

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNION HIGH SCHOOL DISTRICT.

CASE NO. 2024020802

DECISION

JULY 1, 2024

On February 26, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Fremont Union High School District. Administrative Law Judge Laurie Gorsline heard this matter by videoconference on April 16, 17, 18, 23, 24 and 25, and May 1, 2 and 8, 2024.

Parent represented Student. Student did not attend the hearing. Attorneys Melanie Larzul and Ankita Thakkar represented Fremont Union High School District. Nancy Sullivan, Fremont Union's Director of Educational and Special Services, and Roxy Machuca, Fremont Union's Coordinator of Special Services, each attended portions of the hearing on Fremont Union's behalf.

At the parties' request, OAH continued the matter to June 12, 2024, for written closing briefs. The record was closed and the matter was submitted on June 12, 2024.

ISSUES

The issues at hearing are stated below. A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

1. Did Fremont Union deny Student a FAPE by failing to conduct appropriate three-year review evaluations prior to the January 31, 2023 IEP team meeting, specifically:
 - A. Failing to conduct an appropriate psychoeducational evaluation?
 - B. Failing to conduct an occupational therapy evaluation prior to the January 31, 2023 IEP team meeting?
 - C. Failing to conduct a speech and language evaluation prior to the January 31, 2023 IEP team meeting?
2. Did Fremont Union deny Student a FAPE by implementing the October 17, 2023 amendment to the January 31, 2023 IEP without parental consent?
3. Did Fremont Union deny Student a FAPE by denying parental participation in the IEP process at the January 30, 2024 IEP team meeting when it failed to discuss Student's progress on the January 31, 2023 IEP?

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

subsequent references to the Code of Federal Regulations are to the 2006 version. 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)(A) & (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] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Student had 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).)

At the time of the hearing, Student was 22 years old and Parents were limited conservators of Student, authorized to make decisions concerning Student's education. Student attended a post-secondary nonpublic school program at Pacific Autism Center for Education, called PACE. Student began attending PACE on September 12, 2023, pursuant to a September 8, 2023 IEP amendment to his January 2023 IEP. Student resided with Parents within Fremont Union's geographic boundaries at all relevant times. At all relevant times, Student was eligible for special education under the category of autism. Student had a seizure disorder and required medication to manage the seizures.

Student's recent educational history has included several IEP placements. After middle school, he attended Creative Learning Center, a nonpublic school. Between January 2020 and August 2023, Student attended a post-secondary program at Wings Learning Center, called WINGS, another nonpublic school. He then transitioned to PACE in September 2023.

ISSUE 1A: DID FREMONT UNION DENY STUDENT A FAPE BY FAILING TO CONDUCT APPROPRIATE THREE-YEAR-REVIEW EVALUATIONS PRIOR TO THE JANUARY 31, 2023 IEP TEAM MEETING – FAILING TO CONDUCT AN APPROPRIATE PSYCHOEDUCATIONAL EVALUATION?

Student contends the January 2023 three-year reevaluation conducted by Fremont Union was improper because it consisted only of a review of old and outdated records and was done merely to confirm Student's eligibility for special education. Student contends that Fremont Union's record review was insufficient to provide the January 31, 2023 IEP team with information necessary for development of Student's

program, including determination of his current functioning to formulate his annual goals. Student argues Parent did not understand the implications of signing the assessment plan presented to Parent for the January 2023 three-year reevaluation and Fremont Union did not include the required procedural safeguards with the assessment plan which prevented him from understanding his rights. Student argues that an email from WINGS to Fremont Union in December 2023 indicated that a full comprehensive assessment was required, which should have included standardized assessments.

Student contends that a full assessment of Student including the use of standardized instruments was required for the January 31, 2023 three-year reevaluation to inform the IEP team regarding Student's needs. Student argues the fact that Fremont Union offered amended goals and services in the October 2023 IEP after the missing assessments were conducted, demonstrates that the assessments were necessary before the January 31, 2023 IEP team meeting. Student contends that the independent psychoeducational assessment reviewed at the October 2023 IEP team meeting contained vital information that was missing from Fremont Union's January 2023 psychoeducational evaluation by record review, including accurate information about Student's functioning and numerous educational recommendations.

Fremont Union contends Parent consented to a record review for Student's January 2023 three-year reevaluation. It argues that although it never informed Parent of the right to a full evaluation using standardized assessments, Parent was fully aware of that right at the time he signed the January 2023 assessment plan. It asserts that when presented with an assessment plan for Student's 2020 three-year reevaluation proposing a record review, Parents disagreed and asked for a full assessment. Fremont Union argues Parent requested a full assessment at the January 31, 2023 IEP team

meeting, therefore the failure to provide a copy of parent's procedural safeguards with the January 2023 assessment plan was not the reason Parents delayed in exercising their rights. Fremont Union contends to the extent there was a procedural violation by failing to properly assess Student, it remedied that violation by funding an independent psychoeducational evaluation which was completed later in 2023 and reviewed at an October 17, 2023 IEP team meeting, and that evaluation's results and recommendations were consistent with the IEP already in place for Student.

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 individualized education program, referred to as 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 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. 386, 402 [137 S.Ct. 988, 1000].)

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An IEP is a written document for each child with a disability that includes a statement of the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345 subd. (a)(1).) An IEP must contain

- a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a
- statement of the program modifications or supports for school personnel that will be provided to enable the student to
 - advance appropriately toward attaining the annual goals and to be involved in and make progress in the regular education curriculum and participate in nonacademic activities, and to
 - be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).)

In developing the IEP, the IEP team shall consider

- the strengths of the child,
 - the concerns of the parents for enhancing the education of their child,
 - the results of the initial evaluation or most recent evaluation of the child and the
 - academic, functional, and developmental needs of the child.
- (20 U.S.C. § 1414(d)(3)(A).)

For each area in which a special education student has an identified need, the IEP team must develop annual goals that are based upon the child's present levels of academic achievement and functional performance. (Ed. Code, § 56345, subd. (a)(2); *Letter to Butler, United States Department of Education Office of Special Education and Rehabilitative Services* (OSERS), March 25, 1988.)

The IEP team is required to review a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revise the IEP as appropriate to address the

- lack of progress toward the annual goals,
- the results of any reevaluation,
- information provided to or by the parents,
- the child's anticipated needs, or
- other matters. (20 U.S.C. § 1414(d)(4)(A).)

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to the student's suspected disability. (20 U.S.C. § 1414 (a)(1), (2) & (3); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320.) School district evaluations of students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.303, 300.324(a)(1); Ed. Code, § 56341.1.)

A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119-1120 (*Timothy O.*)). Such notice may come in the form of concerns expressed by parents about a child's symptoms, opinions

expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Id.* at p. 1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202].)

An assessment must be sufficiently comprehensive to identify all 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).) A student's unique educational needs are to be broadly construed to include

- academic,
- social,
- health,
- emotional,
- communicative,
- physical, and
- vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. at pp. 56-58.)

The "educational benefit" to be provided to a student requiring special education is not limited to addressing the student's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

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The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (*See Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

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. (34 C.F.R. §§ 300.301 and 300.303.)

The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46640 (Aug. 14, 2006).)

The IDEA provides for reevaluations, referred to as reassessments in California, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted more often than once every three years if the school district determines that the educational or related services needs, including improved academic achievement and functional

performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i) & (ii); 34 C.F.R. § 300.303(a)(1) & (2); Ed. Code, § 56381, subd. (a)(1).)

As part of an initial evaluation or any reevaluation, the IEP team and other qualified professionals, as appropriate, must review existing data on the pupil, including evaluations and information from parents, current classroom-based assessments and observations, and identify what additional data, if any, is necessary to determine:

- if the student continues to have a qualifying disability and the student's educational needs;
- the present levels of performance;
- whether the student continues to need special education and related services; and
- whether any additions or modifications to the special education and related services are needed to enable the student to meet the student's annual goals and participate in the general education curriculum. (20 U.S.C. § 1414(c)(1)(A) & (B); 34 C.F.R. § 300.305(a) & (b); Ed. Code, § 56381, subd. (b).)

The local educational agency is required to administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP team. (20 U.S.C. § 1414(c)(2); 34 C.F.R. § 300.305(c); Ed. Code, § 56381, subd. (c).)

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If the local educational agency and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency shall notify the child's parents of:

- that determination;
- the reasons for the determination; and
- the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs. (20 U.S.C. § 1414(c)(4)(A)(i) & (ii); 34 C.F.R. § 300.305(d)(1); Ed. Code, § 56381, subd. (d).)

In that circumstance, the local educational agency shall not be required to conduct such an assessment unless requested to do so by the child's parents. (20 U.S.C. § 1414(c)(4)(B); 34 C.F.R. § 300.305(d)(2); Ed. Code, § 56381, subd. (d).)

A school district's failure to assess a child may constitute a procedural violation of the IDEA. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 249; see also *Park v. Anaheim Union High School Dist., et.al.* (9th Cir. 2006) 464 F.3d 1025, 1032 (*Park*) [A failure to properly assess is a procedural violation of the IDEA].)

BACKGROUND

STUDENT'S 2020 THREE-YEAR REEVALUATION

Fremont Union reevaluated Student in early 2020, when he was 18 years old. He had just begun attending WINGS. For Student's 2020 reevaluation, Fremont Union school psychologist Jack Neudorf originally proposed doing only a record review

instead of doing a full assessment of Student. During Parents' communications with Neudorf, it became clear to Neudorf that Parents wanted more than a record review. As a result, Fremont Union conducted a reevaluation of Student in 2020 that included some standardized testing in the areas of cognition, and Neudorf had Mother complete one instrument designed to measure Student's overall adaptive behavior. Neudorf also reviewed records, had Parents complete an updated health form, and observed Student at WINGS on February 5, 2020. Neudorf's 2020 psychoeducational evaluation report included no input from WINGS staff for Student's 2020 three-year reevaluation.

In 2020, Neudorf unsuccessfully attempted to administer three standardized measures of Student's cognitive ability before the discontinue criteria was met. Neudorf estimated Student's overall cognitive ability to be commensurate with his adaptive functioning, which continued to be significantly below age-level expectations when compared to same-aged peers. In the areas of social interaction and communication skills, community living skills, and broad independence, Student's scores were described by the test publisher as in the Very Limited to Negligible range, and in motor skills his scores were in the Limited to Very Limited range. Student's scores in personal living skills fell in the Very Limited range. Neudorf concluded Student met special education eligibility criteria for autism and recommended programmatic support in goal areas of self-help, daily living skills, community living/safety skills, and functional communication/social skills.

Student began participating in instruction online, also called distance learning, using Zoom during the COVID-19 pandemic. At hearing, Parent opined that online instruction was not effective for Student and Student had issues maintaining attention to the screen, and it caused Student stress.

STUDENT'S 2021 ANNUAL IEP

Student's annual IEP team meeting was held on February 9, 2021, during distance learning. This IEP was not proffered as evidence.

STUDENT'S 2022 ANNUAL IEP

Student returned to on-campus, in-person learning in October 2021. His course of study was a certificate of completion with an anticipated completion date of June 30, 2024. Student was scheduled to age-out of special education in June 2024 because he turned 22 years old in January 2024. (Ed. Code, § 56026, subd. (c)(4)(A) & (D).)

Student's annual IEP team meeting was held on February 4, 2022, while he attended WINGS. Parents' primary concerns included Student's behavior such as screaming in public, communication to express his wants and needs, and increasing his independence by decreasing his prompt dependence. Student met only one of nine of his 2021 annual IEP goals. Prompt dependence appeared to be Student's greatest hinderance in meeting his goals. Most of his goals were focused on completing tasks independently, but Student required verbal, physical, and gestural prompts to complete most tasks.

Student was described by Fremont Union in the February 2022 IEP as largely nonverbal, but inconsistently verbally approximated answering yes or no to questions about his wants and needs, and he occasionally tried to approximate some sounds modeled by an adult touching Student's chin to cue him to produce sound and word approximations. Overall, Student's verbal approximations were unintelligible to classroom staff, and he needed support to use his augmentative and alternative

communication device, called AAC device, which was a computer tablet, specifically an iPad. He sought maximum prompting from one-to-one staff in the form of verbal, gestural, and sometimes physical support throughout most of his school day. Student also demonstrated prompt dependence during distance learning. Student was able to remain seated during instruction but needed constant adult prompting to remain focused during 30-minute group and one-to-one activities. He inconsistently followed directions and required gestural prompts to find his face or name on the board. He inconsistently identified his head and toes when asked and was unable to point to other body parts.

In language arts, Student could flip through books placed in front of him but did not always turn one page at a time. He inconsistently attended to read-alouds in class or when an adult read to him; his attention span during these activities was about 30 to 60 seconds. When answering concrete comprehension questions about a text and given a field of two or three choices, he consistently chose the last option. He had trouble with tracing large letters, and that task was even more difficult for him with letters that curved such as S and R. When asked to write his name independently he sometimes made scribbles or did not respond to the direction. When asked to identify the letters in his name, he could not verbalize or find the letter on his AAC device. In math, Student could occasionally count from one to 10 by rote but required adult prompting to first focus on the direction to "count" and to initiate counting. He could not consistently match coins of similar color from a field of two.

In gross and fine motor development, Student was able to navigate his community and the school environment but required supervision for safety. Student could trace his name when the letters were two inches tall, but he did not produce

legible writing when tracing letters not in his name. He used a static tripod grasp and could manipulate his hands and fingers to pick up objects. Regarding sensory and regulatory skills, he vocalized when dysregulated. He often rocked back and forth both while seated and standing. He constantly fidgeted with his mask and held items up to his mouth, sometimes putting them in his mouth, but was easily redirected. Student sought vestibular movement by requesting the swing in the occupational therapy gym.

In the social-emotional/behavioral areas, Student sometimes expressed his dislike for something by yelling loudly and/or flailing his arms. No one had seen him express "his like for something." Rather, he tolerated most items or activities until he lost interest, or the task or activity was completed. Behaviors of concern included

- a recent demonstration of aggressive behavior in the form of grabbing staff with enough force to cause reddening of their arm,
- yelling loudly,
- biting his own fingers,
- uncontrollable laughter for up to 45 minutes, and
- general non-compliance.

Student did not initiate communication when he needed help. Student required gestural support to say "I need help" on his AAC device. Student could not look at a visual model of a sequence and then input the sequence on his device.

In the vocational area, Student inconsistently followed familiar one-step directions at school and did not demonstrate understanding of visuals shown to him. With both familiar and novel directions, he typically waited for step-by-step prompting.

In adaptive/daily living skills, Student needed adult support with most adaptive daily living skills practiced at school. He did not indicate when he needed to use the restroom and staff saw him use his bare hand to wipe following a bowel movement. He demonstrated more independence with hygiene routines but required supervision and prompting to sustain engagement in each step such as for brushing his teeth. He could walk to places in the community but depended on an adult to keep him with the group and maintain safety. Given COVID-19 mask mandates, he was unable to enter some community locations because he could not keep his mask on properly. He also needed reminders to give people space, walked into others or bumped them with his arms.

Student's receptive language skills were inconsistent. He understood speakers at a phrase level of two to three words. With cueing, he followed simple or routine one-or two-step directions, answered functional yes-or-no questions and WH-questions. In expressive language, Student used multimodal communication, primarily verbal speech, gestures, body language, and his AAC device to request, protest, makes choices, and use greetings. Student had apraxia of speech and his intelligibility to unfamiliar listeners was less than 20 percent. He received private speech therapy outside of school. He often needed models and visual and verbal cues to produce verbal speech. He used a program called TouchChat on an iPad as his AAC device. Fremont Union reported Student was able to transport his AAC device independently, but he did not take it with him consistently throughout the day or independently take it out of his backpack. He was less motivated to use his AAC device as compared to being verbal. When using his AAC device, Student needed gestural cues to communicate. Motivation was a factor in how much cueing Student needed for both receptive and expressive language and using his AAC device. In pragmatic language, Student had difficulty initiating communication either with verbal speech or with his AAC device. He did not initiate

greetings but responded to greetings when cued. He often used nonverbal communication, such as facial expressions, gestures, and body language to communicate his feelings, needs, and wants.

Student's areas of need were noted on the annual 2022 IEP as

- expressive language,
- social/behavioral/emotional skills,
- vocational skills,
- recreation/leisure,
- functional academics, and
- transition.

Student required assistive/augmentative devices or tools to meet his educational goals and his behavior impeded his learning or the learning of others. Although Student previously had a behavior intervention plan, Fremont Union did not offer a plan because WINGS staff reported Student's behaviors no longer required one because his behavior needs could be addressed through a behavior goal.

Fremont Union offered Student 11 goals in the following areas:

- self-care/independent living,
- transition-employment,
- community access,
- communication,
- functional academics,
- social-emotional/behavior, and
- recreation/leisure.

Fremont Union also offered Student a post-secondary transition plan with three transition goals. Fremont Union offered Student placement at a nonpublic school with

- group specialized academic instruction,
- transportation,
- individual instructional aide support, and
- various accommodations including frequent breaks, a fidget object, use of first/then cards with pictures, and use of preferred activities for reinforcement to address sensory needs.

Fremont Union also offered:

- one hour per week of individual speech and language services;
- one hour per week of individual occupational therapy services;
- consultation for teachers and staff with the speech-language pathologist for 420 minutes yearly;
- consultation for teachers and staff with an occupational therapist for 300 minutes yearly; and
- extended school year services.

Parent consented to the February 4, 2022 annual IEP on February 28, 2022, with the exception of wanting another IEP team meeting to discuss why the 2021 IEP's annual goals were not achieved.

STUDENT'S JANUARY 2023 THREE-YEAR REEVALUATION

Student's three-year reevaluation and annual IEP were due by early February 2023. On December 1, 2022, Dianne Holcomb, a program specialist for Fremont Union, sent Parents an email informing them that Student's annual IEP and what she referred

to as a “triennial IEP” was due in early February 2023. Holcomb stated that school psychologist Neudorf would be working on the new psychoeducational assessment, and that he would send out an assessment plan for Parents’ approval. The email also asked WINGS Administrator Laxmi Ghale, who was copied with the email, which areas of assessment to include for the WINGS staff.

On December 1, 2022, Ghale responded by email and copied Parents and Neudorf, stating that the WINGS team would “cover [Student’s] progress reports, the present level [sic], proposed goals, ITP [individual transition plan], and the BIP [behavior intervention plan], if needed, through informal assessment,” and that WINGS staff would work with the Fremont Union team to complete Student’s three-year reevaluation. Ghale also told Holcomb to inform Fremont Union’s speech-language pathologist, occupational therapist, and school psychologist to reach out to the WINGS program assistant to schedule any observation or assessment time.

On December 1, 2022, Fremont Union’s school psychologist Neudorf sent an email to Parents informing them he would be doing the “triennial eligibility” portion of Student’s upcoming IEP and reminded them he had done the reevaluation report for Student in 2020. Neudorf told Parents that because eligibility was not in question, he proposed that a review of records was sufficient to fulfill the eligibility report requirement and he wanted to do a program observation at WINGS. He offered to draft an assessment plan for Parents to sign if Parents were in agreement with his proposal. His email invited any additional information Parents wanted considered for “the triennial eligibility portion of the IEP.”

On December 5, 2022, Parent emailed Holcomb, Neudorf, and Ghale, instructing them to let him know which staff would be assessing Student. The same day, Neudorf sent another email essentially repeating what he stated in his December 1, 2022 email, informing Parent he would be conducting the "triennial re-evaluation portion" of Student's IEP. Neudorf again stated that because "overall eligibility" was not in question, he proposed a review of records, which he claimed would be sufficient to fulfill the eligibility report requirement, and repeated that he wanted to do a program observation at WINGS. Neudorf again offered to send a proposed assessment plan if that "sounded OK" to Parents. He also offered to schedule a time to "connect" if Parents had questions or wanted to discuss the assessment plan.

