

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**IN THE MATTER OF  
IRVINE UNIFIED SCHOOL DISTRICT**

**v.**

**PARENT ON BEHALF OF STUDENT.  
OAH CASE NUMBER 2019061154**

**DECISION**

On June 26, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Irvine Unified School District, naming Parent on behalf of Student as respondent. On July 15, 2019, OAH restarted the timeline for the case based on Parent's receipt of the complaint on July 9, 2019. OAH continued the hearing on July 15, 2019. Administrative Law Judge, Christine Arden, heard this matter in Irvine, California, on October 15, 16 and 17, 2019.

Attorney Amy Rogers represented Irvine. Irvine's Executive Director of Special Education, Melanie Hartig, and Director of Special Education, Jennifer O'Malley, attended all hearing days on Irvine's behalf. Father, accompanied and advised by his advocate, attended all hearing days on behalf of Student. Student did not attend the hearing.

At the parties' request the matter was continued until November 7, 2019 for written closing briefs. The record was closed, and the matter was submitted on November 7, 2019.

## **ISSUES**

1. Was Irvine's academic assessment memorialized in the report dated November 20, 2018 appropriate within the meaning of Education Code section 56329(c)?
2. May Irvine assess Student pursuant to the assessment plan dated September 24, 2018 without parental consent?

## **SUMMARY OF DECISION**

Irvine's November 2018 academic achievement assessment of Student and the November 2018 multi-disciplinary assessment report of that assessment were both appropriate, and met all legal requisites. Therefore, Irvine prevailed on Issue 1, and Student is not entitled to an independent educational evaluation at public expense.

Due to Irvine's knowledge of Student's suspected disabilities, the assessments in the areas described in the September 24, 2018 assessment plan were appropriate to determine Student's eligibility for special education and what supports, if any, were necessary to enable her to make educational progress. The assessment plan and all required notices were properly served by Irvine on Father and complied with the law. Therefore, Irvine prevailed on Issue 2 and may conduct all the assessments proposed in the September 24, 2018 assessment plan without Father's consent, if Father wants Irvine to provide special education or related services to Student.

## **FACTUAL FINDINGS**

At the time of the hearing, Student was a 16-year-old female. She resided with her family within Irvine's geographic boundaries at all relevant times. Father, who spoke English fluently, held Student's educational rights.

### **BACKGROUND**

Student was initially found eligible for special education under the category of specific learning disability and received an IEP on March 15, 2013 when she was in fourth grade. Father has had full custody of Student since November 21, 2016. Student had mental health issues. Father suspected she had dyslexia.

In November, 2016, when Student was 13 years old, she first enrolled in Irvine and attended seventh grade at Jeffrey Trail Middle School. Irvine comprehensively assessed Student in Spring 2017 in preparation for her triennial IEP review. Irvine's assessors opined that Student did not meet eligibility criteria under the categories of emotional disturbance or specific learning disability, but met eligibility criteria for other health impairment.

At Student's April 14, 2017 triennial IEP team meeting, the team concluded Student was eligible for special education under the category of other health impairment. Father consented to the team's offer of a FAPE, and the IEP was implemented. The April 14, 2017 IEP was Student's last IEP implemented by Irvine.

During the first half of eighth grade at Jeffrey Trail, Student had two very negative experiences. The first involved alleged abuse of Student by a peer. The other concerned Student's negative reaction to medication while at school. A school

psychologist, and other Irvine staff members, were involved in handling both incidents. Father claimed Jeffrey Trail staff grossly mishandled both situations. He mistrusted Irvine staff after these experiences.

Student left Irvine and enrolled in Inspire Charter Schools-South in December, 2017. Inspire was an online independent charter school, not affiliated with Irvine. While attending Inspire Student had an IEP team meeting on March 23, 2018. Student completed eighth grade at Inspire.

### **2018-2019 SCHOOL YEAR AT NORTHWOOD HIGH SCHOOL**

In August, 2018, before the beginning of the 2018-2019 school year, Father reenrolled Student in Irvine. They went to Northwood High School to register Student for her freshman class schedule. Father did not indicate Student had an IEP on enrollment documents. Because Father and Student did not inform Northwood staff that Student had an IEP, they were referred to guidance counselor, Allison Singer, who customarily registered new general education students for classes. If Ms. Singer had known Student had an IEP she would have referred her to a school psychologist for class registration. School psychologists at Northwood, instead of guidance counselors, customarily register students with IEPs for class schedules in order to assure that their schedules are consistent with the IEPs.

Staff members relied on parents of new transfer students to inform staff if their children had IEPs during enrollment. Ms. Singer, Irvine school psychologist Casey Kramer, Irvine program specialist Anna Zieman, and Irvine special education director Jennifer O'Malley, all credibly testified that there was no other way to know if new students had IEPs because it takes a while to receive records from transfer students'

former schools. Customarily parents of new students provide their children's IEPs to school staff because they want the IEPs to be implemented at Irvine.

Ms. Singer remembered her initial meeting with Father and Student in August, 2018. She was a guidance counselor at Northwood for four years. At the time of hearing she was the lead guidance counselor. She provided college, career and academic counseling, as well as social-emotional support, to approximately 450 ninth through twelfth graders each school year in her case load. Student was in Ms. Singer's case load in the 2018-2019 school year. Ms. Singer had a masters' degree in counseling, and held a California pupil personnel credential. Ms. Singer was candid, confident and clearly remembered the matters she testified about. Her testimony was credible and persuasive.

During their initial meeting, neither Father nor Student informed Ms. Singer that Student had an IEP, or was eligible for special education. Father told Ms. Singer that Student had previously received some support, but he was vague. Ms. Singer asked Father if Student had an IEP. Father responded that Student did not have an IEP.

Father testified he simply forgot to mention to Ms. Singer that Student had an IEP because he did not think it was important. Father's testimony on this point did not ring true. His hesitant voice quality during this portion of his testimony, varied from his delivery during other portions of his testimony. His demeanor suggested he was not being forthright on this point. To the extent that Ms. Singer's and Father's testimony were inconsistent, Ms. Singer's testimony was more credible than Father's.

Ms. Singer scheduled Student for general education classes standard for freshmen. Student started school at Northwood on August 23, 2018, the first day of the 2018-2019 school year.

### **FATHER REVOKED STUDENT'S SPECIAL EDUCATION**

Ms. Singer sensed something was amiss during her first meeting with Student and Father. She noticed Student was withdrawn during the meeting. Ms. Singer later asked Mr. Kramer to research whether Student had an IEP when she attended Jeffrey Trail. Mr. Kramer learned Student had an IEP when she attended Jeffrey Trail. Mr. Kramer also looked for, and did not find, a written revocation of Student's special education. He passed this information along to Ms. Singer.

Ms. Singer wrote to Father on September 7, 2018, and informed him Irvine had discovered Student had an IEP in middle school. Ms. Singer mentioned Student might still be eligible for special education and invited Father to a meeting with her, Mr. Kramer, the Northwood assistant principal Kourtney Tambara, and the school wellness coordinator, to discuss Student's last IEP and her class schedule. Father did not accept Ms. Singer's invitation. Father's refusal to participate in such a meeting indicated Father was not willing to acknowledge or discuss Student's last IEP.

Mr. Kramer also emailed Father on September 7, 2018. His email explained that Student's class schedule had to be changed to conform with her last IEP, unless Father had exited Student from special education, or wanted to revoke Student's special education eligibility. Mr. Kramer provided Father with a copy of Student's last IEP known to Irvine, along with a copy of parental rights and procedural safeguards.

On September 10, 2018, Father responded in writing to Mr. Kramer stating, "I revoke consent. If we need any services we will let you know." Father's email went on to warn Mr. Kramer that neither he, nor any other Irvine staff, were permitted to speak with Student about this matter. Mr. Kramer replied by acknowledging his receipt of Father's email. Father's September 10, 2018 email constituted his express revocation of special education for Student, and that is how Mr. Kramer, Ms. Tambara, and Ms. Singer understood it.

On September 11, 2018, Ms. Zieman sent Father a prior written notice via email and U.S. mail, confirming his revocation of Student's special education. Ms. Zieman's letter gave Father notice that Father's revocation meant that Student was exited from special education and no longer entitled to receive special education and services. The letter further informed Father that Student would immediately be considered a general education student.

Since Student's IEP had not been implemented at Northwood, there was no need to change her class schedule to eliminate special education classes or services. Ms. Zieman further explained that if Student wanted to receive special education or related services in the future, Irvine would conduct an initial evaluation to consider whether she was eligible for special education, assuming Father consented to a proposed assessment. Ms. Zieman attached a document entitled "Notice to Parent/Guardian/Surrogate Notice of Procedural Safeguards" to her letter.

On September 18, 2019, Father informed Ms. Tambara in an email that he was "receptive to IEP support for academics only." Father further stated he did not want any mental health services for Student and instructed "that the school stay away from this

issue.” Father’s email implicitly acknowledged Student might need academic support.

### **THE SEPTEMBER 24, 2018 ASSESSMENT PLAN**

Within a month of the start of the school year, Student’s English and History teachers notified Ms. Singer that Student was falling behind in their classes due to frequent absences and missing assignments. Ms. Singer then contacted all of Student’s teachers to inquire about Student’s progress and learned Student was also having problems in her other classes. Based on the concerns of teachers and Ms. Singer about Student’s poor academic performance, Mr. Kramer developed an assessment plan proposing assessments be conducted to determine if she was eligible for special education. The proposed assessments included academic achievement by an Irvine education specialist; health by an Irvine school nurse; and intellectual development and social emotional-behavior by an Irvine school psychologist.

