

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020100499

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

DECISION

MARCH 10, 2021

On, October 16, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Fremont Unified School District as respondent. OAH granted a continuance on November 23, 2020. Administrative Law Judge, called ALJ, Rita Defilippis, heard this matter via videoconference on January 26, 27, 29, and February 2, 2021.

Parent represented Student. Parent attended all hearing days on Student's behalf. Student attended hearing to testify on January 26 and February 2, 2021.

Elizabeth Schwartz, Attorney at Law, represented Fremont. Fran English, Director of Special Education, attended all hearing days on Fremont's behalf.

At the parties' request OAH continued the matter until March 2, 2021, for written closing briefs. The record was closed, and the matter was submitted on March 2, 2021.

ISSUES

The sole issue at hearing involved multiple alleged procedural violations regarding Student's May 4, 2020 individualized education program, called an IEP, team meeting. Student's issues were discussed and clarified at the prehearing conference. The order following prehearing conference required the parties to immediately file a written request for relief if the issue as stated in the order did not reflect their understanding of the issues as clarified during the prehearing conference. Neither party filed any such request. The ALJ read the issue on the first day of hearing and neither party raised an objection.

Student's issue has been re-organized for the purpose of analysis and clarity of this decision. The administrative law judge has authority to reword and re-organize a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

1. Did Fremont deny Student a free appropriate public education, called a FAPE, by:
 - a. failing to timely provide notice of the May 4, 2020 IEP team meeting;
 - b. failing to schedule the May 4, 2020 IEP team meeting at a mutually agreeable time and place;
 - c. failing to provide a legally sufficient notice of the May 4, 2020, IEP team meeting, specifically, failing to include the names of IEP team participants;

- d. including a general education teacher on the IEP team;
- e. including a general education teacher on the IEP team who was not currently involved in Student's education;
- f. convening an IEP team meeting on May 4, 2020, without Parent; and
- g. providing a placement offer to Student, in Parent's absence, at the May 4, 2020 IEP team meeting?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (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 Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- 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, students, and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Student requested the hearing in this case and has the burden of proof on all issues. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 19 years old at the time of hearing. Student resided with Parent within Fremont's geographic boundaries at all relevant times. Student was eligible for special education under emotional disturbance due to anxiety. Student assigned her right to represent herself at this hearing to Parent, both orally and in writing.

EDUCATIONAL RIGHTS

It is first necessary to determine who held Student's educational rights, before, and at the time of, the May 4, 2020 IEP team meeting, to decide the issues in this case. Pursuant to title 20 United States Code, section 1415(m), when a student with exceptional needs reaches the age of majority under state law, except for a student who has been determined to be incompetent under state law, any notice of procedural safeguards required by title 20 United States Code section 1415, shall be provided to both the student who is 18, and the parents. All other rights accorded to parents shall transfer to the student. (Ed. Code § 56041.5.)

Student turned 18 on February 20, 2019, and was not conserved at the time of hearing. Accordingly, without evidence to the contrary, Student held educational rights at the time of the May 4, 2020 IEP team meeting at issue. The parties submitted a five-

page document, dated April 3, 2019, purporting, by document title, to be a notification of representation for Student. Nothing in the five-page document indicated that Student assigned educational rights to Parent. At most, the document indicated that Student designated Parent to receive and respond to written communications from Fremont, about which Parent informed Student. The document also indicated that Student gave permission to Parent to pursue legal remedies on Student's behalf regarding educational services to which Student and Parent mutually agree. Therefore, as a matter of law, Student retained educational rights at all times relevant to resolution of the issues in this matter. This legal conclusion is consistent with the documentary and testimonial evidence presented at hearing, including the testimony of Parent and Student.

ISSUE 1A AND IB: DID FREMONT DENY STUDENT A FAPE BY FAILING TO TIMELY PROVIDE NOTICE OF THE MAY 4, 2020 IEP TEAM MEETING, AND SCHEDULE THE MEETING AT A MUTUALLY AGREED TO TIME AND PLACE?

Student contends that Fremont did not give adequate advance notice of the May 4, 2020 IEP team meeting as compared to past notices of meetings. Student also contends that Fremont failed to schedule the May 4, 2020 IEP team meeting at a mutually agreed to time and place, based on Parent's email, which Student claims established Parent's unavailability for the meeting.

Fremont contends that its five-day notice of the May 4, 2020 meeting was adequate to ensure Parent's attendance. Fremont asserts that numerous unsuccessful attempts to schedule IEP team meetings at a mutually agreed to time and place to Parent, evidenced Parent's unwillingness to participate in the IEP process. Therefore, Fremont asserts that additional notice of the May 4, 2020 IEP team meeting would not

have resulted in Parent's attendance. Further, Student held educational rights by that time so additional notice to Parent was not legally required.

Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including, notifying parents of the meeting early enough to ensure that they will have an opportunity to attend, and scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322 (a); Ed. Code, § 56341.5, subd. (a)-(c).)

FREMONT PROVIDED TIMELY NOTICE OF THE MAY 4, 2020 IEP TEAM MEETING

Student held educational rights before and including the time of the May 4, 2020 IEP team meeting. Accordingly, Student had to be afforded an opportunity to attend the May 4, 2020 IEP team meeting, and Fremont was obligated to provide Student with enough notice of the May 4, 2020 IEP team meeting to give Student the opportunity to attend.

On April 29, 2020, Dr. Rebecca Zartman, Program Specialist for Fremont, sent an email addressing both Parent and Student, to Parent's email address, notifying them of a May 4, 2020 IEP team meeting, at 2:00 pm. The email explained that Fremont will proceed with the IEP team meeting regardless of Parent's participation, in an effort to complete discussion of residential placement for Student. Attached to the email was a notice of the May 4, 2020, IEP team meeting, via teleconference, at 2:00 pm, dated April 29, 2020. The notice of meeting stated the purpose of the meeting was part-two of Student's annual IEP team meeting, including transition planning. Part-one of Student's annual IEP team meeting was held on January 17, 2020.

Student testified at hearing. Student responded clearly and directly to all questions and had no difficulty remembering details of events about which Student was questioned. Accordingly, Student's testimony was credible and given great weight.

Student received Fremont's April 29, 2020 written notice of the May 4, 2020 IEP team meeting. Parent promptly informed Student of the April 29, 2020 IEP team meeting notice, including the information that the IEP team planned to discuss residential special education placement, and that Fremont would proceed with the IEP team meeting regardless of Parent's participation.

Student's assertion that Fremont's notice was unreasonable because Fremont gave more than five-days advance notice for IEP team meetings in the past, was unpersuasive. There was no evidence presented at hearing as to any reason why Student could not attend the May 4, 2020 IEP team meeting at 2:00 pm. The five-day notice of the May 4, 2020 IEP team meeting provided enough time to ensure Student's opportunity to attend. Student did not sustain the burden of proof that Fremont denied Student a FAPE by failing to give timely notice of the May 4, 2020 IEP team meeting to afford Student the opportunity to attend.

FREMONT SCHEDULED THE MAY 4, 2020 IEP TEAM MEETING AT A MUTUALLY AGREED TO TIME AND PLACE FOR STUDENT

Fremont was required to schedule the meeting at a mutually agreed to time and place for Student, not Parent. (34 C.F.R. § 300.322 (a); Ed. Code, § 56341, subd. (a)-(c).)

Student was aware of the importance of the IEP team meeting. Student knew the meeting was scheduled to discuss a potential residential placement, and that Fremont

planned to convene the meeting regardless of Parent's attendance. Student knew that either Student's or Parent's attendance at the meeting was important.

Student's contention that Fremont's notice of the May 4, 2020 IEP team meeting did not schedule the meeting at a mutually agreed to time and place was unpersuasive. Student did not inform Fremont that the proposed time and place for the IEP team meeting was not agreeable to Student. Student also did not present any evidence at hearing of such. Therefore, Student failed to prove that Fremont denied Student a FAPE by failing to schedule the May 4, 2020 IEP team meeting at a mutually agreed upon time and place for Student to attend.

ISSUE 1(C): DID FREMONT DENY STUDENT A FAPE BY FAILING TO PROVIDE A LEGALLY SUFFICIENT NOTICE OF MEETING, SPECIFICALLY BY FAILING TO INCLUDE THE NAMES OF IEP TEAM PARTICIPANTS?

Student contends that Fremont was required to provide the individual names of IEP team participants on the April 29, 2020 IEP team meeting notice. Fremont contends that no legal requirement exists to provide the individual names of IEP team participants on an IEP team meeting notice. Fremont asserts that its notice of the May 4 IEP team meeting was legally sufficient because it listed the titles of IEP team meeting participants which provided enough information to allow Parent to prepare for the IEP team meeting.

Education Code section 56341.5, subdivision (c), states: "The notice for an IEP team meeting shall indicate the purpose, time, and location of the meeting and who shall be in attendance." (See also 34 C.F.R. 300.322(b)(1)(i), containing the same language.) The school district is not required to identify individuals who will be

attending the IEP team meeting by name, as long as the notice identifies the individuals by position. (*Letter to Livingston*, 21 IDELR 1060 (OSEP 1994) ["While public agencies could elect to indicate in the notice the names, as well as the positions of the individuals who will be in attendance, there is no requirement for public agencies to do so."])

Historically, Parent has requested in writing that the names and titles of IEP team meeting participants be listed on Fremont's notices of IEP team meetings, insisting that the law so requires. Fremont has repeatedly informed Parent that the reason that titles are listed, and not individual names, is that if a particular participant is not available for the meeting, Fremont can substitute in another person with the same title, thus avoiding the need to reschedule the IEP team meeting. Instead, Fremont has provided the individual names of IEP team participants in emails to Parent, separate from the notice of meeting document.

Fremont's April 29, 2020 notice of meeting listed the following anticipated IEP team members for the May 4, 2020 IEP team meeting: administrative designee, special education teacher, general education teacher, Student, psychologist, program specialist, and the administrator of Circle of Independent Living Charter School, referred to as COIL.

Student provided no legal authority for Student's interpretation of the statute, other than the statute itself. No express language exists in the statute that the individual names of anticipated IEP team meeting participants are required to be included in the IEP team meeting notice. Therefore, Student failed to sustain the burden of proof that Fremont's omission of the individual names of IEP team meeting participants on the May 4, 2020 IEP team notice denied Student a FAPE.

ISSUE 1(D): DID FREMONT DENY STUDENT A FAPE BY INCLUDING A GENERAL EDUCATION TEACHER ON THE IEP TEAM?

For the purposes of this decision, “general education” has the same meaning as “regular education” and both terms refer to instruction for typically developing students. General education classes are taught by regular education teachers. The general education environment may include some students with disabilities.

Student contends that Fremont was not required to include a general education teacher on the May 4, 2020 IEP team because Student was not currently enrolled in any general education classes. Student therefore contends that the inclusion of a general education teacher on the May 4, 2020 IEP team was prohibited and denied Student a FAPE. Fremont contends that a general education teacher was required to participate in the IEP team meeting because Student has participated in general education in the past and is working toward graduating with a high school diploma.

An IEP team is required to include at least one regular education teacher of a student if the student is, or may be, participating in the regular education environment. (20 U.S.C. § 1414 (d)(1)(B)(ii), 34 C.F.R. 300.321(a)(2), Educ. Code § 56341, subd. (b)(2).) A regular education teacher who is a member of the IEP team shall participate in the review and revision of the IEP. (20 U.S.C. § 1414(d)(4)(B), Educ. Code § 56341(b)(2).) Congress revised the IDEA to specifically emphasize the role a regular education teacher plays on an IEP team. The regular education teacher on the IEP team, to the extent appropriate, shall participate in the development of the IEP, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and needed support for school personnel in the implementation of such. (20 U.S.C.

1414(d)(3)(C).) The requirement regarding participation of a general education teacher on an IEP team is therefore not merely technical, but serves an important function in the provision of a FAPE to a student. (*M.L. v. Federal Way School Dist.*, (9th Cir. 2003) 341 F. 3d 1052, 1064.)

The April 29, 2020 IEP team notice listed, "general education teacher", as one of the intended May 4, 2020 IEP team participants. Michael Tagami, a general education teacher, attended the May 4, 2020 IEP team meeting.

At the time of the May 4, 2020 IEP team meeting, Student's educational services included individualized home instruction by an outside agency, one-to-one resource support, one-to-one counseling, and one-to-one physical education support by an outside non-credentialed person, outside of the school setting. Student had not been able to consistently access these individualized educational services due to Student's disability including significant anxiety and depression. Student had not been enrolled in general education classes since Student was enrolled in Tagami's class in the fall of 2017. Student attended Tagami's class only two days.

Fremont held part-one of Student's annual IEP team meeting on January 17, 2020. The IEP team members expressed concern regarding Student's well-being and inability to access Student's individualized services due to Student's anxiety. The team recommended residential placement as the most appropriate, due to Student's demonstrated inability to access less restrictive services. The team ended the meeting to allow Parent time to consider and discuss placement with Student.

Student was not participating in the regular education environment, and there was no evidence presented at hearing that Student was likely to participate in the

regular education environment, at the time of the May 4, 2020 IEP team meeting. Fremont was therefore not legally required to include a general education teacher on the IEP team. Student's contention that Fremont was therefore prohibited from including a regular education teacher on the IEP team, is unpersuasive. Student failed to provide any legal authority to support the contention that Fremont was prohibited from including a regular education teacher on the IEP team, if not legally required. Student failed to prove that Fremont's inclusion of a general education teacher on the IEP team denied Student a FAPE.

ISSUE 1(E): DID FREMONT DENY STUDENT A FAPE BY INCLUDING A GENERAL EDUCATION TEACHER ON THE IEP TEAM WHO WAS NOT CURRENTLY INVOLVED IN STUDENT'S EDUCATION?

Student contends that Student was denied a FAPE by Fremont's inclusion of Tagami on the May 4, 2020 IEP team because Tagami was not currently Student's teacher or involved in Student's educational services. Fremont contends that its decision to include Tagami, a general education teacher, on the May 4, 2020 IEP team was proper. Fremont asserts that Tagami was Student's last general education teacher and could assist the IEP team regarding decisions related to Student's achieving a high school diploma.

A local education agency has the discretion to include other individuals on the IEP team who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a)(6).)

At the time of the May 4, 2020 IEP team meeting, Student was on a high school diploma track. A high school diploma necessitates instruction in the general education curriculum. At the time of the scheduling of the May 4, 2020 IEP team meeting, Student was receiving this instruction from an outside agency. Student's outside agency instructors could not give her grades or credits toward a high school diploma. Tagami, had knowledge of Student as Student's last general education teacher and as an IEP team meeting participant for Student's IEP in the past. Tagami also had knowledge of the general education curriculum. Tagami could therefore contribute to the discussion regarding Student's progress toward achieving a high school diploma. Fremont had the discretion to include Tagami on the IEP team. Student failed to prove that the inclusion of Tagami on the May 4, 2020 IEP team denied Student a FAPE.

ISSUE 1(F) AND 1(G): DID FREMONT DENY STUDENT A FAPE BY CONVENING THE MAY 4, 2020 IEP TEAM MEETING, WITHOUT PARENT, AND PROVIDING A PLACEMENT OFFER TO STUDENT, IN PARENT'S ABSENCE?

Student contends that Fremont's convening the May 4, 2020 IEP team meeting and making a placement offer to Student, without Parent, resulted in a denial of FAPE. Fremont contends that it was entitled to hold the May 4, 2020 IEP team meeting, with or without Parent, because of prior failed attempts to convince Parent to attend a part-two meeting for Student's annual IEP.

Any State or local educational agency that receives assistance under the IDEA, must establish procedures to ensure that children with disabilities and their parents are

guaranteed procedural safeguards with respect to the provision of a FAPE by such agencies. (20 U.S.C. 1415(a), Ed. Code, § 56342.5.) Educational agencies are required to provide an opportunity for the parents of a child with a disability to participate in meetings with respect to the identification, evaluation, educational placement, and the provision of a FAPE to the child. (20 U.S.C. 1415(b).) Accordingly, IEP team meetings must include the parents of a child with a disability. (20 U.S.C. § 1414(d)(1)(B)(i), 34 C.F.R. § 300.321(a)(1), Ed. Code, § 56341, subd. (b)(1).) However, these legal provisions must be considered concurrently with the legal provisions regarding the transfer of educational rights to students with exceptional needs who reach the age of majority.

When a student with exceptional needs reaches the age of majority under state law, except for a student who has been determined to be incompetent under state law, any notice of procedural safeguards required by title 20 United States Code section 1415, shall be provided to both the student who is 18, and the parents. All other rights accorded to parents shall transfer to the student. (20 U.S.C §1415(m); Ed. Code § 56041.5.) Accordingly, a parent of such an adult student only retains the right to receive notice of procedural safeguards. The right to participate in IEP team meetings regarding the identification, evaluation, educational placement, and the provision of a FAPE to the adult student, is transferred from parent to student, upon the student's reaching the age of majority. Educational agencies must thereafter afford the adult student the opportunity to participate in such IEP team meetings, not the student's parent.

It is undisputed that Fremont convened the May 4, 2020 IEP team meeting without Parent or Student. At that meeting, Fremont offered Student placement in a

residential school, in or outside of California, depending on availability. Fremont had no legal obligation to include Parent in the May 4, 2020 IEP team meeting because Student held educational rights. Student failed to prove that Fremont's failure to include Parent at the May 4, 2020 IEP team meeting denied Student a FAPE. Student did not raise any issue regarding Fremont's convening the May 4, IEP team meeting without Student. Accordingly, no analysis or legal conclusions regarding Fremont's convening the IEP team meeting without Student are included in this decision.

Fremont had no legal obligation to include Parent in the May 4, 2020 IEP team meeting when a placement offer was provided to Student. Student failed to prove that offering Student a placement at the May 4, 2020 IEP team meeting, without Parent's presence, denied Student a FAPE. Student did not raise any issue regarding Fremont's providing a placement offer to Student, without Student's presence. Accordingly, no analysis or legal conclusions regarding the appropriateness of providing a placement offer to Student at the May 4, 2020 IEP team meeting, without Student's presence, are included in this decision.

CONCLUSIONS AND 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.

Issue 1(a): Fremont did not deny Student a FAPE by failing to timely provide notice of the May 4, 2020 IEP team meeting. Fremont prevailed on Issue 1(a).

Issue 1(b): Fremont did not deny Student a FAPE by failing to schedule the May 4, 2020 IEP team meeting at a mutually agreeable time and place for Student. Fremont prevailed on Issue 1(b).

Issue 1(c): Fremont did not deny Student a FAPE by failing to provide a legally sufficient notice of the May 4, 2020, IEP team meeting, specifically, failing to include the names of IEP team participants. Fremont prevailed on Issue 1(c).

Issue 1(d): Student did not sustain the burden of proof that Fremont denied Student a FAPE by including a general education teacher on the IEP team. Fremont prevailed on Issue 1(d).

Issue 1(e): Student did not sustain the burden of proof that Fremont denied Student a FAPE by including a regular education teacher on the IEP team who was not currently involved in Student's education. Fremont prevailed on Issue 1(e).

Issue 1(f): Student did not sustain the burden of proof that Fremont's convening the May 4, 2020 IEP team meeting, without Parent, denied Student a FAPE. Fremont prevailed on Issue 1(f).

Issue 1(g): Student did not sustain the burden of proof that Fremont's providing a placement offer to Student at the May 4, 2020 IEP team meeting, in Parent's absence, denied Student a FAPE. Fremont prevailed on Issue 1(g).

ORDER

All of Student's requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Rita Defilippis

Administrative Law Judge

Office of Administrative Hearings