On December 6, 2022, Neudorf spoke briefly with Parent by telephone to follow up on his prior emails. Parent stated he would respond by email.

On January 9, 2023, Neudorf sent Parents an email advising them that he wanted to get the assessment plan and "triennial paperwork" for the upcoming IEP out for Parents to sign as soon as possible. He asked that Parents let him know if they had any questions with his proposed review of records and program observation described in his previous email.

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On January 11, 2023, Parent emailed Neudorf agreeing Neudorf could do a program observation at WINGS for the evaluation. Parent also stated Student showed no significant change in behavior and considerable improvement in his speech and verbal communication, which Parent believed would improve with therapy. Parent had some concerns, including:

- Student screamed loudly for unknown reasons;
- Student got angry immediately, jumped, and raised his arms up and down when bored and Student's requests were not honored;
- Student whined continuously while riding in the car;
- Student still lacked self-help skills and Parent was concerned Student was not ready for vocational training;
- Student engaged in socially unacceptable conduct such as putting his hand inside his pants in public; and
- Parent believed that Student's AAC device of the iPad with TouchChat application was "useless" and stated he could elaborate at the IEP team meeting.

Parent asked for feedback and Neudorf's opinion.

THE ASSESSMENT PLAN FOR STUDENT'S 2023 THREE-YEAR REEVALUATION

On January 11, 2023, Neudorf sent Parents the proposed assessment plan for them to sign, along with an email to Parents thanking them for the feedback and telling them he would schedule an observation of Student at WINGS.

The proposed assessment plan was attached to a prior written notice dated January 11, 2023, which had the box checked for "Triennial." The prior written notice stated the assessments in the attached assessment plan were being proposed to understand Student's needs. It stated that the assessment might include, but were not limited to, classroom observations, administration of rating scales, one-on-one testing, and a review of records. It also stated that all testing instruments were selected so as not to be racially, culturally, or sexually discriminatory. It also stated Parents would receive a copy of the assessment report. It stated the reason for the assessment was "Triennial review of special education eligibility." It also stated under description of other options considered and reasons for rejecting them that by email on January 11, 2023, Parents "consented to review of records and program observation to re-confirm existing triennial eligibility" for Student.

The assessment plan sent to Parents included assessments for "health" and "other." The assessment plan stated health information and testing would be gathered to determine how Student's health affected school performance, and indicated the examiner's title was "FUHSD Nurse for hearing and vision (if needed)." For the category of "other," the assessment plan stated "FUHSD Psychologist, WINGS Staff" would do "Review of Records, Observation, Interview." Fremont Union did not send Parents a copy of the Procedural Safeguards with the assessment plan.

On January 11, 2023, Parent signed the assessment plan and returned it to Fremont Union.

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THE 2023 THREE-YEAR-REEVALUATION AND ASSESSMENT REPORT

School psychologist Neudorf conducted a three-year reevaluation of Student, which consisted of reviewing some of Student's prior records and observing Student one time at WINGS.

Neudorf's assessment report consisted of eight pages and was reviewed at an IEP team meeting on January 31, 2023. The report stated the purpose of the evaluation was to discuss implementation of Student's program, evaluate his progress since his last review, and determine whether his program was appropriate and what changes were warranted. The first page of the report stated that Neudorf used the following procedures to determine Student's needs and present levels of functioning:

- review of records;
- update of medical and developmental history;
- interview with Student and Parent; and
- standardized assessment instruments.

Pages two through eight of the report were broken into three parts, background information on pages two through seven, assessment of current functioning on pages seven and eight, and summary and recommendations at the bottom of page eight. Most of the information on the first seven pages of the 2023 psychoeducational report came from prior reports in Student's file, including the prior health and developmental history, prior educational history, and prior testing from 2011, 2012, 2014, 2017, and

2020. It also stated that Fremont Union's school nurse conducted an updated hearing and vision screening on October 21, 2022, both of which Student passed. The only other new information was a summary of some of Parent's concerns taken from Parent's January 11, 2023 email.

At the beginning of the two-page section entitled, "Assessment of Current Functioning," the report stated Parents agreed a review of records was sufficient in lieu of standardized assessments to reconfirm Student's eligibility for special education, referencing the January 11, 2023 assessment plan. The report listed three bullets as if to signify what Neudorf had done, "Review of All Available Records," Observation," and "Interview." However, the only item in Assessment of Current Functioning was Neudorf's summary of his January 13, 2023 observation of Student at WINGS. In the classroom, Neudorf observed Student occasionally

- rocked back and forth in his chair while shaking his foot,
- practiced stocking groceries,
- swung and waved his hands while walking down the hall,
- took out the trash,
- wiped windows, and
- shredded paper.

In the gym, Student used the elliptical machine while vocalizing out loud. Neudorf did not conduct any interviews as part of his assessment and did not set forth a comprehensive list of the documents he reviewed. He did not conduct any standardized assessments or other testing as part of Student's 2023 three-year reevaluation.

The report's summary and recommendations stated Student had a documented history of medical, developmental, and adaptive functioning challenges, which were found to warrant support within "specialized programming." Neudorf noted previous assessments consistently found deficits in Student's cognitive processing, communication, and adaptive skills, as well as a behavior profile consistent with autism spectrum disorder. Neudorf stated a review of records indicated these remained areas of need for Student and were present to a level warranting special education support and related services. Neudorf concluded Student continued to meet eligibility criteria for special education under the category of autism. He stated that based on the standardized assessments completed and attempted for the evaluation, the IEP team might consider programmatic support within the goal areas of self-help, daily living skills, community living/safety skills, and functional communication/social skills.

THE JANUARY 31, 2023 IEP

On January 31, 2023, Fremont Union convened Student's annual IEP team meeting. Parents, Fremont Union school psychologist Neudorf and case manager Holcomb, as well as WINGS personnel, specifically WINGS administrator Ghale, Student's teacher, speech-language pathologist and occupational therapist, attended the IEP team meeting.

The January 2023 IEP described Student as an energetic and generally happy 21-year-old. He enjoyed doing independent work such as matching tasks and puzzles. He enjoyed being social with his peers and going on walks. He also enjoyed taking breaks outside throughout the day. The only Parent concern recorded on the IEP under the "parent concerns" section of the IEP was that Student got loud during group and work tasks, but nothing about the other concerns Parent raised in his January 11, 2023 email.

Student's present levels of performance in the January 2023 IEP stated Student's last vision and hearing screening was in 2015. Student's current academic and functional skills were reported on the IEP to have been informally assessed by teacher observations during one-on-one work and group instruction. Student was mostly nonverbal but could verbally answer yes-or-no questions pertaining to his wants and needs and could sometimes approximate other words modeled by his teacher. Sometimes, Student's verbal approximations were unintelligible to classroom staff, and he needed support to use his AAC device. Student needed prompting to remain calm, quiet, and focused during 30-minute group and one-to-one activities. He could identify basic body parts and followed verbal directions well. He needed more practice with comprehension questions. When given a choice in a field of two or three responses, he often chose the last option. He recognized and verbalized most letters. He needed gestural prompting to use his AAC device, which also announced words and so was called a talker. Student could use the talker to find words, then verbally approximate them, but he needed prompting and practice. He was not able to match similar coins. He consistently dropped or spilled food when feeding himself and needed supervision to ensure he did not eat food that fell on the floor. He needed prompting and practice to prepare his food. Student could walk in the community but required one-to-one support for safety.

His communication development levels were reported on the IEP to have been informally assessed using informal classroom observation and report, therapy data and observation, parent report, and file review. In receptive communication, the IEP stated that Student was able to understand speakers at a sentence level of four or more words, and that with cueing, he was able to follow simple or routine one-or two-step directions, make choices, and understand basic concepts such as shapes, colors, and sizes. WINGS

staff also reported Student could independently understand and answer yes-or-no questions, but had difficulty with WH-questions, and understanding basic concepts for numbers, body parts, community signs, and prepositions. In the areas of expressive language, Student continued to be a multimodal communicator and his verbal intelligibility to unfamiliar listeners was less than 20 percent. He continued to show a preference for verbalizing responses, which were more limited, and he benefitted from using his AAC device to participate in class when the activity was more complex or when he was unintelligible even with cueing. In pragmatic language, WINGS staff described Student as able to initiate and respond to greetings when given verbal or gestural cueing.

In the area of gross/fine motor development and sensory/regulatory skills, the present levels reported by occupational therapist were mostly almost word-for-word identical to what had been reported in the 2022 IEP, as if it had been cut-and-pasted into the 2023 IEP or slightly paraphrased, with little new information.

In social-emotional/behavioral functioning, Student continued to be unable to initiate communication or indicate a need for help. He could not follow visuals for pathing sequences on his AAC device. The IEP stated Student was rarely bothered by anything in the learning setting. Sometimes he got too excited and made a lot of noise and moved his arms up and down quickly, and staff described Student's only concerning behaviors in the classroom as yelling loudly, moving his arms frantically, and uncontrollable laughter.

In the area of vocation, Student was able to follow familiar one-step directions consistently, and was better at following verbal directions than visual models, but with both familiar and novel directions he typically waited for step-by-step prompting. In

adaptive living skills, Student needed support for most daily living skills practiced at school. He still required prompting for his hygiene routine and needed to be monitored in the bathroom, although he used the bathroom independently. He needed gestural prompting to clean up after meals.

Student's areas of need were identified in the January 31, 2023 IEP as

- receptive and expressive language,
- self-care,
- mobility,
- functional academics, and
- independent living.

Fremont Union records stated Student qualified for special education eligibility under the category of autism, and that Student exhibited a developmental disability that significantly affected verbal communication, nonverbal communication, and social interaction, and may exhibit repetitive activities,

- engagement in stereotyped movements,
- resistance to environmental change,
- resistance to change in daily routines, and
- unusual responses to sensory experiences.

The records also stated that Student's developmental disability adversely affected his educational performance. Student required assistive/augmentative devices or tools to meet his educational goals. The IEP stated behavior was not impeding Student's learning or the learning of others.

The IEP notes documented that a review of records was completed in lieu of direct assessments for Student's three-year reevaluation because the IEP team agreed that there was sufficient evidence of Student's continuing eligibility for special education as a student with autism.

THE JANUARY 31, 2023 IEP TEAM MEETING

At the January 31, 2023 IEP team meeting, Neudorf reviewed his 2023 evaluation report. Parent objected to the lack of assessment data to document growth and inform future placement. Parent wanted direct assessments conducted in the areas of cognitive ability, speech/language skills, motor and sensory processing, and Student's use of the AAC device. Parent stated new test scores were needed to document growth and to inform future adult program placements. Fremont Union and WINGS team members told Parents that Student's growth was measured more adequately and accurately through goal progress and present levels of performance, and that standardized measures of processing skills did not typically show much variation over time. They told Parents the acquisition and maintenance of skills being taught demonstrated growth and development. Parent requested standardized assessments of Student so he could compare Student's current scores to previous scores.

Parents again informed the IEP team that they did not see Student's AAC device as useful, and wondered if it should be discontinued. Mother shared that she wanted Student to be able to express his feelings, but the AAC device was limited in this area. The WINGS speech-language pathologist informed Parents that many more levels of content could be added to the device. The speech-language pathologist added that when Student developed an understanding of labels for feelings, these terms could be added to his device, and that it could be updated regularly.

The IEP notes reported Student met all of his annual goals, but did not document the specific discussion of Student's 2022 IEP's goals or his goal progress, other than stating "all team members agree that Student demonstrated good progress in the past year," and Student had shown more independence at school, could take a break by himself, get a snack from his locker, and walk to the cafeteria independently. The notes summarily stated Parents previously reviewed progress and proposed goals with WINGS staff, and that Parents agreed with the progress and goals. It was not established at hearing what this meant.

The speech-language pathologist and the occupational therapist proposed reducing Student's individual related services by 30 minutes per week because they believed it was more appropriate for "meeting his goals and preparing him for participation in an adult program." Parents disagreed because Student did not yet learn in a group setting and needed one-to-one instruction. Parents stated they would wait for further assessments before agreeing to any changes in the service minutes.

THE JANUARY IEP OFFER OF SPECIAL EDUCATION AND RELATED SERVICES

The January 31, 2023 IEP offered Student a total of 11 annual goals in the areas of

- communication,
- including articulation/voice fluency,
- self-care/independent living,

- functional academics,
- transition/independent living, and
- motor skills/mobility.

The IEP also included a post-secondary transition plan with three additional transition goals. Fremont Union offered Student placement at a nonpublic school with group specialized academic instruction, transportation, individual aide support, and various accommodations, including frequent breaks, fidget object, use of first/then cards with pictures, and use of preferred activities for reinforcement to address sensory needs.

Fremont Union also offered Student:

- 30 minutes per week of individual speech and language services, which was reduced from 60 minutes weekly he received in the 2022 IEP;
- 30 minutes per week of individual occupational therapy services, which was reduced from 60 minutes weekly he received in the 2022 IEP;
- consultation with the speech-language pathologist for 420 minutes yearly;
- consultation with an occupational therapist for 300 minutes yearly; and
- extended school year services.

Parent consented to the January 31, 2023 IEP on February 14, 2023, with the following exceptions: "Triennial evaluation and services" and "Parents not sure of the goals achievable in the absence of required triennial evaluations." In an email dated February 14, 2023, Parents clarified that they consented to the offered goals,

placement, and transportation, but did not consent to the reduced services in speech and language or occupational therapy and reiterated that they were unsure of the IEP goals' achievability in the absence of the required three-year reevaluations.

THE SUBSEQUENT 2023 ASSESSMENTS

In a telephone call with Parent sometime in late February 2023, Fremont Union Director of Educational and Special Services proposed to have Fremont Union conduct a speech and language assessment and an occupational therapy assessment, and to do an assessment in the areas of cognition and academic performance or to give Student a psychoeducational assessment with an independent evaluator.

On March 13, 2023, Fremont Union sent Parents a prior written notice with a copy of the procedural safeguards, responding to Parent's exceptions to the January 31, 2023 IEP and offering the independent psychoeducational evaluation. Sullivan also tried to justify the reduced services proposed at the January 2023 IEP, stating that it would allow Student to increase his group participation in the classroom and in school activities. The letter stated Student had demonstrated steady progress in both communication, behavior, and pre-vocational areas. It also stated that based on Student's current rate of progress and demonstrated ability to generalize skills, there was no indication that individual services should remain at the same level for either speech or occupational therapy. The letter assured Parents Fremont Union would continue to implement the services from the February 2022 IEP, and that following "the completion of assessment," an IEP team meeting would be scheduled to review the results and discuss the services proposed.

On April 7, 2023, Mother asked Sullivan about the independent evaluation process and the cost. On April 9, 2023, Fremont Union again offered an independent psychoeducational evaluation and to send an assessment plan for the speech and language and occupational therapy assessments. On April 11 and 17, 2023, Fremont Union sent Parents an assessment plan for the occupational therapy and speech and language assessments, noting that the assessments were being conducted to address Parents' concerns and that additional data was needed "to review progress and appropriate goals and services." On April 20, 2023, Mother asked if Fremont Union was paying for the independent psychoeducational assessment or for only a portion of it. On April 24, 2023, Sullivan explained that Fremont Union was paying for the independent assessment. Parent consented to the assessment plan on April 30, 2023.

FREMONT UNION'S 2023 OCCUPATIONAL THERAPY EVALUATION

In May 2023, Fremont Union's occupational therapist Lena Grodin conducted an educationally based occupational therapy evaluation documented in an assessment report dated May 29, 2023. The methods of assessment included a review of records, clinical observations, and two standardized measures including a Sensory Profile completed by Student's teacher, and the Wide Range Assessment of Motor Abilities intended to assess children ranging in age from three to 17 years of age, and a Teacher Questionnaire. Grodin admitted at hearing she did not obtain any input from Parents for her assessment. Grodin concluded Student had challenges in sensory processing that impacted his ability to access his educational setting. His fine motor skills were limited, and he benefited from adaptations and modifications to support his access to

his academic setting and the community. Grodin recommended occupational therapy services to help support sensory processing skills, increase independence, and improve self-regulation, among her other proposals.

FREMONT UNION'S 2023 SPEECH AND LANGUAGE EVALUATION

In May 2023, Fremont Union's speech-language pathologist/AAC advisor Jennifer Venditti, Ph.D., conducted a speech and language assessment which included an AAC evaluation. Venditti had conducted the speech and language evaluation for Student's 2020 three-year reevaluation.

Venditti's 2023 assessment was documented in a detailed report dated June 1, 2023. The methods of assessment included

- parent and staff input,
- a review of records and IEP goals,
- a review of AAC interventions,
- observing Student in his educational program,
- examination of instructional supports and existing interventions, and
- direct assessment of Student, including unsuccessful attempts at using standardized testing of vocabulary and articulation.

Venditti summarized that Student was a minimally verbal communicator with severe apraxia of speech who could use verbal speech with significantly limited intelligibility to imitate verbal models provided by staff. When a listener knew the context, Student's speech comprehensibility was rated high and functional for supported classroom activities. However, Student's expressive communication was

severely limited due to his significant difficulty with initiating communication and dependence on verbal models and choices being offered to him. Venditti opined that aided communication by an AAC device could expand Student's expressive language by increasing his vocabulary, range of choices, and utterance length.

Venditti recommended that school staff use Student's AAC device for functional communication and choice making. She outlined several pages of essential considerations and recommendations for AAC support and success, including

- increased communication opportunities,
- motivating and meaningful communication,
- AAC modeling and aided language stimulation,
- prompt fading,
- further customization of Student's AAC device layout, and
- recommended individual speech therapy services be provided inside his classroom, called a push-in model.

THE JUNE 5, 2023 IEP TEAM MEETING

On June 5, 2023, Fremont Union convened an IEP team meeting to review Fremont Union's speech and language and occupational therapy assessments, and to develop and revise Student's IEP. The IEP team reviewed the assessment reports. Fremont Union's occupational therapist Grodin stated Student required occupational therapy to access his educational program and concurred that the January 2023 IEP offer of 30 minutes a week of individual occupational therapy services was appropriate to meet Student's occupational therapy needs based on her assessment. Grodin stated Student's primary occupational therapy area of concern was sensory needs, which were

best addressed through more classroom integration, supported by consultation and 30 minutes a week of direct services. Parents disagreed, asserting the assessment lacked foundation and Student required one hour a week of services, like he was currently receiving. Parent stated he could see Student's occupational therapy needs at home, and a reduction in direct service minutes was not justified.

Venditti also reviewed her speech and language assessment report. She explained that Student was often comprehensible to familiar listeners, when there were context clues and Student had limited choices of responses, but to an unfamiliar listener without context clues, most or all his utterances were considered unintelligible. She felt that incorporating support for speech into Student's typical classroom routines was the best way to generalize his learning, foster independence, and fade prompting. Venditti thought classroom push-in model speech services would be most effective for Student, for generalization among staff, context, and environment. She recommended 20 to 30 minutes of direct sessions two days a week because Student needed practice during different parts of the day. She also believed calming strategies recommended by occupational therapist Grodin could be included on Student's AAC device. Parents continued to have questions regarding speech services, including about Student's attention span, but they could not be answered at that time because of the time constraints of the meeting.

Fremont Union did not make a new offer of special education and related services at the June 5, 2023 IEP team meeting pending the review of the independent psychoeducational evaluation. Holcomb emailed Parents on June 21, 2023 confirming Fremont Union was not changing its January 2023 IEP offer until the IEP team met to review the independent psychoeducational evaluation.