On September 24, 2018, Ms. Tambara, provided Father with the assessment plan, along with parent questionnaires for the assessments, and notice of procedural safeguards. The assessment plan was written in language easily understood by the general public. It was in English, Father’s native language. It explained the types of assessments proposed, and stated that no IEP would result from the assessment without Father’s consent.

The September 24, 2018 assessment plan described Irvine’s proposed action to assess Student in four areas to determine if she was eligible for special education services. The assessment procedure was described by listing the nature of things which would be measured in each area assessed. The assessment procedure was further



explained by listing the methods which would be used (classroom observations, rating scales, interviews, record review, one-on-one testing or some other types or combination of tests). Parents' rights were explained in detail in the attached notice of procedural safeguards. Mr. Kramer was offered as a source for Father to contact if he needed further information about Irvine's proposal to assess Student. Mr. Kramer's email address and telephone number were included in the assessment plan.

In an email response to Ms. Tambara on September 24, 2018, Father consented only to the academic achievement assessment. He did not consent to Student being assessed in the areas of health, intellectual development, and social emotional-behavior. Father expressly noted he did not consent to an Irvine school psychologist or school nurse collecting information about Student.

In a series of emails with Father in late September 2018, Ms. Zieman and Ms. Tambara informed Father that all of the assessments listed on the September 24, 2018 assessment plan would have to be completed before Student could be considered for special education eligibility. Ms. Zieman further informed Father that Student's doctor could complete the required vision and hearing screenings, instead of the school nurse. Ms. Tambara explained to Father that Student's attention processing issues would be evaluated in the social emotional-behavior assessment, and assured him that Student would not receive therapy during the assessment. Ms. Zieman informed Father that, since Student had been exited from special education pursuant to his express revocation of special education services, Student would have to be initially assessed before her eligibility for special education could be considered.

When testifying at hearing Father claimed he meant to revoke only counseling and psychological services, instead of all special education for Student. Through the date of hearing Father continued to refuse to consent to the September 24, 2018 assessment plan, other than to an assessment in the area of academic achievement.

### **SEPTEMBER 27, 2018 STUDENT SUCCESS TEAM MEETING**

On September 24, 2018, Ms. Tambara invited Father and Student to attend a student success team meeting scheduled for September 27, 2018 at 7:30 AM to discuss general education supports for Student that could be put in place while Student was being assessed for eligibility for special education. Student success team meetings were customarily held to address potential supports for students without IEPs.

Student's teachers, Mr. Kramer, Ms. Singer and Ms. Tambara attended the September 27, 2018 student success team meeting to discuss the academic problems Student was having in her classes. Father and Student did not attend the meeting. On September 28, 2018, Ms. Tambara sent Father a summary of the discussion that occurred at the student success team meeting. Because Student was failing multiple classes the student success team recommended Student be assessed for special education. Once again the assessment plan was offered to Father. The student success team also recommended that Student's class schedule be changed to less challenging general education classes with more support, including a study skills class, while she was being assessed.

## **THE NOVEMBER, 2018 ACADEMIC ACHIEVEMENT EVALUATION**

Irvine special education teacher and certified educational specialist, Mr. Emery conducted Student's academic assessment in November, 2018. The purpose of the assessment was to consider her for initial eligibility for special education under the categories of specific learning disability and other health impairment. Mr. Emery sent standard questionnaires devised by the Irvine special education department regarding Student's academic progress to each of her teachers. The teachers returned the completed questionnaires to Mr. Emery. Their responses generally indicated Student was a "good kid" who struggled with assignments and had reading comprehension problems. The teachers' responses were considered and included in a multi-disciplinary assessment report dated November 20, 2018.

Mr. Emery observed Student in her English and History classes and in the tutorial sessions she was required to attend because she was failing at least two classes. He noted she was able to listen and participate adequately in English class, but she struggled to complete assignments. He also observed she had trouble keeping up in History class and working on group projects.

Mr. Emery also observed Student while she took the Woodcock Johnson IV Tests of Achievement, referred to as the Woodcock Johnson. Student took the Woodcock Johnson over a two-day period in November, 2018. There is not a time limit for the Woodcock Johnson, and Mr. Emery gave Student the time she needed to complete each section. Students struggling in academics often take longer to complete the test.

The Woodcock Johnson is a nationally normed standardized assessment instrument that measures academic skills through a series of brief tests. It evaluates academic skill levels in: broad reading, basic reading, reading comprehension, reading fluency, broad mathematics, math calculation, math problem solving, broad written language, written expression, and overall academic fluency. Student scored average in written expression. She scored low average, below average, and well below average in all other areas measured. Mr. Emery adjusted and converted Student's raw scores to standardized scaled scores. The scaled scores rated Student's academic achievement compared to a national sample of other test takers the same age as Student.

Student's scores on the Woodcock Johnson in the areas of broad reading and reading skills were in the below average range. Scores in reading comprehension and fluency, broad mathematics, calculation and problem solving skills were in the well below average range. Student's scores on broad written language skills fell within the low average range. Her scores on written expression fell within the average range. Mr. Emery noted that Student's results on the Woodcock Johnson were consistent with her teachers' feedback about her classroom performance and his observations of her.

Mr. Emery observed Student identified words rapidly and accurately, but she had difficulty spelling words and limited ability to apply phoneme-grapheme (sound-letter) relationships. She read passages very slowly, and it was hard for her to identify correct usage words, even with syntax cues. Mr. Emery noted Student had limited understanding of grade level math problems. She worked very slowly on math calculations and used below grade level strategies. Mr. Emery opined that her writing samples were simple, but adequate.

Mr. Emery further observed Student mispronounced words, and incorrectly omitted and inserted words when reading aloud. She worked at a typical rate. Her conversational proficiency was also typical. She was cooperative and her anxiety level during testing was typical. Her attention and concentration were appropriate. Mr. Emery also noted that as the questions increased in difficulty, she generally persisted. Her behavior was appropriate during testing. Mr. Emery's observations were thorough, detailed and perceptive. He credibly opined that the results of the academic achievement assessment he administered to Student were a valid and reliable representation of her academic achievement.

Mr. Emery drafted a report summarizing the results of Student's academic assessment and gave it to Mr. Kramer. Mr. Kramer drafted a multidisciplinary assessment report in November 2018 based on Mr. Emery's report of Student's academic assessment, and Mr. Kramer's own review of Student's available educational records. The November 2018 multidisciplinary assessment report included a summary of Student's previous standardized test results from February 2016 and the triennial assessment completed in April 2017.

Data from Student's April 4, 2017 triennial social emotional assessment was included in the November, 2018 multidisciplinary assessment report. This was the most recent information Irvine had about Student in the areas of intellectual development and social emotional-behavior. Because Irvine was unable to complete the health, intellectual development and social emotional-behavior assessments, the November 2018 multidisciplinary report indicated Irvine did not yet have sufficient information to determine if Student was eligible for special education under the categories of other health impairment or specific learning disability. The report concluded the results of

these other assessments were necessary in order for the IEP team to determine Student's eligibility for special education.

Student's records indicated that while she attended Inspire she had an individualized service plan, dated March 23, 2018, developed through the El Dorado County Charter SELPA, to provide her with limited support. A service plan provides for limited services to private school students; it is not an IEP. The service plan provided for Student to receive virtual specialized academic instruction for 90 minutes a week, and a 30-minute counseling session twice a month. Student's records also indicated she had truancy or excessive absences in eighth and ninth grade. At the time of the multidisciplinary assessment report, Student had the following grades in her classes at Northwood: History-F; English-D; Math-F; Science D-; and Drama-A+. Student's grades from Inspire were not available when Mr. Kramer drafted the report.

Mr. Emery, who was a special education teacher for seven years, testified with candor and confidence at hearing. He was trained and qualified to conduct academic assessments, and had administered about 100 of them. He had administered the Woodcock Johnson about 80 times. He conducted both initial assessments and reassessments for special education eligibility. He regularly assessed students in reading, writing and mathematics. Mr. Emery had participated in 250 to 300 IEP meetings. Mr. Emery was a well qualified assessor and a very credible, believable witness.

Mr. Emery knew Student before he assessed her because he provided collaborative "push-in" special education services to some students in the general education English and History classes in which Student was enrolled in the first semester

of the 2018-2019 school year. Mr. Emery credibly testified that the Woodcock Johnson was not racially, culturally, or sexually biased. It was given to Student in English, her native language. Mr. Emery followed all standard protocols of the publisher when administering the Woodcock Johnson to Student. When drafting his report on the academic achievement assessment he considered teacher feedback, his observations of Student, as well as the standardized test results on the Woodcock Johnson.

### **JANUARY 30, 2019 IEP MEETING**

Irvine timely contacted Father after the academic achievement assessment was completed on November 20, 2018, to arrange for an IEP meeting to review the report of the academic achievement assessment. Irvine tried to hold it promptly, but the meeting did not occur until January 30, 2019, because that was the earliest date Father was available to meet with the IEP team.

At the January 30, 2019 IEP meeting the team reviewed the November 2018 multidisciplinary assessment report. The teachers present at the meeting reported that Student was having trouble in classes. She missed many assignments and did not understand some concepts covered in class. The team informed Father that they could not consider Student for special education eligibility until the school psychologist and nurse completed the other assessments described on the September 24, 2018 assessment plan. Father did not consent to the school psychologist and school nurse assessing Student.

## **MARCH 18, 2019 IEP MEETING**

Student's IEP team met again on March 18, 2018, at Father's request. Student's teachers shared their concerns about Student's continued poor academic progress. She had been absent frequently and missed a lot of assignments. The team continued to propose that Student be comprehensively assessed for special education eligibility as described in the September 24, 2018 assessment plan. Father did not consent to the proposed assessments because he mistrusted Irvine's employees, particularly school psychologists.

