) were not English, they participated in these proceedings, including IEP team meetings and the prehearing conference and hearing, without an interpreter. They never requested an interpreter, either during the IEP process, or the due process hearing and related prehearing conference. They never asked that documents be translated at the IEP level, or during the due process hearing process. The documents they submitted to both Gilroy during the IEP process, and to OAH during the due process hearing process, were written in grammatically correct English that is sophisticated, and easily understood.

41. Parents did not sign and return the assessment plan Gilroy sent to them on December 12, 2017. The evidence established that it was received. On January 30, 2018, Gilroy sent another assessment plan to Parents, accompanied by a notice of

procedural safeguards, but they also did not respond to this plan.[7]

42. Ms. Pulido and other witnesses established that Gilroy has properly qualified, licensed, and/or credentialed personnel to conduct each of the assessments. There was no contradictory evidence presented.

43. Multiple witnesses from Gilroy credibly testified that updated information about Student is needed to determine if he has any health needs, the level of his academic achievement, his intellectual development, and whether he has any social emotional or behavior needs that could be addressed in a new IEP. The information gleaned from each of the assessments would be used to determine Student's unique needs and appropriate baselines so that meaningful goals could be developed in all areas of need. The speech and language assessment would provide updated information that would be used to develop meaningful speech and language goals. The occupational therapy and adaptive physical education assessments would provide information necessary to address any motor or sensory deficits, and develop goals in these areas.

Student's Current Situation

44. Mother has been teaching Student at home for much of the two past school years, if not longer, using material she has found on the internet. Parents report that Student spends an hour each week with a tutor, and also receives weekly speech and language therapy.

[7] The only difference in the assessment plans is that the December 2017 plan is undated, and the word "education" was left out of the reference to an adaptive physical education specialist.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT [8]

1. This hearing was held under the IDEA, 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);[9] 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 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

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

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

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.

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. __, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained in *Endrew F.* 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 a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student like *Endrew F.*, 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 circumstances. (*Endrew F., supra*, 137 S.Ct. at p. 1001; see *E.F. v. Newport Mesa Unified Sch. Dist.* (9th Cir., Feb. 14, 2018, No. 15-56452) 2018 WL 847744, * 1 [nonpub. opn.] [the Ninth Circuit found *Endrew F.* clarified but did not change *Rowley* standard], citing *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1200.) The high court noted that "[a]ny review of an IEP must appreciate that the

question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Endrew F., supra,* 137 S.Ct.. at p. 999 [italics in original].)

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, Gilroy had the burden of persuasion on the issues decided.

ISSUE 1: OFFER OF FAPE

6. Gilroy argues that it should be permitted to implement the IEP, and states that the operative documents comprising the IEP are the November 29, 2016 IEP, as amended by the March 20, 2017 IEP, the May 12, 2017 IEP, and the November 16, 2017 IEP, with the goals attached to the Settlement Agreement from September 2017. Gilroy claims it met procedural requirements because the IEP team included all required attendees at meetings, Parents were given the opportunity to meaningfully participate in the process, adequate prior written notices were provided to parents, and the IEP documents contain all required information. Gilroy also claims the offer it made was substantively compliant because Student's present levels of academic achievement and behavioral functioning were appropriate in terms of the time the IEP was developed, the goals were appropriate, the accommodations and modifications were appropriate, the related services were appropriate, and Student was placed in the least restrictive environment.

7. Student claims Gilroy did not comply with the terms of the settlement agreement by not updating baselines and goals by October 13, 2017, and decisions about placement and services were based on a flawed independent educational evaluation. Student claims Parents were denied meaningful participation in the IEP process. He argues that the IEP did not provide him with adequate instruction and supports, and had him working at an academic level lower than where he was capable of working. Student claims he is working at a much higher academic level than reflected in the IEP. Therefore, he does not want the IEP implemented without parental consent.

Description of an IEP

8. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals…will be measured and when periodic reports on the progress the pupil is making…will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3)); (ii) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4)); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

9. A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (Ed. Code, § 56344, subd. (c); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) The district must also review the child's IEP at least once a year to determine whether the student's annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).)