THE SEPTEMBER 2023 IEPs

On September 1, 2023, Student's IEP team met to discuss Student's placement. Fremont Union proposed placement at a post-secondary program called SOAR located at Lynbrook High School. In addition to other supports Fremont Union offered, it proposed:

- speech and language services of 20 minutes a week individual push-in, and 30 minutes a week small group push-in services with 300 minutes a year of AAC specialist consultation; and
- occupational therapy services of 30 minutes a week individual push-in, with 300 minutes a year of occupational therapy consultation.

At the meeting, Parent reiterated that he believed Student required 60 minutes a week each for speech therapy and occupational therapy services. Parent also thought new recommendations needed to wait until the pending independent psychoeducational evaluation was completed. In response to Parent's concerns about what would happen if he did not consent to the proposed amendments to the IEP, program specialist Holcomb confirmed that the most recent IEP Parent had consented to would be implemented. Parent refused to consent to the September 1, 2023 IEP on September 2, 2023.

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On September 8, 2023, Fremont Union amended Student's January 31, 2023 IEP, offering placement at PACE. In addition to the other supports Fremont Union proposed, it offered the same reduced amount of speech and language and occupational therapy services it offered in the January 31, 2023 IEP:

- 30 minutes a week individual speech services with 420 minutes a year of consultation; and
- 30 minutes a week individual occupational therapy services with 300 minutes a year of consultation.

On September 8, 2023, Parent consented to the September 8, 2023 IEP with the exception of speech and occupational therapy services.

THE 2023 INDEPENDENT PSYCHOEDUCATIONAL EVALUATION

Over summer 2023, Fremont Union funded an independent psychoeducational evaluation conducted by licensed educational psychologist Randy Yates, M.A., with the collaboration of Damon Korb, M.D., a behavioral and development pediatrician. Neither assessor testified at hearing. The independent psychoeducational evaluation was documented in a 21-page report, signed by both assessors, which included four pages of recommendations, which was reviewed at an October 17, 2023 IEP team meeting.

The assessment report listed multiple assessment measures to determine Student's present cognitive and adaptive behavior functioning levels and what interventions and diagnosis were most appropriate given Student's present levels of functioning. The measures listed in the report by Yates and Korb as having been

completed included standardized testing as well as the review of available records, Parent interview and questionnaires, and clinical observations of Student. The assessment report stated that the following procedures were completed:

- Comprehensive Test of Nonverbal Intelligence, Second Edition, a nonverbal reasoning test;
- Leiter International Performance Scale, Third Edition, a nonverbal reasoning test;
- Peabody Picture Vocabulary Test, Fifth Edition;
- Expressive Vocabulary Test, Third Edition;
- Autism Diagnostic Observation Schedule, Second Edition, used to assess communication, social interaction, play, and imaginative use of materials;
- Childhood Autism Rating Scale, Second Edition, Standard Version;
- Childhood Autism Rating Scales, Second Edition, Questionnaire for Parents or Caregivers; and
- Vineland Adaptive Behavior Scales, Third Edition, Parent/Caregiver Form, used to rate adaptive behavior functioning.

Yates and Korb concluded the results of the evaluation were consistent with Student's long-standing history of autism and intellectual disability, and that Student met the special education eligibility criteria for both autism and intellectual disability.

Yates and Korb recommended that when creating an education/transition plan for Student, several factors needed to be taken into consideration, including that Student was permanently disabled, had autism and oral motor apraxia, his functional abilities ranged between those of a typical person 18 months to five years old, his cognitive abilities were near the lower end of that range, and Student required direct supervision for the satisfactory completion of most daily living tasks and for his safety.

Yates and Korb concluded Student's cognitive testing revealed two educationally relevant factors. Student's information processing ability declined with something called "overwhelming coregulation," and Student had a relative cognitive strength in categorizing, meaning recognizing shared features or similarities between objects. On the one test, Student was given substantial coregulation, meaning verbal and pointing prompts to focus his attention, and verbal prompts and physical guidance to direct his deliberative processing. On a second test, the assessor only used verbal prompts to concentrate Student's attention. Student demonstrated a +19 standard score difference with reduced coregulation. When he received substantial coregulation, he looked toward the examiner after offering a response as if he were seeking approval. When given limited coregulation, Student flipped the easel page after responding. Substantial coregulation overwhelmed Student's information processing by dividing his attention, whereas limited coregulation allowed him to focus on the task.

Yates and Korb made numerous recommendations at the end of the report, including educationally related recommendations. Among other things, Yates and Korb stressed that communication needed to be the primary focus of Student's education and Student needed one-on-one speech therapy and educational support that included guidance by the speech-language pathologist for Student's parents, teachers, and other

providers. Yates and Korb recommended the use of realistic pictures of objects on Student's AAC device instead of caricatures because Student had problems with abstraction. They reiterated that Student's information processing was overwhelmed by too much coregulation. They recommended that Student's curriculum and instruction begin close to his current skill level. They also recommended altering Student's response choice options placement to help him understand the concept of making choices and decreasing Student's dependence on prompting when giving him choices. Yates and Korb stated Student could benefit from applied behavior analysis one-on-one support to continue teaching him life skills using repetitive strategies and rewards for positive progress. They suggested the use of picture schedules using realistic pictures to help Student understand his daily routines. They also recommended the providers develop mini routines for Student to help him gain independence. They recommended using a picture schedule to help foster independent routines in dressing, instead of Student being prompted to complete each step by adults, starting with two or three routines and over time developing 10 to 15 routines. The report documented that during observation, Student put his hands down his pants on multiple occasions. Because Student was unaware of social norms around public masturbation, Yates and Korb recommended addressing that behavior through alternative sensory objects and by keeping Student busy. Yates and Korb recommended teaching Student skills for his safety, including saying "stop" and how to exit a building in an emergency.

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THE OCTOBER 17, 2023 IEP

Fremont Union convened an IEP team meeting on October 17, 2023, to review the independent psychoeducational evaluation and review Student's placement. Those in attendance at the IEP team meeting included

- Parents,
- independent evaluator Yates,
- Fremont Union school psychologist Neudorf,
- case manager Holcomb,
- Fremont Union occupational therapist Grodin,
- Fremont Union speech-language pathologist Venditti, as well as
- PACE personnel, specifically administrator Lori Strickland, Student's teacher Elizabeth Wanschura, speech-language pathologists Dylaina Swan and Devida Thompson, and occupational therapist Samantha Sitki.

Independent evaluator Yates reviewed his assessment report. The PACE team provided information on Student's progress since starting at PACE in September 2023. Student's present levels of functioning were reviewed during the meeting. The PACE service providers reviewed Student's goals and recommended modifying the January 2023 IEP goals, as well as adding two new goals, which are further discussed in Issue 2 below. During the meeting, Parent reiterated that he thought the AAC device was useless and a failure. A PACE speech-language pathologist recommended Student receive group services and consultation in addition to individual speech services to help Student generalize his skills. Parent stated group services were not effective for Student.

Fremont Union speech therapist Venditti clarified that her prior recommendation for 20 to 30 minutes twice per week of push-in individual services was based on Student's placement at WINGS at the time, but because he was now at PACE, she agreed with the PACE speech therapists' recommendations.

The IEP team also discussed Student's fine and gross motor skills, and his behavior, including public masturbation. Parent asked for Yates's opinions regarding the AAC device and to comment on some of the recommendations in the independent evaluation, including the recommendation in the report for applied behavior analysis services, and safety recommendations. Yates also clarified that although he had recommended one-on-one speech services, he believed Student needed to focus on functional use of skills in the classroom, not the use of skills in a separate individual session or a certain number of minutes.

Fremont Union's offer of special education and related services included a nonpublic school placement, specialized academic instruction of 1,440 minutes per week, aide support for 1,500 minutes per week, and:

- Speech and language individual services for 120 minutes per month;
- Speech and language group services for 60 minutes per month;
- Consultation with the speech-language pathologist for 30 minutes per month;
- Occupational therapy individual services for 120 minutes per month;
- Occupational therapy group services for 60 minutes per month; and
- Consultation with the occupational therapist for 30 minutes per month.

Parents agreed to review the offer and determine their level of consent. On November 13, 2023, Parent signed the IEP, checking the box that he did not consent to the October 17, 2023 IEP.

FREMONT UNION'S 2023 PSYCHOEDUCATIONAL ASSESSMENT FAILED TO COMPLY WITH THE LAW

At the time of Fremont Union's 2023 psychoeducational evaluation, it had been three years since Fremont Union assessed Student. Although the law allows a school district to do a record review in lieu of a full reevaluation in certain circumstances, Fremont Union failed to comply with conditions excusing it from conducting a full three-year reevaluation of Student in January 2023.

FREMONT UNION DID NOT PROPERLY DETERMINE THAT NO ADDITIONAL DATA WAS NEEDED TO DETERMINE STUDENT'S EDUCATIONAL NEEDS

The evidence established Student's IEP team never properly determined whether additional data was needed to identify Student's educational needs before Neudorf decided to do a record review in lieu of a full assessment for Student's 2023 three-year reevaluation. At hearing, school psychologist Neudorf admitted he alone made the determination not to conduct a full assessment of Student and that he made that determination without first consulting with other members of Student's IEP team to determine whether additional data was needed to determine Student's educational needs. Neudorf never spoke to any of the WINGS staff providers before he made the decision only to do a record review. He thereafter found out WINGS was not doing any

formal assessments, however, there was no persuasive evidence that WINGS believed formal assessments were unnecessary to determine Student's educational needs. Formal assessments were Fremont Union's responsibility, not WINGS's.

Significantly, no one from WINGS testified at hearing. The December 1, 2022 email from WINGS administrator Ghale merely stated that it would provide Student's progress reports, report his present levels of performance through informal assessment, propose new goals, propose any updates to his post-secondary transition plan, and propose a behavior intervention plan if needed. The email specifically instructed Fremont Union to have its speech-language pathologist, occupational therapist, and school psychologist contact WINGS to schedule any observations or assessments needed for the three-year reevaluation. Ghale's email did not state that formal assessments were unnecessary.

Case manager Holcomb testified that after receiving Ghale's email, she sent an email to Ghale asking if WINGS was recommending or requesting further assessments, and that Ghale told her "no" and nothing beyond the informal assessments was necessary. Holcomb's testimony on this point was unbelievable and therefore unpersuasive. Holcomb only volunteered this testimony at the end of her testimony in response to the ALJ's questioning after having been thoroughly examined by both by Parent and Fremont Union's attorney. Fremont Union's counsel had earlier questioned Holcomb about whether anyone at WINGS had recommended any additional assessments, but Holcomb never mentioned these subsequent communications with Ghale when she testified. Moreover, neither of these emails was proffered by Fremont Union as part of the documentary evidence, casting serious doubt on their existence.

In addition, Holcomb did not otherwise appear to be a credible witness. At different points in her testimony, she was defensive, flippant, and repeatedly evasive when responding to questions, including repetitively stating she had to check the school district's records regarding matters she should have been able to recall as a member of Student's IEP team and Student's case manager since 2018. Finally, Ghale was merely a WINGS administrator, and there was no persuasive evidence that Ghale, Holcomb, or Neudorf ever spoke to Student's teacher or related service providers at WINGS as to whether they ever determined, after reviewing existing data on Student including evaluations as well as information from Parents, that additional assessments were necessary to determine Student's educational needs for his 2023 three-year reevaluation.

The evidence established Neudorf proposed not conducting a full assessment for Student's 2023 three-year reevaluation because he incorrectly believed that the purpose of the reevaluation was merely to confirm a student's eligibility for special education every three years. He repeatedly stated this throughout his testimony. He thought Student's areas of suspected disability were well-established and as such, believed a review of Student's records would suffice to document Student continued to be eligible for special education, and therefore the administration of further testing was not required.

Neudorf's testimony revealed his fundamental misunderstanding of the purpose of a reevaluation every three years, which is not only to confirm a student was still eligible for special education, but also to determine the child's current educational needs to help the IEP team identify the specific special education and related services the child required. (34 C.F.R. §§ 300.301, 300.303, 300.305(d).) Because Neudorf

misunderstood that reevaluations had a dual purpose, the evidence established he failed to conduct the necessary analysis before proposing the January 2023 record review, specifically to determine whether formal assessments or additional testing was necessary to determine Student's educational needs as of January 2023. This was most evident in Neudorf's communications with Parent where he stated in both his December 1 and 5, 2022 emails that he was proposing a record review because eligibility was not in question and would be sufficient to fulfill the eligibility report requirement, essentially ignoring whether the limited assessment he proposed would be sufficient to determine Student's educational needs as of January 2023.

Fremont Union's truncated analysis in proposing a record review was also evident in the way Neudorf handled Parent's January 11, 2023 email stating Parent's concerns, including Student's lack of self-help skills and behavior issues, including putting his hands down his pants in public, and Parent's statement about the uselessness of Student's AAC device. As discussed further below, these concerns should have alerted Fremont Union of the need to conduct formal assessments to determine Student's current educational needs. However, Neudorf never contacted Parents to find out more about these concerns, nor did he contact WINGS staff to determine whether further testing was necessary for the proposed evaluation. Fremont Union did not do this required analysis because Neudorf believed a three-year reevaluation was only conducted to "check the box" regarding continued special education eligibility.

Nor did Neudorf review the records first to determine whether further assessments needed to be conducted. This is evident on the January 2023 assessment plan itself, which stated hearing and vision testing would be done "if needed." At hearing, Neudorf

admitted he never looked at these records before he wrote the January 2023 assessment plan, providing further evidence Fremont Union did not follow the required protocol for a record review.

Fremont Union unsuccessfully tried to defend its records review proposal by attempting to have Neudorf confirm at hearing that nothing had indicated Student's functioning changed between 2020 and 2023. Neudorf himself qualified his answer to that question by District's attorney, by responding he was not aware of anything in terms of Student's overall eligibility. He later attempted to explain that as far as the "big picture" of Student's eligibility and functioning, he believed any 2023 assessment results would be consistent with his 2020 assessment results. However, this testimony was unpersuasive to justify his actions. Neudorf himself earlier agreed that Student's present levels of functioning between 2020 and 2023 would be different. The evidence also established that aside from conducting Student's reevaluations in 2017 and 2020, Neudorf had no contact or involvement with Student between 2020 and 2023. Student was attending a nonpublic school, Neudorf was not a member of the 2022 IEP team, and Neudorf never spoke to Student's teacher or related service providers at WINGS before proposing a records review for Student's 2023 three-year reassessment. Even Neudorf's 2020 psychoeducational evaluation recorded no input from WINGS's staff. As such, Neudorf's beliefs about Student's 2023 functioning were not convincing.

Fremont Union's 2023 psychoeducational assessment was not legally compliant because it did not properly determine that no additional data was needed to determine Student's educational needs.

FREMONT UNION DID NOT PROPERLY NOTIFY PARENTS OF THEIR RIGHTS TO REQUEST AN ASSESSMENT TO DETERMINE STUDENT'S NEEDS

Fremont Union never provided Parents with the notice mandated by law when it opted not to administer additional testing for Student's 2023 three-year reevaluation. (See 20 U.S.C. § 1414(c)(4)(A)(i) & (ii); 34 C.F.R. § 300.305(d)(1); Ed. Code, § 56381, subd. (d).)

To the extent Fremont Union's January 2023 assessment plan proposed only a record review, Fremont Union never properly notified Parents as to the reasons why no additional data was needed to determine Student's educational needs. Neudorf's communications with Parent prior to the January 31, 2023 IEP team meeting focused only on why assessments were unnecessary to establish continued eligibility, but completely ignored the other part of the required notice, which was to explain why testing was not required to determine Student's educational needs. The January 2023 assessment plan documented this by stating the reason for the proposed assessment was "triennial review of special education eligibility." Neudorf's emails to Parents and the January 2023 assessment plan did not disclose the belief Neudorf espoused at hearing, that any 2023 assessment results would be consistent with the 2020 results regarding Student's functioning. In addition, in proposing a "record review," for Student's three-year reevaluation, Fremont Union never notified Parents of their rights pursuant to title 20 United States Code section 1414(c)(4)(A)(i) & (ii) and Education Code section 56381, subdivision (d), to request a complete assessment to determine Student's continued special education eligibility and educational needs.

Particularly with assessments, the importance of a school district informing a parent of the reasons why it is refusing to reevaluate a student cannot be overstated. On its face, the IDEA requires the school district to conduct a comprehensive evaluation at least once every three years. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The law appears to give a school district the opportunity to demonstrate to the parents that assessments are unnecessary by reviewing existing data and identifying what additional data, if any, is required to determine, among other things, the student's educational needs. (34 C.F.R. § 300.305(a).) If after such a review, the IEP team and other qualified professionals, as appropriate, determine that no additional data is needed to determine the child's educational needs, the public agency need not perform the reevaluation at that time. (34 C.F.R. § 300.305(d)(1) & (2).) However, it must notify the parents of that determination, the reasons for that determination, and the right of parents to request an assessment. (34 C.F.R. § 300.305(d)(1)(i) & (ii).) The public agency is not required to conduct the assessment unless the parents persist in their request. (34 C.F.R. § 300.305(d)(2).)

Fremont Union is correct that the evidence does not support a finding that the reason Parent did not understand his rights was because Fremont Union did not provide Parents a copy of their procedural safeguards with the January 2023 assessment plan. Parent's testimony on this point was not convincing because Parent could not explain or point to anything specific in the notice of procedural safeguards that would have alerted him to his rights in the circumstance of a proposed record review.

However, Fremont Union's argument that Parents nonetheless knew of their rights to request assessments because of what happened with the 2020 reevaluation was not persuasive. The record was unclear as to the detailed circumstances revolving

around the 2020 proposed record review and the subsequent formal assessments that Fremont Union ultimately conducted for Student's 2020 three-year reevaluation. Even assuming Parent's requested assessments resulted in the 2020 reevaluation including standardized measures, there was no persuasive evidence that Fremont Union notified Parents of their right to request assessments in 2020 or 2023 in the face of a proposed record review. The evidence established that at the time of the 2023 proposed record review, Fremont Union failed to notify Parents of their right to request a complete assessment to determine Student's continued eligibility and current educational needs. Nothing in the assessment plan or any other document provided to Parents in preparation for the January 2023 reevaluation clearly notified Parents of their rights in this regard.

The fact that Parents may have requested standardized assessments in 2020 and at the IEP team meeting on January 31, 2023, did not negate the fact that Fremont Union was required by law to notify Parents of their right to request an assessment when Fremont Union proposed a record review for Student's 2023 three-year reevaluation. The coincidence of a parent requesting assessments does not equate to notifying parents of their right to request an assessment.

The IDEA contains numerous procedural safeguards that are designed to protect the rights of disabled children and their parents. (See 20 U.S.C. § 1415). These safeguards are a central feature of the IDEA process, not a mere afterthought:

"Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of

the resulting IEP against a substantive standard.” (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1195 (*M.C.*), quoting *Rowley*, 458 U.S. at 205, 102 S.Ct. 3034).

Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial. (*M.C.*, *supra*, 858 F.3d at p. 1195.)

It was abundantly clear from Parent’s testimony and other evidence that Parent did not understand the full implication of signing the proposed assessment plan. The December 1, 2023 email from WINGS administrator Ghale gave the impression that three areas of need would be assessed, specifically speech, occupational therapy, and the matters covered by a psychoeducational assessment. Neudorf’s emails to Parent and the 2023 assessment plan spoke about determining eligibility through a record review but did not properly explain that Fremont Union did not intend to conduct any formal assessments to determine Student’s current functioning and educational needs for purposes of assisting the IEP team in formulating Student’s program. Compounding the error, Fremont Union never properly notified Parents of their right to request assessments to determine Student’s needs when Fremont Union proposed only doing a records review. While it is true Parent could have checked the boxes on the assessment plan for other assessment areas, or asked questions about the scope of the assessment, that did not negate Fremont Union’s obligation to fully comply with all reevaluation protocols, which it did not do.

Fremont Union’s 2023 psychoeducational assessment was not legally compliant because it did not properly notify Parents of their rights to request an assessment to determine Student’s needs, given Fremont Union’s record review proposal.

FREMONT UNION FAILED TO COMPREHENSIVELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY

Having failed to comply with the conditions for a record review, Fremont Union was required to conduct a comprehensive reevaluation in all areas of suspected disability, including administering such assessments and other evaluation measures as needed to produce the data to determine Student's present levels of functioning, whether Student needed special education and related services, and whether any additions or modifications to Student's special education and related services were needed for Student to meet his annual goals. (See 20 U.S.C. § 1414(c)(2); 34 C.F.R. §§ 300.304(c)(6), 300.305(c); Ed. Code, § 56381, subd. (c).)

Assessments must be conducted in a way that:

- uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;
- does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and
- uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The assessments used must be:

- selected and administered so as not to be discriminatory on a racial or cultural basis;

- provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- used for purposes for which the assessments are valid and reliable;
- administered by trained and knowledgeable personnel; and
- administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(a)(2), (b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).)

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

The evidence was undisputed that Fremont Union did not conduct a comprehensive reevaluation of Student for his January 2023 three-year reevaluation. Fremont Union did not use a variety of assessment tools to gather relevant information about Student. Despite having significantly low cognitive ability and adaptive functioning, as well as documented needs in the areas of behavior, communication, mobility, self-care, functional academics, and independent living, and despite Parent

raising concerns on January 11, 2023, about Student's behavior, communication with the AAC device, and self-help skills, Fremont Union failed to comprehensively assess Student in any of these areas. On the January 11, 2023 assessment plan, none of the boxes were checked for

- academic achievement,
- intellectual development,
- communication,
- perceptual motor development,
- social/emotional functioning,
- adaptive behavior, or
- post-secondary transition.

The only boxes on the assessment plan that were checked were health for "hearing and vision (if needed)" and "other" with the notation "Review of Records, Observation and Interview" next to it. The scope of the proposed assessment was insufficient to gather the data necessary to determine Student's present levels of functioning, and whether any additions or modifications to Student's special education and related services were needed for Student to meet his annual goals.

Neudorf's 2023 psychoeducational evaluation did not include any testing or standardized measures in any of the areas of Student's suspected disabilities. Neudorf merely looked at old test results or summaries of test results, the most recent of which were from the 2020 psychoeducational report he completed. Although the January 2023 assessment plan called for Neudorf to interview Parents, he admitted he never did this. Specifically, when Fremont Union's counsel asked Neudorf if he conducted an interview as part of his January 2023 psychoeducational evaluation,

Neudorf clarified that he “made himself available” to obtain information from Parents if they had any questions or information they wanted to provide. He had a brief telephone conversation with Parent in early December 2022, but that was not an interview. The way Neudorf described it was, “I was just making myself available.” This was insufficient under the assessment plan and the law requiring a comprehensive reevaluation.

Parent gave Neudorf a list of his concerns by email on January 11, 2023, but Neudorf provided no specific list of questions for Parents to answer, and never followed up to ask questions about the concerns Parents raised. Neudorf merely pasted Parent’s concerns into his assessment report, and admittedly took no other action based on the concerns Parents raised, including the numerous concerns Parent raised about Student’s public masturbation behavior, as well as Student’s lack of self-help skills, apparent sensory processing issues, and communication challenges with his AAC device. This hardly qualified as an interview, which Neudorf himself recognized at hearing.

Conspicuously absent from Neudorf’s evaluation was any interview of Student’s teacher or the service providers at WINGS. As discussed above, other than conducting Student’s three-year reassessments in 2017 and 2020, Neudorf had no regular interaction with Student, and was not a member of his 2022 IEP team. Thus, he was unfamiliar with Student’s day-to-day functioning, yet he took no steps to inform himself about it other than conducting one observation in January 2023, which he testified was approximately 40 minutes in length, although he later claimed not to recall if he had previously said it was only 20 minutes in length.

At hearing, Neudorf tried to shore-up this glaring omission in failing to interview WINGS's staff. He claimed he asked some questions of a male staff member during his brief January 2023 observation, but he could not identify to whom he spoke, nor was his communication with this staff member documented in his written assessment report. Regardless, when asked if he ever interviewed anyone as part of his 2023 evaluation, Neudorf admitted that he never interviewed anyone at WINGS.

When Parent raised concerns in the January 11, 2023 email about Student's behavior, self-help skills, sensory processing, and communication issues, Neudorf never conducted any assessments in any of those areas, some of which were clearly within the domain of a psychoeducational evaluation. He also never spoke to anyone at WINGS or Fremont Union about conducting further assessments of Student in the areas of communication and occupational therapy. Fremont Union's 2023 psychoeducational evaluation failed to comprehensively evaluate Student in all areas of suspected disability regarding psychoeducation.

FREMONT UNION'S ASSESSMENT REPORT FAILED TO COMPLY WITH THE LAW

The personnel who assess a student are required to prepare a written report that includes, without limitation, the following:

- whether the student may need special education and related services;
- the basis for making that determination;

- the relevant behavior noted during observation of the student in an appropriate setting;
- the relationship of that behavior to the student's academic and social functioning;
- the educationally relevant health, development, and medical findings, if any;
- if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and
- consistent with superintendent guidelines for low incidence disabilities, which are those affecting less than one percent of the total statewide enrollment in grades kindergarten through 12, the need for specialized services, materials, and equipment. (Ed. Code, § 56327.)

Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent. (Ed. Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).)

The 2023 psychoeducational report falsely stated on the first page that Neudorf used the following procedures to determine Student's needs and present levels of functioning.

- Review of Records
- Update Medical and Developmental History
- Interview with Student and Parent
- Standardized Assessment Instruments

There was no updated medical and developmental history in the report. Parents were never asked to fill out a medical and developmental history or otherwise asked to provide this information for the 2023 three-year reevaluation. The medical and developmental history in this section was information obtained from old records. The only new information was Parent's list of concerns that Neudorf basically pasted into his report from Parent's January 11, 2023 email, but it did not include new medical or developmental information.

The only other new information listed in this section was information regarding updated vision and hearing tests that allegedly occurred on October 21, 2022, which Student reportedly passed. However, when Neudorf was asked if he was certain updated hearing and vision tests had been done, he claimed it was "my understanding." When asked if he ever saw a record of the test results, he claimed he had been informed, but could not recall exactly how and was otherwise equivocal about how he had been "informed." The January 31, 2023 IEP stated Student's last hearing and vision tests had been in January 2015, which Neudorf claimed was an error.

At hearing, Parent disputed that this testing ever took place. Parent checked all his records and found no evidence they had been conducted. He also explained that it would have been very difficult for Fremont Union to have assessed Student's hearing because of Student's particular sensitivities and that no one ever contacted Parents to obtain permission to do these tests. Despite Parent's testimony, Fremont Union pointed to no specific persuasive rebuttal evidence that these vision and hearing tests took place, or otherwise explained at hearing or in their closing brief how the updated testing could have occurred in October 2022, months before Parent consented to the January 2023 assessment plan.

Although interviews were listed as an assessment measure on the January 2023 assessment plan and on the first page of the January 2023 psychoeducational report, Neudorf conducted no interviews and there were no interviews listed in the report. As addressed above, Neudorf never conducted any interview of Parent, and when Parent provided him with a list of concerns, he never contacted Parents to interview them or ask questions about the listed concerns. He also never interviewed or otherwise obtained input from Student's teacher or related service providers at WINGS for his assessment. Furthermore, although the 2023 psychoeducational report stated Student was interviewed as part of the 2023 reevaluation, Neudorf admitted at hearing that interview never took place.

Despite listing "Standardized Assessment Instruments" as assessment instruments used for the 2023 reevaluation, Neudorf conducted no standardized assessments for Student's three-year reevaluation. Later in the report, under "Assessment of Current Functioning," Neudorf stated Parent consented to a review of records in lieu of standardized assessments to re-confirm overall eligibility for special education, but the report said nothing about Parent agreeing to a record review in lieu of standardized assessments to determine Student's educational needs – the crucial other purpose of a reevaluation.

The January 2023 psychoeducational report was defective because it failed to include any information from the WINGS staff, or otherwise document what WINGS staff did for Student's three-year reevaluation. The January 2023 assessment plan stated that besides Fremont Union's school psychologist, the "WINGS staff" would be performing part of the "Other" assessment, described on the document as review of records, observation, and interview. However, the psychoeducational report failed to include

any information from the WINGS staff regarding their record review, observations, and interviews. At hearing, Neudorf claimed “the majority” of what the WINGS staff was supposed to do for the three-year reevaluation was informal assessments, but it was clear from his testimony he was not sure what WINGS staff actually ended up doing for the January 2023 three-year reevaluation.

Whatever WINGS staff did for Student’s January 2023 three-year reevaluation, it was not included in the January 2023 psychoeducational report or factored into any of Neudorf’s conclusions or recommendations in the psychoeducational assessment. The January 31, 2023 IEP in some parts of the present-levels-of-performance section stated in conclusory terms that WINGS staff informally assessed Student, but Neudorf admitted he did not document the part of the assessment conducted by the WINGS staff into his evaluation report. Moreover, Neudorf never spoke to anyone at WINGS regarding their informal assessments before he wrote his 2023 psychoeducational assessment report, other than his brief interaction with an unidentified WINGS staff member during Neudorf’s one observation of Student on January 13, 2023, which staff interaction he failed to document. At hearing, Neudorf also admitted he was unaware of whether the WINGS staff ever interviewed anyone, conducted any observations, or reviewed any records for the January 2023 reevaluation regarding Student’s needs in communication or occupational therapy. Fremont Union’s failure to include in the January 2023 psychoeducational report the informal assessments performed by the WINGS staff, and their findings, rendered the report defective.

Finally, the January 2023 psychoeducational report was also defective because it failed to explain the relationship of the behavior Neudorf observed to Student’s academic and social functioning. Although Neudorf documented his one observation

of Student at WINGS, the report mentioned nothing about the significance of Student's observed behavior in relation to Student's functioning. In fact, there was no analysis of Student's current functioning. The scant one-paragraph conclusion at the end of the report was wholly insufficient to satisfy this report requirement.

Student proved by a preponderance of the evidence that Fremont Union failed to conduct an appropriate January 2023 psychoeducational evaluation. Whether Fremont Union's failure resulted in a substantive denial of FAPE is discussed below.

ISSUES 1B AND 1C: DID FREMONT UNION DENY STUDENT A FAPE BY FAILING TO CONDUCT APPROPRIATE THREE-YEAR-REVIEW EVALUATIONS PRIOR TO THE JANUARY 31, 2023 IEP TEAM MEETING – FAILING TO CONDUCT AN OCCUPATIONAL THERAPY EVALUATION AND A SPEECH AND LANGUAGE EVALUATION?

Student contends that by email on December 1, 2022, WINGS identified speech and language and occupational therapy as areas that required formal assessments for Student's January 2023 three-year reevaluation. Student argues Fremont Union failed to include these areas on the January 2023 assessment plan, and Parent did not understand that by consenting to that proposed assessment plan, speech and language and occupational therapy evaluations would not be conducted for Student's January 2023 three-year reevaluation. Student maintains that because Fremont Union did not conduct speech and language and occupational therapy assessments, the January 31, 2023 IEP team could not properly formulate goals to address Student's communication, sensory, and fine motor needs. Student argues that the communications goals based on Student using his AAC device were useless. Student maintains that because these

assessments were not timely done, Parent doubted whether the January 31, 2023 IEP proposed goals could be implemented or achieved, which Parent noted on the January 31, 2023 IEP's consent page. Student argues Parent requested occupational therapy and speech and language assessments at the January 31, 2023 IEP team meeting because they were missing from the documents reviewed at the January 31, 2023 IEP team meeting. Student contends Fremont Union's occupational therapy and speech and language assessments conducted after the January 31, 2023 IEP team meeting only tried to ratify or endorse the offer it made in the January 2023 IEP.

Student argues that if the January 2023 IEP had been appropriate, there would have been no need to amend it in October 2023, after the belated assessments were done. Student argues Fremont Union's proposed goal amendments in the October 17, 2023 IEP demonstrate that the January 2023 IEP goals were inappropriate, which was the result of Fremont Union's failure to appropriately assess Student in preparation for his January 2023 IEP.

Fremont Union contends WINGS intended to do a review of records for Student's January 31, 2023 IEP by reviewing Student's prior records, and presenting progress reports on his 2022 IEP goals, preparing present levels of performance and proposed goals, and updating Student's post-secondary transition plan. It maintains that although WINGS did not prepare an assessment report, Fremont Union included this information in the January 31, 2023 IEP. Fremont Union argues Parents were informed in the January 2023 assessment plan WINGS would do a record review, and Parent consented. Fremont Union contends that to the extent Parents attribute their delay in seeking assessments to Fremont Union's failure to provide Parents notice of their procedural rights with the January 2023 assessment plan, that argument is undermined

by the fact Parent asked for an occupational therapy assessment and a speech and language assessment at the January 31, 2023 IEP team meeting, before Parents received the updated procedural rights in March 2023.

Fremont Union asserts that to the extent there was a procedural violation by failing to conduct occupational therapy and speech and language evaluations, it remedied that defect when it later conducted both those assessments in May 2023, and reviewed them at the June 5, 2023 IEP team meeting. Fremont Union argues there was no substantive FAPE denial, because both assessments were thorough and comprehensive, its assessors testified the results of the assessments would not have changed if they conducted the assessments in January 2023, and the January 31, 2023 IEP's goals remained appropriate for Student. It also argues that its occupational therapist did not recommend any changes to the January 2023 IEP goals and services following the assessment. It also argues that although its speech-language pathologist recommended a different number of speech therapy minutes, the IEP team agreed to reconvene later because Parents wanted input from the independent assessor conducting the independent psychoeducational evaluation. Fremont Union claims that when it reconvened in October 2023 to review the independent psychoeducational evaluation, its speech-language pathologist agreed with the recommendation by the PACE nonpublic school speech-language pathologist for a slightly different but similar number of minutes.

At the time of Student's three-year reevaluation in January 2023, Student demonstrated needs in the areas of occupational therapy and speech and language, including AAC needs. Among other things, Student was mostly nonverbal and demonstrated sensory issues. In Parent's January 11, 2023 email to Neudorf, Parent

alerted Fremont Union to some of Parent's current concerns, including that Student's AAC device and the application on the device were useless, and that Student had sensory issues and lacked self-help skills impacting his vocational training readiness. Instead of following up with Parent or contacting Student's teacher or his related service providers to make an appropriate determination as to whether further assessments were needed to fully inform the IEP team regarding Student's functioning in the areas of speech and language and occupational therapy, Fremont Union proceeded with Neudorf's pre-determined record review instead of conducting a full evaluation of Student.

For the same reasons discussed in Issue 1A above, Fremont Union failed to comply with the required conditions excusing it from conducting a full three-year reevaluation of Student in January 2023, including an occupational therapy assessment and a speech and language assessment that included AAC. Among other things, Student's IEP team never properly determined whether additional data was needed to identify Student's educational needs in the areas of speech and language and occupational therapy before Neudorf decided to do a record review in lieu of a full assessment for Student's 2023 three-year reevaluation. In addition, in violation of title 20 United States Code section 1414(c)(4)(A), and Education Code section 56381, subdivision (d), Fremont Union did not explain to Parents why assessments were unnecessary to determine Student's educational needs in the areas of speech and language and occupational therapy and did not properly notify Parents of their rights to request additional assessments.

Having failed to comply with the statutory conditions for a record review, Fremont Union was required to conduct a comprehensive reevaluation of Student in all areas of known or suspected eligibility, including an occupational therapy evaluation and a speech and language evaluation which included AAC. Fremont Union was required to administer such assessments and other evaluation measures as needed, using a variety of assessment tools and strategies, to produce the data to determine Student's present levels of functioning, and whether any additions or modifications to Student's special education and related services were needed for Student to meet his annual goals. (See 20 U.S.C. § 1414(a)(2), (b) & (c); 34 C.F.R. §§ 300.304(c)(6), 300.305(c); Ed. Code, §§ 56320, 56381, subd. (c) & (e).)

However, Fremont Union failed to conduct any formal assessments of Student in the areas of occupational therapy, speech and language or AAC for Student's 2023 three-year reevaluation. Whatever informal assessments WINGS staff conducted, they were not a formal assessment of Student satisfying Fremont Union's three-year reevaluation obligations under the law. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2), see also, *Timothy O.*, *supra*, 822 F.3d at p. 1119 ("School districts cannot circumvent th[eir] responsibility [to assess children in all areas of a suspected disability] by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion.")) The evidence did not establish that WINGS providers did anything more than what was done as part of any annual IEP in updating a Student's present levels of performance and functioning.

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Student proved by a preponderance of the evidence that Fremont Union committed a procedural violation in failing to conduct an occupational therapy evaluation and a speech and language evaluation prior to the January 31, 2023 IEP. Whether Fremont Union's failure to conduct these two assessments prior to the January 31, 2023 IEP team meeting resulted in a substantive denial of FAPE, is discussed below.

ISSUES 1A, 1B AND 1C: FREMONT UNION DENIED STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE PSYCHOEDUCATIONAL ASSESSMENT AND BY FAILING TO CONDUCT AN OCCUPATIONAL THERAPY EVALUATION AND A SPEECH AND LANGUAGE EVALUATION PRIOR TO THE JANUARY 31, 2023 IEP TEAM MEETING

As discussed above, Student proved by a preponderance of the evidence that Fremont Union committed procedural violations in failing to conduct an appropriate January 2023 psychoeducational evaluation, failing to conduct an occupational therapy evaluation, and failing to conduct a speech and language evaluation prior to Student's annual IEP on January 31, 2023.

However, a procedural violation results in a denial of a FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*),

superseded in part by statute on other grounds [“... procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents’ opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE.”].)

A parent has meaningfully participated in the development of an IEP when parent

- has been informed of the child’s problems,
- attends the IEP meeting,
- expresses disagreement regarding the IEP team’s conclusions, and
- requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

The IDEA’s procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994] (*Winkelman*).) “[T]he informed involvement of parents” is central to the IEP process. (*Ibid.*) Protection of parental participation is “[a]mong the most important procedural safeguards” in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*).)

As discussed below, the weight of evidence established that Fremont Union’s failure to conduct appropriate reevaluations in connection with Student’s January 2023 three-year review significantly impeded Parents’ participation rights.

Fremont Union's January 2023 three-year reevaluation was inappropriate because it failed to comprehensively assess Student in the areas of psychoeducation, occupational therapy, and speech and language. This procedural violation significantly impeded the opportunity of Parents to participate in the IEP process and denied Student a FAPE. This is evident not only from Parent's testimony at hearing where he explained his internal difficulty in formulating goals but was documented in the January 2023 IEP team meeting notes and subsequent correspondence from Parent to Fremont Union. It was also demonstrated in Fremont Union's January 2023 psychoeducational report which failed to include any comprehensive information about Student's current functioning and recommendations for addressing his current needs.

