

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

CASE NO. 2023110049

DECISION

FEBRUARY 12, 2024

On November 2, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Fremont Unified School District as respondent. Administrative Law Judge Tiffany Gilmartin heard this matter via Zoom on December 19, 20, 21, 27, 28, and 29, 2023 and January 2 and 9, 2024.

Attorney Robin Miller represented Student. Parent attended on December 19, 20, 2023 and January 2, 2024. Parent attended for part of the day on December 21, 27, 28, 2023. Parent did not attend on December 29, 2023, and January 9, 2024. Attorney David Mishook represented Fremont Unified School District. Fran English attended on behalf of Fremont Unified School District.

At the parties' request, the matter was continued to January 29, 2024, for written closing briefs. On January 30, 2024, Student filed a request to reopen the record. On January 31, 2024, Fremont filed an objection to Student's restatement of the issues in her closing brief. Student filed a response to Fremont's objection on February 1, 2024. On February 1, 2024, an order denying Student's motion to reopen the record was issued. Discussion of Fremont's objection to restatement of the issues is addressed below in this decision. The record was closed, and the matter was submitted on January 31, 2024.

PROCEDURAL MATTERS

As directed in the prehearing conference order, the first day of hearing focused solely on whether some or all of Student's claims against Fremont were barred by the statute of limitations. Student and Fremont presented argument and evidence; thereafter the ALJ took the matter under submission, carefully considered the parties' presentations, and took a brief recess. The ALJ ruled Student had not met her burden proving an exception to the statute of limitations existed allowing her to present claims arising prior to November 2, 2021. Student's Issue 1, as pled, predated the two-year statute of limitations was barred pursuant to the ALJ findings below.

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ISSUES

1. From November 2, 2021, through the 2021-2022 school year, did Fremont Unified School District deny Student a free appropriate public education, or FAPE, by:
 - A. failing to meet its Child Find obligation;
 - B. failing to assess in all areas of suspected disability; specifically, visual efficiency;
 - C. failing to find Student eligible for special education in the categories of specific learning disability and other health impairment?
2. Did Fremont deny Student a FAPE during the 2022-2023 school year by:
 - A. failing to meet its Child Find obligation;
 - B. failing to find Student eligible for special education in the categories of specific learning disability and other health impairment;
 - C. failing to provide services to support phonological processing, social problems, attention deficit and hyperactivity, and social anxiety?
3. Did Fremont deny Student a FAPE during the 2023-2024 school year through November 2, 2023, by failing to make Student eligible for special education services under the category of specific learning disability and other health impairments?

STATUTE OF LIMITATIONS

The statute of limitations for filing of due process requests in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) An action must be filed within two years from the date a party knew or had reason to know of the facts underlying the action. (Ed. Code, § 56505, subd. (l), see also 20 U.S.C. § 1415(f)(3)(C) ("knew or should have known about the alleged action that forms the basis of the complaint").)

It does not matter if the parent understood that the inadequacy of student's education constituted a legal claim, just that parent had knowledge of the problem forming the basis of a claim. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Alexopoulos v. San Francisco Unified Sch. Dist.* (9th Cir. 1987) 817 F.2d 551, 555.) "[A] cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which is the basis of his action." (*Id.*)

Student argued that she was denied a FAPE based on Fremont's failure to provide Parent with procedural rights and safeguards. On the first day of hearing, counsel for Student submitted a stipulation that Fremont provided Parents a copy of the procedural safeguards in February 2021.

Fremont argued Student's stipulation demonstrated Parent was aware of Student's legal rights, including the right to file a due process hearing request, and thus, Student's claims were barred by the two-year statute of limitations.

A copy of procedural safeguards must be provided to parents on initial referral or parental request for evaluation. (20 U.S.C. § 1415(d)(1)(A)(i); Ed. Code, § 56501, subd. (a)(1).)

Student also argued Fremont also misrepresented to Parent that her requested assessment could not be completed during the 2020-2021 school year.

EXCEPTIONS TO THE STATUTE OF LIMITATIONS

The law contains two express exceptions to the two-year statute of limitations. Those exceptions apply in cases where the parent was prevented from filing a request for due process because of specific misrepresentations made by the local educational agency that it had resolved the problem forming the basis of the complaint, or because the local educational agency withheld information from the parent that was required to be provided to the parent. (20 U.S.C. § 1415(f)(3)(D)(i) & (ii); Ed. Code, § 56505, subd. (l)(1) and (2).) The Ninth Circuit reaffirmed this rule. (*Avila v. Spokane School Dist.* 81 (2017) 852 F.3d 936.) Otherwise, the statute of limitations for due process complaints in California precludes claims that occurred more than two years prior to the date of filing the request for due process. Ed. Code, § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(C). (*M.M. v. Lafayette School District* (9th Cir. 2014) 767 F.3d 842, 859.)

Student argued Fremont misrepresented to Parent that the initial assessment for Student could not be conducted until students returned for the 2021-2022 school year. Fremont argued Student was required to file a request for due process within two years of the date Parent believed Student's education was inadequate. Fremont argued

Parent was on notice of her procedural rights from February 2021 when she was provided a copy of the procedural safeguards and any request to extend the timeline should be barred by the statute of limitations.

Student further contended the statute of limitations should be extended because Fremont misrepresented to Parent the timeline for which Student would be initially assessed. Parent had formally requested Student be assessed for special education on March 4, 2021. Parent further requested Student be assessed in person. During the spring semester of the 2020-2021 school year, Fremont was still conducting virtual learning. Fremont personnel told Parent Student would be assessed in-person the following school year when students returned in-person.

Fremont argued the exceptions to the statute of limitations do not apply in this matter. Specifically, Fremont did not inform Parent it had solved the problem that formed the basis of the complaint or withheld information from Parent that it was required to provide.

Student's misrepresentation argument fails to address either of the two exceptions to the statute of limitations. That Fremont failed to timely initiate the initial assessment for special education is not an exception to the statute of limitations. The first exception to the statute of limitations applies if specific misrepresentations were made by the local educational agency, commonly referred to as LEA, that it had solved the problem forming the basis of the due process request. There is no allegation that

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Fremont claimed it solved the problem forming the basis of the due process complaint. Student failed to prove the statute of limitations should be extended based on Fremont's untimely response to Parent's request for initial assessment.

Student did not meet her burden of proving the second exception to the statute of limitations applied in this matter. The statute of limitations is extended if the local educational agency withheld information from parent that it was required to provide the parent. (Ed. Code, § 56505 subd. (l)(2).) Student alleged Fremont withheld the procedural safeguards from Parent. Counsel for Parent stipulated on the first day of hearing Parent was provided a copy of the procedural safeguards in February 2021. Whether Parent understood at the time the rights she had under the law is not relevant. The evidence proves Parent received the procedural safeguards in February 2021. Student failed to establish by a preponderance of the evidence that Fremont withheld information from Parent it was required to provide.

For the above reasons, Student failed to meet her burden of proving that either exception, to the two-year statute of limitations applied in Issue 1. Accordingly, Issue 1 was dismissed as barred by the statute of limitations and the remaining issues were renumbered.

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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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- 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 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 carried the burden of

proof on all issues. 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 11 years old and in fifth grade at the time of the hearing. Student resided within Fremont's geographic boundaries at all relevant times. At the time of hearing, Student was not eligible for special education.

ISSUES 1A AND 2A: DID FREMONT DENY STUDENT A FAPE BY FAILING TO MEET ITS CHILD FIND OBLIGATIONS DURING THE 2021-2022 AND 2022-2023 SCHOOL YEARS?

Student contends that Fremont should have suspected Student had disabilities requiring special education in the categories of specific learning disability and other health impairment. Student asserts Fremont was on notice because Parent shared concerns regarding Student's spelling, anxiety, and acting out at home. Further, Parent also shared Student had a medical diagnosis of attention deficit hyperactivity disorder and anxiety.

In her closing brief, Student withdrew her allegation that Fremont failed to meet its child find obligation for the school year 2021-2022, which was Student issue 1A. Evidence was taken on this issue. Despite the withdrawal, findings will be made on this issue for two reasons. First, Student had ample opportunity to withdraw her claim prior to the closing briefs; however, never did so. Second, under the IDEA, parties are not required to assert all claims in a single matter. (20 U.S.C. § 1415 (o).) Therefore, if Student's late withdrawal were permitted, it may be possible for Student to file again

on the same claim. As this issue was fully litigated in the hearing, Student's late withdrawal is not recognized on Issue 1A as it relates to Fremont's child find obligation in the 2021-2022 school year.