Importance of a Clear Written Offer

10. The procedural requirement of a formal, written IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*) A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (*Ibid.*)

11. An offered IEP may be invalidated under *Union*'s rigorous approach if it is "insufficiently clear and specific to permit parents to make an intelligent decision." (See e.g. *A.K. v. Alexandria City School Bd.*, 484 F.3d 672, 681 (4th Cir. 2007); *Knable v. Bexley School Dist.*, 238 F.3d 755, 769 (6th Cir. 2001); *Bend LaPine School Dist. v K.H.*, No. 04-1468, 2005 WL 1587241 (D. Ore. June 2, 2005); *Glendale Unified School Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1108 (C.D. Cal. 2000); *Mill Valley Elem. School Dist. v. Eastin*, No. 98-03812, 32 IDELR 140, 32 LPR 6046 (N.D. Cal., Oct. 1, 1999); *Marcus I. v. Dept. of Educ.*, No. 10-00381, 2011 WL 1833207 (D. Hawai'i, May 9, 2011)). A school district may not dispense with this procedural requirement as an empty gesture if parents indicate that

they will not accept the offer. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra,* 15 F.3d at p. 1526.) The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. (See *Anchorage School District v. M.P.* (2012) 689 F.3d 1047, 1055.)

12. The IEP is to be read as a whole. There is no requirement that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

13. The procedural safeguards that protect parents' rights to be involved in the development of their child's educational plan are among the most important in the IDEA. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013), 720 F. 3d 1038, 1044, and a district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

14. The IEP offer Gilroy wishes to implement without Parents' consent is not a clear, written formal offer, based on the criteria established by *Union*. Even during the hearing, it was often unclear which documents Gilroy was asking to be considered as its offer of a FAPE. It was clear after reviewing the documents developed between November 29, 2016, and November 16, 2017, that the IEP development process was never completed.

15. The foundation of the IEP Gilroy wishes to implement is the document from the IEP team meeting of November 29, 2016. The purpose of this meeting was to develop a new annual IEP for Student. This IEP team meeting was never finished, and therefore the IEP from this meeting does not make "a clear written formal offer." While

there are two pages with what appears to be an IEP offer of a FAPE, and the amount of time Student was to receive specialized academic instruction is reflected, as well as the related services he requires, the specific components were never discussed at the meeting. Instead these two pages constitute what Gilroy *was considering offering* at the meeting, subject, of course, to being amended by the team during the meeting.

16. The meeting on November 29, 2016, ended when a disagreement arose because Parents disputed Student's levels of academic achievement and functional behavior that were contained in the IEP document. Parents were adamant that Student was performing at a much higher level at home and wanted their reports of his functioning at home to be the levels reported in the IEP. At hearing several Gilroy witnesses who observed and worked with Student during the 2017-2018 school year testified that the levels of performance described in that IEP did not reflect Student's current performance as they observed it in the fall of 2017.

17. When the IEP team meeting ended on November 29, 2016, the team had not discussed progress on previous goals, other than occupational therapy. The team did not review or discuss the proposed goals that are part of the IEP document of that date. Placement and services are dependent on whether they will aid the student in meeting his goals, so that discussion must be completed before moving on to the accommodations and modifications, the continuum of placements, and then the offer of placement and services. The offer of a FAPE in the November 29, 2016 IEP, was not developed after a team discussion of Student's progress on previous goals. It was not developed after a discussion of proposed goals. There was no discussion of accommodations and modifications, or the continuum of placements, and therefore the offer of a FAPE contained in the IEP document is not a clear, formal written offer that can be implemented without parental consent.

18. The IEP team convened again in January 2017, but Parents did not attend,

so no action was taken in developing Student's annual IEP. When the team met again in March 2017, there was a vigorous discussion of Student's levels of performance, which led to the proposed goals in the November 29, 2016 IEP document being rewritten and made more rigorous. Gilroy wishes to have these goals considered as part of the IEP it now wishes to implement without Parents' consent.