Student had not been assessed since the beginning of 2020, right before the COVID-19 pandemic began, and before he entered PACE. Parent testified that online instruction during the pandemic had a negative effect on Student, and Student regressed during that period. Fremont Union should have been aware of the difficulties Student had with online instruction given the documented issues he had with attention, among other things. Because Fremont Union did no testing by January 31, 2023, Parent was unable to compare any current scores with Student's previous scores. At the January 2023 IEP team meeting, Parent again complained that the AAC device was not useful and questioned whether its use should be continued. Mother also raised concerns with the limits of the content of the AAC device. Without conducting any speech and language or occupational therapy assessments, and even though Student was mostly nonverbal and had ongoing sensory concerns, Fremont Union proposed cutting Student's individual speech therapy and occupational therapy services in half to just 30 minutes a week. Although on

February 14, 2023, Parent consented to the January 2023 IEP with exception of the proposed reduction in services, Parent was careful to document he was unsure whether the goals could be achieved in the absence of the information which the “required triennial evaluations” would have provided.

Because Fremont Union failed to conduct a speech and language evaluation including AAC and an appropriate psychoeducational evaluation for Student’s January 2023 three-year reevaluation, Parent did not have the data such assessments would have provided regarding Student’s functioning in the areas investigated by those assessments, which Parent needed to help inform him in deciding whether Fremont Union’s January 31, 2023 IEP offer of special education and related services was appropriate, including the proposed goals and the reduction in speech and language services.

Without formally assessing Student, Fremont Union did not have the information necessary to develop an appropriate program in the January 31, 2023 IEP, including offering appropriate related services and addressing Student’s AAC device needs, among other things. This is evident by the useful information reported in the subsequent assessments funded and conducted by Fremont Union in 2023, after the January 31, 2023 IEP team meeting, including the speech and language evaluation reviewed at the June 2023 IEP team meeting, and the independent psychoeducational evaluation reviewed at the October 17, 2023 IEP team meeting.

Fremont Union’s speech and language assessment report and the independent psychoeducational assessment had specifics about Student’s current functioning, including attempted tests and test results, and contained numerous recommendations

based on the assessments conducted. Both the speech and language and independent psychoeducational evaluations included Parent input, and made recommendations that included consideration of that input, whereas Parent input was essentially ignored by school psychologist Neudorf.

Among other things, both the speech and language and independent psychoeducational evaluations addressed issues pertaining to Parent's concerns about Student's AAC device, which Neudorf failed to address in his assessment or refer for evaluation. Fremont Union speech-language pathologist/AAC advisor Venditti's evaluation noted Student's difficulty with abstract symbols and the importance of further customizing the layout of the AAC application's home screen. She also explained the value of the AAC device in expanding Student's communication repertoire, increasing Student's communication opportunities, editing Student's AAC device to include Student's most desirable choices and expanding choice-making outside the speech room. She also explained the importance of fading direct pointing prompts, which was the most common prompt used by WINGS staff, as opposed to having Student follow verbal directions, to facilitate communication by Student.

At hearing, Venditti reiterated her recommendation to change the AAC device's home screen to give Student easier access to the communication options, rather than having him look for the icons. She also reluctantly admitted there were icons on Student's AAC device that he probably did not use because they were too abstract, and she recommended the icons be reviewed to ensure they were more functional for Student. Venditti not only recommended a specific type of delivery of speech services in her report recommendations, but at the June 5, 2023 IEP team meeting she recommended more than the 30 minutes a week offered by the January 2023 IEP.

Venditti also suggested that the calming strategies recommended by Fremont Union occupational therapist Grodin be included on Student's AAC device. Venditti's recommendations alone, including her recommendations for speech services, demonstrated that the offer Fremont Union made in the January 31, 2023 IEP was not appropriate, and that a formal assessment had been necessary to inform Parent and the IEP team about Student's communication needs.

In their report, independent evaluators Yates and Korb also addressed communication issues, including the need to use realistic pictures on Student's AAC device because of Student's difficulties with abstraction, and altering the response choice options. Yates and Korb also made suggestions in Student's communication by making choices, and for decreasing Student's dependence. Yates and Korb emphasized that communication should be the primary focus of Student's education, including the need for one-to-one communication and consultation services. Although the IEP team meeting notes state that it was Korb who made the recommendation in the report for one-to-one applied behavior analysis therapy, Yates's and Korb's report included the recommendation for teaching Student life skills through repetitive teaching strategies and rewards for positive progress. Yates and Korb also made other recommendations for increasing the use of mini routines to promote independence, addressing Parent's concerns regarding Student's public masturbation, and some safety recommendations. Yates and Korb determined that Student's information processing ability improved with limited coregulation and revealed Student had a relative cognitive strength in categorizing. These matters and the recommendations were not emphasized in the January 2023 Fremont Union psychoeducational evaluation by record review. The information Yates and Korb obtained could have instructional implications for Student, but the January 2023 IEP team lacked this foundational information.

Because Fremont Union failed to conduct an occupational therapy evaluation, Parents were deprived of the data or recommendations that such an assessment would have provided regarding Student's functioning in the area of sensory processing and gross and fine motor skills necessary to inform Parents whether Fremont Union's January 31, 2023 proposed goals and reduction in occupational therapy services were appropriate, and whether he required other program services, supports or goals. Student had not been formally assessed in the areas covered by an occupational therapy evaluation in at least three years. Student was not producing legible handwriting and had documented sensory issues.

Fremont Union's argument that its funding of the independent psychoeducational evaluation and the belated speech and language and occupational therapy evaluations remedied the violations is unpersuasive. The information in the reports was not available to Parent for months after the January 31, 2023 IEP team meeting, so Parent was unable to use it to aide in the development of Student's program in January 2023. The speech and language assessment and occupational therapy assessment were not completed and reviewed until June 5, 2023, and the independent psychoeducational evaluation was not reviewed until October 17, 2023. It was not unreasonable for Parent to want to wait until October 2023 to obtain the input from the independent evaluator before making some decisions about Fremont Union's offer of special education and related services. Had Fremont Union appropriately conducted Student's three-year reevaluations in January 2023, Parents would not have had to wait until October 17, 2023, to have the information from the independent assessor necessary to evaluate Fremont Union's offers.

Although Fremont Union reviewed the related services assessments in June 2023, it was not until the fall of 2023 that it made a new offer of special education and related services. On September 8, 2023, it ultimately offered the same amount of speech therapy services offered in the January 2023 IEP, but in the October 17, 2023 IEP, Fremont Union added 60 minutes a month of group speech therapy services, but reduced the consultation services from 420 minutes a year offered in January and September 2023, to 30 minutes per month, which totals approximately 300 minutes in a regular school year plus extended school year. For occupational therapy, the total minutes Fremont Union proposed on September 8 and October 17, 2023, was the same as was offered in the January 2023 IEP, except the October 2023 IEP added group occupational therapy services of 60 minutes per month.

Fremont Union's position that the belated occupational therapy assessment remedied its failure to timely conduct this assessment is also unpersuasive because its May 2023 occupational therapy evaluation contained a fatal flaw – it lacked any input from Parent. At hearing, Fremont Union occupational therapist Grodin acknowledged parental input was useful, but admitted she got no input from Parents for her assessment. She attempted to explain away her conduct, claiming she was "just looking at the school setting ... what prevents [Student] from developing fine motor skills ..." so she saw no need to obtain Parents' input. Having failed to obtain Parents' input for the occupational therapy evaluation, an essential component of all educational assessments, cast doubt on Grodin's findings and conclusions. (See 20 U.S.C. § 1414(b) [Assessments must be conducted in a way that uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, "including information provided by the parent" that may assist in determining whether the student

is a child with a disability and the content of the student's IEP]; see also, *Amanda J.*, *supra*, 267 F.3d at 882 ["Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know."].)

Also unconvincing is Fremont Union's conclusory argument that the January 31, 2023 IEP itself provided the necessary information that the January 2023 assessment failed to include. Nowhere in its closing brief, or at hearing, did Fremont Union comprehensively explain how the January 2023 IEP provided the missing assessment information to Parents. It is not the ALJ's responsibility to construct or develop Fremont Union's argument. (*Independent Towers of Washington v. Washington* (9th Cir. 2003) 350 F.3d 925, 929 [the court cannot construct arguments for a party and will only examine issues specifically and distinctly argued in a party's brief] (*Independent Towers*); see also *Kraim v. Virginia, et al.* (S.D.W. Va. July 26, 2021, No. 3:21-cv-00326) 2021 WL 3612305, at *7 ["[J]udges are not pigs searching for truffles," and not required to be "mind readers."]; *Agarwal v. Oregon Mutual Insurance Company* (D. Nev. January 18, 2013, No. 2:11-cv-01384-LDG) 2013 WL 211093, at *3 ["[I]t is not the responsibility of the judiciary 'to sift through scattered papers in order to manufacture arguments for the parties.'"].)

Moreover, the January 2023 IEP's section reporting present levels of performance were not based on formal assessments by WINGS staff and did not include all the information that an assessment required, including the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by Parents. In addition, in gross/fine motor development and sensory/regulatory skills, the present levels reported contained little

new information than what was reported by WINGS in the 2022 IEP. As the Ninth Circuit Court of Appeals has made clear, informal observations are not a substitute for formally assessing a student in all areas of suspected disability. (See *Timothy O.*, *supra*, 822 F.3d 1105, 1119.) Nor did the present levels of performance listed in the January 2023 IEP contain the data and other detailed information and recommendations provided to Parents as a result of the belated assessments conducted after the January 31, 2023 IEP team meeting.

Because Fremont Union conducted no comprehensive assessments for Student's three-year review, Parent was denied the information timely assessments would have provided Parents regarding Student's current special education and related services needs to allow him to participate in the January 31, 2023 IEP team meeting in an informed and meaningful way. (Cf. *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted] (*Deal*) ["Participation must be more than mere form; it must be meaningful."].) Fremont Union's failure to conduct an appropriate January 2023 psychoeducational assessment significantly impeded Parents' opportunity to participate in the decision making process and denied Student a FAPE. Fremont Union's failure to conduct a speech and language evaluation, and failure to conduct an occupational therapy evaluation, prior to the January 31, 2023 IEP team meeting significantly impeded Parents' opportunity to participate in the decision making process and denied Student a FAPE.

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ISSUE 2: DID FREMONT UNION DENY STUDENT A FAPE BY IMPLEMENTING THE OCTOBER 17, 2023 AMENDMENT TO THE JANUARY 31, 2023 IEP WITHOUT PARENTAL CONSENT?

Student asserts Fremont Union implemented the modified and new goals offered at the October 2023 IEP without Parents' consent. Student contends Fremont Union completely ignored Parent's decision not to consent to the October 17, 2023 IEP amendments to the January 2023 IEP, specifically the modified and new goals. It was important to Parent to see Student's progress on goals on an annual basis. Parent felt that goals were supposed to be developed annually, and it would be impossible for Student to complete new goals in only three months, so he opted to continue with the old goals from the January 2023 IEP. Parent did not believe the new goals could have been achieved without the applied behavior analysis services recommended by independent assessors Yates and Korb in October 2023, which Fremont Union did not offer, so he wanted to continue with the goals he had agreed to in the January 2023 IEP. Student argues these modified and new goals were not appropriate, regardless of whether they were achieved or not. Student argues that if Fremont Union wanted to implement goals Parents did not agree to, they were required to file for due process to obtain permission to implement the unconsented-to IEP goals.

Fremont Union contends Student did not meet his burden of proof to show a substantive denial of FAPE for any October 2023 IEP goal implemented without Parent's consent. Fremont Union argues Parents verbally agreed to the goals at the October 17, 2023 IEP team meeting, and there was implementation of the modified or new goals to varying degrees by the nonpublic school providers. Fremont Union asserts parental consent is not required for a school district to revise and implement new IEP goals so

long as the revision to the goals is not a change in educational placement. Fremont Union contends because Student did not prove the modified or new goals resulted in a change of educational placement, Student did not establish Parent's consent for implementation of these goals was required. Regardless, Fremont Union contends the October 2023 IEP revisions to the January 2023 IEP goals did not result in a substantive FAPE denial because there was no change in the function of the goals or the targeted skills Student was working on, but rather, the modified and new goals were based on Student's present levels of performance in October 2023 and what was appropriate given Student's September 2023 placement at PACE.

THE OCTOBER 17, 2023 IEP AMENDMENT TO THE IEP GOALS

Student began attending PACE in September 2023. On October 17, 2023, Fremont Union convened a 30-day IEP team meeting to review Student's new placement, review the assessment results from the independent psychoeducational evaluation, and develop revisions to Student's IEP. Student's PACE special education teacher Wanschura and well as PACE related services providers, speech-language pathologist Swan and occupational therapist Sitki, attended along with Parents, Fremont Union personnel, and independent psychoeducational assessor Yates.

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In the October 2023 IEP Fremont Union proposed the following goal amendments to the goals offered in the January 31, 2023 IEP:

GOAL 1

January 2023 IEP Goal 1 focused on articulation, voice, and fluency by requiring Student to say functional words he commonly used with 90 percent accuracy in two out of three sessions given "maximal verbal, visual or tactile cueing." Maximal was not defined.

At the October 17, 2023 IEP team meeting, Fremont Union proposed replacing Goal 1 with October 2023 IEP Goal 1, targeting Student's pragmatic social skills by requiring him to initiate communication verbally or with his AAC device given no more than two prompts with 80 percent accuracy in two of three sessions.

GOAL 2

January 2023 IEP Goal 2 targeted communication, requiring Student to answer "where" and "when" questions when given a field of three answer choices in 80 percent of trials in two out of three sessions. The speech-language pathologist was responsible for implementing this goal.

At the October 17, 2023 IEP team meeting, Fremont Union proposed modifying Goal 2 with October 2023 IEP Goal 2, which required Student to perform the same task "in 80% of trials across 10 days of data collection," which the special education teacher was responsible for implementing. The October 17, 2023 IEP notes taken by Fremont Union case manager Holcomb incorrectly stated no changes were proposed to Goal 2.

GOALS 3, 7 AND 12

January 2023 IEP Goal 3 targeted independence in daily living skills and January 2023 IEP Goal 7 targeted the same area. Fremont Union proposed discontinuing January 2023 IEP Goals 3 and 7 and replacing them with October 2023 IEP Goal 12.

January 2023 IEP Goal 3 required Student to complete three-or four-step self-care tasks with less than two verbal and gestural prompts in three of four opportunities as measured by the special education teacher and data collection by the occupational therapist.

January 2023 IEP Goal 7 required Student, when given a visual task analysis, to complete three chores in their entirety with no more than three prompts in 80 percent of opportunities as measured by the special education teacher and data collection.

The October 2023 IEP proposed new Goal 12 required Student to demonstrate increased independence with daily living skills as evidenced by completing a three-or-more-step chore of sweeping, washing dishes, or completing laundry with minimal, defined as one to two, verbal, visual, and physical cues and 75 percent accuracy in four out of five opportunities as measured and reported by the occupational therapist and staff.

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GOAL 4

January 2023 IEP Goal 4 targeted functional academics, requiring Student after viewing prices with images, to add items from a menu or price list with no more than three prompts in four of five consecutive trials as measured by teacher observation and data collection.

The October 2023 IEP offered with same Goal 4 without amendment.

GOAL 5

January 2023 IEP Goal 5 targeted functional academics, requiring Student with his AAC device, verbal language, or pointing to the correct answer, to answer five questions with visual support from class lessons about his social and vocational interests from a field of two, "with 100% accuracy in 4 out of 5 opportunities" as measured by work samples, teacher observation, and data collection.

The October 2023 IEP modified Goal 5. It targeted the same skill but modified the mastery criteria, deleting "with 100% accuracy."

GOAL 6

January 2023 IEP Goal 6 targeted memory, requiring Student at the end of his day to use verbal language or his AAC device to answer five questions about what he did and learned during his school day with visual support and no more than two prompts in four out of five opportunities, to be implemented by the special education teacher.

The October 2023 IEP offered with same Goal 6 without amendment.

GOAL 8

January 2023 IEP Goal 8 targeted Student's motor skills and mobility. It required Student to receive 20 minutes of fitness throughout the day from activities such as walking, yoga, and pedal biking given verbal and gestural support as needed in four of five opportunities as measured by teacher observation and data collection.

The October 2023 IEP proposed a revision of this goal to replace the "yoga" with "recreational sports," changing the mastery to be measured "by teacher observation and data collection with OT consult," and adding the occupational therapist in addition to the special education teacher as the persons responsible for Goal 8.

GOAL 9

January 2023 IEP Goal 9 targeted independent-living skills. It required Student to follow a two-to three-step visual analysis to complete a laundry task to load and unload laundry into a washer and dryer, with no more than three prompts in four of five opportunities as measured by teacher observation and data collection.

The October 2023 IEP Goal 9 was the same except it replaced the special education teacher with the occupational therapist as the person responsible for observing and recording implementation.

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GOAL 10

January 2023 IEP Goal 10 targeted independent-living skills. It required Student, when going shopping or to a restaurant in the community, to follow community signs and stop at every street corner on the way before following a purchasing sequence to use a debit card to make a purchase with no more than three prompts in four of five opportunities as measured by teacher observation and data collection.

October 2023 IEP Goal 10 modified the original goal. It now required Student to demonstrate vocational readiness by carrying out steps of a basic store transaction in a simulated or actual store environment by greeting customers, retrieving products, and thanking customers, with no more than two verbal and/or gestural prompts in 80 percent of opportunities across 10 trial days as observed and recorded by teacher and staff.

GOAL 11

January 2023 IEP Goal 11 addressed self-help and independent-living skills. It required Student, when given a visual schedule before engaging in a bathroom and hygiene routine, to independently apply deodorant and brush his teeth in three out of five trials, as measured by teacher observation and data collection.

The October 2023 IEP offered the same Goal 11 without amendment.

GOAL 13

The October 2023 IEP offered new Goal 13. It targeted Student's receptive language and pragmatic social skills by requiring Student to appropriately respond to

real life situations, during community access and social situations, when given visual supports of a photo, illustration, or social story in 80 percent of opportunities, in two out of three data collection sessions as measured by the speech-language pathologist.

THE DISCUSSION AT THE OCTOBER 2023 IEP TEAM MEETING ABOUT THE GOALS

During the October 2023 IEP team meeting, Parent asked Yates for his opinion about Student's use of the AAC device. Yates explained Student had difficulty understanding two-dimensional representations of language, which impacted Student's effectiveness in using the device. Parent believed the AAC device was useless, explaining Student did not use the device at home. At hearing, Parent reiterated Student did not understand icons that were abstract. During the October 17, 2023 IEP, the PACE speech-language pathologist agreed with Yates, explaining that was why they used AAC as one aspect of Student's multimodal communication, and that PACE staff were working to help Student "connect verbal, gestures, pictures and real objections/actions." Yates recommended an AAC device program that included 200 common objects for instruction. The IEP team reviewed the proposed goal changes, Parent indicated some initial verbal approval of the changes, but the IEP team continued discussing Student's goals.

During the IEP team meeting, Parent asked Fremont Union to propose an additional speech goal. Parent reiterated that the AAC device had been a failure and explained that verbal communication was sufficient in the home. The Fremont Union special education coordinator explained the value of the AAC device. Parent said he believed Parents' preference should be honored. Parent asked for clarification that

"stay-put" had been maintained, and Fremont Union confirmed that the last consented to IEP from January 2023 IEP was being implemented with the service minutes from the 2022 IEP. The team also discussed Student's fine motor skills. Parent asked about adding a handwriting goal requiring Student to write his name legibly, and a goal for tricycle riding because Student had balance issues. Parent also thought a behavior goal should be added to address Student masturbating in public. PACE special education teacher Wanschura said this behavior was not a problem at school because Student was compliant with redirection and the classroom strategies in use were effective for Student, but they could monitor and address the behavior. Fremont Union recommended the team collect data and, if necessary, propose a goal at Student's annual IEP team meeting in January 2024. Parent disagreed and thought a goal should be proposed immediately.

FREMONT UNION IMPLEMENTED THE OCTOBER 2023 IEP PROPOSED GOALS WITHOUT PARENT'S CONSENT

Although at the October 2023 IEP team meeting Parent may have indicated some initial verbal approval of one or more of the modified or new goals, Parent never consented to the implementation of the goals proposed in the October 2023 IEP. On November 13, 2023, Parents signed the October 17, 2023 IEP consent page, checking the box that they did not consent to the October 2023 IEP amendment to the January 31, 2023 IEP.

FREMONT UNION'S IMPLEMENTATION OF THE OCTOBER 2023 IEP

The January 31, 2023 IEP required progress to be reported to Parents quarterly through progress summary reports. The evidence established that Parents were provided with progress reports in May 2023, August 2023, and January 30, 2024. Fremont Union also prepared a progress report in November 2023, but the weight of evidence established Parents never received it.

Several of the October 2023 IEP amendments to the January 2023 IEP goals were implemented by PACE without Parent's consent to the October 2023 IEP. PACE special education teacher Wanschura admitted at hearing she mistakenly believed Parent consented to the October 2023 IEP proposed goals, so she began implementing them a few days after the October 17, 2023 IEP team meeting. She claimed at one point, that when she discovered about a month after the October 2023 IEP team meeting that Parent did not consent to the October 2023 IEP goals, she began implementing the January 2023 IEP goals, but continued to implement the October 2023 IEP goals until the January 30, 2024 IEP team meeting. Thereafter, Wanschura claimed she only implemented the January 31, 2023 IEP goals. As the person responsible for implementing only some of the October 2023 IEP goals, this meant Wanschura would have implemented the changes in the October 2023 IEP regarding Goals 2, 3, 5, 7, 8, 9, and 10, which included goals Parent never agreed to, from approximately October 18, 2023, through January 30, 2024, or approximately three months of school. This testimony also meant she stopped implementing two of the goals from the January 2023 IEP for at least a month, specifically Goals 3 and 7.

Wanschura's testimony was impeached as to whether she started implementing all the January 2023 IEP goals in November 2023, as she claimed. For example, Wanschura did not report progress for January 2023 IEP Goal 7 in either the November 2023 or January 2024 progress reports, which indicated she stopped implementing Goal 7 after the October 2023 IEP team meeting. The January 2024 progress report also stated that Goal 7 was discontinued.

PACE speech-language pathologist Swan admitted at hearing she mistakenly believed Parent consented to the October 2023 IEP goals, so she began implementing the October 2023 IEP goals after the October 17, 2023 IEP team meeting. She claimed she stopped implementing the modified and new goals of the October 2023 IEP sometime around mid-November 2023, because she found out Parent did not consent to that IEP. She testified that at that time, she began implementing only the goals from the January 31, 2023 IEP. As the person responsible for implementing only some of the October 2023 IEP goals, these admissions meant Swan implemented October 2023 IEP Goals 1, 2, and 13 without Parent's consent for approximately four weeks.

Swan's testimony was impeached as to the length of time she implemented the unconsented-to October 2023 IEP goals. For example, Fremont Union's own records demonstrated that in January 2024, Swan reported on October 2023 IEP Goal 13 as "Goal met." This record also impeached her later inconsistent testimony denying she implemented Goal 13. It also appeared from the January 2024 progress report that some or part of October 2023 IEP Goals 1 and 2 were implemented as further discussed below. The January 2024 progress report for Goal 1 reported some unspecified mix of communication by initiating and responding to functional communication, which was not the stated goal in the January 2023 IEP. Although at hearing Swan claimed Goal 1

from the January 2023 IEP was met, and the goal she reported on at the January 2024 IEP team meeting, her testimony was not convincing. Goal 1 from the January 2023 IEP required 90 percent accuracy, not the 80 percent accuracy level required of Goal 1 from the October 2023 IEP. Yet, Swan reported Student met Goal 1 with an 80 percent accuracy level on the January 2024 progress report.

Swan was otherwise not a convincing witness. Some of her testimony seemed rehearsed because of the robotic way she responded to questions. She attempted to claim that Goal 2 in the January 2023 IEP and the October 2023 IEP were identical except for the person responsible for implementing it. Swan unsuccessfully asserted that the mastery criteria for Goal 2 was not different despite the fact January 2023 IEP Goal 2 stated "in 2/3 sessions," which was replaced in the October 2023 IEP with "across 10 days of data collection." Swan's testimony that she implemented and reported on the January 2023 IEP Goal 2 was not convincing because the October 2023 IEP Goal 2 was the one stated on the January 2024 progress report as having been implemented "Across 10 data collection sessions." Swan's testimony on this issue was otherwise convoluted and nonsensical, and therefore was unpersuasive.

Swan's overall credibility was also negatively affected by her confusing, inconsistent, and evasive testimony regarding her licensing as a speech-language pathologist. When the ALJ asked Swan if she held a license at the time of the October 17, 2023 IEP team meeting, she said she held a speech-language pathologist license. When further questioned about whether she had a license prior to November 2023, Swan claimed it was "processing," instead of directly answering the question. Swan ultimately conceded she did not have any license prior to November 2023, in direct contradiction to what she had earlier represented.

PACE occupational therapist Sitki testified she never began implementing the October 2023 IEP, which would have meant she never implemented its changes regarding Goals 3, 8, 9, and 12. Sitki's testimony was impeached on this point, because Fremont Union's own records demonstrated that in November 2023 and January 2024, Sitki reported on at least one goal, Goal 9, which she was not responsible for implementing under the January 2023 IEP. Her testimony was also inconsistent with the January 2024 progress report stating new Goal 12 had been met.

As discussed above and in Issue 3 and as reflected in the record, the evidence from the PACE staff regarding the implementation of the goals, was fraught with inconsistencies and contradictions within their own testimony, and when compared with the testimony of the other witnesses and the documentary evidence. This negatively impacted the credibility of the PACE staff and the weight given their testimony.

THE NOVEMBER 2023 AND JANUARY 2024 PROGRESS REPORTS DEMONSTRATED IMPLEMENTATION OF THE OCTOBER 2023 IEP

There was other evidence that demonstrated Fremont Union implemented the October 2023 IEP goal modifications to which Parent never consented. In November 2023, Fremont Union prepared a November 2023 progress report listing 13 goals, including the modified goals from the October 2023 IEP and the two new goals added in the October 2023 IEP. The November 2023 progress report documented Student's goal progress on the November 2023 goal benchmarks, including Student's progress on the October 2023 IEP modified goals, specifically Goals 1, 2, 5, 9, and 10. The progress report stated Student met all the modified goals from the October 2023 IEP including

Goal 8, except modified Goal 10. As discussed above, Fremont Union's November 2023 progress report also stated Student had met new Goals 12 and 13, although no progress was reported for the November 2023 benchmark for either goal.

Regarding the Goals 3 and 7 from the January 2023 IEP proposed to be discontinued in the October 2023 IEP, Fremont Union documented November 2023 progress on Goal 3, but no November 2023 progress was reported for Goal 7, although the report stated that both Goals 3 and 7 had been discontinued and that both goals had been met. Fremont Union also reported on the November 2023 benchmark for the January 2023 IEP goals that were not changed in October 2023 IEP, specifically Goals 4, 6, and 11. The report stated Goal 6 and 11 were met, but Goal 4 was not met.

On January 30, 2024, Fremont Union sent Parents an Educational Progress Report purporting to document Student's annual goal progress through January 30, 2024. On the left column under "Current Goals," Fremont Union listed the same 13 goals from the November 2023 progress report, which were the same goals listed in the October 2023 IEP. Among the goals, it listed the modified proposed goals from the October 2023 IEP, Goals 1, 2, 5, 8, 9, 10, and proposed new Goals 12 and 13 from the October 2023 IEP – even though none of them had been agreed to by Parent. Fremont Union stated Student had met 11 of 13 goals, specifically Goals 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, and 13. It stated Student did not meet Goals 4 and 10. None of the January 2023 IEP Goals 1, 2, 5, 8, 9, and 10, which Parents had agreed to in February 2023 and believed were being implemented, were listed in either the November 2023 progress report or the January 2024 progress report.

In the right-hand column of the progress report, under the words “benchmarks and progress,” Fremont Union listed the same benchmark information contained in the November 2023 progress report, in addition to a statement about Student’s progress between November 2023 and January 30, 2024, for most of the goals. This document clearly showed that Fremont Union was implementing all or parts of the modified October 2023 IEP Goals 1, 2, 5, 8, 9, and 10 through January 30, 2024. This is further evident in the fact that with regard to Goal 7, the January 2024 progress reported nothing about Student’s progress for the November 2023 benchmark or in the January 2024 progress report, which noted Goal 7 had been “discontinued” at the October 17, 2023 IEP team meeting.

For these reasons, and the reasons discussed in Issue 3, the preponderance of evidence established that Fremont Union implemented the October 17, 2023 amendment to the January 2023 IEP regarding goals without parental consent.

FREMONT UNION’S IMPLEMENTATION OF THE OCTOBER 17, 2023 GOALS SIGNIFICANTLY IMPEDED PARENT’S RIGHTS TO PARTICIPATE IN THE IEP PROCESS

The weight of evidence established that Fremont Union implemented all or parts of October 2023 IEP Goals 1, 2, 5, 8, 9, and 10, without Parent’s consent. The weight of evidence established that without Parent’s agreement, Fremont Union stopped implementing Goals 3 and 7 for some period of time after the October 2023 IEP team meeting, and began implementing Goals 12 and 13. Although Parents participated in the October 17, 2023 IEP team meeting where the modified goals were developed, the IEP notes Holcomb wrote when taken as a whole and all of the other evidence

established that Parent was less than convinced about the appropriateness of some of the goals proposed at the October 2023 IEP team meeting. In any event, any verbal indication of Parents' consent to the goal changes proposed at the October 2023 IEP team meeting did not equate to parental consent for implementation.

In fact, Parent apparently did not have a copy of the IEP recommendations at the October 2023 IEP team meeting, because he asked for written confirmation of the recommendations at the end of the meeting. At that point, Holcomb informed Parent she would send him a copy of the IEP developed on October 17, 2023. It was also during this meeting that Parent asked whether the prior "stay put" offer remained in place. Holcomb explained the service minutes for speech and occupational therapy from the February 2022 IEP had continued to be implemented because Parents had not agreed to the January 2023 IEP service-minute reductions.

On November 17, 2023, Fremont Union sent a prior written notice letter to Parents regarding the October 17, 2023 IEP. In the letter, Fremont Union admitted some of Student's service minutes had not been implemented by PACE and reiterated that Student's services from his February 2022 IEP were now being implemented. The letter said nothing about the implementation of the October 2023 IEP amendment to the January 2023 IEP goals to which Parent had not agreed.

Prior written notice is required to be given by the public agency to parents of a child with exceptional needs upon initial referral for assessment, and a reasonable time before the public agency initiates or changes, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or provision of FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503; Ed. Code, § 56500.4, subd. (a).) The notice is required to include a description of the action proposed and an explanation

why the agency proposes the action. It must also contain a description of each assessment procedure, assessment, record, or report used as a basis for the proposed action. The notice must also include a description of any other options that the IEP team considered and the reasons why those options were rejected, and other factors relevant to the proposal or refusal of the agency. (20 U.S.C. § 1415(c)(1); Ed. Code, § 56500.4, subd. (b).) It must also include a statement that the parents of the child with a disability have procedural safeguards protection, the means by which procedural safeguards can be obtained, and sources for parents to contact to obtain assistance. (*Ibid.*, 34 C.F.R. § 300.503(b)(4) & (5).)

Goals are a provision of a FAPE in an IEP. Fremont Union was required to inform Parents if it intended to implement the October 2023 IEP in the absence of Parent's consent, specifically the goal modifications to the January 2023 IEP goals, as well as the implementation of the new goals. Fremont Union never did this. It never sent Parents prior written notice or otherwise properly informed Parents that it was implementing any part of the October 2023 IEP.

Although the November 2023 progress report evidenced implementation of the October 2023 IEP, the weight of evidence established Parent never received this report until after Student filed this action. Parent denied receiving this report, and there was no persuasive evidence it was received by Parents. Wanschura testified it was sent to Parents at the end of November 2023 by email, but there was no email proffered or other evidence establishing Parent received it. As such, her testimony was unconvincing.

The January 2024 progress report also evidenced implementation of the October 2023 IEP, however, Parent did not receive this document until approximately ten minutes after the January 30, 2024 IEP team meeting began. Parent did not have

the opportunity to study the report until after the January 30, 2024 IEP team meeting and it was not properly reviewed at the January 2024 IEP team meeting, which is further discussed in Issue 3. Comparing the January 2023 IEP goals and benchmarks to the goals and benchmarks listed on the January 2024 progress report was a tedious and time-consuming task, which would have taken Parent time to process even if he had looked at the progress report during the January 30, 2024 IEP team meeting.

At no time at or after the October 17, 2023 IEP team meeting did Fremont Union properly inform Parent that the October 2023 IEP amendment was being implemented. There was nothing in the October 2023 or January 2024 IEP team meeting notes documenting Parents were specifically informed that any part of the October 2023 IEP was going to be or had been implemented. At hearing, Parent specifically denied anyone ever told him at the January 2024 IEP team meeting that any of the modified or new goals proposed at the October 2023 IEP team meeting had been implemented for any period. He also denied that anyone ever told him at the January 2024 IEP team meeting that any of the goals reflected on any progress report he received were not the goals being implemented after the October 2023 IEP team meeting. None of Fremont Union's witnesses offered any specific rebuttal to this testimony.

The preponderance of evidence established that Parent was not specifically told and did not understand that Fremont Union, for any period, implemented the October 2023 IEP amendments to the January 2023 IEP goals. Parent was credible in his testimony when he stated that if he had been told or understood that Fremont Union was implementing goals to which he did not agree, he would have objected to the implementation of the goals he did not approve. The IEP team meeting notes undoubtedly would have reflected this objection, but there was nothing in the IEP team

meeting notes or in the testimony at hearing demonstrating this occurred. The absence of any evidence indicating that Parent was specifically told about the implementation of the October 2023 IEP, together with the other evidence, demonstrated that Fremont Union concealed its implementation of the October 2023 IEP from Parent through at least January 30, 2024.

Fremont Union's implementation of the October 2023 IEP without Parent's consent significantly impinged on Parent's participation rights. (Cf. *M.C.*, *supra*, 858 F.3d at p. 1198 [finding procedural harm where parents were not apprised of the actual status of the services even where student was receiving more than the services stated in the IEP].) Moreover, if Fremont Union had not implemented the October 2023 IEP amendment regarding the January 2023 goals, Parent would have had a clearer and more complete understanding of the annual progress Student made on the January 2023 IEP goals he approved. Instead, Fremont Union provided Parent with confusing and contradictory information.

The January 2024 progress report did not report the annual progress on all the January 2023 IEP goals, so Parent was unable to get a full or clear picture of the annual progress Student made through January 30, 2024, on those prior annual goals. Both during and after the January 2024 IEP team meeting, Parent demonstrated difficulty in participating in the formulation of the January 2024 annual goals because he had questions about Student's progress on his January 2023 IEP goals. As further discussed in Issue 3 below, at the January 30, 2024 IEP team meeting Fremont Union summarily reported Student met 11 of his 13 goals, even though there were only 11 annual goals in the January 2023 IEP. The IEP notes also documented that "father reiterated that without having more time to review the proposed goals, he is not able to state his

priorities or concerns for Student.” On February 1, 2024, Parent emailed Holcomb documenting that at the January 2024 IEP team meeting, he requested a follow-up meeting because goals were not discussed, and he wanted a demonstration of the achieved goals. On February 9, 2024, Parent told Holcomb he wanted a clear demonstration of achieved goals before he would consent to the January 2024 IEP, and that paper documentation of Student’s goal achievement was insufficient. Parent was understandably suspicious about Student’s ability to perform the skills the January 2024 progress report claimed he satisfactorily achieved given the confusing nature of the report.

At hearing, some Fremont Union’s witnesses attempted to claim that they reported on the old goals at the January 2024 IEP team meeting even though the modified and new goals were listed on the progress report sent to Parent on January 30, 2024, and indicated implementation of the October 2023 IEP. For example, October 2023 IEP new Goals 12 and 13 were reported as being met, even though the service providers testified at hearing, they did not report progress on these goals at the January 2024 IEP team meeting because they were not implementing them. Compounding the confusion, the January 30, 2024 IEP notes, sent to Parent the same day, documented that Student fully met 11 of his 13 goals, when there were only 11 goals in the January 2023 IEP aside from Student’s three transition plan goals, and the January 2024 progress report stated that the two goals Student did not meet were Goals 4 and 10. As such, Parent’s doubts about the veracity of Student’s alleged goal achievement as of January 30, 2024, was well-founded, and the implementation of the October 2023 IEP without Parent’s consent caused this confusion. Implementation of the October 2023 IEP goals to which Parent never consented significantly impacted Parent’s informed participation in the IEP process.

FREMONT UNION'S ARGUMENTS ARE UNCONVINCING

Fremont Union unpersuasively relies on *Anchorage School District v. M.P.* (9th Cir. 2012) 689 F.3d 1047 (*Anchorage*) for the argument it was not required to obtain Parent's consent to the October 2023 IEP to implement the modifications to Student's January 2023 IEP goals and the new goals offered in the October 2023 IEP. *Anchorage* involved a claim by parents that a 2006 IEP denied the student educational benefits in 2008 where a prior stay-put order required the school district to maintain the student's placement. The court held that the school district could satisfy its statutory obligations to review and revise the student's IEP, specifically the student's present levels of academic achievement and functional performance and establish corresponding goals and objectives, so long as such revisions did not involve changes to the academic setting in which the instruction was provided or constitute a significant change in the student's educational program. (*Id.* at p. 1057.)

Unlike *Anchorage*, this case does not involve a two-year-old IEP which had not been reviewed and updated in more than a year. The October 2023 IEP goals at issue proposed to modify the January 2023 IEP, the entirety of which – apart from the reduction in services – Parent consented to on February 14, 2023, including all the January 2023 IEP proposed goals. Furthermore, *Anchorage* did not involve the school district implementing unconsented-to goals, without informing parents, and then concealing its implementation, seriously infringing on the parents' ability to participate in the IEP decision making process, as happened in this case.

Moreover, *Anchorage* involved a school district located in Alaska, thus, the court's opinion did not implicate California Education Code section 56346, subdivision (f), which required Fremont Union to initiate an action with OAH if it determined that the proposed changes to the January 2023 IEP to which Parents would not consent were necessary for Student to receive a FAPE. (See *I.R. v Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169-1170 [If the parent refuses to consent to an IEP program component necessary to provide student a FAPE, after previously consenting to special education for the student, the local educational agency must file a due process hearing request].) In fact, in a case involving a California school district, the Ninth Circuit has confirmed that an IEP "embodies a binding commitment" and cannot be changed unilaterally. (*M.C., supra*, 858 F.3d. at p. 1197). Absent a parent's consent to an IEP amendment, a school district is "bound by the IEP as written ..." (*Ibid.*)

Fremont Union is unconvincing in its assertion that Parent's consent was not required for it to lawfully implement modified and new goals based on its interpretation of California legislative history. Fremont Union's interpretation fails to effectively reconcile the consent provisions of California law, including California Education Code 56346, which specifically permits parents to consent to less than all components of an IEP and requires school districts to file an action to obtain consent to the components to which a parent will not agree but the school district believes are necessary to provide the student a FAPE. (Ed. Code, § 56346, subds. (e) & (f).)

Contrary to Fremont Union's argument, Education Code section 56346 does not impose a higher standard of educating individuals with exceptional needs than that established by Congress under the IDEA. Rather, Education Code section 56346 embodies procedural protections to ensure parental participation in the decision

making process, including requiring school districts to seek judicial override to implement components of an IEP to which parent will not consent if it believes such components are necessary for a student to receive a FAPE.

Moreover, Fremont Union's suggestion that its October 2023 IEP provided prior written notice for its implementation of goal changes in that IEP is unpersuasive. Its closing brief fails to explain how the IEP satisfied the requirements of a prior written notice. Again, it is not the ALJ's responsibility to construct or develop a party's argument. (See *Loewen v. Berryhill* (9th Cir. 2017) 707 Fed. Appx. 907, 908 (nonpub. opn.), citing *Carmickle v. Commissioner* (9th Cir. 2008) 533 F.3d 1155, 1161, fn. 2 [the court is not required to address arguments made without specificity]; *In re: Out of Network Substance Use Disorder Claims Against UnitedHealthcare* (C.D.Cal., October 14, 2022, 8:19-cv-02075-JVS(DFMx)) 2022 WL 17080378, fn. 2 ["The Court 'is not a pig searching for truffles in a forest,' and will 'not perform the work of representing parties.'"]; see also, *Independent Towers, supra*, 350 F.3d at p. 929 [a court cannot manufacture arguments for a party].)

In any event, the October 2023 IEP does not contain all the required elements of a prior written notice, most notably, clear indication that Fremont Union intended to implement the IEP without Parent's written consent. Nor did Fremont Union intend to use the October 2023 IEP as prior written notice. The testimony of at least two Fremont Union witnesses established that at least initially, they only implemented the goal changes because they thought Parent had agreed to the changes, and at least one of its witnesses testified they stopped implementing the October 2023 goals because they

realized Parent had not consented to the October 2023 IEP goals. Finally, Fremont Union's position is at odds with its contemporaneous statements to Parent made throughout the record, that it would implement the IEP to which he had last consented.

The evidence established that Fremont Union's implementation of the October 2023 IEP seriously interfered with the IDEA's most important safeguard, to protect Parent's informed involvement. (*Winkelman, supra*, 550 U.S. at p. 524; *Amanda J., supra*, 267 F.3d at p. 882.) Because Fremont Union implemented the October 2023 IEP changes to Student's January 2023 IEP goals without Parent's knowledge, he was unable to participate in an informed way in the development of Student's program, including the development of Student's January 2024 annual goals. Thus, FAPE was denied, whether or not Parents had attended the IEP team meetings and participated in the formulation of the IEPs. (Cf. *M.C., supra*, 858 F.3d at p. 1198.)

By implementing the October 2023 IEP without Parent's consent, Fremont Union significantly impeded Parent's opportunity to participate in the decision making process and denied Student a FAPE.

ISSUE 3: DID FREMONT UNION DENY STUDENT A FAPE BY DENYING PARENTAL PARTICIPATION IN THE IEP PROCESS AT THE JANUARY 30, 2024 IEP TEAM MEETING WHEN IT FAILED TO DISCUSS STUDENT'S PROGRESS ON THE JANUARY 31, 2023 IEP?

Student contends that at the January 30, 2024 IEP team meeting Fremont Union refused to discuss Student's annual goal progress based on the January 2023 IEP goals, which prevented Parent from effectively participating in the formulation of the new

goals. He also claims the IEP team did not discuss the January 2024 progress report during the meeting, which Parent only received after requesting it. Student argues Fremont Union tried to hide the January 2024 progress report from Parent, which revealed it had implemented goals to which Parent had not agreed. Student argues that without a clear understanding of the progress Student had made and whether the January 2023 IEP annual goals had been achieved, Parent could not provide input or meaningfully participate in the development of new goals because new goals needed to be based on past achievement. Student contends that even though Parent asked during the January 30, 2024 IEP team meeting for a continuance to fully review and discuss Student's annual progress and the proposed new goals, Fremont Union ignored Parent's request and immediately sent the January 30, 2024 IEP for Parent's consent after the meeting that day, instead of scheduling another meeting. Student contends Parent did not believe the January 2023 IEP's goals had been achieved so Parent requested a demonstration of the goals, but Fremont Union refused that request.

Student also contends that Holcomb, the person responsible for drafting the IEP notes, admitted she could not recall if, at the January 30, 2024 IEP team meeting, the January 2023 goals or the October 2023 IEP goals were discussed and reported as achieved, but the progress reports clearly stated the October 2023 goals were implemented. Student argues Holcomb deliberately omitted mention of the October 2023 IEP in the IEP team meeting notes because it had been implemented without Parent's consent. Parent argues that if the January 2024 progress report had been discussed during the meeting, he would have realized Fremont Union had implemented goals he had not agreed to. Student contends Fremont Union's witnesses falsely testified that Student's progress was discussed at the January 30, 2024 IEP team meeting. Student contends Fremont Union's obstruction of parental participation is

recorded in the IEP notes, and Fremont Union “sidelined” Parent’s attempts to discuss the January 2024 progress report because it would have revealed unconsented-to goals had been implemented and Parents would have questioned Fremont Union about it. Student contends the false and confusing nature of the January 2024 progress report itself evidences Fremont Union’s attempt to prevent discussion of it.

Fremont Union contends Student failed to meet his burden of proof. It maintains both Parents had the opportunity to meaningfully participate in the January 30, 2024 IEP team meeting and there is no requirement that Parents be provided with progress reports in advance of the meeting. Fremont Union further argues Parent was provided with updated goal progress on May 30, 2023, and August 2, 2023, when WINGS provided Parent with the May 2023 and August 2023 progress reports. Fremont Union argues it sent Parent a copy of the January 2024 progress report ten minutes after the January 30, 2024 IEP team meeting began, and Parent testified he did not look at the report until a few days later. Fremont Union asserts all the school IEP team members had access to Student’s progress report through the student information system.

Fremont Union contends the IEP notes, and the Fremont Union witnesses including Holcomb and staff from PACE, confirmed the goals were reviewed during the January 2024 IEP team meeting. It asserts that although Parent stated he wanted more time to review the proposed goals, both Parents had the opportunity to ask questions, provide input, and state their concerns during the January 30, 2024 IEP team meeting. Fremont Union argues Parent was informed the entire IEP team was available that day to discuss Student’s needs and develop his IEP, and that the IEP team could meet another day as well. It argues Student failed to meet his burden to demonstrate Fremont Union had an obligation to provide Parents with a demonstration Student achieved his goals.

Fremont Union argues Parent was unable to give details on who prevented him or how he was prevented from participating in the January 2024 IEP team meeting. It asserts that after the January 2024 IEP team meeting it offered to hold another IEP team meeting, but Parent refused.

The Ninth Circuit has emphasized the parental participation safeguards are among the most important safeguards in the IDEA, and procedural violations that interfere with parental participation in the IEP formulation process “undermine the very essence of the IDEA.” (*Amanda J.*, *supra*, 267 F.3d at p. 892.) Although school district personnel may bring a draft of the IEP to the meeting, parents are entitled to bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child’s needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.)

A school district is required to conduct not just an IEP team meeting, but a meaningful IEP team meeting. (*Target Range*, *supra*, 960 F.2d at p. 1485.) “Participation must be more than mere form; it must be meaningful.” (*Deal*, *supra*, 392 F.3d at p. 858.) A school cannot independently develop an IEP, without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range*, *supra*, 960 F.2d at p. 1484.) A school district that predetermines the child’s program and does not consider parents’ requests with an open mind, has denied the parents’ right to participate in the IEP process. (*Deal*, *supra*, 392 F.3d at p. 858; *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute.)

THE JANUARY 30, 2024 IEP TEAM MEETING

On January 30, 2024, Fremont Union convened Student's annual IEP team meeting by videoconference, with Parents, Fremont Union program specialist Holcomb, and PACE personnel, specifically special education teacher Wanschura, speech-language pathologist Swan, occupational therapist Sitki, and PACE's school director, Lori Strickland.

About two hours before the meeting began at 10:00 AM, Wanschura sent Parents a draft copy of the January 2024 IEP. At the beginning of the meeting, Parent told the IEP team Parents never received an updated copy of Student's progress report. The last progress report Parent received was from August 2023. About ten minutes into the meeting, Wanschura sent Parent a copy of the eight-page January 2024 progress report described in Issue 2 above, but Parent did not look at it until a few days later.

THE JANUARY 2024 IEP TEAM MEETING NOTES

The IEP team meeting notes written by Holcomb reflect that Parent was informed Student would be aging out of special education in June 2024. The notes summarily stated that PACE staff reviewed progress on the prior year's goals and present levels of functioning, claiming Student "fully met 11 of his 13 previous goals," but required more prompting than these goals allowed. Wanschura reported Student was often capable of completing tasks without staff support but tended to look to them before attempting the tasks on his own. There were no further details about any discussion on Student's goal progress in the notes.

During the IEP team meeting, Parent explained he was unable to share his current concerns and priorities for Student because he did not have enough time to review the proposed goals because he had only just received the documents and asked that the meeting be continued to another day and be conducted in-person. Holcomb explained that the meeting could be continued, if necessary, but asked if Parents could share the areas they wanted to have Fremont Union and school staff focus on before Student aged out of special education in June 2024. Parent again reiterated that without having adequate time to review the proposed goals, he was not able to state his priorities or concerns. At that point, the PACE school director Strickland interjected, stating that Student's team was all present and available to discuss the development of Student's IEP in detail and was able to meet again, if necessary. The notes reflect that Strickland explained the proposed goals were designed to help Student be successful at PACE and beyond. The PACE team members then reviewed the proposed goals and agreed to add a sorting goal. The notes stated that no additional revisions were recommended at that time. The IEP team also reviewed the post-secondary transition plan.

On January 30, 2024, Fremont Union made an offer of special education and related services offering the same services and total service minutes that were offered in the October 2023 IEP, except group occupational therapy services were reduced to 30 minutes a month. It offered nine goals, including two communication goals, one community-access vocational goal, two independent-living goals, three transition goals for employment, and one transition goal to demonstrate improved vocational readiness. The notes stated a copy of the IEP would be sent home for Parents to review and consider, and that if an additional IEP team meeting needed to be held, Parents could request one and another meeting would be scheduled.

THE SUBSEQUENT COMMUNICATIONS FOLLOWING THE JANUARY 2024 IEP TEAM MEETING

On January 30, 2024, Holcomb sent a copy of the IEP to Parents by email, "just in case" they were ready to sign. The weight of evidence established that Fremont Union did not finalize the IEP that day, because IEPs were not generally finalized until Fremont Union received the consent page from parents indicating whether they consented or not to the IEP.

On February 1, 2024, Parent emailed Holcomb documenting that during the January 30, 2024 IEP team meeting, he requested a continuance of the meeting because goals were not discussed. Parent requested a follow-up meeting to discuss the goals in more detail. He explained that he was unable to verify the achievement of the goals, and asked for a demonstration of the achieved goals, so he could understand how to reinforce Student's learned skills and ensure he was on track to meet established objectives.

On February 1, 2024, Holcomb offered another meeting for February 14, 2024, and asked questions about the demonstration Parent requested. Parent responded that he wanted to see whether Student could demonstrate the skill reported as having been met from the October 2023 IEP Goal 5, to answer five questions about his vocational interests from a field of two, in four out of five opportunities, using his AAC device, verbal language, or pointing to the correct answer.

On February 9, 2024, Parent emailed Holcomb again, requesting a response regarding Student's communication development for the requested skill demonstration. He reminded Holcomb that he had repeatedly emphasized that Student had not been successful in using the AAC device, so Student's ability to perform the task in Goal 5 was of paramount importance to Parent.

On February 9, 2024, Holcomb responded to Parent's request for a demonstration, reminding him that he had not responded to the proposed February 14, 2024 IEP team meeting invitation to address his concerns. She informed Parent that PACE staff would bring documentation of Student's goal achievement to the meeting, and if there were still concerns, Parent could schedule a time to observe Student at school.

On February 9, 2024, Parent responded to Holcomb explaining that he required a clear demonstration of the goals before he could consent to the January 2024 IEP, and the documentation did not offer enough verifiable evidence. Parent also stated that he was never offered the opportunity to discuss the goals with Student's teachers, and that Fremont Union sending him the consent forms prematurely felt rushed. Parent stated he saw little value in attending a meeting to discuss a predetermined IEP without addressing his fundamental questions about the goals and their achievement.

On February 9, 2024, Holcomb emailed Parent encouraging him to attend the proposed February 14, 2024 IEP team meeting so his concerns could be addressed.

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On February 9, 2024, Parent responded to Holcomb, formally requesting a hearing with OAH. Parent stated he repeatedly encountered evasive responses and a lack of clarity in previous interactions, leaving Parent feeling unable to reach a satisfactory solution through traditional channels. He requested the presence of a neutral third party to facilitate a more open and productive discussion.

On February 9, 2024, Parent sent Fremont Union the consent page to the January 2024 IEP, checking the box that he did not consent to the IEP. He also sent an email the same day stating he consented to placement. That day, he further clarified in writing that he was only consenting to placement and wanted to maintain the status quo for Student's stability but had serious concern about potential fraud by Fremont Union.

On February 21, 2024, Fremont Union Director of Educational and Special Services Sullivan sent a prior written notice to Parent regarding the prior correspondence with Holcomb and documenting that she had emailed Parent on February 12 and 16, 2024, seeking Parent's availability for a meeting with a facilitator. She expressed confusion at why Parent was not communicating directly with PACE staff because it was the service providers who needed to answer Parent's questions. Parent filed this action shortly after Sullivan sent this email to Parents.

TESTIMONY ABOUT THE JANUARY 2024 IEP TEAM MEETING

PARENT'S TESTIMONY

At hearing, Parent denied that PACE staff ever reviewed the prior year's goals during the January 2024 IEP team meeting and claimed that the IEP notes were inaccurate. He explained that goals were mentioned but the specifics and contents

of the goals were not discussed. He stated the IEP team never reviewed the January 2024 progress report which contained the October 2023 IEP goals. He also asserted that because Fremont Union never gave him a progress report which reported progress on all of the January 2023 IEP goals, demonstrates that the January 2023 IEP goals were never reviewed at the January 2024 IEP team meeting.

Parent testified that during the January 2024 IEP team meeting he wanted to review the January 2024 progress report regarding the January 2023 IEP goals, and asked that the meeting be “tabled,” but school personnel went on to discuss the new goals being proposed for the January 2024 IEP. Parent claimed he asked that the meeting be continued, but instead of scheduling a new meeting to fully review Student’s prior progress, Fremont Union rushed the papers to him trying to get him to consent to the January 2024 IEP. Parent claimed program specialist Holcomb “obstructed” his attempts to discuss Student’s progress on the January 2023 IEP goals.

Parent did not consent to the January 2024 IEP because he wanted to discuss the progress report of the achieved goals and verify at least one goal had in fact been achieved. After Parent had an opportunity to review the January 2024 progress report and looked at the January 2024 IEP with the consent page, he was no longer interested in having another IEP team meeting. Parent was suspicious about the accuracy of Student’s reported goal progress, and ultimately came to believe that any further IEP team meeting would have been a sham and a waste of time.

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CASE MANAGER HOLCOMB'S TESTIMONY

At hearing, Holcomb was repeatedly asked questions requiring her to identify which IEP goals were discussed at the January 2024 IEP team meeting, but she was unable to answer. For example, when asked whether the January 2023 IEP goals were discussed during the January 2024 IEP team meeting, Holcomb did not know. Even when shown the January 2023 IEP, Holcomb did not know whether it was the January 2023 IEP goals that were discussed at the January 2024 IEP team meeting. When shown the January 2024 progress report, she did not know whether the goals enumerated on it were the goals discussed during the January 2024 IEP team meeting. Although she was Student's case manager and attended all of Student's 2023 and 2024 IEP team meetings, she claimed she needed to do research to answer the questions. When shown the October 2023 IEP, she was evasive and claimed she was not the best person to answer the question of which past IEP's goals were discussed at the January 2024 IEP team meeting. At one point, Holcomb testified the January 2024 IEP team should have been discussing the most recent IEP to which Parents had consented, but when asked to identify which IEP that was, she did not know, and stated she was not the best person to answer those questions.

Holcomb admitted that when she took the IEP notes she wrote down the general topics of what was being reported on by each person and did not look at the January 2024 progress report. She typed the notes as she was listening to the content of the discussion. Holcomb claimed she did not typically include much detail on goal progress, except to state progress was reviewed and the level of progress made. During her

testimony, Holcomb defensively claimed she tried to write “really good notes” and be a fair reporter of what happened in IEP team meetings and claimed that the January 2024 IEP team meeting notes were accurate.

Holcomb recalled Parent declined to participate during the January 2024 IEP team meeting because he said he did not have enough time to review the proposed goals and the January 2024 progress report to be able to participate. She also recalled that Mother continued to participate, that no one asked to end the IEP team meeting, and as the IEP team went on to cover other topics, Parent stated he had “no comment.” This was not documented in the notes, although Holcomb unpersuasively claimed that one sentence in the IEP notes captured Parent’s repeated statements of “no comment.” Holcomb was defensive when questioned about the IEP team meeting notes.

TESTIMONY FROM PACE STAFF

PACE SPECIAL EDUCATION TEACHER

Two or three days before the January 2024 IEP team meeting, special education teacher Wanschura sent the PACE members of the IEP team a copy of the January 2024 progress report, but did not send it to Parent until he requested it during the January 2024 IEP team meeting. Holcomb had access to the report through the online database PACE used. Wanschura testified that the January 2024 IEP team meeting notes were accurate to the best of her recollection and that the IEP team reviewed Student’s progress during the meeting.

At hearing, after looking at the IEP notes, Wanschura unconvincingly explained that each team member went through one goal at a time, discussed what had been worked on and how Student had met each goal. Then, Wanschura claimed Student met 11 of his 13 goals, even though she earlier maintained new Goal 12 from the October 2023 IEP had never been implemented. When confronted with this inconsistency, she evasively asserted “it was not implemented as intended.” She later contradicted herself yet again, asserting Goal 12 had been implemented, even though no progress had been reported. She also stated Goal 7 was reported on through January 2024, which directly conflicted with the November 2023 and January 2024 progress reports, neither of which contained any information about Student’s progress on Goal 7 and stated it had been discontinued. She also claimed that the January 2024 progress report was accurate, which directly conflicted with other evidence, including the testimony of the other PACE providers, namely, occupational therapist Sitki and speech-language pathologist Swan.

PACE OCCUPATIONAL THERAPIST

PACE occupational therapist Sitki denied she ever implemented any of the October 2023 IEP changes to the January 2023 IEP goals. Sitki testified the IEP team discussed Student’s progress on his goals and goals proposed at the January 2024 IEP team meeting, and Parents participated in that discussion and provided input into all those areas. This was inconsistent with Holcomb’s account of events, that Parent refused to participate and repeatedly stated “no comment.”

