BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

FREMONT UNION HIGH SCHOOL DISTRICT,

V.

PARENTS ON BEHALF OF STUDENT.

CASE NO. 2024110291

DECISION

April 22, 2025

On November 12, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Fremont Union High School District, naming Student. On November 20, 2024, OAH granted the parties' joint request to continue the matter. Administrative Law Judge, Dan Senter, heard this matter by videoconference on March 25 and 26, 2025.

Attorney Elizabeth Schwartz represented Fremont Union High School District. Nancy Sullivan, director of educational and special services, attended all hearing days on Fremont Union's behalf. Parent represented Student and attended all hearing days.

At the parties' request the matter was continued to April 7, 2025 for written closing briefs. Both parties timely submitted closing briefs. The record was closed, and the matter was submitted on April 7, 2025.

ISSUE

Is Fremont Union entitled to complete assessments in accordance with the assessment plan dated May 15, 2024, and updated on October 23, 2024, absent parent consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents 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).) Fremont Union had 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 16 years old and in the 10th grade at the time of hearing. Student enrolled in Fremont Union at the start of the 2023-2024 school year and resided within Fremont Union's geographic boundaries at all relevant times. Prior to enrolling with Fremont Union, Student attended school within Cupertino Union School District. Student was initially found eligible for special education in 2017.

ISSUE: IS FREMONT UNION ENTITLED TO COMPLETE ASSESSMENTS IN ACCORDANCE WITH THE ASSESSMENT PLAN DATED MAY 15, 2024, AND UPDATED ON OCTOBER 23, 2024, ABSENT PARENT CONSENT?

Fremont Union contends it is entitled to assess Student. Fremont Union claims it is legally obligated to assess, it provided Parents with a procedurally compliant assessment plan, and it made reasonable efforts to assess prior to filing for due process.

Student contends that Fremont Union assessors are biased against finding Student eligible for special education. Therefore, assessment should not be conducted by Fremont Union absent Parent's consent.

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 (2007), 300.321 (2007), and 300.501 (2006).)

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 Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

REASSESSMENT WARRANTED

The IDEA provides for reevaluations to be conducted no more frequently than once a year, but at least once every three years, unless the parents and the agency agree that it is unnecessary. (20 U.S.C. §§ 1414(a)(2)(B)(ii), 1414(c)(4); 34 C.F.R. § 300.303(b)(2) (2006); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).)

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A school district must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1) (2006); Ed. Code, § 56381, subd. (a)(1),(2).)

School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (20 U.S.C. § 1414(a); 34 C.F.R. §§ 300.301 (2007), 300.303 (2006); Ed. Code, § 56043.) The IDEA uses the term evaluation, while the California Education Code uses the term assessment. The terms are interchangeable. (20 U.S.C. § 1414(a); Ed. Code, § 56302.5.)

Here, Student's most recent three-year psychoeducational assessment was completed by Cupertino Union School District on September 24, 2020. Additionally, Student's most recent speech and language assessment was completed in January 2021, and Student's most recent academic assessment was completed in January 2022. More than three years have passed since Student was last comprehensively assessed. Parent and Fremont Union did not agree to forego reassessment. Accordingly, assessment of Student is warranted under both the IDEA and California law.

In addition, assessment will help Student's IEP team determine Student's current educational or related service needs. Student's most recent psychoeducational assessment from September 2020 found that Student no longer met eligibility criteria for special education. Student's most recent speech and language evaluation from January 2021 found that Student no longer required speech-language services. Because Parent disagreed, Student was never exited from special education.

Fremont Union has been providing services to Student based on Student's last agreed-upon and implemented IEP from December 2018, when Student was in the fourth grade. This IEP offers Student 30 minutes of specialized academic instruction per week and 30 minutes of speech and language services per week.

Nancy Sullivan, Fremont Union director of educational and special services, and Dr. Brittany Stevens, Fremont Union school psychologist, testified about the need for reassessment.

Sullivan possessed over 25 years of experience in her field. Prior to becoming Fremont Union's director of educational and special services, Sullivan served as coordinator of special services, program specialist, lead resource specialist, and resource specialist. She held a bachelor's degree in child development, a master's in special education, two Level II Mild to Moderate Education Specialist credentials, and a Level II Administrative Services Credential. Her current job duties included

- supporting Fremont Union's special education program,
- implementation of services,
- development of programs,
- staffing,
- budget, and
- health and mental health services.

Dr. Stevens possessed over 23 years of experience in her field. She served as school psychologist for Fremont Union since 2001. She held a bachelor's, master's, and Ph.D. in psychology, as well as a Tier 1 Administrative Services Credential and Pupil Personnel Services Credential in school psychology. Dr. Stevens was responsible for initial and triennial assessments and annually conducted 40 to 50 assessments.

Both Sullivan and Dr. Stevens were familiar with the laws and practices regarding special education assessment, and both provided well-supported, clear, and detailed responses regarding Student's need for reassessment. No expert opinion was presented countering their opinion regarding the need for reassessment. Their testimonies were given significant weight.

Sullivan testified that reassessment was warranted not only for compliance purposes but because Fremont Union was serving Student based on outdated information. Sullivan explained that Fremont Union had never assessed Student. Fremont Union had attempted, unsuccessfully, to obtain Parent consent to assess since February 2024. Sullivan asserted that a new assessment would determine if Student remained eligible for special education, and if so, it would identify Student's areas of need and which services were appropriate.

Dr. Stevens asserted that new assessment data was essential to determining Student's current eligibility and educational needs. The lack of current assessment data, according to Dr. Stevens, impacted Fremont Union's ability to serve Student because Student did not have updated IEP goals or services.

For the above reasons, Fremont Union proved by a preponderance of the evidence that reassessment of Student was warranted.

ASSESSMENT PLAN PROCEDURAL REQUIREMENTS MET

Reassessment of a student generally requires parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c) (2008); Ed. Code, §§ 56021.1; 56381, subd. (f)(1).) California law defines consent consistent with federal regulations. (34 C.F.R. § 300.9 (2008); Cal Ed. Code, § 56021.1.) To obtain consent, a school district must develop and

propose to parents an assessment plan and include a statement of parents' procedural rights under the IDEA. (20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.304(a) (2006); Ed. Code, § 56321, subd. (a).) The assessment plan must:

- Be in language easily understood by the general public;
- Be provided in the native language of the parent or guardian or other mode of communication used by the parent or guardian, unless to do so is clearly not feasible;
- Explain the types of assessments to be conducted; and
- State that no individualized education program will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).)

The school district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (c)(4).)

Here, Fremont Union's assessment plan dated May 15, 2024, and updated October 23, 2024, complied with necessary procedural requirements. The assessment plan was provided in a language easily understood by the general public. It described the types of assessments Fremont Union proposed to conduct. It explained that assessment activities could include classroom observations, rating scales, one-on-one testing, and records review, including review of information requested by parents to be considered. It also included a statement that no special education services would be provided to Student without Parent's written consent. The assessment plan was provided in English, the language in which Parent communicated at hearing and in which Parent communicated with Fremont Union, as demonstrated by Parent's written email communication with Fremont Union.

Parent was provided at least 15 days from the receipt of Fremont Union's proposed assessment plan to arrive at a decision. Fremont Union provided Parent with the assessment plan on October 23, 2024, and Parent returned a signed copy the same day. Parent revoked consent to the assessment plan on October 27, 2024. Fremont Union filed for due process on November 12, 2024. Fremont Union established that the assessment plan dated May 15, 2024, and updated on October 23, 2024, complied with necessary procedural requirements.

PROCEDURAL SAFEGUARDS PROVIDED

Fremont Union contends it provided Parents with procedural safeguards multiple times. It asserts Parents were repeatedly given procedural safeguards with proposed assessment plans over the course of a year.

Student does not dispute receiving procedural safeguards. Rather, Student contends that procedural safeguards were not provided in all instances.

School districts must give parents notice of the proposed assessment plan and a copy of the parents' procedural safeguards under the IDEA. (20 U.S.C. § 1415(c), (d); Ed. Code, § 56321, subd. (a).)

Here, Parent did not dispute being sent the procedural safeguards as to the updated May 15, 2024 assessment plan. Fremont Union provided Parents with a copy of procedural safeguards on May 15, 2024, when it emailed the assessment plan to Parents. Fremont Union also provided Parent with a copy of procedural safeguards on October 23, 2024, when it emailed Parent the updated May 15, 2024 assessment plan.

Student maintained, however, that Fremont Union failed to provide procedural safeguards in all cases. Student asserted that Fremont Union failed to provide procedural safeguards when it emailed Parent an assessment plan on February 7, 2025. On February 7, 2025, Sullivan emailed Parent about scheduling an IEP meeting and conducting assessments. This email referenced attached forms and a link to a document titled "PWN-Assessment_Plan."

Student's February 7, 2025 email exhibit did not include copies of the attachments or linked documents. Sullivan testified that she routinely sent procedural safeguards when sending assessment plans, but Fremont Union did not provide evidence of sending procedural safeguards on February 7, 2025. Even if the procedural safeguards were not provided in this instance, the evidence established that procedural safeguards were provided to Parent on several occasions, including on October 23, 2024, as part of the updated May 15, 2024 assessment plan.

Fremont Union proved that it provided procedural safeguards to Parent in connection with the assessment plan at issue in this case. Accordingly, it met its burden of proof on this issue.

COMPETENT ASSESSORS AVAILABLE

Fremont Union contends that it offered qualified, competent assessors to conduct the assessments described in the assessment plan at issue.

Student contends that Fremont Union assessors are inherently biased against finding Student eligible for special education due to their employment with Fremont Union. Given their bias against eligibility, Student asserts Fremont Union employees should not be permitted to assess Student.

Assessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv) (2006); Ed. Code, § 56322.) Any psychological assessments of pupils shall be made in accordance with Education Code section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56324, subd. (a).)

Fremont Union school psychologist, Dr. Brittany Stevens, assisted in preparing the updated May 15, 2024 assessment plan and testified that she would conduct assessments in the areas of intellectual development, perceptual motor development, social/emotional, and adaptive/behavior. As established earlier in this Decision, Dr. Stevens was a credentialed and experienced school psychologist. Dr. Stevens was trained and experienced in conducting initial assessments and reassessments using assessment tools relevant to the assessments described in the updated May 15, 2024 assessment plan. She reviewed Student's records, was prepared to assess Student with a range of assessment tools, and asserted that the assessments would not have a racial or cultural bias.

Fremont Union resource teacher, Anne Greene, assisted in preparing the updated May 15, 2024 assessment plan and testified that she would conduct the Student's academic achievement and post-secondary transition assessments. Greene, who worked for Fremont Union since 1999 as a resource specialist, held dual bachelor's degrees, a master's in special education, dual Mild/Moderate Education Specialist credentials, and a Reading Specialist Credential. Greene assessed an average of 12 to 15 students each year. She had training and experience conducting academic and transition assessments using relevant assessment tools. Greene was familiar with Student. She provided Student with 30 minutes per week of resource support since

August 2023. Greene routinely checked Student's records and grades, and she checked in with Student's teachers. Greene testified that Student had received all A's except for one B.

Fremont Union speech-language pathologist, Nicole Tseng, assisted in preparing the updated May 15, 2024 assessment plan and testified that she would conduct the language/speech assessment. Tseng, who worked for Fremont Union since 2000, was a licensed speech-language pathologist in California and possessed the American Speech-Language-Hearing Association ("ASHA") Certificate of Clinical Competence (CCC-SLP) and a Clear Clinical Services Credential. Tseng also held a master's degree in education with a focus on speech pathology and audiology. She annually conducted approximately 25 to 30 assessments. Tseng was familiar with Student. She provided Student with speech and language services since the beginning of the 2023-2024 school year.

Fremont Union's proposed assessors were trained, experienced, and appropriately licensed or credentialed to conduct assessments in their respective areas of competence. They each reviewed Student's past assessments and education records and were knowledgeable about Student. They provided detailed, well-supported responses. Their testimonies were given significant weight. Fremont Union established that it has assessors qualified to assess in all areas identified in the assessment plan.

At hearing, and in Student's closing brief, Student asserted that Fremont Union's assessors were biased, and therefore, not qualified to conduct the assessments. Student asserted that the assessors' long-term employment relationships with Fremont Union, as well as their references to Student's strong grades, biased them against finding Student

eligible for special education. Student also asserted that Fremont Union had predetermined that Student would not remain eligible for special education or be granted an independent educational evaluation, called an IEE.