19. The discussion at the IEP team meeting in May 2017 focused on having Student return to school. Even though Gilroy is not asking that the notes and suggestions in the document developed at this meeting on addendum/amendment pages be considered part of the IEP offer, there is enough information contained in them to further muddy the IEP-offer waters.

20. Gilroy then wishes to add as part of its IEP offer, the portion of the settlement agreement from September 2017, in which Parents agreed to the goals from March 2017 being implemented. There are several components in the settlement agreement, and while Gilroy is not asking that those components be considered as part of its offer of a FAPE, a person unfamiliar with this case, presented with this document as part of an IEP, would be very confused.

21. The last document Gilroy asserts is part of the IEP it seeks to implement without Parents' consent is the notes from the IEP team meeting of November 16, 2017. As discussed in the Factual Findings, however, it contains incorrect information as it purports to offer Student group occupational therapy, which was described as a "typographical error." Other prior documents that Gilroy asserts are part of the same FAPE offer call for individual occupational therapy which is the service Student was receiving in the fall of 2017. And there was no evidence whatsoever that the IEP team, at the November 16, 2017 meeting even discussed proposed goals, discussed modifications and accommodations, discussed the continuum of placement levels, and then discussed placement and services to arrive at a genuine clear written formal offer.

22. The requirement of an annual IEP for a student who is eligible for special education is essential because students grow and change over the course of a school year. The IEP offer Gilroy wishes to implement without Parents' consent is contained in at least four separate documents, developed over a nearly year-long period. The foundational document, the IEP dated November 29, 2016, was drafted based on information gathered by Gilroy staff when Student attended the special day class at Luigi Aprea, for a total of 12 school days during the 2016-2017 school year. The last document, the notes from the November 16, 2017 meeting, was drafted during the 2017-2018 school year. Gilroy is asking to implement an IEP drafted over the course of two school years, and it would be implemented during the 2018-2019 school year. One document, the settlement agreement, was not even developed in a formal IEP team meeting, and there was no evidence that any of the meetings between November 29, 2016, and November 16, 2017, ever had the entire IEP team, including one or both Parents, discussing a formal offer of a FAPE. None of these meetings concluded with a formal offer actually being communicated to Parents, even verbally. Gilroy has not made a clear written IEP offer that meets the *Union* criteria. Accordingly, Gilroy cannot implement a hodgepodge of documents it claims to be an IEP offer of a FAPE, without parental consent.

23. Because Gilroy will not be permitted to implement its purported IEP offer, there is no need to have a detailed discussion about whether levels of academic achievement and functional behavior contained in the documents are accurate, whether baselines of goals are accurate, or whether proposed goals are legally compliant. There is no need to discuss whether proposed accommodations or modifications meet Student's needs, or the lack of a discussion of a continuum of placements. There was no clear, formal written offer of placement and services, since the team never reached the point of even discussing one at any of the IEP team meetings held beginning November

29, 2016, and concluding on November 16, 2017. Therefore it is found that there is no IEP that Gilroy can implement.

TRIENNIAL ASSESSMENTS

24. Gilroy contends that it is required to assess Student now because he is overdue for his triennial assessment. Further, it needs current information about him in all the areas it seeks to assess: academic achievement, health, intellectual development, language/speech communication development, motor development, and social emotional/behavior. With this information the IEP team can develop measurable goals in all areas of need, baselines for appropriate goals, determine what accommodations and modifications he needs in the classroom, and determine what additional related services he needs, and at what level. With this information, the IEP team can determine what placement Student will best benefit from, and can develop an IEP that will meet his unique needs and provide him with educational benefit. Gilroy argues that it complied with all procedural requirements for the assessment to be conducted without parental consent, and has qualified assessors to conduct the assessments.

25. Student contends that cognitive testing should not be required. Instead he argues that a student's educational progress should be a sufficient measure of cognitive ability. Student is adamantly opposed, to cognitive testing. He does not express opposition to the other tests Gilroy is requesting in this closing argument, although he contends that since Gilroy's assessment plan should have been sent to Parents earlier than it was, pursuant to the settlement agreement, this should prevent Gilroy from assessing him.

Reassessment Requirements

26. 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).)

27. 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).)