At hearing, Sitki claimed she reported on Student’s occupational therapy goals at the January 2024 IEP team meeting, specifically on the unmodified Goal 3 and modified Goals 8 and 9. Sitki denied she reported progress on Goal 12 during the IEP team

meeting. When asked whether Goal 12 was met, Sitki paused because she could see that the January 2024 progress report represented that Goal 12 had been met, then answered, "Humm ... since this goal was not officially signed, no." When asked why the report stated that goal was met, she provided a confusing and evasive response. Sitki then claimed she discussed Goal 12 at the January 2024 IEP team meeting, but did not report it had been met, incorrectly recalling that the IEP notes she had been shown earlier stated nine out of 11 goals had been met. Thus, she stated, Goals 12 and 13 would not have been mentioned at the meeting. However, Sitki admitted she had checked the box indicating that Goal 12 had been met. When asked if there was any response from Parent when the January 2024 progress report was allegedly discussed at the January 2024 IEP team meeting, she could not recall.

PACE SPEECH-LANGUAGE PATHOLOGIST

PACE speech-language pathologist Swan testified that the January 2024 IEP team discussed Student's progress on his goals at the January 2024 IEP team meeting. After Fremont Union's counsel showed Swan the January 2024 IEP team meeting notes, Swan testified she reported on Student's two communication goals, Goals 1 and 2. When asked which IEP's goals she reported on at the meeting, she claimed it was the last signed IEP, which she thought was the January 2023 IEP. However, when shown in the January 2024 progress report, specifically Goals 1 and 2 as modified by the October 2023 IEP, Swan claimed it was these goals she reported on at the January 2024 IEP team meeting.

Swan also testified she did not report progress on or implement new Goal 13 after November 2023 because Parent had not signed the IEP, although Goal 13 was reported on both the November 2023 and January 2024 progress reports as having been met. At hearing, she was unable to explain why Goal 13 was marked as met, but later admitted she was the person responsible for reporting whether the goal had been met. When further questioned at hearing about Goal 13, she was evasive. For example, when asked if Goal 13 was met, she answered that the report says it was met but there was no data reported for the goal. When asked again if the goal was actually met, she finally said it was not. She was also evasive in answering other questions regarding why Goal 13 had been reported as met.

Swan claimed that Goal 1 listed on the January 2024 progress report was not the Goal 1 she was targeting and blamed it on the computer program. She testified that at the time of the January 2024 IEP team meeting, she was working on the January 2023 IEP Goal 1, which Student met, not the modified Goal 1 from the October 2023 IEP. At one point, Swan denied that the modified October 2023 IEP Goal 1 was met, despite it being reported as met in the January 2024 progress report. Swan maintained the January 2024 IEP progress report was not an accurate portrayal of the Goal 1 being targeted in January 2024, but the data listed was for Goal 1 from the January 31, 2023 IEP. She asserted that the January 2024 IEP progress report was accurate.

When asked if Parent raised concerns about the progress reports at the January 2024 IEP team meeting, she claimed he raised concerns but could not recall what the concerns were.

FREMONT UNION DID NOT SIGNIFICANTLY INTERFERE WITH PARENT'S PARTICIPATION RIGHTS BY FAILING TO DISCUSS STUDENT PROGRESS ON THE JANUARY 31, 2023 IEP GOALS AT THE JANUARY 30, 2024 TEAM MEETING

The weight of evidence established that Student's progress on his January 31, 2023 IEP goals was not properly addressed or discussed at the January 30, 2024 IEP team meeting. The January 2024 IEP team meeting notes prepared contemporaneously with the meeting merely stated that progress was reviewed but documented no details about that discussion. Holcomb, the person who wrote the IEP team meeting notes and Student's case manager, could not even identify which goals were discussed. But Holcomb's notes were nonetheless telling. They did not include details about the discussion held on the goals Student allegedly achieved, but rather, a conclusory statement that Student met 11 of his 13 goals. The January 2023 IEP only had 11 annual goals, but the October 2023 IEP listed 13. Based on the testimony and documents from Fremont Union, Student did not meet Goals 4 and 10 from either the January 2023 or October 2023 IEPs. Further, on February 1 and 9, 2024, Parent's correspondence to Fremont Union documented that Fremont Union had not discussed the goals during the January 30, 2024 IEP team meeting. These details support Parent's position that the specifics of Student's progress on each of his January 2023 IEP annual goals was never separately discussed at the January 2024 IEP team meeting, but that the "discussion" consisted of basically a statement that Student had met 11 of 13 goals from the October 2023 IEP.

None of the witnesses from PACE were credible in their testimony regarding what was discussed at the January 2024 IEP team meeting. They were repeatedly asked leading questions by Fremont Union's counsel, who suggested the answers Fremont Union was attempting to elicit rather than candid responses based on the witnesses' memory. Furthermore, as detailed above and reflected in the record, there were numerous inconsistencies in the testimony from the PACE witnesses about the goals and the January 2024 progress report and what happened at the January 2024 IEP team meeting. Their testimony conflicted with the other PACE witnesses and, in some places, with Holcomb's account of the events. The PACE witnesses were also evasive, and their testimony was both confusing and contrary to the documentary evidence. All of this negatively impacted the reliability and weight given the testimony from the PACE staff regarding the discussion about goal progress at the January 2024 IEP team meeting.

Fremont Union had an obligation to report progress on Student's January 2023 IEP goals every quarter, which it failed to do. (Ed. Code, § 56345, subd. (a)(3).) Although Fremont Union claims it did not have an obligation to provide the January 2024 progress report before the IEP team meeting, it certainly had an obligation to report progress at the January 2024 IEP team meeting, which it failed to properly do. It merely summarily enumerated the goals Student met that were listed in the October 2023 IEP. It should have also ensured accurate reporting on goal progress was done, instead of completely relying on PACE to do it. The abundance of evidence established the January 2024 progress report was not only confusing but, based on some of the testimony from Fremont Union's witnesses, had numerous errors in it. Yet, none of this was ever explained to Parent.

Nonetheless, Student did not prove that the failure to discuss the January 2023 IEP goals at the January 2024 IEP team meeting significantly interfered with Parent's participation rights. The evidence established that while Parent wanted to further discuss Student's progress on his IEP goals, he did not want to do it on January 30, 2024, but at another IEP team meeting after he had time to review Student's January 2024 progress report. Specifically, Parent admitted he asked Fremont Union to "table" the meeting until he had time to review the January 2024 progress report, which according to Parent would have taken some time to analyze. The preponderance of evidence established that Fremont Union was available to answer questions about Student's progress during the January 2024 IEP team meeting, but Parent was not prepared to ask those questions. This was understandable. The report was eight pages long and analyzing it would no doubt have been a tedious and time-consuming task. Parent was upset when Fremont Union did not immediately adjourn the IEP team, and that the IEP team proceeded to discuss the rest of the IEP components.

Significantly, at both the January 2024 IEP team meeting and in the subsequent correspondence between Fremont Union and Parents as detailed above, Fremont Union made it clear that it was willing to meet to answer further questions Parent had or address his concerns. Although Fremont Union sent Parents the January 2024 IEP with the consent page on January 30, 2024, this was not done to foreclose Parent's opportunity to meet to discuss Student's goals, but to provide a copy of the proposal discussed at the IEP team meeting. The consent page was sent with the IEP to permit Parent to sign the IEP "just in case" Parent was ready to agree to its implementation. Although Fremont Union made an offer of goals, placement, and related services on January 30, 2024, the IEP had not been finalized, and could have been revised.

Two days after the January 30, 2024 IEP team meeting, Fremont Union proposed another meeting date to take place in less than two weeks, on February 14, 2024. It also later tried to arrange to meet with Parents using a facilitator. However, Parents did not agree to any subsequent meeting. Thus, Parent had the opportunity to participate in the further development of Student's 2024 annual IEP where progress on the January 2023 goals could have been reviewed and his questions about it answered, but he chose not to avail himself of that opportunity. Although progress on the January 2023 IEP goals was not properly reviewed at the January 2024 IEP team meeting, that failure to did not result in the significant interference with Parent's opportunity to participate in the decision making process. Student failed to meet his burden of proof on Issue 3.

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 Union denied Student a FAPE by failing to conduct appropriate three-year review evaluations prior to the January 31, 2023 IEP team meeting, specifically, failing to conduct an appropriate psychoeducational evaluation.

Student prevailed on Issue 1A.

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ISSUE 1B:

Fremont Union denied Student a FAPE by failing to conduct appropriate three-year review evaluations prior to the January 31, 2023 IEP team meeting, specifically, failing to conduct an occupational therapy evaluation prior to the January 31, 2023 IEP team meeting.

Student prevailed on Issue 1B.

ISSUE 1C:

Fremont Union denied Student a FAPE by failing to conduct appropriate three-year review evaluations prior to the January 31, 2023 IEP team meeting, specifically, failing to conduct a speech and language evaluation prior to the January 31, 2023 IEP team meeting.

Student prevailed on Issue 1C.

ISSUE 2:

Fremont Union denied Student a FAPE by implementing the October 17, 2023 amendment to the January 31, 2023 IEP without parental consent.

Student prevailed on Issue 2.

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ISSUE 3:

Fremont Union did not deny Student a FAPE by denying parental participation in the IEP process at the January 30, 2024 IEP team meeting when it failed to discuss Student's progress on the January 31, 2023 IEP.

Fremont Union prevailed on Issue 3.

REMEDIES

Student prevailed on Issues 1A, 1B, 1C, and 2. As a remedy, Student requests Fremont Union fund independent educational evaluations, specifically an occupational therapy evaluation and a speech and language evaluation. Student also seeks compensatory education in the form of individual occupational therapy one hour per week, and individual speech and language therapy one hour per week, including transportation, until June 30, 2026. Student also seeks an order requiring Fremont Union to provide a demonstration for Parents of Student's supposedly achieved January 2023 IEP goals, a new IEP team meeting to set annual goals until June 30, 2026, for a nonpublic school placement, and unspecified "sanctions" against Fremont Union, presumably monetary, for interfering with Parent's participation rights.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(2)(C)(iii); see also *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education

administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) An ALJ can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d at p. 1033.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) 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 fact-specific and “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.*)

An order requiring training of school district personnel can be an appropriate remedy to compensate a student for a school district’s violations. (*Park, supra*, 464 F.3d at p. 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].)

Regarding all the Issues upon which Student prevailed, the evidence did not establish Student's entitlement to a goal demonstration, or a new IEP team meeting to set annual goals until June 30, 2026, for a nonpublic school placement. Student was scheduled to age-out of special education in June 2024 because he turned 22 in January 2024. Education Code section 56026, subdivision (c)(4)(A) provides that any person who becomes 22 years of age during the months of January to June may continue to participate in their IEP program for the remainder of the current fiscal year. Thus, Student was entitled to participate in his program through the current fiscal year, or until June 30, 2024. Fremont Union is not permitted to develop an IEP that extends this eligibility date, nor is Student allowed to attend school beyond this eligibility date. (Ed. Code, § 56026, subd. (c)(4)(D).) Therefore, after June 2024, Student was no longer entitled to an IEP and Fremont Union was no longer obligated to conduct IEP team meetings or set annual goals.

Issues 1A, 1B, 1C are interrelated. Fremont Union failed to comprehensively assess Student prior to the January 2023 IEP team meeting, specifically in the areas of psychoeducation, speech and language including AAC, and occupational therapy. Fremont Union improperly concluded it was not required to reevaluate Student because his continued special education eligibility was not in question. Nor did Fremont Union comply with the procedures required to excuse it from conducting a full reevaluation prior to January 31, 2023. Fremont Union witnesses demonstrated a profound misunderstanding of a school district's assessment obligations under the IDEA and California Education Code. Fremont Union attempted to improperly abdicate its assessment responsibilities to WINGS, while failing to comply with its reevaluation duties or ensure that Student was properly reevaluated.

As a remedy for the violations in Issues 1A, 1B, and 1C, Fremont Union shall provide at least five hours of training to all its special education administrative personnel and special education staff, including the director, program specialists, school psychologists, case managers, and related services providers/assessors, pertaining to a school district's obligations to assess students, which shall include comprehensive training on a school district's obligations in conducting reevaluations of students, its obligations under Education Code section 56381, its assessment obligations when students are attending nonpublic schools, and parents' participatory rights in the assessment process, including the importance of school staff obtaining and considering parental input.

Regarding Issue 1A, Fremont Union was required to do a psychoeducational evaluation as part of Student's January 2023 reevaluation but failed to conduct a legally compliant assessment. Among other things, the January 2023 psychoeducational evaluation failed to comprehensively assess Student despite his significantly low cognitive and adaptive functioning and documented needs in the areas of behavior, functional academics, self-care, and independent living. It also failed to properly obtain parental involvement and input from school personnel. An independent educational psychoeducational evaluation was an appropriate remedy for Fremont Union's failure to properly conduct a psychoeducational evaluation. However, in 2023 Fremont Union funded an independent psychoeducational evaluation that was reviewed at the October 2023 IEP team meeting after Parent objected to the January 2023 psychoeducational evaluation. Accordingly, Student is not entitled to a second independent psychoeducational evaluation as a remedy for the violations in this case.

Regarding Issue 1B, the evidence supports an award for an independent educational occupational therapy evaluation. Fremont Union was required to do an occupational therapy evaluation as part of Student's January 2023 reevaluation, given his documented needs in the areas serviced by an occupational therapist. Fremont Union failed to timely conduct this assessment. Fremont Union occupational therapist Grodin later conducted that assessment in May 2023 and determined Student required occupational therapy services. However, Student waited months before obtaining the results of that assessment, and Grodin failed to conduct an assessment that complied with all legal requirements. Grodin admittedly failed to obtain any input from Parents in conducting the occupational therapy evaluation, rendering her assessment defective. (See, e.g., 20 U.S.C. § 1414(b).) In addition, given that the Fremont Union occupational therapy evaluation was approximately a year old at the time of hearing, and Student was scheduled to age-out of special education in June 2024 because he turned 22 in January 2024, Student is entitled to an independent educational occupational therapy evaluation in accordance with North West Santa Clara County SELPA guidelines.

Regarding Issue 1C, the evidence supports an award for an independent educational speech and language evaluation that includes an AAC evaluation. Fremont Union was required to do a speech and language evaluation, including an AAC assessment as part of Student's January 2023 reevaluation, given his documented needs in the areas of communication and AAC. Fremont Union failed to timely conduct this assessment. Fremont Union speech-language pathologist/AAC advisor Venditti conducted that assessment in May 2023 and determined Student required speech and language services. She also determined Student had AAC needs and recommended various ways to address those needs to support Student's communication growth more effectively. However, Student waited months before obtaining the results of that

assessment and Fremont Union did not make a new offer of special education and related services until September 2023. Given that the Fremont Union speech and language evaluation was approximately a year old at the time of hearing, and Student was scheduled to age-out of special education in June 2024 because he turned 22 in January 2024, Student is entitled to an independent educational speech and language evaluation that includes an AAC evaluation in accordance with North West Santa Clara County SELPA guidelines.

The evidence did not establish Student's entitlement to compensatory education for either speech and language or occupational therapy services, and transportation through June 30, 2026. Student did not prove he was denied services in these areas as a result of Fremont Union failing to properly assess him before the January 31, 2023 IEP team meeting. Pursuant to Student's "stay-put" rights, between January 2023 through the hearing, Fremont Union implemented the 2022 IEP's 60 minutes per week individual speech and language therapy services and 60 minutes per week of occupational therapy services. To the extent that any such services were not provided, Fremont Union's witnesses testified that these services were made up, and that testimony was not contradicted. These 60 minutes a week of individual services Fremont Union provided Student pursuant to the 2022 IEP was not less than the individual speech service minutes recommended by Venditti and was more than the individual occupational therapy service minutes recommended by Grodin. They were also not less than the individual services Fremont Union offered in the fall 2023 and January 2024 IEPs. Student did not prove he was entitled to more individual service minutes than he received pursuant to the 2022 IEP for speech therapy and occupational therapy. Although Fremont Union made offers in fall 2023 for group speech and group occupational therapy services, Parent never agreed to the implementation of those

services. As such, Student is not entitled to a compensatory award for group speech or group occupational therapy services and Student did not request such services as part of his remedies.

Student prevailed on Issue 2. Fremont Union improperly implemented Student's October 2023 IEP goal amendments to which Parent never consented, and then failed to properly notify Parent, which significantly interfered with Parents' participatory rights. Fremont Union had an obligation to only implement the components of IEPs to which Parent had agreed. (Ed. Code, § 56346, subds. (e) & (f).) Because Student was attending a nonpublic school, PACE, Fremont Union had an obligation to ensure that the PACE providers were properly implementing Student's IEP, which it failed to do.

As a remedy for the violation in Issue 2, Fremont Union shall provide at least three hours of training to all its special education administrative personnel and special education staff, including the director, program specialists, school psychologists, case managers, and related services providers/assessors, pertaining to a school district's obligations to properly implement a Student's IEP, monitoring and ensuring that for students placed at nonpublic schools the nonpublic schools properly implement students' IEPs, complying with prior written notice obligations, and parents' participatory rights in the IEP process.

Student failed to establish an entitlement to sanctions. Student failed to specify the type of sanctions he seeks. Assuming Student seeks monetary sanctions, he did not specify the amount he is requesting and otherwise failed to set forth a proper basis, including the statutory or other authority which would permit the ALJ to award monetary

sanctions in this IDEA case. Again, it is not the ALJ's responsibility to construct or develop a party's argument. (*In re: Out of Network, supra*, 2022 WL 17080378, at fn. 2 [the court will not perform the work of representing parties].)

ORDER

1. Fremont Union shall provide five hours of training to all its special education administrative personnel and special education staff, including the director, program specialists, school psychologists, case managers, and related services providers/assessors, pertaining to a school district's obligations to assess students, which shall include comprehensive training on a school district's obligations in conducting reevaluations of students, its obligations under Education Code section 56381, its assessment obligations when students are attending nonpublic schools, and in parents' participatory rights in the assessment process, including the importance of school staff obtaining and considering parental input.
2. Fremont Union shall provide at least three hours of training to all its special education administrative personnel and special education staff, including the director, program specialists, school psychologists, case managers and related services providers/assessors, pertaining to a school district's obligations to properly implement a Student's IEP, monitoring and ensuring that for students placed at nonpublic schools the nonpublic schools properly implement students' IEPs, complying with prior written notice obligations, and parents' participatory rights in the IEP process.

3. The specified training shall be completed by no later than December 30, 2024. The training shall be conducted by an outside agency or firm with expertise in special education not affiliated with Fremont Union or the law firm that represented Fremont Union in this case.
4. Fremont Union shall fund an independent educational occupational therapy evaluation and an independent educational speech and language evaluation that includes an augmentative and an alternative communication evaluation by assessors of Parents' choice, who meet the criteria under North West Santa Clara County SELPA guidelines for independent educational evaluations.
5. Within 10 business days of this Decision, Fremont Union shall provide Parents with a copy of North West Santa Clara County SELPA guidelines for independent educational evaluations, including any SELPA list of qualified assessors who meet SELPA criteria for the independent educational occupational therapy evaluation and independent speech and language evaluation that includes AAC ordered in this Decision.
6. Parents shall have 90 calendar days from the receipt of the SELPA guidelines for independent educational evaluations, to provide Fremont Union with the name of a qualified occupational therapist to conduct an independent educational occupational therapy evaluation and the name of a qualified speech-language pathologist to conduct an independent educational speech and language/AAC evaluation.

7. Within 15 business days of its receipt of Parents' respective selections of a qualified assessor, Fremont Union shall contract with the selected assessors to perform the independent educational evaluations ordered in this Decision.
8. All other relief sought by Student is 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.

Laurie Gorsline
Administrative Law Judge
Office of Administrative Hearings