Student's reliance on *JG v. Douglas Cnty. Sch. Dist.* to support Student's position that Fremont Union was biased is unpersuasive. ((9th Cir. 2008) 552 F.3d 786, 801.) In this case, student asserted that the school district impermissibly presented identical pre-written IEPs for twin students because the IEPs were not individually tailored. (*Ibid.*) In contrast, here, Fremont Union is seeking to assess Student and present assessments to the IEP team for consideration. Student's reliance on *Deal v. Hamilton County Bd. of Educ.* is similarly misplaced. ((6th Cir. 2004) 392 F.3d 840, 858). In this case, a school system predetermined not to offer a student applied behavioral analysis therapy, called ABA, because it had an unofficial policy of refusing to provide such services. (*Ibid.*) The school personnel did not have open minds and based their decision on the unofficial policy rather than the Student's IEP team and individual needs. (*Id. at 859.*) In contrast, here, Fremont Union has not yet had a chance to conduct its own assessments for consideration by Student's IEP team, of which Parent is a member.

Student's citation to Education Code Section 56320 to support its assertions of bias is also unpersuasive. This Section provides in relevant part, "Testing and assessment materials and procedures … are selected and administered so as not to be racially, culturally, or sexually discriminatory." (Ed. Code, § 56320, subd. (a).) Student provided no evidence that Fremont Union's proposed assessments would be discriminatory. On the contrary, each Fremont Union assessor persuasively established that their proposed assessment tools were not racially or culturally biased and that they would use a variety of assessment tools in assessing Student.

Further, Student's argument that the long employment tenure of each assessor with Fremont Union biased them was unconvincing. Student offered no persuasive evidence that Fremont Union staff was biased by the length of time they had worked for Fremont Union. Likewise, Student's argument that the assessors' statements about Student's grades constituted evidence of bias was unpersuasive. Even if Student had strong grades, and the assessors were aware of that, that is not a legal basis to deny Fremont Union the right to assess. It is Fremont Union's right to select qualified personnel of its choice to reassess, and Student offered no persuasive evidence to find otherwise. (*Andress v. Cleveland Indep. Sch. Dist*. (5th Cir. 1995) 64 F.3d 176, 179; see *Johnson by Johnson v. Duneland Sch. Corp*. (7th Cir. 1996) 92 F.3d 554, 558; *Gregory K. v. Longview Sch. Dist*. (9th Cir. 1987) 811 F.2d 1307, 1315.)

The evidence supported a finding that Fremont Union had competent assessors prepared to conduct Student's assessments. Fremont Union proved that assessment was necessary to determine whether Student remained eligible. In other words, eligibility was an open question. Sullivan and Dr. Stevens each further established that if Student were found to remain eligible, assessment was essential to determining Student's areas of need and services.

Fremont Union met its burden that it has competent assessors available to conduct the assessment in the assessment plan dated May 15, 2024, and updated October 23, 2024.

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REASONABLE EFFORTS TAKEN TO OBTAIN PARENT CONSENT

The obligation to obtain informed consent is central to the IDEA's overall adherence to the principal of parental participation. (*M.M. v. Lafayette Sch. Dist.* (9th Cir. 2014) 767 F.3d 842, 851.) The school district must make reasonable efforts to obtain informed parent consent to assess. (Ed. Code, § 56381, subd. (f).) To meet the reasonable efforts requirement, the district must document its attempts to obtain parental consent. (Ed. Code, § 56381, subd. (f)(2); 34 C.F.R. § 300.300(d)(5) (2008).) Such documentation includes

- keeping detailed records of telephone calls made or attempted, and the results of those calls;
- copies of correspondence sent to the parents and any response received; and
- detailed records of visits made to the parent's home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d) (2006).)

If the student's parents do not consent to the assessment plan, the school district may conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (34 C.F.R. § 300.300(c) (2008); Ed Code, §§ 56381, subd. (f)(3); 56501, subd. (a)(3); 56506(e).)

Fremont Union, led by Sullivan, made multiple attempts to discuss its proposed assessment plan with Parents and to obtain Parent's consent. As determined earlier in the Decision, Sullivan possessed requisite knowledge, training, and experience regarding special education assessment, as well as regarding relevant law and procedures. She

answered questions in detail, provided thorough responses, and frequently referred to email communication with Parents regarding Fremont Union's attempts to assess Student. Her testimony was given significant weight.

Sullivan proved Fremont Union's ongoing efforts to obtain consent beginning in February 2024 and continuing through October 2024. On February 1, 2024, Sullivan emailed Parents and attached a prior written notice of Student's annual IEP meeting, a proposed assessment plan, and notice of procedural safeguards. Within this email, Sullivan explained the purpose of the IEP meeting and proposed assessment. Sullivan sent additional emails to Parent regarding the proposed assessment on February 6, 2024, and February 8, 2024, to which Parent responded by email but did not consent to assessment.