28. 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 levels. (Ed. Code § 56345; see, e.g. *Cloverdale Unified School Dist. v. Student* (OAH, Mar. 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.)

29. 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).)

30. 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, 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."

31. 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.

32. Gilroy has established that it meets all requirements to assess Student without parental consent. The parties agree that the statements of Student's levels of academic achievement and functional performance on IEP documents are outdated and do not present a realistic picture of Student's strengths and weakness. The parties agree that the baselines on the goals that were being implemented when Student was attending Rucker in the fall of 2017, are not current, and are therefore inaccurate. Parents believe Gilroy should rely on their statements about Student's performance at home to develop new goals and a new IEP, but this would result in Gilroy being noncompliant with the IDEA.

33. Student's triennial assessments were due to be completed in December 2017, and are now six months overdue. Student's last consented to IEP is from November 2015, as amended in May 2016. While Mr. Bettencourt's assessment provided more current information about Student, his inability to conduct formal assessments in the areas of intellectual development and academic achievement underscore an even more urgent need for Gilroy to conduct its own assessments. Further, Mr. Bettencourt's assessment did not contain information about Student's health, speech and language skills and deficits, and his needs in the areas of occupational therapy and adaptive physical education because he is not licensed or credentialed to conduct assessments in these areas. However, the information contained in his report will provide guidance to Gilroy's assessors in how to best assess Student in all areas, and what instruments should be used.

34. There are no defects in the nearly identical assessment plans presented to Parents on December 12, 2017, and January 30, 2018. The form states that procedural

safeguards accompany the assessment plan, and there was no evidence that the notice of procedural safeguards did not accompany the plan. The assessment plan contains a section that states special education services will not be provided without parental consent. Although the forms are in English, and Parents are not native English speakers, there was no evidence that they required the forms in a different language; they participated in the due process hearing without interpreter services, and did not request them, nor was there any indication that they needed them. They participated in IEP team meetings without interpreter services and did not request them. They never requested translated IEP documents from Gilroy, or due process hearing documents from OAH. They corresponded with the school via email, and provided documents they had written at one or more IEP team meetings and all correspondence and documents were written in grammatically correct English and easily understood. The same is true of all filings with OAH.

35. In spite of Student's argument that cognitive testing should not be conducted, the evidence established that this is necessary. Cognitive testing is vital to determine under which category Student meets the special education eligibility criteria, and determining his level of functioning so that appropriate goals can be developed. Cognitive testing will help the IEP team, and Student's teachers, determine instructional strategies which would be encompassed in the accommodations and modifications portions of an IEP.

36. Parents claim that Gilroy should not be permitted to assess Student because the first assessment plan was sent to them December 12, 2017, although the settlement agreement required it to be provided to them by December 6, 2017. OAH has very limited jurisdiction when there are allegations that a school district has not complied with a settlement agreement. If a parent believes a school district has not complied with a settlement agreement, the remedy is to file a compliance complaint

with the California Department of Education. If Gilroy did not comply with the provisions of the September 2017 settlement agreement in that it did not sent the assessment plan to Parents until December 12, 2017, this is not a procedural violation that invalidates Gilroy's request that it be permitted to assess Student without parental consent.

37. Gilroy established that Student requires reassessment in all of the areas listed on the assessment plan, and has qualified personnel to perform the assessments. It complied with all procedural requirements. Therefore, it is found that Gilroy may assess Student without parental consent.

ORDER

1. Gilroy's November 29, 2016, individualized education program offer, as subsequently amended, does not constitute an offer of a free appropriate public education in the least restrictive environment. Therefore, Gilroy may not implement the IEP without parental consent.

2. Gilroy may assess Student according to the assessment plan of January 30, 2018, without parental consent.

3. Within 10 business days of the date of this order, Gilroy shall present Parents with an assessment schedule that details the dates, times and places for assessments. Parents must immediately notify Gilroy if it cannot comply with the schedule and propose alternative dates and times. Parents shall reasonably cooperate in presenting Student for assessment on the agreed upon dates and times and in those places.

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 Issue 1, and Gilroy prevailed on Issue 2.

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 5, 2018

/s/

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings