BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

CASE NO. 2023050768

DECISION

NOVEMBER 9, 2023

On June 19, 2023, the Office of Administrative Hearings, called OAH, received an amended due process hearing request from Student, naming Fremont Unified School District. The matter was continued on July 28, 2023. Administrative Law Judge June R. Lehrman heard this matter via videoconference on August 22, 23, 24, 29, and 30 and September 19, 2023.

Father represented Student. Student attended the hearing on September 19, 2023. Attorney Elizabeth Schwartz represented Fremont. Director of Special Education Fran English attended all hearing days on Fremont's behalf.

At the parties' request the matter was continued to October 16, 2023, for written closing briefs. The record was closed, and the matter was submitted on October 16, 2023.

ISSUES

1. Did Fremont violate the provisions of Education Code section 56041, subdivision (a), by failing to provide special educational services and accommodations after Student reached the age of majority from May 19, 2021, through May 19, 2023?

2. Did Fremont deny Student a free appropriate public education, called FAPE, by assigning Student to a full day at Kennedy High School for the 2021-2022 school year, rather than home instruction and home services as set forth in the implemented individualized education program, called an IEP, without Parent's prior informed consent?

3. Did Fremont deny Student a FAPE by denying, delaying, and modifying requested special educational services that were uniquely designed to properly address Student's fear of school attendance for the period of May 19, 2021, through May 19, 2023?

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4. Did Fremont deny Student a FAPE by:

   a. violating Student's right of choice of education and representation, once Student had signed over her educational rights to Parent, by continuing to communicate with Student, and failing to communicate only with Parent?

   b. making changes to Student's IEP services and accommodations that required both the Parent and Student's agreement?

5. Did Fremont deny Student a FAPE during the 2020-2021 school year, from May 19, 2021, to May 19, 2023, by failing to assign California special education credentialed teachers to provide any assistance to Student in her English language distance learning class?

6. Did Fremont deny Student a FAPE by failing to obtain informed consent from Student and Parent to place Student in a residential facility for Student's education and mental health service from May 19, 2021, through May 19, 2023?

7. Did Fremont deny Student a FAPE when it continued to offer a 24/7 residential care facility placement, ignoring the recommendation of Student's independent educational evaluator, Jan Johnston-Tyler, as well as Parent and the adult Student's objection that they did not agree to a 24/7 care facility placement from May 19, 2021, through May 19, 2023?

8. Did Fremont deny Student a FAPE when Student was denied transitional services, independent living skills including (a) denying Student driver's education and driver's training, and (b) being able to select Student's own private counsellor from May 19, 2021, through May 19, 2023?

9. Did Fremont deny Student a FAPE by ignoring Parent's, the holder of Student's educational rights, right to obtain Student's IEP records from May 19, 2021, through May 19, 2023?

10. Did Fremont deny Student a FAPE by rejecting the request for a re-evaluation of Student in its May 26, 2023 prior written notice?

11. Did Fremont deny Student a FAPE by refusing to implement any of the recommendations of the independent educational evaluation of Jan Johnston-Tyler, at the IEP meeting on January 20, 2022?

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.) All

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further references to the Code of Federal Regulations are to the 2006 edition unless otherwise specified. 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 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 free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student bore the burden of proof. The factual statements in this Decision 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 22 years old at the time of hearing. Father resided within Fremont's geographic boundaries at all relevant times.

ISSUE 1: DID FREMONT VIOLATE THE PROVISIONS OF EDUCATION CODE SECTION 56041, SUBDIVISION (A), BY FAILING TO PROVIDE SPECIAL EDUCATIONAL SERVICES AND ACCOMMODATIONS AFTER STUDENT REACHED THE AGE OF MAJORITY FROM MAY 19, 2021, THROUGH MAY 19, 2023?

Student contends Fremont was obligated to offer her an educational program after she relocated to Texas, based upon Father's residency when Student turned 18. Although the issue as worded states that Fremont failed to "provide" services, the gravamen of the issue is not that Fremont failed to implement a program, but failed to offer one at all. Fremont contends that prior to Student's relocation to Texas, it offered her an educational program. Fremont contends it would be a legal absurdity to hold it responsible for her education after she relocated out of state.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services that are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the*

Hendrick Hudson Central School Dist. v. Rowley (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 399 [137 S.Ct. 988, 998-1000.)

Education Code section 56041, subdivision (a), states that if it is determined by the IEP team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, shall, for nonconserved pupils, be the last district of residence in effect prior to the pupil attaining the age of majority as long as and until the parent or parents relocate to a new district of residence.

Student was a nonconserved pupil for whom the IEP team had determined that special education services were required beyond her 18th birthday. For this reason, the local education agency where Father resided just prior to Student's 18th birthday was responsible so long as Father continued to reside there.

Student turned 18 on February 20, 2019. Father resided within Fremont at that time. For this reason, Fremont remained the responsible local educational agency for purposes of special education unless or until Father relocated, which he did not. Fremont convened IEP team meetings and offered Student special education and related services through IEPs and amendments up to and including January 20, 2022.

On or around February 23, 2022, when Student was 21, Father at an IEP team meeting informed Fremont that Student had permanently relocated to Texas. The next day, February 24, 2022, Fremont sent letters stating that because Student was an adult living in Texas, Fremont no longer had an obligation to educationally serve her based on residency. The letters stated that due to Student's relocation to Texas, Fremont was under no legal obligation to provide her with a FAPE and would not hold any additional

IEP team meetings unless Fremont received information that Student was residing, and seeking an educational program, in California. The February 23, 2022 IEP team meeting was the last IEP team meeting held for Student.

Fremont's position stated in these letters was legally incorrect. Student's residency was determined by Father's residence when Student turned 18. (Ed. Code, § 56041, subd. (a).) Therefore, for the time period commencing February 24, 2022, when Fremont discontinued serving her, Student remained entitled to an offer of an educational program from Fremont.

Fremont argues it is a legal absurdity to require it to offer a FAPE to a student who has relocated to another state. The argument is not persuasive. The statute is clear that Fremont was responsible to offer Student a FAPE because Student's residence was based on Father's continued residence there. Fremont incorrectly determined that Student's relocation had absolved it of the duty to make an educational offer of any kind. However, Fremont had the legal responsibility to offer Student an educational program that it considered to constitute a FAPE. If that offer were made and Student declined it, Fremont would have complied with its responsibilities to offer what it considered to be FAPE based on Student's legal residency within its boundaries. Having made no offer of any kind, however, Fremont's "legal absurdity" argument is not persuasive.

However, Student's entitlement to a FAPE ended when she turned 22 on February 20, 2023. Both the IDEA and California law have maximum age limits for special education eligibility. (34 C.F.R. § 300.102; Ed. Code, § 56026, subd. (c)(4)(A)-(D).) The termination of eligibility due to reaching the maximum age is commonly referred to as "aging out." Under California law, the month that an eligible student with a February

birthday turns 22 dictates when eligibility for special education services stops if a regular diploma has not been awarded, unless Student is "participating in a program," in which case eligibility lasts to the end of the school year. (Ed. Code, § 56026, subd. (c)(4)(A).) Whenever a student ages out, the student is then permanently aged-out of special education eligibility. (Ed. Code, § 56026, subd. (c)(4)(D).) Because Student was not participating in her educational program, she aged out on her 22nd birthday.

For these reasons, Fremont denied Student a FAPE for the time period commencing February 24, 2022, when Fremont discontinued serving her, until February 20, 2023 when she turned 22. For this time frame, Student prevailed on Issue 1. Remedies are discussed below.

ISSUE 2: DID FREMONT DENY STUDENT A FAPE BY ASSIGNING STUDENT TO A FULL DAY AT KENNEDY HIGH SCHOOL FOR THE 2021-2022 SCHOOL YEAR, RATHER THAN HOME INSTRUCTION AND HOME SERVICES AS SET FORTH IN THE IMPLEMENTED IEP, WITHOUT PARENT'S PRIOR INFORMED CONSENT?

Student contends that at the beginning of the 2021-2022 school year, Fremont assigned Student to classes at Kennedy High School without consent, and that this constituted a change from her last agreed-upon and implemented IEP. Fremont contends it did not fail to implement Student's IEP.

A school district violates the IDEA if it materially fails to implement a child's IEP. (20 U.S.C. § 1401(9)(D).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.)

Student's last agreed-upon IEP was dated June 13, 2018, and Father consented to it on June 14, 2018. Throughout the entire time frame at issue in this due process matter, Student's June 13, 2018 IEP remained the last IEP to which Father had consented. The June 13, 2018 IEP stated on the page entitled "educational setting" that Student would attend Kennedy High School until graduation.

The June 13, 2018 IEP also offered related services. It offered one hour a week of specialized academic instruction, to take place at COIL charter school. COIL was a charter school that provided services either virtually or in person. The June 13, 2018 IEP offered individual counselling services to take place in a separate classroom at a public school and it specified Kennedy High. It offered 720 weekly minutes of home instruction by a nonpublic agency, and specified Varsity Tutors. Special education teacher and case manager Jan Johnson explained at hearing that these were related services as opposed to a "placement." The Notes page reiterated the educational setting: "[Student] will attend Kennedy High School until graduation."

During the 2020-2021 school year, the COVID-19 pandemic meant that all students were receiving instruction in a virtual format and not in-person on campus.

Fremont returned to in-person learning after the pandemic, for the 2021-2022 school year, commencing on August 18, 2021.

On August 19, 2021, English emailed Father a proposed schedule of classes for Kennedy High that would comprise Student's schedule for the 2021-2022 school year. Later that day another Fremont employee sent a follow-up email stating that because Fremont had returned to in-person instruction, books would no longer be distributed

as they had been during the prior year due to the COVID-19 pandemic. The email continued: "The schedule that Ms. English sent earlier is for all day and on campus learning."

Johnson was assigned as Student's case manager on or around August 24, 2021. On August 24, 2021, Johnson offered Student regular Zoom sessions on Tuesdays and Thursdays for her specialized academic instruction services, and she set a recurring Zoom invitation.

Here, the June 13, 2018 IEP accommodated Student's disability by providing her with various forms of in-home instruction, both before and after school closures due to the COVID-19 pandemic. These took the form of related services, specifically specialized academic instruction through the online charter school COIL, then Johnson offering specialized academic instruction via Zoom, and home instruction with Varsity Tutors. But, the last agreed-upon and implemented IEP, from June 13, 2018, called for Student's placement to be in general education and for her to attend Kennedy High as her educational setting. Therefore Fremont did not fail to implement Student's IEP by assigning Student to a full day at Kennedy High for the 2021-2022 school year, rather than home instruction and home services. Fremont prevails on Issue 2.

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ISSUE 3: DID FREMONT DENY STUDENT A FAPE BY DENYING, DELAYING, AND MODIFYING REQUESTED SPECIAL EDUCATIONAL SERVICES THAT WERE UNIQUELY DESIGNED TO PROPERLY ADDRESS STUDENT'S FEAR OF SCHOOL ATTENDANCE FOR THE PERIOD OF MAY 19, 2021, THROUGH MAY 19, 2023?

Fremont convened Student's annual IEP for the 2020-2021 school year on October 16, 2020. This annual IEP comprised numerous continuation dates. The October 16, 2020 annual IEP continued on October 23, 2020, December 4, 2020, March 25, 2021 and April 22, 2021. These meetings and continuations will be referred to as the "2020-2021 annual IEP." Other IEP meetings occurred at Parent's request to discuss his concerns on May 14, 2021 and August 19, 2021. Fremont convened Student's annual IEP for the 2021-2022 school year on October 5, 2021, and continued on October 12, 2021. This will be referred to as "the 2021-2022 annual IEP." Other IEP meetings occurred at Parent's request on January 20, 2022 and February 23, 2023. Fremont's offer of FAPE beginning with the 2020-2021 annual IEP and repeated in the 2021-2022 annual IEP was for a residential treatment center. Student contends that instead of residential treatment, Fremont should instead have offered Student modifications to her preexisting program. Thus, Student contends Fremont denied her a FAPE by failing to provide her with a change in her tutoring agency. Student also sought a female counsellor who would meet her off site in a park or restaurant. Fremont contends its offer of residential treatment was FAPE, and it did not deny Student a FAPE by denying these requests.

TUTORING SERVICES

At the May 14, 2021 IEP team meeting, Father requested to replace Varsity Tutors with a different agency called Strategies for Learning. At the time, Fremont denied the request. Instead of agreeing to specialized academic instruction by Strategies for Learning, Fremont wrote prior written notice letters dated May 27, 2021, and August 25, 2021, that denied Strategies for Learning and instead offered home hospital instruction from Fremont for 12 hours a week with a credentialled special education teacher to support Student with her class and homework assignments. This offer was not consented to. At the 2021-2022 annual IEP team meeting on October 5, 2021, Student through her advocate again requested Strategies for Learning to deliver remote instruction as Student had not participated in Varsity Tutors sessions since January of 2021. Fremont then agreed to fund Strategies for Learning in lieu of Varsity Tutors as the provider. Once granted, Student did not actually access the services.

FEMALE COUNSELLOR

The first day of the 2021-2022 school year was August 18, 2021. On August 24, 2021, Student signed a declaration to the effect that she was concerned that she had been appointed to a male counsellor. Via a prior written notice dated the next day, August 25, 2021, Fremont agreed to appoint a female counsellor. In other words, Fremont granted this request immediately.

COUNSELLING AT A PARK LOCATION

At the 2021-2022 annual IEP team meeting of October 5, 2021, Student's advocate asked for the Fremont mental health provider assigned to Student to meet her in a park or restaurant rather than a school location. Fremont denied this request. The assigned

counsellor was not comfortable with the idea. She had concerns over confidentiality, and also whether her license authorized services off-site. However, she offered several other counselling options including Zoom meetings or phone calls. Via a prior written notice dated October 18, 2021, Fremont formally declined the request for counselling at a park or restaurant.

ANALYSIS AND CONCLUSION

Fremont prevails on Issue 3. The IDEA does not confer upon parents the right to choose the personnel who work with their children, and assignment of staff is the prerogative of the school district. The IDEA permits districts to treat these matters as administrative decisions, which are made by school personnel. (*Letter to Wessels* (OSEP March 9, 1990) 16 IDELR 735.) Several unpublished Ninth Circuit decisions have held that if the assigned personnel are qualified to perform the designated service, the allocation of qualified personnel to provide services falls within the administrative discretion of the agency. (See *Cheryl Blanchard v. Morton School Dist. et al.* (9th Cir. 2010) 385 Fed.Appx. 640 (unpublished)(*Blanchard*); *Gellerman v. Calavaras Unified School Dist.* (9th Cir. 2007) 43 Fed.Appx. 28 (unpublished); *Zasslow v. Menlo Park City School Dist.* (9th Cir. 2003) 60 Fed.Appx. 27 (unpublished).)

The IDEA does not require school districts to defer to parental preference in choice of educational providers. In *Blanchard*, the school district chose a qualified educational assistant for student. The parent hoped to have district retain an educational assistant of parent's choosing. At hearing, no independent or objective evidence demonstrated the educational assistant selected by the school district was an inadequate choice. (*Cheryl Blanchard v. Morton School Dist, et al.* (W.D.Wa) 2009 WL 481306, at p. *2; aff'd by *Blanchard, supra*).

Fremont's offer of placement, beginning with the 2021-2022 annual IEP and repeated in the 2022-2023 annual IEP, was a residential treatment center. Student had stopped participating in her educational program prior to the 2020-2021 school year. During the 2019-2020 school year, Student refused specialized academic instruction services. She was not accessing an online credit recovery program called APEX. Johnson was assigned as Student's case manager on or around August 24, 2021. Student was not submitting work or coming to class, nor attending APEX. On August 24, 2021, Johnson offered Student regular Zoom sessions on Tuesdays and Thursdays for her specialized academic instruction services, and she set a recurring Zoom invitation, but Student never attended, and all the Zoom invitations were returned as "declined." The evidence presented in this due process hearing for the time frame at issue here, commencing May 19, 2021, was that Student had not been able to consistently access any educational services due to her disability including significant anxiety and depression. Student was not participating in the regular education environment. Student's declining of all educational services that had been offered to her was the basis for Fremont's offers of residential treatment.

Given this history of school refusal of all services that had been offered, Student did not meet the burden of proving that a six-week denial of a change of tutoring agencies was a denial of FAPE, especially since she did not access the services once granted. The May 27, 2021 request for a change of tutoring agencies was made at the end of the 2020-2021 school year. The request was granted on October 5, 2021, six weeks after the beginning of the 2021-2022 school year. There was no proof that the six-week delay caused any actual deprivation of instructional time. Once granted, Student did not actually access the services.

Similarly, the granting of the request for a female counsellor was granted immediately but did not result in Student's accessing those services.

Insofar as Student contends she should have been permitted to dictate the location of her counselling services, there is no legal authority to support such a requirement as part of the provision of FAPE. FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Counselling at a school location met state educational standards. Student did not access the services when these were offered to her via telephone or Zoom. She did not establish she would have accessed or was denied a FAPE when the counsellor declined, for professional responsibility reasons, to meet her in a public location.

Fremont therefore prevails on Issue 3. Fremont did not deny Student a FAPE by denying, delaying, and modifying requested special educational services that were uniquely designed to properly address Student's fear of school attendance for the period of May 19, 2021, through May 19, 2023, specifically by not changing tutoring agencies, not appointing a female counsellor, and not offering counselling services to occur at a park or restaurant.

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ISSUE 4(a): DID FREMONT DENY STUDENT A FAPE BY VIOLATING STUDENT'S RIGHT OF CHOICE OF EDUCATION AND REPRESENTATION, ONCE STUDENT HAD SIGNED OVER HER EDUCATIONAL RIGHTS TO PARENT, BY CONTINUING TO COMMUNICATE WITH STUDENT, AND FAILING TO COMMUNICATE ONLY WITH PARENT?

Student contends that by virtue of Student's transfer of educational rights to Father, dated January 28, 2021, and other documentation, Fremont denied Student a FAPE by communicating directly with her rather than solely with Father. Fremont contends that it did not deny Student a FAPE by communicating with both Student and Father.

On April 3, 2019, Student and Father signed a document entitled "notification of representation" that authorized Father to communicate with Fremont on Student's behalf. The document requested that no communications regarding her education be sent directly to her except those from her counsellor. In this document entered into between Father and Student, they agreed that he would "represent" her in her educational dealings, and would shield her from all communications about it. By virtue of this contract, Student contends Fremont violated Student's rights when it chose to communicate with her directly. In other words, Student contends Fremont was obligated or bound by the terms of this contract between Student and Father.

There is no merit to Student's argument. The contract did not bind Fremont, who was not a signatory to it. Under California Civil Code section 1427, "an obligation is a legal duty, by which a person is bound to do or not to do a certain thing." Under Civil Code section 1428, an obligation arises either from the contract of the parties, or the

operation of law. Here, there was no contract that Fremont signed and thus, no contractual obligation on its part. Father and Student cannot by their contract bind a stranger to the contract, a third party, to an obligation they purport to impose on that party.

Student further argues that because Student had on January 28, 2021, signed over her educational rights to Father, and had signed declarations to the same effect dated August 24, 2021, and June 12, 2023, Fremont violated Student's rights by thereafter communicating directly with Student.

No later than one year before a pupil reaches the age of 18, the IEP must include a statement that the pupil has been informed of the rights that will transfer to the pupil upon reaching the age of 18. (Ed. Code, § 56345(g); 34 C.F.R. § 320(c).) When an individual with exceptional needs reaches the age of 18, with the exception of an individual who has been determined to be incompetent under state law, the local educational agency shall provide any notice of procedural safeguards to both the individual and the parents of the individual. All other rights accorded to a parent under this part shall transfer to the individual with exceptional needs. The local educational agency shall notify the individual and the parent of the transfer of rights. (Ed. Code, § 56041.5.).) However, this statute does not prohibit a nonconserved adult from assigning educational decision-making authority back to his or her parents, or another representative, after the nonconserved adult is deemed to possess those rights.

The law is silent regarding the effect of a transfer or delegation of educational rights on who shall be the recipient of education-related communications. Therefore,

there is nothing in the law that prohibited Fremont, after the transfer of educational rights from Student back to Father, from communicating with both of them. A school district "must ensure that … ." (34 C.F.R. § 300.321(a)(7).)

There are various examples of direct contact with Student about which Father, on Student's behalf, now complains. On August 23 and 26, 2021, a school counsellor emailed both Student and Father to introduce himself to them. On February 24, 2022, May 25, 2023, and June 12, 2023, English addressed prior written notices to both Student and Father. Also, Student was copied on pleadings in this due process matter in which Student is the named Petitioner. For example, on May 25, 2023, after the May 19, 2023 filing of this due process matter, English sent to Student an invitation to a resolution session.

No law has been cited by Student in support of the argument that Fremont was legally obligated to abide by Student's expressions of her desires not to be contacted. No law has been cited that the effect of a transfer of educational rights prohibits direct contact with the transferor, as well as the transferee, of those rights. For these reasons, Student failed to meet her burden of proof that there was any procedural violation here. Fremont prevails on Issue 4(a).

ISSUE 4(b): DID FREMONT DENY STUDENT A FAPE BY MAKING CHANGES TO STUDENT'S IEP SERVICES AND ACCOMMODATIONS THAT REQUIRED BOTH THE PARENT AND STUDENT'S AGREEMENT?

Student contends Fremont made changes and implemented programs to which Student and Father did not consent. Fremont contends there was no evidence to support Student's contention.

Fremont is correct. Student presented no evidence to support a contention that Fremont made changes to Student's IEP services and accommodations without required consent. After the transfer of educational rights dated January 28, 2021, evidence was introduced pertaining to IEP meetings on May 14, 2021, August 19, 20201 at Parent request after the 2020-2021 annual IEP. Then, the 2021-2022 annual IEP occurred on October 5, 2021, October 12, 2021, after which further meetings occurred to discuss parental concerns on January 20, 2022 and February 23, 2021. The offers made in these documents were not consented to, and no evidence was presented that Student's program was changed absent the required consent. Fremont prevails on Issue 4(b).

ISSUE 5: DID FREMONT DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR FROM MAY 19, 2021, TO MAY 19, 2023, BY FAILING TO ASSIGN CALIFORNIA SPECIAL EDUCATION CREDENTIALED TEACHERS TO PROVIDE ANY ASSISTANCE TO STUDENT IN HER ENGLISH LANGUAGE DISTANCE LEARNING CLASS?

Student contends that during the 2020-2021 school year, which is when distance learning was being implemented due to the COVID-19 pandemic, Student was enrolled in an English class without a special education credentialled teacher to assist her. Fremont contends Student's IEP did not require a credentialled special education teacher's assistance in the English language arts distance learning class, and that this was not required to offer her a FAPE.

The claim in Issue 5 is almost all outside the statute of limitation for this due process matter. The relevant time period for the statute of limitations for this due process dispute commenced on May 19, 2021, almost at the very end of the 2020-2021

school year. The only portion of the 2020-2021 school year that is within the statute of limitations is the approximately three-week time period from May 19, 2021 to June 9, 2021, which was the last day of the 2020-2021 school year.

Neither for the 2020-2021 school year nor the remainder of the time frame at issue in this due process proceeding, did Student offer any evidence to support the contention in Issue 5. No evidence was presented concerning distance learning classes, nor the assignment of special education assistance in those classes, nor the absence of any such assistance. Accordingly, Student failed to meet her burden of proof and Fremont prevails on issue 5.

ISSUE 6: DID FREMONT DENY STUDENT A FAPE BY FAILING TO OBTAIN INFORMED CONSENT FROM STUDENT AND PARENT TO PLACE STUDENT IN A RESIDENTIAL FACILITY FOR STUDENT'S EDUCATION AND MENTAL HEALTH SERVICE FROM MAY 19, 2021, THROUGH MAY 19, 2023?

ISSUE 7: DID FREMONT DENY STUDENT A FAPE WHEN IT CONTINUED TO OFFER A 24/7 RESIDENTIAL CARE FACILITY PLACEMENT, IGNORING THE RECOMMENDATION OF STUDENT'S INDEPENDENT EDUCATIONAL EVALUATOR, JAN JOHNSTON-TYLER, AS WELL AS PARENT AND THE ADULT STUDENT'S OBJECTION THAT THEY DID NOT AGREE TO A 24/7 CARE FACILITY PLACEMENT FROM MAY 19, 2021, THROUGH MAY 19, 2023?

Student contends Fremont denied her a FAPE by failing to obtain informed consent regarding its offer of a residential facility and by continuing to make that offer

over objection. Fremont contends it did not place Student anywhere without consent, and that it is legally obliged to make offers of educational placement and service it considers FAPE even if a parent or student disagree.

If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, the components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) If the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a FAPE to the child, a due process hearing shall be initiated in accordance with title 20 United States Code section 1415(f). (Ed. Code, § 56346, subd. (f).)

School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers; and that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); Ed. Code, § 56031.)

The continuum of program options includes, but is "not necessarily" limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;

- designated instruction and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication, and instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

As stated above, Fremont's offer of placement beginning with the 2020-2021 annual IEP was a residential treatment center. Father and Student did not consent to the offer of residential treatment. On November 5, 2020, and January 28, 2021, Student signed declarations stating her opposition to the idea of residential treatment. Fremont maintained the same placement offer throughout the remaining time frame at issue here, reiterating it in the 2021-2022 annual IEP. The placement offer was based on Student's history of refusing to go to school, her social isolation, anxiety, and depression. Student had not accessed any classes or related services offered by Fremont during or since the 2020-2021 school year.

Sherry Burke was a licensed marriage and family counsellor and educational psychologist who had practiced as a school psychologist for 17 years prior to practicing privately conducting independent educational evaluations, of which she had conducted approximately 800. Fremont contracted with Burke to conduct Student's triennial assessment in preparation for the October 2020 annual IEP. Burke found that Student's mental health issues had impacted her education to a significant degree as she had not received a consistent educational program due to excessive absences that resulted from severe anxiety and depression. Burke concluded, "At this time, it is the opinion of the

evaluator that [Student] is entitled to both residential treatment (based on her pattern of school and service refusal or inability to access these services) and [mental health] school-based counseling."

Student was strongly opposed to going to a residential treatment center. Student told Burke her feelings, and Burke's assessment report noted Student's opposition. Nevertheless, Burke felt a residential treatment center would be in Student's best interests. She felt that socially and educationally it would be a "great opportunity." At the time, Student was not leaving the home, or accessing her education via Zoom. She was staying up all night, had no routine, had bad sleep hygiene, bad food hygiene, deficits in her personal care and was unkempt, and presented as overweight to a degree with which Student stated she was not comfortable.

Burke presented her report at the 2020-2021 annual IEP team meeting held on December 4, 2020. Burke discussed the benefits of a residential facility, such as very small classes and a therapeutic environment. In a therapeutic program, Student would have access to round-the-clock social-emotional support to develop coping skills and access her educational program. For all these reasons, Fremont believed Student required a residential treatment center to receive a FAPE, and thought the adult program at Journey Academy, specifically, was a good fit for Student. Father did not consent.

At an amendment IEP team meeting on May 14, 2021, Fremont continued to offer placement at a residential treatment center program. Father informed Fremont he did not agree with this offer. In a prior written notice dated May 27, 2021, Fremont reiterated that its offer of FAPE was a residential treatment center.

The first day of school of the 2021-2022 school year was August 18, 2021. Fremont convened an IEP team meeting on August 19, 2021, to discuss Father's concerns. Father continued to state his disagreement with Fremont's offer of FAPE for Student. On August 24, 2021, Student signed another declaration stating her opposition to residential treatment.

When Jan Johnston-Tyler conducted her independent transition evaluation, discussed elsewhere in this Decision, and presented it at the January 20, 2022 IEP team meeting, she opined that a residential treatment center was not appropriate because Student would consider it "punitive."

There is no merit to Student's contention in Issue 6 that Fremont denied Student a FAPE by failing to obtain informed consent from Student and Parent to place Student in a residential facility. Fremont never actually placed Student against her will. Districts are legally obliged to make offers they consider to be a FAPE even when a parent disagrees with those offers. Absent parental consent, or a judicial order authorizing implementation if the parent/student seeks special education and related services from the school district, the offer will not be implemented. Father did not consent, and as a result Fremont did not actually place Student anywhere to which consent was not obtained. Parent retains the right to withhold consent for the provision of special education and related services. (Ed. Code, § 56346, subd.(e.) Thus, the making of the offer itself with which a student or parent disagrees is not a denial of FAPE. Fremont prevails on Issue 6.

For the same reasons, there is no merit to Student's contention in Issue 7, that Fremont denied Student a FAPE when it continued to offer a residential treatment over Father's and Student's objections and against Johnston-Tyler's recommendations.

Districts do not deny a FAPE by making offers with which a student or parent disagrees. Districts are obligated to offer that which they as education professionals consider to be necessary for a FAPE. Parents and student are free to disagree, and in the absence of the parent's or student's consent, the offer will not be implemented. Moreover, as discussed below, the recommendations of an independent evaluator must be considered but a school district is under no obligation to follow recommendations with which it disagrees. Fremont prevails on Issue 7.

ISSUE 8: DID FREMONT DENY STUDENT A FAPE WHEN STUDENT WAS DENIED TRANSITIONAL SERVICES, INDEPENDENT LIVING SKILLS, INCLUDING (A) DENYING STUDENT DRIVER'S EDUCATION AND DRIVER'S TRAINING AND (B) BEING ABLE TO SELECT STUDENT'S OWN PRIVATE COUNSELLOR FROM MAY 19, 2021, THROUGH MAY 19, 2023?

Student contends Fremont denied her a FAPE when it denied her driver's education and driver's training, and being able to select her own private counsellor. Fremont contends there is a distinction between driver's education and driver's training and that the latter was not necessary to offer Student a FAPE. Fremont further contends that it was not obligated to provide Student with a private counsellor.

Once a child turns 16, the IEP must include appropriate measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills, and the transition services needed to assist the child in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(a)(7)(b).) Transition services are defined as a coordinated set of activities

that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including

- post-secondary education,
- vocational education,
- integrated employment,
- continuing and adult education,
- adult services,
- independent living, or
- community participation.

It is based on the student's needs, taking into consideration the student's strengths, preferences and interests; and includes

- instruction,
- related services,
- community experiences,
- the development of employment and other post-school adult living objectives, and
- if appropriate, acquisition of daily living skills and a functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

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DRIVER'S EDUCATION AND TRAINING

California Education Code section 51220, subdivision (j), states that the adopted course of study for grades seven to 12, inclusive, shall offer courses in automobile driver education, designed to

- develop a knowledge of the Vehicle Code and other laws of this state relating to the operation of motor vehicles,
- a proper acceptance of personal responsibility in traffic,
- a true appreciation of the causes, seriousness, and consequences of traffic accidents, and
- the knowledge and attitudes necessary for the safe operation of motor vehicles.

As applied to special education, Education Code section 56363, subdivision (b)(8), specifically includes specialized driver training instruction within the definition of designated instruction and services, also known as related services. Furthermore, Education Code sections 41304 and 41306 provide for funding for such programs:

> It is the intent of the Legislature that driver training instruction be provided to pupils as a part of the high school curriculum, and the Legislature finds and declares that exceptional children are entitled to the benefit of that instruction so far as their individual capabilities permit, understanding that those pupils herein described often require individualized and amplified driver training instruction in order to succeed in becoming safe operators of motor vehicles. Since without a means of self-transportation much of the overall program of education

> and rehabilitation provided for by the Legislature would be of little avail to the person without the mobility required to become a productive and well-adjusted member of society, the Legislature further declares that it is incumbent upon the state to share in the cost of providing a most needed and desirable program of driver training instruction for these exceptional children. (Ed. Code, § 41306.)

Fremont offered Student a post-secondary transition plan at the 2020-2021 annual IEP meeting that occurred on October 5, 2021. As pertinent here, the October 5, 2021 transition plan did not include a goal to obtain a driver's license. At the continuation of the 2020-2021 annual IEP that was held on October 12, 2021, Student's transition plan was updated to include a post-secondary goal of taking a driver's education course and obtaining a driver's license. The transition plan listed certain activities to support that goal, but it did not offer any specific instruction or related services. Fremont stated at the October 12, 2021 IEP team meeting, and reasserted at hearing, that only limited driver's education was offered through the school district. English explained at hearing that the activities outlined in the transition plan would be self-directed by Student. These included studying the driver's handbook, helping prepare for driver safety, studying how to enroll in a driver's education course, and applying for a driver's permit.

At the January 20, 2022 IEP team meeting at which Johnston-Tyler's independent transition evaluation was reviewed, Father asked for driver's education. On February 24, 2022, and June 12, 2023, Fremont sent prior written notices denying the request because the services would have to be provided out of state, where Student then resided. English explained at hearing that driver's training is not "related to the curriculum." English reiterated that driver's education is not legally mandated, and that she did not believe Fremont remained responsible for Student's education once Student resided in Texas.

English's testimony concerning driver's education was vague and ambiguous. While acknowledging that the IDEA requires providing a student with appropriate services based on their unique needs to receive a FAPE, English also stated categorically that Fremont teachers do not teach driver's education. English testified that driver's education is not a required part of the curriculum and although some teachers may go over some of the basics, "we do not offer the training necessary to get a license." And, although special education should meet Student's unique needs, Student would have to attend school in order to be provided transition services. English asserted Fremont did not provide Student driver's education because she did not attend school.

Based on the authorities cited above, there is no merit to Fremont's contentions concerning driver's education being outside the purview of the school district's curriculum. Since obtaining a driver's license was a stated transition goal in Student's transition plan, it was a denial of FAPE to offer her no instruction and services in that area of need. For the time period from January 20, 2022 when the request was made, to February 20, 2023 when Student aged out of eligibility for special education, Student prevails on Issue 8(a). Remedies are discussed below.

OWN COUNSELLOR

At the January 20, 2022 IEP team meeting at which Johnston-Tyler's independent transition evaluation was reviewed, Father asked that Student be allowed to choose her own therapist. He reiterated this request at the last IEP team meeting on February 23, 2022.

On February 24, 2022, and June 12, 2023, Fremont sent prior written notices denying the request. English explained at hearing that a counsellor of Student's own choosing was denied because school-based counsellors must be credentialled.

As stated in further detail above, the IDEA does not confer upon parents the right to choose the personnel who work with their children, and assignment of staff is the prerogative of the school district. The IDEA permits districts to treat these matters as administrative decisions, which are made by school personnel. The IDEA does not require school districts to defer to parental preference in choice of educational providers. For these reasons, the denial of a therapist of Student's own choosing did not deny her a FAPE. Fremont prevails on Issue 8(b).

ISSUE 9: DID FREMONT DENY STUDENT A FAPE BY IGNORING PARENT'S, THE HOLDER OF STUDENT'S EDUCATIONAL RIGHTS, RIGHT TO OBTAIN STUDENT'S IEP RECORDS FROM MAY 19, 2021, THROUGH MAY 19, 2023?

Student contends Fremont denied her a FAPE by ignoring the right of Parent, the holder of Student's educational rights, to obtain Student's educational records. Fremont contends the documentation concerning transfer of educational rights was ambiguous, and that even if it did procedurally fail to provide Father with Student's records, there was no denial of FAPE as a result.

As explained above, when an individual with exceptional needs reaches the age of 18, with the exception of an individual who has been determined to be incompetent under state law, the local educational agency shall provide any notice of procedural safeguards to both the individual and the parents of the individual. All other educational rights accorded to a parent shall transfer to the individual with exceptional needs. The

local educational agency shall notify the individual and the parent of the transfer of rights. (Ed. Code, § 56041.5.).) However, this statute does not prohibit a nonconserved adult from assigning educational decision-making authority back to his or her parents, or another representative, after the nonconserved adult is deemed to possess those rights.

The Family Educational Rights and Privacy Act, called FERPA, is a federal law that protects the privacy of student education records. (20 U.S.C. § 1232g; 34 C.F.R. § 99.) It applies to all schools that receive funds from the United States Department of Education. It gives parents the right to access and amend their children's education records and to control the disclosure of personally identifiable information from them. When a student turns 18 or enters a post-secondary institution, the rights under FERPA transfer to the student.

In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following:

- impeded the right of the child to a FAPE;
- significantly impeded the opportunity of the parents to participate in the decisionmaking process regarding the provision of a FAPE to the child of the parents; or
- caused a deprivation of educational benefits. (20 U.S.C.§ 1415 (f)(3)(C); Ed Code, § 56505, subd. (f).)

The hearing officer

"shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted

> in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505,subd. (j).)

On January 28, 2021, Student signed over her educational rights to Father. On June 15, 2022, Father emailed English asking for Student's high school transcripts. English responded that because Student was an adult, Student herself would need to request her records from the registrar at Kennedy High School. Father responded that he was the holder of Student's educational rights. English responded that the document Student had signed was solely intended to permit a prior due process hearing to proceed and it

> "does not constitute a formal conservatorship or permanent legal transfer of rights to you. That must be done through a court of law. Under FERPA we will not release any information to you without [Student's] consent. Additionally the document is many years old. If you would like a new transfer of rights document, please have it signed and notarized by [Student]."

There appears to have been confusion on English's part, conflating the January 28, 2021 transfer of educational rights with a prior, more limited type of document. But English's contentions about the limitations of the transfer, the law concerning FERPA and conservatorship, the need for a judicial ruling, or the need for Student to sign a new document, were all incorrect. First, the January 28, 2021 transfer of educational rights Student signed was not limited in its scope or duration. Second, the law does not forbid an adult student from transferring her educational rights, and

thus there is no merit to English's statement that achieving that result required a judicial ruling through a court. Third, English misapplied FERPA when she stated Fremont "will not release any information to you without [Student's] consent," when such consent had clearly and unequivocally been given through the January 28, 2021 document. Fourth, the law does not state any limitation on the duration of such a transfer of educational rights, thus English was not correct to insist upon a new document. For these reasons, Fremont's refusal to provide Student's educational records to Father was a procedural violation. Student prevails on Issue 9. Remedies are discussed below.

ISSUE 10: DID FREMONT DENY STUDENT A FAPE BY REJECTING THE REQUEST FOR A RE-EVALUATION OF STUDENT IN ITS MAY 26, 2023 PRIOR WRITTEN NOTICE?

Student contends Fremont denied her a FAPE by rejecting her May 11, 2023 request to be re-evaluated. Fremont contends Student had been appropriately assessed within three years of the request, and Student was 22 years old when Father requested re-assessment.

Fremont received no communication from Father or Student during the 2022-2023 school year before May 11, 2023, when Student through Father requested she be re-evaluated. Fremont denied that request, stating Student had been evaluated for her triennial in October 2020, and her next triennial reevaluation would not be due until October 2023 unless her educational needs had changed.

More importantly however, as discussed above, Student turned 22 on February 20, 2023. It is unclear why Fremont, in denying a reevaluation, relied on the law regarding the timing of three-year-review assessments, rather than the unequivocal

cessation of its special education obligations on February 20, 2023. Regardless, there is no merit to Student's argument that Fremont denied Student a FAPE by rejecting a re-evaluation after Student had aged out. Fremont prevails on Issue 10.

ISSUE 11: DID FREMONT DENY STUDENT A FAPE BY REFUSING TO IMPLEMENT ANY OF THE RECOMMENDATIONS OF THE INDEPENDENT EDUCATIONAL EVALUATION OF JAN JOHNSTON-TYLER, AT THE IEP MEETING ON JANUARY 20, 2022?

Student contends Fremont failed to accept the recommendations of an independent transition assessment and not following the independent assessor's recommendations denied Student a FAPE. Fremont contends it considered the independent transition assessment but was not obligated to follow its recommendations.

A parent is entitled to obtain an independent educational evaluation of a child. (20 U.S.C. § 1415(b)(1).) An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) If a parent obtains an independent educational evaluation at public expense or shares an evaluation obtained at private expense, the district must consider the results of that evaluation when making decisions involving the provision of FAPE to the child, provided that the evaluation meets district criteria. (34 C.F.R. § 300.502 (c)(1); Ed. Code § 56329, subds. (b) & (c).)

While a district must consider the results of an independent educational evaluation, it has no obligation to adopt the evaluator's recommendations or conclusions. (See, e.g., *T.S. v. Board of Educ. of the Town of Ridgefield* (2d Cir. 1993)

10 F.3d 87; *G.D. v. Westmoreland School Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.) The district is not required to adopt the conclusions of such an evaluation. (*Ibid.; Michael P. v. Department of Educ*. (9th Cir. 2011) 656 F.3d 1057, 1066, fn. 9 (*Michael P.*) Evidence that district IEP team members have considered a private evaluation include a lengthy discussion of the evaluation at an IEP team meeting. (*Michael P.*, *supra*, 656 F.3d at p. 1066, fn. 9.)

Just because an IEP team does not adopt the placement or services suggested by the parents or preferred by them, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ*. (D.Hawaii 2006) 483 F.Supp.2d 1042, 1050-1051.) A school district is not required to acquiesce to every parental demand. (*Shaw v. Dist. Of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education … designed according to the parent's desires."]; *A.V. v. Lemon Grove School Dist.* (S.D.Cal. Feb. 24 2017, 3:16-cv-0803-CAB-(BLM)) 2017 WL 733424, *7.)

Here, the evidence clearly showed Fremont meaningfully considered Student's private post-secondary transition evaluation. On November 16, 2021, a "post-secondary education and transition report" was prepared by an entity called Evolibri, specifically by a person named Jan Johnston-Tyler. At hearing, Student presented no evidence concerning the background or qualifications of Johnston-Tyler. At hearing, Student presented no evidence concerning the manner in which the report was conducted other than the report itself. Student did not call Johnston-Tyler as a witness. The report stated it was an "independent transition assessment and evaluation." It listed records Johnston-Tyler reviewed, and interviews she conducted with Student and Father. She administered two assessment instruments, the "Strong Interest Inventory" and the "Myers Briggs Type Indicator." She also administered a third instrument, identified as

a "proprietary" independent living skills assessment. The report recounted the results of these three instruments, but it did not describe the instruments themselves, what they were intended to measure, whether they were standardized or informal measures, nor the manner in which the instruments were administered. For example, no information was provided as to whether these three instruments were rating scales, or if so, who filled them out; interviews, nor who participated; or formal testing, and if so how these were administered and to whom.

The lack of information regarding who or what Evolibri was, what Jan Johnston-Tyler's qualifications were, what the assessment instruments measured, or how they were administered rendered the report unreliable. The report was uncorroborated hearsay and, although admissible itself, was of no persuasive force.

The report stated Student could no longer be successful in a high school setting, because she had tried several different formats for completing her studies and none had been successful. The report stated Student's mental health was a direct barrier to completion of high school, and forcing her to continue would further exacerbate her anxiety and poor mental health. To that end, the report recommended Fremont come to a "financial settlement" with Student. It recommended that funds be put into a trust managed by an independent fiduciary as trustee, with Student named as the beneficiary holding her own educational rights. The recommended financial settlement would cover two years of vocational or community college classes as well as private independent living skills and mental health services. The report recommended that the monies should be placed in a trust managed by an independent fiduciary giving Student sufficient flexibility to use the funds to pay for vocational or community college, mental health, intensive

outpatient services, and private independent living services for two years at three hours a week, for a total of 300 hours. The report contained a "cost analysis addendum" that estimated the total cost of the "settlement" to be $135,000.

Johnston-Tyler interviewed no Fremont employees and was not aware Fremont offered Student residential treatment. She attended, and her report was reviewed at, an IEP team meeting on January 20, 2022. Fremont IEP team members stated compensatory education was not something that is discussed in the IEP process. Fremont IEP team members inquired about the assessor's recommendations regarding Student accessing her education within the scope of the school district and IEP process. Johnston-Tyler stated she had no recommendations that could be implemented via an IEP within the constraints of the IEP process.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Compensatory education not provided through the IEP process does not meet the definition of FAPE. Therefore, Fremont's refusal to offer a "compensatory education" package as recommended by Johnston-Tyler, in lieu of a program of special education and related services, did not constitute a denial of FAPE. Fremont prevails on issue 11.

CONCLUSIONS AND PREVAILING PARTY

As required by 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:

Fremont violated the provisions of Education Code § 56041(a), by failing to provide special educational services and accommodations, but only for the time period commencing February 24, 2022 until February 20, 2023. Fremont did not violate the provisions of Education Code § 56041(a), prior to February 24, 2022 or after February 20, 2023.

Student partially prevails on Issue 1.

ISSUE 2:

Fremont did not deny Student a FAPE by assigning Student to a full day at Kennedy High School for the 2021-2022 school year, rather than home instruction and home services as set forth in the implemented IEP, without Parent's prior informed consent.

Fremont prevails on Issue 2.

ISSUE 3:

Fremont did not deny Student a FAPE by denying, delaying, and modifying requested special educational services that were uniquely designed to properly address Student's fear of school attendance for the period of May 19, 2021, through May 19, 2023.

Fremont prevails on Issue 3.

ISSUE 4:

Fremont did not deny Student a FAPE by:

a. violating Student's right of choice of education and representation, once Student had signed over her educational rights to Parent, by continuing to communicate with Student, and failing to communicate only with Parent;
b. making changes to Student's IEP services and accommodations that required both the Parent and Student's agreement.

Fremont prevails on Issues 4(a) and (b).

ISSUE 5:

Fremont did not deny Student a FAPE, during the 2020-2021 school year from May 19, 2021, to May 19, 2023, by failing to assign California special education credentialed teachers to provide any assistance to Student in her English language distance learning class.

Fremont prevails on Issue 5.

ISSUE 6:

Fremont did not deny Student a FAPE by failing to obtain informed consent from Student and Parent to place Student in a residential facility for Student's education and mental health service from May 19, 2021 through May 19, 2023.

Fremont prevails on Issue 6.

ISSUE 7:

Fremont did not deny Student a FAPE when it continued to offer a 24/7 residential care facility placement, ignoring the recommendation of Student's independent educational evaluator, Jan Johnston-Tyler, as well as Parent and the adult Student's objection that they did not agree to a 24/7 care facility placement from May 19, 2021 through May 19, 2023.

Fremont prevails on Issue 7.

ISSUE 8(a):

Fremont denied Student a FAPE by denying driver's education and driver's training, but only from the time period from January 20, 2022 through February 24, 2022. Fremont did not deny Student a FAPE by denying driver's education and driver's training prior to January 20, 2022 or after February 20, 2023.

Student partially prevails on Issue 8(a).

ISSUE 8(b):

Fremont did not deny Student a FAPE by denying Student being able to select Student's own private counsellor from May 19, 2021 through May 19, 2023.

Fremont prevails on Issue 8(b).

ISSUE 9:

Fremont denied Student a FAPE by ignoring Parent's, the holder of Student's educational rights, right to obtain Student's IEP records from May 19, 2021 through May 19, 2023.

Student prevails on Issue 9.

ISSUE 10:

Fremont did not deny Student a FAPE by rejecting the request for a re-evaluation of Student in its May 26, 2023 prior written notice.

Fremont prevails on Issue 10.

ISSUE 11:

Fremont did not deny Student a FAPE by refusing to implement any of the recommendations of the independent educational evaluation of Jan Johnston-Tyler, at the IEP meeting on January 20, 2022 IEP meeting.

Fremont prevails on Issue 11.

REMEDIES

Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass* (1985) 471 U.S. 359, 374.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

Student testified at hearing that she felt she could benefit from interactive one-on-one teaching methods using multimedia presentations. She would prefer an environment that encouraged creativity and "thinking outside the box." She wanted to continue with her education but believed she required an environment that is relaxed, cozy and comfortable, and not a place that looks like a normal classroom where information is forced and regurgitated. She considered the offer of residential treatment to be an institution that she likened to a dog pound inside a cage. She felt she needed an environment that would be more akin to a sanctuary that provided her with freedom, no walls, and an open floor plan. She wanted to choose her own counsellor, as she could not open up to someone with whom there was no rapport. She wanted to learn how to drive. She already knew how to apply for a job, and had done so multiple times, although without success. She wanted to explore career opportunities in art, and felt she would benefit from more training in that area but not art school. She suggested that she would

benefit from a private art instructor. She was interested in digital art, paint, canvas, photography, and interior design. She wanted to "crank out big canvases." Student did not produce any evidence of the feasibility or availability of any remedies other than Johnston-Tyler's suggested "financial settlement."

Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].)

Here, Fremont's staff committed procedural and substantive errors by failing to offer Student driver's education and training, failing to provide Student's High School transcripts to Father, and by failing to make any offer to Student of FAPE for the period of time from February 24, 2022 to February 20, 2023. These errors occurred because Fremont staff misunderstood special education laws relating to driver's education and training, FERPA, and residency of adult students. The relevant statutes and regulations are discussed above in this Decision. Accordingly, training Fremont on these important topics is ordered. In addition, Fremont is ordered to provide Student's High School transcripts to Father immediately. In addition, Fremont is ordered to fund a driver's education program of Student's choosing, within specific parameters ordered below. In addition, because Fremont should have and failed to make an offer of FAPE, it is ordered to hold open the 2021-2022 IEP offer and make the placement and services offered there available to Student for one additional calendar year, beginning with the date of this Decision. If consented to and implemented, the placement and services shall cease

one calendar year from the date of this Decision. Although Student has aged out and is no longer eligible for special education and related services, she was entitled to the 2021-2022 offer of FAPE that Fremont improperly rescinded in February 2022. Accordingly, holding that offer open to be accessed within one additional calendar year, is an equitable remedy as compensatory education.

Weighing the equities in this case, no other remedy is ordered. There was a complete absence of proof as to how Student's requested remedies might be implemented. For example, Student presented no evidence regarding what interactive one-on-one teaching methods using multimedia presentations were available. Nor did Student present any evidence concerning available learning environments that encouraged creativity or that were relaxed, cozy, and comfortable, or that would provide Student with freedom, and had no walls and an open floor plan. Nor was there any evidence pertaining to the qualifications of available agencies or counsellors, driver's training courses, independent living skills options, or private art instruction. Student failed to produce any evidence concerning what agencies were available, what services they offered, or any other evidence pertaining to how the requested relief could be accomplished. For these reasons, Student failed to meet her burden of proof concerning remedies. The Evolibri independent assessment, as discussed above, lacked credibility. Weighing the equities further, it was apparent from the evidence that Student had not availed herself of any of the educational services that had been available to her, either per her preexisting IEP or as offered by Fremont, over the entire time period at issue in this due process matter. The remedy to a prevailing Student must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. Dist. of Columbia*, *supra,* 401 F.3d at p. 524.)

Here, the evidence established that there would have been no such benefits. Therefore, both because of the failure of proof and equitable considerations, Student is not entitled to any further remedy other than the district training and additional offer of FAPE for an additional year.

ORDER

1. Fremont Unified School District shall provide no less than two hours of training for all district special education personnel in the topics of driver's education and driver's training statutes as they pertain to special education, FERPA, and residency statutes. This training shall not be provided by a Fremont employee or by an employee of the attorneys' office representing Fremont in this case. Rather, it must be provided by an independent expert in state and federal special education laws, who shall be directed to read this Decision prior to conducting the training and shall tailor the training to the facts presented herein. This training shall be arranged and completed by June 30, 2024.

2. Fremont shall immediately provide Student's High School transcripts to Father.

3. Fremont shall fund a driver's education program as follows. Within one week of the date of this Decision, Student will present Fremont with three options of driver's training courses that Student wishes to take. This will be a driver's training that includes both behind the wheel and classroom instruction. Fremont will investigate the costs of each and shall fund

whichever of the three Fremont selects. If Student fails to attend, does not pass or does not obtain her driver's license, Fremont shall not have to provide any additional training.

4. Fremont is ordered to hold open the 2021-2022 IEP offer and make the placement and services offered there available to Student. If Student wishes to access that placement and those services, she or Father shall provide written consent within 30 days of the date of this Decision. The placement and services shall then cease one calendar year from the date of this Decision.

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.

June R. Lehrman
Administrative Law Judge
Office of Administrative Hearings