The IEP team asked Father to share Student's medical records with the team. Father was not willing to do so. Father complained he wanted an IEP for Student without Student being assessed. The team again explained to Father that since Student had been exited from special education, she had to be initially assessed before the team could consider her eligibility for special education. The team did not have sufficient information about Student to consider eligibility without comprehensive assessment results.

Father mentioned he would get outside assessments of Student, instead of allowing Irvine's personnel to assess her. Father never provided Irvine with any outside assessments of Student.

Father did not complain about the validity or reliability of the academic achievement assessment at either the January 30, 2019 or the March 18, 2019 IEP meeting. Father also never told the IEP team he had a problem with Student being assessed by a male school psychologist. If he had, Irvine would have arranged for a female school psychologist to assess Student.



## **DEMAND FOR INDEPENDENT EDUCATIONAL EVALUATION**

On May 1, 2019, an advocate assisting Father, wrote an email to Irvine demanding an independent educational evaluation, referred to as an IEE. The only assessment conducted by Irvine within the two years prior to Father's May 1, 2019 IEE demand was the academic achievement assessment conducted in November 2018 and reviewed at the January 30, 2019 IEP meeting.

Jennifer O'Malley wrote to Father on May 3, 2019, and gave him prior written notice that Irvine would not agree to provide an IEE at public expense because it believed the November 2018 academic achievement assessment had met all statutory and regulatory requirements. She attached copies of Irvine's IEE Guidelines, and parental procedural safeguards, to the prior written notice sent to Father. When Father did not withdraw his request for an IEE Irvine timely filed its request for due process, seeking an Order finding the academic assessment to be legally compliant and appropriate.

Father testified he did not have any problem with Student's academic achievement assessment conducted by Irvine in November 2018. When questioned if he felt there were flaws in the academic achievement assessment, Father was unable to point out any errors in that assessment that would have undermined its validity or appropriateness. Father's only criticism regarding Irvine's assessment was that the assessment plan dated September 24, 2018 was not broad enough. This testimony was not credible because it was inconsistent with Father's refusal to consent to Student being assessed in any area other than academic achievement.

## **THE NEED FOR A COMPREHENSIVE ASSESSMENT**

Mr. Emery and Mr. Kramer both credibly opined that a comprehensive assessment was necessary in order to review Student's eligibility for special education and to evaluate her suspected disabilities and unique needs, if any. They both believed it was necessary to understand the whole child in order to consider eligibility. The result of Student's academic achievement assessment, by itself, was insufficient for the IEP team to consider Student's eligibility for special education.

Mr. Kramer noted that an assessment in the area of social emotional was necessary because changes regularly occur within a child in that area. Also, Student had been diagnosed with post-traumatic stress disorder, which could affect how she attended to tasks. Moreover, Student's seventh grade social emotional assessment revealed she was depressed at that time. Updated data on Student in all proposed assessment areas was necessary in order for the IEP team to have sufficient information about Student's limited strength, vitality and alertness, which are elements of the other health impairment eligibility category. The outdated information Irvine had on Student was not adequate to evaluate her potential eligibility under that category. Mr. Kramer stated he was more concerned about Student's social emotional difficulties than about her possible dyslexia.

Ms. O'Malley and Mr. Kramer also credibly testified that Irvine needed to give Student another academic achievement assessment as of the time of hearing because the November 20, 2018 assessment results were already outdated. A current academic achievement was particularly important since Student had changed to another Irvine high school for the 2019-2020 school year.

Mr. Emery's, Mr. Kramer's and Ms. O'Malley's consistent opinions that Irvine needed comprehensive current assessment results in all proposed assessment areas in order to consider Student's eligibility for special education were extremely credible. Student presented no evidence to controvert their opinions.

In Father's closing brief for this matter filed with OAH on November 7, 2019, he withdrew his demand for an IEE. His stated reason for withdrawing his IEE demand was "to avoid res judicata."

## **LEGAL AUTHORITIES AND CONCLUSIONS**

### **INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION**

In this discussion, unless otherwise indicated, legal citations are incorporated into each issue's conclusion. All references to the Code of Federal Regulations are to the 2006 version.

### **LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT**

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 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education, referred to as 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).)

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 request for due process, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).)

At the hearing, the party filing the request for due process has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Irvine requested the hearing and, therefore, had the burden of proof on the issues.

### **ISSUE 1: APPROPRIATENESS OF THE NOVEMBER, 2018 ACADEMIC ACHIEVEMENT ASSESSMENT**

Irvine contends the November 2018 academic achievement assessment of Student and the November 2018 multidisciplinary report both complied with the law,

and, were appropriate. Irvine further contends Student is not entitled to an IEE in the area of academic achievement at public expense.

Father contends Student is entitled to an IEE because the November 2018 academic achievement assessment did not comply with the law and was not appropriate.

### **Requirements for Appropriate Assessments**

Assessment for special education must be conducted in a way that uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. The assessment cannot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. The assessor must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. §§ 1414(b)(2))

In addition, the assessments used must be selected and administered so as not to be discriminatory on a racial or cultural basis. They must be provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally. Assessments must be used for purposes for which the assessments are valid and reliable, and administered by trained and knowledgeable personnel. Assessments must be administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).)