School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(2006); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty is referred to as "child find," which California has incorporated in its Education Code. (Ed. Code, § 56301, subds. (a), (b).) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

Fremont conducted an initial psychoeducational and speech and language assessment of Student in Fall 2021. An IEP team meeting was convened on November 9, 2021, to discuss the results of the assessments. The IEP team considered whether Student may have been eligible under the categories of specific learning disability and other health impairment. Thus, Fremont did consider her a Student with a suspected disability who may be eligible for special education and related services. This met Fremont's child find obligation. Student did not meet her burden to establish Fremont denied her a FAPE for failing to meet its child find obligation for the 2021-2022 and 2022-2023 school years.

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ISSUE 1B FAILING TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY; SPECIFICALLY, VISUAL EFFICIENCY?

Student alleges Fremont denied her a FAPE by failing to assess her in the area of visual efficiency during the 2021-2022 school year. Fremont argues Student did not demonstrate needs in visual efficiency, and thus, an assessment was not warranted.

In her closing brief, Student withdrew this issue as to the 2021-2022 school year. Student instead argued the issue applied to the 2022-2023 school year. This is essentially a request to amend the complaint after the due process hearing concluded and evidence received. All issues for this hearing were clarified at the prehearing conference on December 11, 2023. Student exercised her opportunity to clarify the issues in writing on December 15, 2023. The ALJ clarified the issues with the parties on the record on the first day of hearing. Findings were made on this issue as to the 2021-2022 school year as pled by Student. No finding is made to the allegations Fremont failed to assess Student for visual efficiency during the 2022-2023 school year as that was not pled.

A school district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6).)

Student was comprehensively assessed in Fall 2021. As part of her initial psychoeducational evaluation, Samantha Kahn, the school psychologist, reported Student's documented health and developmental history. Student had no issues with

her vision. Parent requested assessment for special education due to concerns about Student's spelling and memory. As part of the psychoeducational assessment, Student was observed working independently, reading on her own, and participating in group instruction. As discussed in greater detail below, Student completed a battery of psychometric and academic assessments without issue. Neither Parent, Student, teacher or school staff raised concerns with Student's vision.

Student provided at hearing a copy of a private vision assessment conducted by an optometrist on January 6, 2023. Parent testified to the completion of the appointment. Student produced no evidence she provided this assessment to Fremont. No one testified to the contents of the document or whether Student's vision as it existed in 2021-2022 school year assessment was sufficient to put Fremont on notice that Student had a visional efficiency need.

Student failed to meet her burden of proof to demonstrate Fremont denied her a FAPE during the 2021-2022 school year for failing to assess her for visual efficiency.

ISSUE 1C FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION IN THE CATEGORIES OF SPECIFIC LEARNING DISABILITY AND OTHER HEALTH IMPAIRMENT?

Student alleges Fremont denied her a FAPE during the 2021-2022 school year by failing to find her eligible for special education in the categories of specific learning disability and other health impairment. Fremont contends Student demonstrated she did not need special education or related services during the 2021-2022 school year and was ineligible under either category.

Student raised for the first time in her closing brief, a procedural allegation related to parental participation. This issue was not pled at any point during the hearing, no evidence was taken to the point, and Fremont was not on notice of this issue. Thus, no finding will be made as to this newly pled allegation.

“Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) A child with a disability includes a child that qualifies under the special education categories of other health impairment, specific learning disability, and a serious emotional disturbance, and who as a result needs special education and related services. (20 U.S.C. § 1401(3)(A)(i), (ii); 34 C.F.R. § 300.8(a)(1).)

California law, which refers to students with disabilities as individuals with exceptional needs, defines an individual with exceptional needs as one who, because of a disability, requires instruction and services which cannot be provided with modification of the regular school program to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subds. (a) and (b).) A child may have a qualifying disability, yet not be found eligible for special education if the student does not meet the IDEA eligibility criteria. (See *Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, and 1110.)

A pupil must be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

California law recognizes that attention deficit hyperactivity disorder, referred to as ADHD, may be an underlying processing deficit for eligibility under two categories: other health impairment and specific learning disability. A student whose educational

performance is adversely affected by a suspected or diagnosed ADHD, and who also meets the eligibility criteria for other health impairment or specific learning disability, is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

The IEP team is charged with the duty of

- reviewing assessment results,
- determining special education eligibility,
- determining the IEP contents, and
- making recommendations regarding a student's program and placement. (Ed. Code, § 56342.)

Parents and school personnel develop an individualized education program 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 which 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. ____ [137 S.Ct. 988, 1000].)

Student alleges eligibility in both specific learning disability and other health impairment. As discussed below, although Student met certain criteria, ultimately, the evidence did not establish that Student required special education and related services. Thus, Student failed to meet her burden establishing eligibility in either specific learning disability or other health impairment.

STUDENT WAS NOT ELIGIBLE UNDER SPECIFIC LEARNING DISABILITY DURING THE 2021-2022 SCHOOL YEAR

Student argues that Fremont's November 9, 2021, psychoeducational assessment showed a severe discrepancy between her capabilities and her phonological processing weakness, which qualified her for special education during the 2021-2022 school year. Fremont disagrees. Fremont further argues that irrespective of any discrepancy, Student did not demonstrate a need for special education and related services to access her education, including the curriculum in a general education environment.

A child is eligible for special education under the category of specific learning disability if the child has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).) This type of disorder may result in the imperfect ability to

- listen,
- think,
- speak,
- read,

- write,
- spell, or
- do mathematical calculations. (*Ibid.*)

The basic psychological processes include

- attention,
- visual processing,
- auditory processing,
- sensory-motor skills, and
- the cognitive abilities of association, conceptualization, and expression. (*Ibid.*)

Fremont initially assessed Student for special education in Fall of 2021. School psychologist Kahn administered a battery of assessment measures to determine Student's then current level of functioning. Student scored very low on the phonological awareness composite of the Comprehensive Test of Phonological Processing, Second Edition. Student's poor performance is indicative of an auditory processing disorder. The presence of a processing disorder on its own is not sufficient to meet the criteria for special education and related services under specific learning disability. As will be discussed further below, despite the auditory processing disorder, Student did not demonstrate she required special education.

Kathy Futterman, Ed. D, testified on Student's behalf. Futterman's dyslexia credentials were impressive. She had experience as an education specialist in a school district, taught the next generation of teachers as adjunct faculty at California State University East Bay, and was appointed to the Dyslexia work group for the California Department of Education. Futterman opined Student would benefit from special

education and related services. Her impressive credentials withstanding, her testimony was given little weight. She first met Student after the due process hearing had started, had never observed Student in a classroom setting, and was unable to provide any insight into how Student's phonological processing was impacting her ability to access her education. Moreover, Futterman's assertion was Student would benefit from special education and related services, not that Student required special education and related services to access her education. Even Student's own expert failed to demonstrate Student required special education and related services to access her education.

For eligibility, a student with a disability in a basic psychological process and a discrepancy between cognitive ability and academic achievement, must also demonstrate that the degree of impairment requires special education. (20 U.S.C. § 1401(3)(A); Cal. Code Regs., tit. 5, § 3030, subd. (a); *M.P. v. Santa Monica Malibu Unified School Dist.* (C.D.Cal. 2008) 633 F.Supp.2d 1089, 1103.)

The evidence did not demonstrate that Student required special education as a result of a qualifying disability, as Student accessed the general education curriculum. (Ed. Code § 56026, subd. (b).) Fremont determined Student exhibited strengths in almost all cognitive areas. On the Wechsler Intelligence Scale for Children, Fifth Edition, Student scored in the above average or average range in all composite areas. Student's scores on the Woodcock Johnson, Fourth Edition, Tests of Achievement, were all in the average ranges as well. Kahn, the school psychologist, reviewed Student's first, second, and third-grade report cards and found no areas of academic concern. Student's scores ranged from partially met to meeting grade-level standards in all areas. Kahn determined Student did not meet the eligibility criteria for specific learning disability. She presented her findings to the IEP team on November 9, 2021. The appropriateness

of this psychoeducational assessment is not at issue in this matter. At the conclusion of the IEP team meeting, the Fremont members of the IEP team determined Student was not eligible for special education.

Eligibility also requires a student to be unable to access the curriculum without instruction and services not available in the regular curriculum (Ed. Code § 56026, subd. (b).) Educational benefit is not limited to academic needs, but also includes social and emotional needs that can affect academic progress such as school behavior and socialization. (*County of San Diego v. California Special Education hearing office, et al.*, 93F. 3D 1458, 1467 (9th Cir. 1996.)) None of Student's teachers raised any concerns about Student's educational performance, which included academic, school behavior, and age-appropriate socialization. Student called as witnesses her first, second-grade inclusion teacher, third, fourth, and fifth-grade teachers. Universally, all Fremont personnel described an engaged, well-behaved Student who demonstrated age-appropriate emotional maturity. Student failed to establish her educational performance was impacted to a degree demonstrating she required special education and related services to access her education.

Student's first-grade teacher, Paulette Goldfisher, established Student was a cooperative, hard-working student who met grade-level standards in all areas during her first and second trimester of first grade during the 2019-2020 school year. Student earned a super citizenship designation for her outgoing and cooperative classroom behavior. Goldfisher described Student as a good friend to her classmates. Student was not evaluated for the third trimester of first grade due to the Covid-19 school closures.

Alice Caraway was the special education teacher in Student's second grade, the 2020-2021 inclusion class. Student's presence in an inclusion class had no bearing on her eligibility for special education. Rather the inclusion class was an opportunity for students on IEPs to be educated with their typically developing peers, of which Student was one. Due to the virtual learning platform required by Covid-19, the second-grade class was often broken into small groups so both teachers could best support learning. Caraway had an opportunity to instruct Student over the virtual platform. Caraway established Student was thoughtful, resilient, had good self-advocacy skills, and a good writer. She had no concerns about Student's ability to access her education.

Student's third-grade teacher Gregory Sherrod, who also testified at hearing, reported no concerns with Student's reading, writing, and behavior in class during the 2021-2022 school year. In fact, Sherrod described Student as one of the most positive and helpful in his class. The evidence demonstrated Student met, and in a few instances, met with deep understanding, grade-level standards in

- mathematics,
- reading,
- language,
- writing,
- speaking and listening,
- science,
- history, and
- social science,
- technology,
- physical education, and

- visual performing arts, and
- learning behaviors.

At no point did any school employee raise concerns about Student and her ability to access her education. The evidence supports Student was performing at state standards. She was accessed her education, demonstrated age-appropriate behavior, and engaged with her peers and teachers.

Student did not meet her burden of proving by a preponderance of the evidence that Fremont denied her a FAPE during the 2021-2022 school year by failing to find her eligible for special education and related services under specific learning disability.

STUDENT WAS NOT ELIGIBLE UNDER SPECIFIC LEARNING DISABILITY DURING THE 2022-2023 SCHOOL YEAR

During Student's fourth-grade year, the 2022-2023 school year, she again continued to meet state standards in all her academic classes. Gail Rodriguez, her fourth-grade inclusion teacher, testified she had no concerns about Student accessing her education. The evidence demonstrated Student participated in class, showed strength in reading comprehension and writing.

Students who are not eligible for special education, but who have physical or mental impairments that significantly interfere with one of life's major activities, may still be entitled to general education accommodations in a 504 plan. A 504 plan is a plan developed by school personnel and parents in conformity with Section 504 of the Rehabilitation Act of 1973. (See 29 U.S.C. § 701 et seq.)

Fremont provided Student a 504 plan on November 16, 2022. Here, Student was provided

- extra time on assignments,
- post-it notes to help her keep track of concerns and her schedule,
- adult encouragement to be engaged at recess, and
- fidget tools.

Each of these are accommodations that do not require special education or related services to implement.

Student engaged in her studies, met state standards, and was a joy to teach. Student failed to demonstrate her auditory processing disorder adversely affected her education so that she needed special education and related services during the 2022-2023 school year.

Student did not meet her burden of proving by a preponderance of the evidence that Fremont denied her a FAPE during the 2022-2023 school year by failing to find her eligible for special education and related services under specific learning disability.

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STUDENT WAS NOT ELIGIBLE UNDER OTHER HEALTH IMPAIRMENT DURING THE 2021-2022 SCHOOL YEAR

Student contends she should have been found eligible for special education under other health impairment because her ADHD interfered with her learning. Specifically, Student argued she struggled maintaining friendships, masked school which led to behaviors at home, struggled with self-advocacy, and social problems. Fremont argues Student's successful school performance demonstrated she was accessing her education. Additionally, Fremont's assessments properly determined she was not eligible for special education under other health impairment, as her anxiety and ADHD needs were met by general education interventions.

A child is eligible for special education under the category of other health impairment if the child has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that:

- is due to chronic or acute health problems such as attention deficit hyperactivity disorder, and other conditions; and
- adversely affects a child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

To be eligible, the student's educational performance must be adversely affected by the disorder, and he must demonstrate a need for special education and related services. (Ed. Code, §56339, subd. (a).) As discussed below, even with challenges, Student's educational performance was not adversely affected, and thus not eligible for special education and related services.

Parent requested Student be assessed for special education in Spring of 2021. She specifically requested Student be assessed as Student had received a medical diagnosis of ADHD. Kahn conducted a psychoeducational evaluation of Student in Fall of 2021. As discussed above, Kahn reviewed Student's records, provided rating scales to Parent and Sherrod, Student's third-grade teacher.

Kahn administered the Behavioral Assessment System for Children, Third Edition, measuring behavior and self-perception. Sherrod rated Student as average in all composite areas. Parent, conversely, rated Student clinically significant in three of the four rating scales she completed. Parent ratings scales scored Student clinically significant in externalizing problems, internalizing problems, and behavioral symptoms. Parent also reported behavior and emotional concerns about Student. She described Student as controlling, struggling with peer interactions, and quick to anger. Student reported she had many friends, that she enjoyed returning to campus, and identified reading, math, and art as her favorite subjects. She also expressed concern about family struggles.

Kahn determined Student's ADHD diagnosis did not interfere with her educational performance. Kahn determined Student did not meet the eligibility criteria for other health impairment. The IEP team met and reviewed Kahn's report on November 9, 2021, and determined Student was not eligible for special education and related services under the category of other health impairment.

As discussed above, a child's educational needs are to be broadly construed to include the child's

- academic,
- social,

- health,
- emotional,
- communicative,
- physical, and
- vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds by *Schaffer v. Weast* (2005) 546 U.S. 49, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

Moreover, “educational benefit” is not limited to academic needs, but also includes the social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office, et al., supra*, 93 F.3d 1458, 1467.) Accordingly, the law requires the IEP team to consider the overall impact of Student’s limitations on his educational performance not merely her academic performance.

Here, the evidence demonstrated Student did not need special education and related services to access her education as a result of her ADHD diagnosis. Sherrod, Student’s third-grade teacher established Student’s behavior, her class contributions, and work habits met or exceeded grade-level expectations. Student had a positive attitude and was helpful. At the same time, Student performed at state level in all areas of

- exhibiting self-control,
- respecting others,

- cooperation,
- direction following, and
- completing tasks.

Student did not meet her burden to demonstrate she required special education and related services during the 2021-2022 school year to access her education.

STUDENT WAS NOT ELIGIBLE UNDER OTHER HEALTH IMPAIRMENT DURING THE 2022-2023 SCHOOL YEAR

Student contends she should have been found eligible for special education under other health impairment because her ADHD interfered with her learning. Specifically, Student argued she lacked the confidence to self-advocate. Parent testified Student would report difficulties after the fact and bottle her emotions. Parent reported Student often felt invisible at school.

Counselor Erin Waterhouse taught a social skills class directed at general education female students to assist in friendship development and self-advocacy during the spring of 2023. Student was placed in the class. Waterhouse testified she frequently observed Student on the playground playing with other children during recess. Student's behavior was consistent with other third-grade students.

Parent, Rodriguez, and Waterhouse all established Student enjoyed the social skills class. Rodriguez, Student's fourth-grade inclusion teacher, testified, and the evidence established, Student exhibited social and emotional growth during her fourth-grade year.

Parent testified about an incident where Student alleged she was struck in the chest by another student in Fall of 2022 and did not report it immediately demonstrated she lacked self-advocacy skills. Rodriguez investigated the incident upon discovery and spoke with Student and the other student. It turned out to be an accident, but Rodriguez spoke with Student and used it as an opportunity to reinforce to all fourth graders about reporting concerns by talking to all students in the classroom.

Moreover, the assessment further established that Student's ADHD did not impact her ability to access her education. As part of her initial psychoeducational assessment, Kahn observed Student in class, recess, and interviewed her. At all times, Student was observed interacting with her peers appropriately, even when disputes broke out over tetherball. She actively participated in her lessons. Student self-identified to Kahn as having many friends.

School principal, Sherea Westra, observed Student often after school engaging with a core group of female friends. Westra established Student was very comfortable reporting incidents to her.

Even with Student's medical ADHD diagnosis, Student failed to establish her educational performance was impacted and she had a need for SPED and related services to access her education. Student did not meet her burden of proving by a preponderance of the evidence that Fremont denied her a FAPE during the 2021-2022 and 2022-2023 school years by failing to find her eligible for special education and related services under other health impairment.

ISSUE 2C FAILING TO PROVIDE SERVICES TO SUPPORT PHONOLOGICAL PROCESSING, SOCIAL PROBLEMS, ATTENTION DEFICIT AND HYPERACTIVITY, AND SOCIAL ANXIETY?

Student did not establish she was eligible for special education during the 2022-2023 school year. Accordingly, Student was not entitled to special education and related services for any of these enumerated areas.

Student raised for the first time in her closing brief that Fremont failed to conduct an educationally related mental health assessment of Student during the 2022-2023 school year. No finding is made to this newly raised allegation as it was not properly pled.

ISSUE 3: DID FREMONT DENY STUDENT A FAPE DURING THE 2023-2024 SCHOOL YEAR, THROUGH NOVEMBER 2, 2023, BY FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION IN THE CATEGORIES OF SPECIFIC LEARNING DISABILITY AND OTHER HEALTH IMPAIRMENT?

Parent requested an independent psychoeducational evaluation of Student. Jennifer L. Steinback, a licensed educational psychologist, conducted the IEE in May 2023, resulting in a report dated June 16, 2023.

Steinback presented her findings at an IEP team meeting on August 31, 2023. Steinback testified she believed Student qualified for special education under specific learning disability and other health impairment. Steinback based her opinion on specific

learning disability eligibility on a severe discrepancy between Student's full-scale intelligence quotient and her basic reading score on the Weschler Individual Achievement Test, Fourth Edition.

Student scored in the average range on all composite tests of the WIAT except for phonological processing. Steinback elected to compare one subtest score to Student's full-scale intelligence quotient and argue she met the requirements for a severe discrepancy. California Education Code, section 56320, subdivision (e) mandates no single measure or assessment can be used at the sole criterion for determining whether a student is an individual with exceptional needs. (See also 20 U.S.C. 1414 § (b)(2)(B). Steinback's eligibility opinion, based entirely on comparing Student's full-scale intelligence quotient to one subtest on the WIAT, while ignoring Student's average scores in all other subtests was given little weight.

Steinback also found a severe discrepancy existed between Student's full-scale intelligence quotient and her scores on the Feifer Assessment of Reading and Feifer Assessment of Writing. On the Feifer Assessment of Reading, Student's scores ranged from above average to significantly below average. The Feifer is used to assess why a student struggles with reading. Moreover, on the Feifer Assessment of Writing, Student scored in the average and below average range on the subtests. The Feifer Assessment of Writing is used to assess why a student struggles with writing. Steinback failed to persuasively demonstrate either Feifer Assessments met the requirements to be used in determining a severe discrepancy.

The IEP team reviewed Steinback's report, and the Fremont members of the IEP team did not find Student eligible for specific learning disability. The weight of Steinback's testimony was lessened as Steinback argued it was sufficient to compare

one subtest on the WIAT to Student's full-scale intelligence quotient to determine Student qualified for specific learning disability. No legal support was provided for this method of determining a severe discrepancy. Moreover, even assuming the IEP team had accepted Steinback's finding that Student met the eligibility criteria for specific learning disability, Student failed to meet her burden that she required special education and related services to access her education.

The evidence demonstrated Student did not require special education and related services to access her education. At hearing, Student's fifth-grade teacher, James Mcleod established Student was driven and responsible. Mcleod's class was filled with high performing children and Student fit in with no issues. Student was first to volunteer to present a reading passage where she was asked to summarize a reading and present it orally to her classmates. Her willingness to be first among her classmates demonstrated to Mcleod, an elementary school teacher with 30 years of experience, she was a confident student who wanted to impress. His testimony was forthright and concise and was given significant weight. Moreover, Mcleod described Student's attempt to qualify for the class spelling bee. Student did not make the final cut, but Student's volunteering demonstrated she was comfortable with her academic and social status in his classroom.

Student's grandmother, at hearing, described Student's perfectionist tendencies and found Student to be a well-behaved girl who wanted to do well and be liked. Student's grandmother did explain Student often went over the recommended time for completing her homework. However, Student's desire to continue working on her homework until complete did not demonstrate she was unable to access her education.

Student did not meet her burden of proof to demonstrate Fremont denied her a FAPE by failing to find her eligible for specific learning disability during the 2023-2024 school year.

STUDENT WAS NOT ELIGIBLE UNDER OTHER HEALTH IMPAIRMENT

Student argued she should have been found eligible for special education during the current school year under other health impairment because she had ADHD and alleges it interfered with her ability to learn. Fremont argues Student's attention deficit and hyperactivity did not have a significant adverse effect on Student's educational performance to the degree she required special education.

As explained above, attention deficit hyperactivity disorder is a medical condition that can qualify as other health impairment. In addition to a diagnosis of ADHD, the student must also demonstrate their impairment requires specially designed instruction. (Ed. Code § 56339., subd. (b).; (Cal. Code Regs., tit. 5, § 3030, subd. (a).)

As discussed above, Student alleged her ADHD impacted her ability to make friends, social problems, behaviors at home, and masking school difficulties. Student had a disability within the definition of other health impairment. However, even with a qualifying disability, Student was required to also prove she needed special education and related services.

Prior to the August 31, 2023, IEP team meeting, Student had an independent psychoeducational assessment conducted by Steinback to determine her present levels of cognitive functioning and whether Student met the eligibility requirements for special education, and whether Student required special education.

Steinback interviewed Parent, who reported Student struggled to sleep, was a picky eater, and had difficulties with certain textures. Steinback also interviewed Student's private therapist to address concerns about Student's social isolation, feelings of loneliness, and anxiety. Steinback interviewed Student who expressed her difficulties with social engagements and maintaining friendships. Steinback's report also outlined Student's marked differences between home and school.

Student's fourth-grade general education and inclusion teachers were interviewed. Rodriguez discussed Student utilizing her open classroom policy to play board games with other children her age about 50 percent of the time. Rodriguez also noted Student had heightened anxiety when she missed school due to feelings of falling behind. Neither Rodriguez, nor the general education teacher who did not testify, noted any specific concerns with Student's behavior, attention, or social interaction struggles.

Parent rated Student elevated, from moderate to clinically, on every category of the Brief Rating Inventory of Executive Functioning, Second Edition whereas her teachers rated her average in every category. On the Behavior Assessment for Children, Third Edition, Parent rated her at risk in hyperactivity and withdrawal. She rated Student clinically significant in anxiety, depression, adaptability, and activities of daily living. Meanwhile, her teacher rated her at average in all categories save for at risk in anxiety and somatization. Student's teacher identified no areas of clinical significance.

Steinback opined Student should be made eligible for special education in the category of other health impairment due to her ADHD and difficulties at home, her sense of loneliness, and her difficulty controlling her energy in the evenings.

Much was made during the hearing about Student's ability to mask her discomfort at school. The evidence was clear Student performed appropriately during the school

day. Not one teacher testified to Student having any behavior or mental health issues. Student argued that spats over tetherball and four square demonstrated Student's disability rendered her unable to access her education. However, the evidence, including testimony from every school district employee confirmed this behavior was normal behavior consistent with children of her age. The evidence is clear that this Student is accessing her education, engaging with her peers, and advocating for herself.

Student failed to meet her burden of proof to demonstrate she required special education to access her education.

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 1A:

Fremont did not deny Student a FAPE during the 2021-2022 school year, by failing meet its child find obligation.

Fremont prevailed on Issue 1A.

ISSUE 1B:

Fremont did not deny Student a FAPE during the 2021-2022 school year, by failing to assess in all areas of suspected disability; specifically, visual efficiency.

Fremont prevailed on Issue 1B.

ISSUE 1C:

Fremont did not deny Student a FAPE during the 2021-2022 school year, by failing to find Student eligible for specific learning disability and other health impairment.

Fremont prevailed on Issue 1C.

ISSUE 2A:

Fremont did not deny Student a FAPE during the 2022-2023 school year, by failing to meet its child find obligation.

Fremont prevailed on Issue 2A.

ISSUE 2B:

Fremont did not deny Student a FAPE during the 2022-2023 school year, by failing to find Student eligible for specific learning disability and other health impairment.

Fremont prevailed on Issue 2B.

ISSUE 2C:

Fremont did not deny Student a FAPE during the 2022-2023 school year, by failing to provide services to support phonological processing, social problems, attention deficit and hyperactivity, and social anxiety?

Fremont prevailed on Issue 2C.

ISSUE 3:

Fremont did not deny Student a FAPE during the 2023-2024 school year, through November 2, 2023, by failing to make Student eligible for special education services under the category of specific learning disability and other health impairment.

Fremont prevailed on Issue 3.

ORDER

All 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.

TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings