

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNION HIGH SCHOOL DISTRICT.

CASE NO. 2025020023

DECISION

APRIL 30, 2025

On January 30, 2025, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Fremont Union High School District, called Fremont. Administrative Law Judge Ashok Pathi heard this matter via videoconference on March 18, and 19, 2025.

Parent represented Student and attended all hearing days on Student's behalf. Student did not attend the hearing. Attorneys Ankita Sheth and Alicia Arman Brown represented Fremont. Nancy Sullivan, Director of Educational and Special Services, attended all hearing days on Fremont's behalf.

At the parties' request, the matter was continued to April 9, 2025, for written closing briefs. The record was closed, and the matter was submitted on April 9, 2025.

ISSUES

1. Did Fremont Union High School District deny Student a free appropriate public education, or FAPE, by failing to offer one-to-one instruction accompanied by necessary applied behavior analysis support, from January 31, 2023, through the end of the 2022-2023 school year, including extended school year?
2. Did Fremont Union High School District deny Student a FAPE by failing to offer one-to-one instruction accompanied by necessary applied behavior analysis support during the 2023-2024 school year through June 30, 2024?

ANNUAL GOALS, PROGRESS REPORTS, CLEAR WRITTEN OFFERS, AND JANUARY 2023 TRIENNIAL REASSESSMENT NOT AT ISSUE

During the hearing, Parent repeatedly testified about his dissatisfaction with, and his belief in the inappropriateness of, the annual goals Fremont offered in the January 31, 2023, October 17, 2023, and January 30, 2024 individualized education programs, called IEPs. Parent similarly testified that he did not believe the accuracy of the annual goal progress reports issued by Fremont during the relevant timeframe of this Decision. Through his closing brief, Student raised for the first time, a claim that the intensive individualized services offered in the January 31, 2023, October 17, 2023, and January 30, 2024 IEPs did not meet the requirements of a clear written offer of FAPE.

However, Student did not allege any issues regarding the appropriateness of any annual goals, progress reports, or the clarity of any IEP offer in his January 30, 2025 request for a due process hearing, called a complaint. A party requesting the hearing is limited to the issues alleged in the complaint unless the other party has consented. (20 USC §1415(f)(3)(b); Ed. Code § 56502, subd. (i).) Fremont did not consent to any additional issues. Therefore, this Decision makes no determinations regarding the appropriateness of any annual IEP goals, progress reports, or the clarity of any IEP offer.

Student previously filed a due process hearing request challenging, among other things, the appropriateness of a January 2023 triennial psychoeducational assessment. OAH designated that matter OAH Case number 2024020802. OAH issued a Decision in that matter on July 1, 2024, which determined in part that Fremont failed to comprehensively evaluate Student in all areas of suspected disability and failed to conduct an appropriate psychoeducational evaluation. During the hearing, the undersigned took official notice of this Decision because of potential issues with res judicata and collateral estoppel. OAH may take official notice of previous OAH decisions. (*Hogen v. Valley Hospital* (1983) 147 Cal. App. 3d 119, 125 [citing Evid. Code § 452, subd. (c)].)

Federal and state courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 (*Allen*); *Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [collateral estoppel requires that the issue presented for adjudication be the same one that was decided in the prior action, that there be a final judgment on the merits in the prior action, and that the party against whom the plea is asserted was a party to the prior action].)

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from relitigating issues that were or could have been raised in that action. (*Allen, supra*, 449 U.S. at p. 94.) Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. (*Id.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City Sch. Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, fn. 1 [104 S.Ct. 892, 79 L.Ed.2d 56]; federal courts use the term “issue preclusion” to describe the doctrine of collateral estoppel.) Collateral estoppel applies to final administrative decisions of OAH in special education matters, including final administrative decisions that are pending on appeal. (*Loof v. Upland Unified School Dist.* (C.D. Cal., Sept. 10, 2021, Case No. EDCV 21-556 JGB (SPx)) 2021 WL 4974797, **4-5.)

During the hearing, Parent repeatedly attempted to solicit testimony and otherwise introduce evidence regarding the appropriateness of the January 2023 triennial psychoeducational assessment. However, that issue was fully litigated in OAH Case number 2024020802, and Student cannot raise that issue again. (*Allen, supra*, 449 U.S. at p. 94; see also *Loof, supra*, 2021 WL 4974797 at pp. *4-5.)

Additionally, Student did not allege any issues in this matter regarding the appropriateness of the January 2023 triennial psychoeducational assessment. (20 USC §1415(f)(3)(b); Ed. Code § 56502, subd. (i).) Therefore, this Decision does not make determinations regarding the appropriateness of the January 2023 psychoeducational assessment or the corresponding report.

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this case, Student had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was a 23-year-old conserved adult and had aged out of special education at the time of hearing. Parent was one of Student's conservators. Student resided within Fremont's geographic boundaries at all relevant times. Throughout the school years as issue in this Decision, Student was eligible for special education under the autism category.

LEGAL FRAMEWORK

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP, reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000] (*Endrew F.*)). An appropriate public education "does not mean the absolutely best or 'potential-maximizing' education for the individual child." (*Los Angeles Unified Sch. Dist. v. A.O. by and through Owens* (9th Cir. 2024) 92 F.4th 1159, 1172 (*A.O.*) [quoting *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314] (*Gregory K.*)).

When resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K., supra*, 811 F.2d at pp. 1314-15 [citing *School Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359].) A school district is not required to place a student in a program preferred by parents, even if that program will result in greater educational benefit to the student. (*Gregory K., supra*, 811 F.2d at p. 1314.) For a school district's offer of special education to constitute a FAPE, the offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.*)

ISSUE 1: DID FREMONT UNION HIGH SCHOOL DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER ONE-TO-ONE INSTRUCTION ACCOMPANIED BY NECESSARY APPLIED BEHAVIOR ANALYSIS SUPPORT, FROM JANUARY 31, 2023, THROUGH THE END OF THE 2022-2023 SCHOOL YEAR, INCLUDING EXTENDED SCHOOL YEAR?

Student contends the specialized academic instruction services that Fremont offered did not meet his unique needs, and that he required one-to-one instruction with applied behavior analysis, called ABA, support to receive a FAPE. Student further contends that the January 31, 2023 IEP did not include one-to-one instruction with ABA services, in part because the January 2023 psychoeducational assessment did not adequately assess Student's behavioral needs.

Fremont contends that ABA is a behavior intervention methodology, and staff working with Student had discretion to choose which methodologies to use. Fremont also contends that Student's program utilized ABA strategies as one of the many

behavior intervention strategies staff used throughout Student's school day. Fremont lastly contends that Student did not require individual instruction. Rather, the offer of specialized academic instruction provided in a group model at a non-public school, coupled with intensive individual services in the form of a full-time one-to-one aide, was reasonably calculated to provide Student with a FAPE.

An IEP is a written document for each child with a disability that must comprehensively describe the child's educational needs and the corresponding special education and related services that meet those needs. (*School Comm. of Burlington, supra*, 471 U.S. at p. 368.) The IEP must identify the student's special education and related services and supplementary aids and services, including program modifications or supports. (*Id.* at p. 368; 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(4)(2007); Ed. Code, § 56345, subd. (a)(4).) In California, related services are called "designated instruction and services." (Ed. Code, § 56363, sub. (a).)

In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(2017); Ed. Code, § 56341.1, subd. (a).) The IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) Therefore, a student must have a disability related need in an area before the school district is required to provide services in that area.

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Areas of educational need are to be broadly construed to include the child's

- academic,
- social,
- health,
- emotional,
- communicative,
- physical, and
- vocational needs.

(*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. at pp. 56-58.) An IEP must address a child's 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.)

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2017); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*W.A. ex rel. S.A. v. Patterson Joint Unified Sch. Dist.* (E.D. Cal. July 18, 2011 CV F 10-1317 LJO SMS) 2011 WL 2925393 [citing *Neosho R-V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1030].)

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JANUARY 2023 TRIENNIAL REASSESSMENT

Fremont conducted a psychoeducational assessment, with a report dated January 31, 2023, in preparation for Student's triennial review, due in January 2023. At the time of the triennial review, Student was 21 years old and attended Wings Learning Center, a nonpublic school, through his IEP. The IDEA uses the term evaluation, while the California Education Code uses the term assessment. The terms are interchangeable. (20 U.S.C. § 1414(a); Ed. Code, § 56302.5.)

The assessment revealed that Student continued to demonstrate, "deficits in cognitive processing, communication, and adaptive skills, as well as a behavior profile consistent with an autism spectrum disorder." The assessor believed Student continued to meet the eligibility criteria under the category of autism. The assessor also recommended that the IEP team consider goals in the following areas:

- self-help,
- daily living skills,
- community living/safety skills, and
- functional communication/social skills.

The assessor did not recommend ABA services or one-to-one instruction.

JANUARY 31, 2023 IEP TEAM MEETING

Student's IEP team convened for a triennial review on January 31, 2023. The IEP team included Parents, as well as staff from Fremont and Wings Learning Center. During the meeting, Student's IEP team reviewed the January 2023 psychoeducational assessment report.

Fremont offered Student full-time placement at a nonpublic school, with 1807 minutes per week of specialized academic instruction, to be delivered through a group instruction model, which was the entirety of his school day. Fremont also offered Student 1807 minutes per week of intensive individualized services, to be delivered as a one-to-one aide. The aide helped Student access his other services, including his specialized academic instruction. Fremont offered a similar full-day program with a one-to-one aide during the extended school year period. The IEP document did not indicate which behavior intervention methodologies staff would utilize with Student.

As discussed below, Student did not prove that he required individual instruction with ABA support to receive a FAPE.

STUDENT DID NOT PROVE HE REQUIRED INDIVIDUAL INSTRUCTION

Student did not prove that he required one-to-one instruction to receive a FAPE. A school district is not required to place a student in a program preferred by parents, even if that program will result in greater educational benefit to the student. (*Gregory K., supra*, 811 F.2d at p. 1314.) An appropriate public education "does not mean the absolutely best or 'potential-maximizing' education for the individual child." (*A.O., supra*, 92 F.4th at 1172 [*quoting Gregory K., supra*, 811 F.2d at 1314].)

Student did not prove that Fremont's offer of group specialized academic instruction at a nonpublic school, with full time one-to-one aide support was not reasonably calculated to offer Student a FAPE. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra*, 580 U.S. at p. 402.)

Parent believed Student could only learn with one-to-one instruction with ABA support. Parent suspected Fremont did not offer Student one-to-one ABA services at school because it failed to identify his needs in the January 2023 psychoeducational assessment. Parent also testified that he doubted Student's goal progress reports and believed that Student's progress was not "verifiable." However, Parent's unsubstantiated suspicions and doubts were not evidence that Student required individual instruction.

Parent held no degrees, credentials, or licenses in psychology, teaching, or any other field relevant to special education. Parent had a background and related education in engineering. Parent was not an expert in ABA or any other behavior management methodology. Parent explained that he had participated in various parent trainings on ABA. However, Parent did not establish that these trainings qualified him to give expert opinions regarding Student's need for ABA. Though Parent appeared sincere in his belief, Parent's lay opinion was not convincing.

Parent was Student's only witness. Student did not offer any competent expert testimony in support of his argument that he required one-to-one instruction. Instead, Student argued that a psychoeducational independent educational evaluation completed by Center for Developing Minds proved that he required individual instruction with ABA support. This assessment was conducted by Dr. Damon Korb, M.D., and Licensed Educational Psychologist Randy Yates with a report dated August 3, 2023, discussed more thoroughly in Issue 2, below.

However, this report was not available at the January 31, 2023 IEP team meeting. This is significant, because a determination of whether an IEP offers a student a FAPE must be made in light of information available when the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a

snapshot, not a retrospective;" it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.* [quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036].)

The record established that Student's IEP team did not review the psychoeducational independent educational evaluation until the October 17, 2023 IEP team meeting. Nevertheless, the information included in the psychoeducational independent educational evaluation may shed light on the reasonableness of earlier IEP offers. (*E.M. ex rel. E.M. v. Pajaro Valley Unif. Sch. Dist. Off. Of Admin. Hrngs.* (9th Cir. 2011) 652 F.3d 999, 1006.) As such, the psychoeducational independent educational evaluation has some limited relevance to the analysis of the January 31, 2023 IEP.

Even taking the psychoeducational independent educational evaluation into consideration, Student did not prove that he required individual instruction. As explained in detail in Issue 2, the psychoeducational independent educational evaluation was not persuasive and did not state or otherwise prove that Student required individual instruction with ABA to receive a FAPE.

Contrary to Student's argument, the record established that Student did not require individual instruction. Dianne Holcomb, a Fremont Program Specialist, was Student's IEP case manager during the 2022-2023 school year. Holcomb attended the January 31, 2023 IEP team meeting as an administrator from Fremont. Holcomb held several credentials including pupil personnel services credentials for school psychology and school counseling, as well as general education and special education teaching credentials. Holcomb also held the necessary authorizations to teach children with autism and orthopedic impairments. Holcomb had been an educational professional for nearly 30 years, and her background and education included training in ABA and other

behavior management methodologies. During her career, Holcomb regularly attended IEP meetings, and had conducted psychoeducational assessments, as well as functional behavior assessments. Her testimony was accorded significant weight.

Holcomb was familiar with Student and had been a member of his IEP team for approximately seven years. She credibly explained that Student did not require individual instruction but could benefit from specialized academic instruction in a group setting, with a one-to-one aide supporting him. Holcomb referenced the progress Student had made over the previous school years while receiving group instruction. Examples included a reduction in disruptive behaviors and working toward completing tasks more independently. Student did not successfully refute this testimony.

Student did not prove by a preponderance of the evidence that he required individual instruction to receive a FAPE.

STUDENT DID NOT PROVE HE REQUIRED ABA SUPPORT

Student similarly did not prove that he required specific ABA support to receive a FAPE. In California, school districts may, but are not required to, provide services using the ABA methodology. (See Ed. Code § 56525 [authorizing board certified behavior analysts to conduct functional behavior assessments and provide behavior services, but not requiring local education agencies to utilize those individuals].)

Parent's lay opinion that Student required instruction through the ABA methodology was not convincing. Student did not offer any competent expert testimony in support of his argument that he required ABA support. As with Student's argument for his need for individual instruction, the psychoeducational independent educational evaluation by Center for Developing Minds did not state that Student

required instruction through the ABA methodology at school to receive a FAPE. Rather, the record established that school staff needed flexibility with methodologies because not every teaching method worked with all students all the time. Student did not prove he required services exclusively using the ABA methodology.

Even though Student did not prove he required ABA support to receive a FAPE, Student's program at Wings Learning Center included this support. Laxmi Ghale, Director of Wings Learning Center, credibly explained that staff working with Student during the 2022-2023 school year received comprehensive training in behavior management strategies from a board certified behavior analyst. This training included ABA strategies and techniques, such as the use of timers and "First/Next/Then" visual task lists. Ghale explained that Wings Learning Center staff utilized ABA strategies, along with others, during the 2022-2023 school year.

Student did not successfully refute Ghale's testimony, or prove that the methodologies Wings Learning Center staff used were inadequate. Student also failed to provide legal authority in support of his argument that Fremont was required to provide ABA. Instead, Student argued that "[Fremont] did not give any justifiable reason for rejecting or not giving the ABA one-to-one service." Student's argument demonstrates a misunderstanding of his burden of persuasion and is not convincing.

Student also argued that he did not believe Wings Learning Center provided Student with ABA support because Student's January 31, 2023 IEP did not memorialize the ABA strategies that Wings Learning Center staff used. This argument is not persuasive.

An IEP is not required to include the specific instructional methodologies the school district will use to educate the child. (34 C.F.R. § 300.320(d)(1); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) The methodology used to implement an IEP is left to the school district's discretion so long as it is designed to meet the student's unique needs, comports with the child's IEP, and is reasonably calculated to provide an educational benefit. (*Rowley, supra*, 458 U.S. at p. 208; *Crofts v. Issaquah Sch. Dist. No. 411* (9th Cir. 2022) 22 F.4th 1048, 1056-57; *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122 ["The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit"].)

The Ninth Circuit has further recognized that "teachers need[d] flexibility in teaching methodologies because there was not a single methodology that would always be effective." (*R.E.B. v. Hawaii Dept. of Educ.* (9th Cir. 2019) 770 Fed.Appx. 796, 800 [quoting *J.L. v. Mercer Island Sch. Dist.* (9th Cir. 2010) 592 F.3d 938, 952].) In that case, the Ninth Circuit determined that a student was not denied a FAPE when the IEP did not specify the use of ABA methodology, even when parents "expressed a strong preference" for such a methodology. (*Id.* at pp. 800-801.)

Nevertheless, the Ninth Circuit also acknowledged that "school districts should specify a teaching methodology for some students." (*Id.* at p. 800 [quoting *J.L., supra*, 592 F.3d at p. 952].) The Ninth Circuit has not clearly stated when a school district should specify a teaching methodology, but other courts have determined that an IEP should include a specific methodology when the record shows IEP team member consensus on the issue. (*E.E. by and through Hutchinson-Escobedo v. Norris School District* (E.D. Cal. April 26, 2023 Case No. 1:20-CV-1291-AWI-CDB) 2023 WL 3124618

[citing *R. E. v. N.Y.C. Dept. of Educ.* (2nd Cir. 2012) 694 F.3d 167, 193-94 and *Rogich v. Clark Cty. Sch. Dist.* (D. Nev. Oct. 12, 2021 Case No. 2:17-CV-01541-RFB-NJK) 2021 WL 4781515.)

Student did not prove that such a consensus existed. Thus, Fremont was not required to specifically designate the ABA methodology in Student's January 31, 2023 IEP. Student did not prove by a preponderance of the evidence that he required ABA support to receive a FAPE.

Student only challenged the services offered in the January 31, 2023 IEP. Student did not challenge any other IEPs from January 31, 2023, through the end of the 2022-2023 school year extended school year period, which ended on August 11, 2023.

Student did not prove by a preponderance of the evidence that he was denied a FAPE when Fremont did not offer him one-to-one instruction with ABA support from January 31, 2023, through the end of the 2022-2023 school year extended school year.

ISSUE 2: DID FREMONT UNION HIGH SCHOOL DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER ONE-TO-ONE INSTRUCTION ACCOMPANIED BY NECESSARY APPLIED BEHAVIOR ANALYSIS SUPPORT DURING THE 2023-2024 SCHOOL YEAR THROUGH JUNE 30, 2024?

Student contends that the specialized academic instruction services that Fremont offered did not meet his unique needs, and that he required one-to-one instruction with ABA support to receive a FAPE. Student also argues Fremont reduced the rigor of

Student's annual goals during the October 17, 2023 amendment IEP; thus, proving Student could not meet those goals unless he received individual instruction with ABA support.

Fremont contends that ABA is a behavior intervention methodology, and staff working with Student have discretion to choose which methodologies to use. Fremont also contends that Student's program utilized ABA strategies as one of the many behavior intervention strategies staff implemented throughout Student's school day. Fremont lastly contends that Student did not require individual instruction, and specialized academic instruction provided in a group model at a nonpublic school, coupled with intensive individual services in the form of a full-time one-to-one aide, was reasonably calculated to provide Student with a FAPE.

BEGINNING OF THE 2023-2024 SCHOOL YEAR

The 2023-2024 school year began on August 21, 2023. As determined in Issue 1, Student did not prove that he was denied a FAPE when Fremont did not offer one-to-one instruction with ABA support. Student did not offer evidence of any other IEP team meetings or IEP offers between the January 31, 2023 IEP and the October 17, 2023 IEP discussed in detail below. Therefore, Student did not prove that Fremont denied him a FAPE when Fremont did not offer one-to-one instruction with ABA support from August 21, 2023, through October 17, 2023.

OCTOBER 17, 2023 IEP

Student transferred from Wings Learning Center to Pacific Autism Center for Education, called PACE, for the 2023-2024 school year. PACE was a certified nonpublic school. PACE's 2023-2024 school year began on September 11, 2023.

Student's IEP team convened on October 17, 2023, to review Student's new placement and to review the August 3, 2023 psychoeducational independent educational evaluation. Parents, PACE staff, Fremont staff, including Program Specialist Holcomb, and Yates, one of the independent assessors, attended the meeting. As discussed in detail below, Student did not prove that Fremont denied him a FAPE by not offering him one-to-one instruction with ABA support in the October 17, 2023 IEP.

AUGUST 3, 2023 PSYCHOEDUCATIONAL INDEPENDENT EDUCATIONAL EVALUATION

The IDEA requires a school district to consider the results of an independent educational evaluation, but it does not require a school district to adopt the conclusions of such an evaluation. (*Michael P. v. Hawaii Dept. of Educ.* (9th Cir. 2011) 656 F.3d 1057, 1066, fn. 9 [citing 34 C.F.R. § 300.502(c)(1)]; see also *T.S. v. Board of Educ. of the Town of Ridgefield* (2d Cir. 1993) 10 F.3d 87; *G.D. v. Westmoreland Sch. Dist.* (1st Cir. 1991) 930 F.2d 942, 947.)

Student secured a psychoeducational independent educational evaluation, by Center for Developing Minds, with a report dated August 3, 2023. The report noted that Korb was a behavioral and developmental pediatrician, and Yates was a licensed educational psychologist, a credentialed school psychologist, and a credentialed school counselor. Neither Korb nor Yates testified at the hearing.

Per the assessment report, the assessors conducted multiple formal assessment measures, as well as Parent interviews, clinical observations, and a review of unspecified “available” records. The assessment revealed that Student had significant cognitive impairments, with a nonverbal intelligence quotient below the first percentile. Student demonstrated similar adaptive behavior deficits, with his overall adaptive behavior composite falling within the less than first percentile range. Formal autism assessments revealed that Student met the criteria for an autism diagnosis. The assessors opined that Student met special education eligibility criteria under the autism and intellectual disability categories.

However, the assessors did not include input from Fremont staff, such as interviews or responses to rating scales. The assessors did not include input from Wings Learning Center staff, even though Student attended Wings Learning Center at that time. The assessors did not conduct observations of Student within his classroom setting, relying instead on observations within their clinic setting. Because of this significant missing information, the psychoeducational independent educational evaluation provided an incomplete reflection of Student’s educational needs.

The assessors made multiple recommendations, which they documented in a section of the report entitled “Developing Minds Action Plan.” The assessors separated their recommendations into the following categories:

- Educational Recommendations,
- Sleep Recommendations,
- Communication Recommendations,
- Behavioral Recommendations,
- Safety Recommendations,

- Resource Recommendations, and
- Medical Recommendations.

Parent focused his testimony and argument on the following recommendation under the “Behavioral Recommendations” section: “[Student] will benefit from 1 on 1 ABA support to continue teaching him life skills using repetitive teaching strategies and rewards for positive progress. Ten to fifteen hours per week with a caregiver training component is recommended.”

Parent believed this recommendation meant that Student required individual instruction with ABA between 10 to 15 hours per week to receive a FAPE. Parent argued that individual ABA services were the only way in which Student could receive a FAPE. While Parent appeared sincere in his interpretation, Parent’s interpretation is inconsistent with the plain text of the recommendation. The report did not state that Student required this service to receive a FAPE.

Moreover, the recommendation does not account for a full school day. Divided evenly over five school days per week, the recommended 10 to 15 hours of ABA would equate to about half of the time Student would be in school. This significant discrepancy further undermined Parent’s interpretation that this recommendation was for Student’s education.

Parent additionally asserted that all the recommendation sections, except the “Medical Recommendations” section applied to Student’s education. This argument was not persuasive because many of the recommendations did not pertain to Student’s education. For example, the section entitled “Sleep Recommendations” provided Parent

with suggestions for helping Student establish and maintain a routine to independently fall asleep and stay asleep at night. This is not a set of skills generally relevant to a child's IEP.

Another section entitled "Safety Recommendations" suggests, among other things, that Parent secure a "handicapped parking tag" from the Department of Motor Vehicles, and to investigate group homes for Student should Parent not be able to support Student at home. These recommendations also do not directly implicate Student's educational planning.

The "Behavioral Recommendations" section is similarly tangential to Student's educational needs. In addition to the recommendation quoted earlier, that section includes recommendations for Parents to address Student's behaviors related to inappropriate self-touching. This type of behavior and related recommendations could be relevant to a child's IEP, but that is not the case here. The record did not establish that Student manifested these behaviors in school, and the recommendation section did not include recommendations for addressing this behavior at school. Rather, the section focused primarily on environments outside of school. Overall, it is not clear that the "Behavior Recommendations" section was applicable to Student's IEP. Student did not prove Parent's interpretation of the recommendation.

Fremont offered its own interpretation of the recommendation. Fremont argued that when Yates presented the assessment report at the October 17, 2023 IEP team meeting, he indicated that Korb made a medical recommendation for ABA services, and not an educational recommendation. Fremont also asserted that Yates approved of the PACE program and felt that it met Student's needs.

Fremont supported this argument with portions of the IEP team meeting notes from the October 17, 2023 IEP team meeting. Parents objected to those notes, which was one of the reasons why they did not consent to this IEP. Parents' lack of consent notwithstanding, IEP team meeting notes are not a certified transcript and not necessarily a complete and accurate reflection of the discussion at an IEP team meeting. Especially in circumstances such as here, where the parties disagree about the discussion at the IEP team meeting, the IEP team meeting notes are less persuasive.

Student did not offer either Korb's or Yates's testimony, despite knowing that he carried the burden of persuasion. Parent knew he disagreed with the October 17, 2023 IEP team meeting notes, and Student could have offered Yates's testimony to establish his opinion and resolve problems caused by Student and Fremont's competing interpretations. However, Student failed to do so.

Nevertheless, it is not necessary to reconcile the parties' differing interpretations of the psychoeducational independent educational evaluation report and the assessors' recommendations. Even if Parent's interpretation of the recommendation was accurate, the psychoeducational independent educational evaluation report, without supporting testimony from its authors, is not persuasive, and its recommendations are not determinative of what Student required for a FAPE. (*Michael P. supra*, 656 F.3d at p. 1066, fn. 9 [citing 34 C.F.R. § 300.502(c)(1)]; see also *T.S., supra*, 10 F.3d 87; *G.D., supra*, 930 F.2d at p. 947.)

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In his closing brief, Student unconvincingly asserts that, “[t]here is a requirement that the school district adopt the findings of the [independent educational] evaluation by [Center for Developing Minds] since the report was accepted by parents.” Student did not provide any legal authority or argument to support this conclusory statement, and it is not the undersigned’s responsibility to do so in his place. (See *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]; *Loewen v. Berryhill* (9th Cir. 2017) 707 Fed. Appx. 907, 908 (nonpub. opn.) [citing *Carmickle v. Commissioner, Soc. Sec. Admin.* (9th Cir. 2008) 533 F.3d 1155, 1161, fn. 2 [the court is not required to address arguments made without specificity]].) Student’s unexplained assertion is not persuasive and contradicts the law. (*Michael P. supra*, 656 F.3d at p. 1066, fn. 9 [citing 34 C.F.R. § 300.502(c)(1)]; see also *T.S., supra*, 10 F.3d 87; *G.D., supra*, 930 F.2d at p. 947.)

Student’s IEP team considered the independent educational evaluation and heard from Yates during the October 17, 2023 IEP team meeting. Following that presentation, Fremont made an updated offer of FAPE that maintained Student’s full-time group specialized academic instruction with full-time one-to-one aide support at a non-public school setting. Fremont made this offer using the information available to it at the October 17, 2023 IEP team meeting, including the psychoeducational independent educational evaluation. (*Adams, supra*, 195 F.3d at p. 1149.)

As discussed below, Student failed to prove that Fremont denied him a FAPE in the October 17, 2023 IEP by not offering Student one-to-one instruction with applied behavior analysis support.

STUDENT DID NOT PROVE HE REQUIRED INDIVIDUAL INSTRUCTION

Student did not prove that he required one-to-one instruction to receive a FAPE. A school district is not required to place a student in a program preferred by parents, even if that program will result in greater educational benefit to the student. (*Gregory K., supra*, 811 F.2d at p. 1314.) An appropriate public education "does not mean the absolutely best or 'potential-maximizing' education for the individual child." (*A.O., supra*, 92 F.4th at 1172 [*quoting Gregory K., supra*, 811 F.2d at 1314].)

At the October 17, 2023 IEP team meeting, Fremont offered Student full-time placement at a nonpublic school, with 1440 minutes per week of specialized academic instruction, to be delivered through a group instruction model, and 1500 minutes per week of intensive individualized services, to be delivered as a one-to-one aide. These services reflected that Student would receive specialized academic instruction for the full day and would have a one-to-one aide to support him throughout his entire time on PACE campus. The IEP document did not indicate which behavior intervention methodologies staff would use with Student.

Student again failed to support his argument that he required individual instruction to receive a FAPE. Student relied on Parent's unconvincing lay opinion and the unpersuasive psychoeducational independent educational evaluation. Overall, Student did not prove that Fremont's offer of group specialized academic instruction at a nonpublic school, with full time one-to-one aide support was not reasonably calculated to offer Student a FAPE. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra*, 580 U.S. at p. 402.)

As with Student's Issue 1 above, Program Specialist Holcomb credibly explained that Student did not require individual instruction, but could benefit from specialized academic instruction in a group setting, with a one-to-one aide supporting him. Student did not successfully refute this testimony.

PACE's Program Director, Lori Strickland, also credibly testified that Student did not require individual instruction. She explained that Student was generally calm and cooperative with school activities. She also explained that Student benefitted socially from being in a small group setting. Student did not refute this testimony either.

Strickland held a bachelor's degree in organizational leadership, a master's degree in education, a pupil personnel services credential, and an administrator credential. She previously worked as a school counselor, vice principal, and principal. Strickland had spent a combined 19 years in education. Strickland was a member of Student's IEP team while he attended PACE. Her testimony was thoughtful and careful. Strickland occasionally needed her recollection refreshed through admitted evidence, but this did not negatively affect her credibility. Her testimony was accorded significant weight.

Student did not prove by a preponderance of the evidence that he required individual instruction to receive a FAPE.

STUDENT DID NOT PROVE HE REQUIRED ABA SUPPORT

Student similarly did not prove that he required specific ABA support to receive a FAPE. Student again relied on Parent's unconvincing lay opinion that Student required instruction through the ABA methodology. Student did not offer any competent expert testimony to support his argument. As explained previously, the psychoeducational

independent educational evaluation by Center for Developing Minds did not prove that Student required instruction through the ABA methodology to receive a FAPE. Again, the record established that school staff needed flexibility with methodologies because not every teaching method worked with all students all the time. Student did not prove he required services exclusively using the ABA methodology.

Even though Student did not prove he required services using the ABA methodology, the record established PACE utilized ABA techniques in its behavior management practices similar to Wings Learning Center. Director Strickland credibly explained that PACE staff utilized ABA techniques in conjunction with other methodologies. She described how PACE staff regularly received training in behavior management techniques, including ABA. Staff working with Student received this training throughout the 2023-2024 school year. Strickland also persuasively explained how PACE staff embedded ABA techniques into their program every day. For example, PACE staff provided students with positive reinforcement when they demonstrated desired behaviors.

Student did not successfully refute Strickland's testimony that PACE staff employed ABA techniques, or prove that the methodologies PACE staff used were inadequate. Student's argument that the October 17, 2023 IEP needed to specify the ABA methodology is unpersuasive for the same reasons determined in Issue 1.

Student did not brief his argument that Fremont reduced the rigor of Student's annual goals during the October 17, 2023 amendment IEP; thus, proving Student could not meet those goals unless he received individual instruction with ABA support. The undersigned does not make arguments for this unsupported assertion on Student's behalf. (See *Independent Towers of Washington, supra*, 350 F.3d at p. 929.)

Student did not prove by a preponderance of the evidence that he was denied a FAPE when Fremont did not offer him one-to-one instruction with ABA support in the October 17, 2023 IEP.

JANUARY 30, 2024 IEP

Student's IEP team convened for an annual review on January 30, 2024. Parents, Program Specialist Holcomb, and PACE staff, including Director Strickland, attended the meeting. As discussed below, Student did not prove that Fremont denied him a FAPE by not offering him one-to-one instruction with ABA support in the January 30, 2024 IEP.

STUDENT DID NOT PROVE HE REQUIRED INDIVIDUAL INSTRUCTION

Student did not prove that he required one-to-one instruction in the January 30, 2024 IEP to receive a FAPE. Fremont offered Student full-time placement at a non-public school, with 1440 minutes per week of specialized academic instruction, to be delivered through a group instruction model, and 1500 minutes per week of intensive individualized services, to be delivered as a one-to-one aide. These services reflected that Student would receive specialized academic instruction for the full school day, and would have a one-to-one aide to support him throughout his entire time on PACE campus. This program would be in place until Student aged out of special education at the end of June 2024. The IEP document did not indicate which behavior intervention methodologies staff would use with Student.

The record established that Fremont and PACE staff believed that Student did not require intensive individualized services for behavior, compliance, or instruction purposes. However, Fremont and PACE staff believed that Student required a one-to-

one aide for safety purposes, because Student had a seizure at school the month before and would have fallen had his aide not been there to support him. Ultimately, Fremont offered Student continued specialized academic instruction in a group setting with intensive individualized services in the form of a one-to-one aide.

Student did not prove that these services were not reasonably calculated to provide Student a FAPE. Student did not prove that he required individual instruction to receive a FAPE.

STUDENT DID NOT PROVE HE REQUIRED ABA SUPPORT

Student again did not prove that he required specific ABA support to receive a FAPE. Student again relied on Parent's unconvincing lay opinion that Student required instruction through the ABA methodology. Student did not offer any competent expert testimony to support his argument. As explained previously, the psychoeducational independent educational evaluation by Center for Developing Minds did not prove that Student required instruction through the ABA methodology to receive a FAPE.

As determined previously, PACE staff utilized ABA strategies as part of their behavior management techniques daily. Student did not successfully refute Director Strickland's testimony that PACE staff employed ABA techniques, or prove that the methodologies PACE staff used were inadequate. Student's argument that the January 30, 2024 IEP needed to specify the ABA methodology is unpersuasive for the same reasons determined in Issue 1. Student did not prove by a preponderance of the evidence that he was denied a FAPE when Fremont did not offer him one-to-one instruction with ABA support in the January 30, 2024 IEP.

Student did not challenge any other IEPs from January 30, 2024, through the end of the 2023-2024 school year, which ended for Student on June 28, 2024. At that time, Student aged out of special education.

Student did not prove by a preponderance of the evidence that he was denied a FAPE when Fremont did not offer him one-to-one instruction with ABA support during the 2023-2024 school year through June 30, 2024.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1:

Fremont Union High School District did not deny Student a FAPE by failing to offer one-to-one instruction accompanied by necessary applied behavior analysis support, from January 31, 2023, through the end of the 2022-2023 school year, including extended school year.

Fremont prevailed on Issue 1.

ISSUE 2

Fremont Union High School District did not deny Student a FAPE by failing to offer one-to-one instruction accompanied by necessary applied behavior analysis support, during the 2023-2024 school year, through June 30, 2024.

Fremont prevailed on Issue 2.

ORDER

1. Student did not prevail on any issues.
2. All of Student's requested relief 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.

Ashok Pathi

Administrative Law Judge

Office of Administrative Hearings