The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where the concern prompting the assessment was reading skills deficit].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

The personnel who assess the student shall prepare a written report that includes whether the student may need special education and related services, and the basis for making that determination. The assessment report must include the relevant behavior noted during observation of the student in an appropriate setting, and the relationship of that behavior to the student's academic and social functioning. It must also note the educationally relevant health, development, and medical findings, if any, and, if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage. For students with learning disabilities, the report must include whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services. If the student has a low incidence disability, the written report must be consistent with superintendent guidelines for low incidence disabilities (those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.)

Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent (Ed. Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).) The informed involvement of parents is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) Protection of parental participation is “[a]mong the most important procedural safeguards” in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2)(A) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].)

In response to a request for an independent evaluation, an educational agency must, without unnecessary delay, either file a due process complaint to request a hearing to show its evaluation is appropriate, or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

A school district must provide proper notice to the student and her parents to assess or reassess a student. (20 U.S.C. § 1414(b)(1); Ed. Code, §56321.) The September 24, 2018 assessment plan, which proposed the academic achievement assessment along with three other areas to be assessed, met all legal requisites. It

provided Father with sufficient information about the nature of the assessment. Mr. Emery, who conducted the assessment, as a certified education specialist and special education teacher, was knowledgeable about Student's suspected disabilities in the eligibility categories of other health impairment and specific learning disability.

When conducting the academic achievement assessment Mr. Emery used a variety of appropriate assessment tools and strategies to gather relevant information about Student's academic achievement. He used technically sound instruments, including the Woodcock Johnson. He also considered teacher responses to the questionnaire formulated by the Irvine special education department specifically for the purpose of gathering information about students being assessed. Mr. Emery appropriately used these tools, along with information he knew about Student.

The Woodcock Johnson was not discriminatory on either a racial or cultural basis. It was provided to Student in English, her native language. Mr. Emery's credible testimony established the assessment tools he used were appropriate, valid, and reliable. The results were consistent with the teacher feedback and Mr. Emery's observations of Student, and Father's implicit acknowledgement that Student might need academic supports.

Mr. Emery was trained, knowledgeable and very experienced in administering academic assessments and the Woodcock Johnson. He administered the Woodcock Johnson to Student in accordance with its publisher's instructions. Therefore, the November, 2018 academic achievement assessment complied with all applicable legal requisites for both an initial assessment and a reassessment, and was, therefore, legally appropriate. (20 U.S.C. §§ 1414(a), (b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).)



The November 2018 multidisciplinary assessment report included all the necessary components. (Ed. Code, § 56327.) To the extent possible, the report discussed Student's need for special education and related services based upon her low academic achievement scores in reading and math, although an eligibility determination could not be made without a comprehensive assessment of all Student's suspected areas of need. Mr. Emery summarized his observations of Student's behavior during testing and in the classroom. His observations were consistent with her test results.

Irvine was prevented from including educationally relevant health, developmental or medical findings by Father's refusal to consent to a health assessment by a school nurse. The assessors could not determine if Student had a learning disability that could be corrected without special education, as Father would not consent to a psychoeducational assessment of Student's ability, and it could not be determined if Student's achievement was consistent with her ability. The November 2018 multidisciplinary report determined that Student was not affected by environmental, cultural or economic factors. Lastly, there was no evidence that Student had a low incidence disability, and in any event, the assessors could not make a determination on all of Student's needs without a comprehensive assessment.

A summary of material information from Student's educational records was also included in the report. The November 2018 multidisciplinary report complied with the requisites of Ed. Code, §56327. The report accurately stated that the assessor had insufficient information to recommend if Student was eligible for special education because Irvine had been unable to conduct assessments in three other necessary areas due to Father's refusal to consent to those assessments. The only reason the IEP

meeting on the report was not held within 60 days after Father consented to the assessment was because Father was unavailable to meet until January 30, 2019.

Father's attempt to withdraw his demand for an IEE in his closing brief, weeks after the evidentiary portion of the hearing was completed, and at the last moment before the record in this matter was closed and submitted for decision "to avoid res judicata" does not void OAH's jurisdiction on this issue. A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) Irvine is entitled to a resolution of the issues presented in this case, including whether Student was entitled to an IEE when the case was filed.

Irvine proved by a preponderance of the evidence that the November 2018 academic achievement assessment and the November 2018 multidisciplinary assessment report were both appropriate and met all legal requisites. Student is not entitled to an IEE in the area of academic achievement at public expense.

## **ISSUE 2: IRVINE'S RIGHT TO COMPREHENSIVELY ASSESS STUDENT**

Irvine contends Student's poor performance in her classes indicated she had suspected disabilities and required Irvine to comprehensively assess her for special education eligibility. Irvine further contends the results of the proposed assessments in the four areas identified in the assessment plan were needed in order for an IEP team to have sufficient information to consider if Student was eligible for special education. Irvine asserts it met all procedural requirements entitling it to assess Student pursuant

to the September 24, 2018 assessment plan and other documentation it provided to Father. Because Father repeatedly refused to consent to all the proposed assessments described on the assessment plan Irvine seeks authorization from OAH to assess Student for special education eligibility as proposed in the September 24, 2019 assessment plan without Father's consent.

Father contends he does not want Student to be assessed in any areas, other than academic achievement, because he does not trust the proposed assessors, an Irvine school psychologist and school nurse, due to his past negative experiences with Irvine staff. He also contends he did not intend to revoke all of Student's IEP services, but only psychological services.

### **Irvine's Obligation and Right to Assess Student in All Areas of Suspected Disabilities**

Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to determine whether the child is eligible for special education. (34 C.F.R. § 300.301; Ed. Code, § 56302.1.) Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.)

An initial evaluation must be designed not only to determine whether the child has a disability, but also "to gather relevant functional, developmental, and academic information about the child," that can be used to determine the child's individual educational needs. 34 C.F.R. § 300.304(b)(1); 20 U.S.C. § 1414(a)(1)(C). The school district

must, therefore, “ensure that ... the child is assessed in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B) (emphasis added). Anything less would not provide a complete picture of the child’s needs. (*Timothy O. v. Paso Robles Unified School Dist.*, (9th Cir. 2016) 822 F3d 1105, 1119)

Under the IDEA, the school district must conduct a “full and individual initial evaluation,” one which ensures that the child is assessed in “all areas of suspected disability,” before providing that child with any special education services. 20 U.S.C. §§ 1414(a)(1)(A), 1414(b)(3)(B). The California Education Code, which incorporates the requirements of the IDEA into state law, similarly requires that the child be assessed “in all areas related to the suspected disability.” *See* Cal. Educ. Code §56320(f). This requirement serves a critical purpose. It allows the child’s IEP Team to have a complete picture of the child’s functional, developmental, and academic needs. This information enables the team to design an individualized and appropriate educational plan tailored to the needs of the individual child.

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student’s educational program is appropriate. (Ed. Code, § 56320, subds. (e), (f).) School district evaluations of students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.303, 300.320(a)(4), 300.324(a)(1)(iii) & (iv).)

Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f).) Federal regulation requires a public agency to obtain parental consent prior to conducting both an initial evaluation and a reevaluation of a child. (34 C.F.R. § 300.300.) The IDEA uses the term “evaluation,” while the California Education Code uses the term “assessment.”

When a student is referred for assessment, the school district must provide the student’s parent with a written proposed assessment plan, along with notice of the parent’s rights. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in language easily understood by the general public, be provided in the native language of the parent, explain the types of assessments to be conducted, and state that no individualized education program will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) A school district shall make reasonable efforts to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c)(4).)

Normally, before a school district performs an assessment of a child with a disability, the district must obtain parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c).) However, in the event that a parent or student does not provide consent, the district may bring a due process complaint seeking an order allowing it to conduct the proposed assessment. (20 U.S.C. § 1414(a)(1)(D)(ii)(I); Ed. Code, § 56321, subd. (c)(2); *Schaffer, supra*, 546 U.S. at p. 53 [school districts may seek a due process hearing if parents refuse to allow their child to be evaluated].)

In this case Student had previously been eligible for special education, but Irvine was unaware of it when she enrolled for ninth grade in August, 2018. The evidence indicates Father did not want Irvine to know Student had an IEP when registering her for classes at Northwood in August, 2018. When Irvine personnel later discovered Student previously had an IEP, Irvine offered to change Student's schedule in order to implement her last agreed upon IEP. Father did not accept that offer and instead revoked Student's special education in writing. Irvine's interpretation of Father's email revoking all special education and related services was reasonable, as the email referenced all "services" generally.

Irvine then followed appropriate procedures by giving Father prior written notice confirming his revocation of Student's special education. Once Parent revoked his consent to special education and related services in writing, Irvine was prohibited from providing special education services, and no longer required to make a FAPE available to Student. (34 C.F.R. § 300.300(b)(4)(i) and (iii).) When Student started doing poorly in her classes a short time later, Irvine appropriately sought parental consent to initially assess her for special education eligibility.

### **Proposed Assessments Were Appropriate**

Here, Student's teachers noticed she was struggling with completing her assignments and keeping up with course work. Based on the teacher's reasonable suspicions and Mr. Kramer's review of the assessments and Student's IEP from 2017 (before she was exited from special education), Irvine had reason to suspect Student might have a disability and special education services might be needed to address that disability.

Irvine met its obligation to Student in seeking to assess her in all areas related to her suspected disabilities. The September 24, 2018 assessment plan appropriately included those areas in the proposed assessments. Mr. Kramer persuasively testified that assessments in the areas of academic achievement, health, intellectual development and social emotional-behavioral, were all appropriate in light of Student's circumstances. Moreover, Student did not offer any evidence which controverted Mr. Kramer's testimony.

### **Notice to Parent**

Prior written notice is required to be given by the public agency to parents of a child with possible exceptional needs, upon initial referral for assessment, and a reasonable time before the public agency initiates or changes, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or provisions of FAPE. (Ed. Code, § 56500.4. subd. (a).) The notice is required to include a description of the action proposed, and an explanation why the agency proposes the action. It must also contain a description of each assessment procedure, assessment, record, or report used as a basis for the proposed action. It is required to include a statement that the parents of the individual with exceptional needs have protection under the procedural safeguards, the means by which a copy of the description of the safeguards can be obtained, and sources for parents to contact to obtain assistance. The notice must also include a description of any other options that the IEP team considered and the reasons why those options were rejected, and other factors relevant to the proposal or refusal of the agency. (Ed. Code, § 56500.4. subd. (b).)

The weight of evidence established that Irvine provided Father with proper notice of the September 24, 2018 assessment plan and it complied with the law. The notice consisted of the proposed assessment plan dated September 24, 2018, and a copy of the notice of parental procedural safeguards. Both documents were provided to Father in his native language. The assessment plan was in language easily understood by the general public. It explained the types of assessments Irvine proposed to conduct. The assessment plan also informed Father an IEP would not result from the assessment without the consent of the parent. The assessment plan identified Mr. Kramer as the person Father could contact for further information about the proposed assessments. Mr. Kramer's telephone number and email address were included in the assessment plan.

In this case, the assessment plan and procedural safeguards provided all prior written notice required items, except a description of any other options that the IEP team considered, and the reasons why those options were rejected, and other factors relevant to the proposal or refusal of the agency. (Ed. Code, § 56500.4. subd. (b)). In this instance an IEP team had not yet met since Student was not then eligible for special education, so the description of other options considered and rejected by the IEP team did not apply. In addition, there was no evidence that any notice deficiency resulted in Student losing an educational opportunity, or interfering with Father's opportunity to participate in the IEP formulation process.

### **Reasonable Measures Were Taken to Obtain Parental Consent**

Irvine proved it took reasonable measures to obtain Father's consent for the assessments proposed in the September 24, 2018 assessment plan multiple times, and



that Father continually refused his consent. Irvine attempted since September 24, 2018 to obtain Father's permission to assess Student. The law provides for a parent to have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c)(4).) Father has been afforded ample time to review and consider the assessments proposed initially on September 24, 2018.

**If Special Education Had Not Been Revoked, Irvine Would Have Been Authorized to Reassess Student**

At hearing Father took the position that he did not mean to entirely revoke all of Student's special education, but only psychological services, even though his written statement revoking special education was not limited in nature. Even if this was true, and Student had not been exited from special education, Irvine would still have had an obligation to assess Student in all areas of suspected disability, as proposed in the September 24, 2018 assessment plan. (20 U.S.C. § 1414(b)(3)(B).) Anything less would not provide a complete picture of Student's needs. (*Timothy O. v. Paso Robles Unified School Dist.*, (9th Cir. 2016) 822 F3d 1105, 1119.

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 student warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1); see also, *Patricia P. v. Board of Education of Oak Park, et al.* (7th Cir. 2000) 203 F.3d 462, 468 [if parents want their child to receive special education under the IDEA, they must allow a reevaluation and cannot force the school to rely solely on an independent evaluation].)

In this instance Mr. Kramer, Ms. O'Malley and Mr. Emery all credibly testified that Student's 2017 assessment results were outdated and new assessments were needed to sufficiently inform the IEP team about Student's deficits and unique needs. Therefore, even if there was any merit to Father's argument that he did not intend to revoke all of Student's special education, and Student was simply a continuing special education student, Irvine was still required to reassess Student in the areas proposed in the September 24, 2018 assessment plan. Therefore, Father's questionable argument that he did not revoke, or mistakenly revoked, Student's special education is not material to the outcome of Issue two.

Accordingly, Irvine has met its burden of proof with a preponderance of the evidence that it may conduct an initial assessment of Student without parental consent in the areas of academic achievement, health, intellectual development, and social emotional-behavior, pursuant to the September 24, 2018 assessment plan.

## **ORDER**

Irvine's November 2018 academic achievement assessment of Student and the November 2018 multidisciplinary assessment report were appropriate and met all legal requisites. Therefore, Student is not entitled to an independent educational evaluation in the area of academic achievement at public expense.

Irvine may assess Student pursuant to the September 24, 2018 assessment plan, without parental consent, in the areas of academic achievement, health, intellectual development, and social emotional-behavior, if Father wants Irvine to provide Student with special education and related services under the IDEA.

## **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, Irvine prevailed on all issues presented.

## **RIGHT TO APPEAL**

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

DATED: December 12, 2019

/s/  
Christine Arden  
Administrative Law Judge  
Office of Administrative Hearings