On March 4, 2024, Sullivan filed a mediation only request with OAH. On March 13, 2024, after learning that Parent refused to participate in the proposed mediation, Sullivan again emailed Parents an assessment plan.

On May 15, 2024, Sullivan emailed Parents an assessment plan and notice of procedural safeguards. On September 9, 2024, Sullivan re-emailed this assessment plan to Parents, seeking consent and inquiring if they had any questions.

On September 13, 2024, Fremont Union filed for due process with OAH to obtain an order that it had the right to assess Student without Parent's consent. As a result of the filing, Fremont Union and Parent participated in mediation with OAH. On October 23, 2024, Fremont Union added an adaptive/behavior assessment to the May 15, 2024 assessment plan. On October 23, 2024, Parent signed this updated assessment plan and Sullivan emailed Parent a signed copy and a notice of procedural safeguards.

On October 27, 2024, Parent revoked consent to the assessment plan by email to Sullivan. Parent stated he would not agree to the assessment until he received a written guarantee that Fremont Union would grant an IEE if Parent disagreed with Fremont Union's assessments. On October 28, 2024, Sullivan emailed Parent and offered to explain the IEE process. On October 31, 2024, Sullivan emailed Parent referencing a voicemail she left Parent and detailing that Fremont Union would not agree to an IEE in advance of conducting its assessments and would refile for due process with OAH, unless Parent changed their mind. On November 12, 2024, Fremont Union filed the instant case.

Fremont Union made multiple attempts through multiple means of communication to seek parental consent. These included providing Parent several copies of assessment plans with notices of procedural safeguards; participating in mediation; updating the assessment plan; requesting consent through email and prior written notices; attempting to convene IEP team meetings and phone calls to discuss Parent's concerns; and introducing the assessors to Parent over email.

Fremont Union's attempts were well documented and reasonable. Accordingly, Fremont Union proved that it made sufficient efforts to obtain parental consent to the assessment plan at issue.

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:

Fremont Union High School District may assess Student in accordance with the assessment plan dated May 15, 2024 and updated on October 23, 2024 absent parent consent.

Fremont Union prevailed on the sole issue in this case.

REMEDIES

Fremont Union may assess Student in accordance with the assessment plan dated May 15, 2024, and updated on October 23, 2024, without parent consent. Parent shall cooperate in making Student reasonably available for each assessment.

In addition to an order permitting assessment absent parental consent, Fremont Union requests to be absolved of its obligation to provide Student with a FAPE if Parent does not make Student available for assessment at school.

Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs, tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].)

Here, Fremont Union seeks an advisory opinion on how the IDEA will be applied in the future if Parent does not make Student available for assessment. It seeks an order that if Parent does not comply with this Decision, it will no longer be obligated to provide Student with special education and related services.

Fremont Union cites four cases in its closing brief to support its argument that parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Johnson by Johnson v. Duneland Sch. Corp.*, *supra*, 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.*, *supra*, 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.*, *supra*, 811 F.2d 1307, 1315; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.) However, Fremont Union does not specifically cite these cases, or any authority, to support its argument that if Parent refuses to make Student available for assessments, Fremont Union should be given prior authorization to exit Student from special education and cease providing services.

Indeed, the posture of the instant case is different than the cases cited by Fremont Union. Here, Student's eligibility was not raised in the complaint, nor did Student file a complaint alleging a FAPE violation. It is premature to rule on the availability of any potential affirmative defense to any potential claim Student might file. It is also premature to anticipate the outcome of any action filed by Fremont Union to exit Student from special education based on Parent's hypothetical refusal to make Student available for assessment after this Decision.

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Whether or not Fremont Union is obligated to provide Student with a FAPE in the future is not an issue in this due process proceeding. Fremont Union provides no persuasive authority to find otherwise. Accordingly, Fremont Union's request for an advisory declaration is denied.

ORDER

1. Fremont Union may assess Student in accordance with the assessment plan dated May 15, 2024 and updated on October 23, 2024 with qualified assessors and assessment tools of its choice, without parent consent.
2. Parent shall cooperate in making Student reasonably available for each assessment.
3. Fremont Union's other 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.

DANIEL SENTER
Administrative Law Judge
Office of Administrative Hearings