

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018100281

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on October 5, 2018, naming Long Beach Unified School District.<sup>1</sup> On November 19, 2018, OAH granted Long Beach's request to continue the hearing.

Administrative Law Judge Ted Mann heard this matter in Long Beach, California, on January 29 and 30, 2019.

Brian Sciacca, Attorney at Law, appeared on behalf of Student. Student's mother and father attended both days of the hearing. Student attended the first day of hearing.

Cynthia Yount, Attorney at Law, appeared on behalf of Long Beach. Long Beach's Director of Student Services, Seema Paul, attended each day of the hearing.

The parties requested a continuance to allow them to submit written closing

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<sup>1</sup> Long Beach filed its response to Student's complaint on October 16, 2018. (See *M.C. v. Antelope Valley Unified School Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

arguments. OAH continued the matter to March 4, 2019. The record closed upon timely receipt of written closing arguments and the matter was submitted on March 4, 2019.

## ISSUE<sup>2</sup>

Did Long Beach deny Student a free appropriate public education during the 2017-2018 school year, by failing to implement the accommodations described in her individualized educational program?

## SUMMARY OF DECISION

Student contends that Long Beach denied her a FAPE by failing to implement the accommodations described in her two applicable IEPs for the 2017–2018 school year. Long Beach contends that the accommodations were implemented. This Decision finds that Long Beach failed to materially implement the accommodations, including failing to allow Student to undertake “test corrections”, rather than “test retakes.”

## FACTUAL FINDINGS

1. Student was a 17-year-old girl who resided with her parents within Long Beach’s boundaries during the applicable time frame. Student received special education under the eligibility category other health impairment, arising from her visual processing disorder; dyslexia and accompanying Irlen Syndrome; attention deficit hyperactivity disorder; and other health issues related to her eosinophilic esophagitis,

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<sup>2</sup> At the beginning of the hearing, Student withdrew Issue two, which alleged that Long Beach failed to provide tutoring services. The remaining issue has been rephrased for clarity. The ALJ has authority to renumber and redefine a party’s issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

and chronic gastrointestinal and joint pain.

2. Student attended middle school in Long Beach during sixth, seventh and eighth grades. She attended general education classes at Milliken High School, beginning in the ninth grade during the 2016-2017 school year. In ninth grade, Student earned an overall grade point average of 3.83, and maintained a good attendance record while participating in interscholastic water polo. In 10<sup>th</sup> grade, Student earned an overall grade point average of 4.00, and maintained a good attendance record while participating in interscholastic water polo and swimming.

3. Student's primary educational challenge arose from the confluence of her visual processing disorder, dyslexia, and Irlen Syndrome, a perceptual processing disorder. The combination resulted in Student struggling with understanding exactly what was on the page in front of her, including difficulty with written/typed language, mathematical symbols, or other visual images. Student's struggle to understand what was on the page resulted in the need for specific accommodations to allow her to access her education. Additionally, Student struggled with constant joint pain, gastrointestinal pain, and fatigue, requiring significant medical oversight, treatment, and medication all of which interfered with her ability to access her education.

#### THE DECEMBER 20, 2016 IEP

4. Long Beach held an IEP team meeting for Student on December 20, 2016, with an IEP offer to Student on the same date. The December IEP team meeting was attended by Parents; Dr. Susan Burnett, Student's advocate; Seema Paul, Long Beach administrator; Debra Chastain, Long Beach department head; Torielee Frapwell, Long Beach general education teacher; Dana Meves, Long Beach general education teacher; Ling Bensie, Long Beach general education teacher; Jeanette Sanchez, Long Beach general education teacher; Emily Bishop, Long Beach general education teacher; Sharna Murphy, Long Beach general education teacher; Shannon Williams-Young, Long Beach

administrator; Mary Kelley, Student's case manager; and Viseth Vann, Student's counselor. Parents expressed their concerns that Student receive all necessary accommodations to allow her to access her education and succeed in high school. Teachers reported that Student was working hard, performing well, and accessed her accommodations sparingly, including extra time and test retakes. In addition to a general education placement and related services in specialized academic instruction and transition services, the IEP offer included detailed accommodations for Student. Parents consented to the IEP.

5. The IEP offered 23 accommodations and modifications for Student for non-testing activities. Of the 23 non-testing accommodations, several significantly affected Student's ability to access, among others, her math classes. For example: directions clarified, restated, read aloud, for all assignments, including all testing, as requested by [Student] or noticed by instructor that she needs assistance; questions on tests rephrased/restated as requested by [Student] or noticed by instructor that she needs assistance (included state testing); questions read aloud on all assignments as requested by [Student] or noticed by instructor that she needs assistance; answers may be provided orally on assignments/tests if requested or if teacher believes it may demonstrate her knowledge; testing in small group setting and questions may be read aloud if requested, or if teacher believes it may demonstrate her knowledge; and can retake all tests/redo all assignments, homework and projects without a grading penalty.

6. The IEP offered 27 accommodations/modifications for Student for testing situations. Of the 27 testing accommodations, several significantly affected Student's ability to access, among others, her math testing. For example: questions or tests/quizzes rephrased, restated, read aloud, (including test questions) as requested by [Student] or noticed by instructor that she needs assistance; test over more than one day for a single sitting test/test part; read aloud test questions (If Math, Science, History,

& Writing.); calculator (for calculator-allowed items only); [Student's] answers may be provided orally on assignments/quizzes and tests if requested, or if teacher believes it may demonstrate her knowledge; questions may be read aloud as needed on all testing (in a small group setting) and on all tests and quizzes (includes state testing); and she can retake all tests/redo all assignments, homework and projects without grading penalty.

#### PRE-CALCULUS WITH MR. QUINONES

7. Student began the first semester of ninth grade in a general education pre-calculus class taught by Ronald Quinones. The class ran from the beginning of the semester until the semester final on January 24, 2018. Mr. Quinones held a bachelor's degree in pure mathematics, a teaching credential, and had been teaching for approximately 20 years at the time of the hearing.

#### IMPLEMENTATION OF ACCOMMODATIONS

8. Mr. Quinones did not implement Student's accommodations adequately. He only allowed Student to undertake full retakes of tests; i.e. taking a new, similar test in full, not just the questions similar to those previously answered incorrectly. He also did not return work in a timely fashion, and in some cases never graded Student's initial work, resulting in "E" entries on the "Student Scoresheet". An "E" entry indicated the work was not included in Student's grade. He gave Student some individual assistance in particular areas, including factoring. His post-test review of tested material typically addressed areas of difficulty for the whole class, and was not individualized to Student's needs.

9. In Mid-December 2018, Student was transferred to Kathleen Sharp's fifth

period pre-calculus class.<sup>3</sup> Student's third period class was unassigned, and later changed to office assistant. As a result of the transfer, Student completed the remaining weeks of the first semester, including the semester final, in Ms. Sharp's class.

#### LOST POINTS

10. Student lost points during the first semester pre-calculus class through Mr. Quinones' actions in two ways. First, he did not allow test corrections, only test retakes, precluding Student from obtaining the benefit of the accommodations in her IEP. Second, Mr. Quinones failed to correct or return Student's work in a timely fashion, and compounded the problem by never grading four of Student's tests or quizzes, worth a total of 199 points; and assigning the work an "E". As a direct result of Student's work not being graded, she lost the opportunity to improve her grade, either through successfully completing the task on the first try or through the use of the test correction procedure. Student earned 64 out of 100 points on the first semester final. Student was unable to avail herself of the IEP accommodation for test corrections, as the only alternative she was given was to retake the first semester final that she had failed, rather than correct the wrong answers, per her IEP.

#### DECEMBER 12, 2017 - TRIENNIAL IEP

11. Long Beach held an IEP team meeting for Student on December 12, 2017, with an IEP offer to Student on the same date. The December 12, 2017 IEP team meeting was attended by the following individuals: Parents; Dr. Burnett, Student's advocate, by telephone; Danely Smith, Long Beach general education teacher; Ritambrhra Jain, Long Beach general education teacher; Leslie Gombrich, Long Beach general education

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<sup>3</sup> General education math teacher Kathleen Wallingford changed her surname to Sharp, as of the 2018-2019 school year.

teacher; Shannon Williams-Young, Long Beach administrator; Mary Kelley, Student's case manager; and Viseth Vann, Student's counselor.

12. Long Beach provided Parents a notice of procedural safeguards and Parents had no questions regarding parental rights. Parents reinforced the need for assessments appropriate for their daughter's disabilities, along with an appropriate level of support for Student to allow her to access her education. Student's father explained the difference between test retakes and test correction. He also discussed with the IEP team why it was important for Student and why the accommodations were necessary for her to be able to be adequately assessed for her understanding and mastery of the material. Five additional accommodations were added to the IEP based upon Parents' requests.

13. In addition to the prior accommodations, the December 12, 2017 IEP offered new accommodations, including: teacher feedback for all assignments, quizzes, and tests must be provided within 3 class periods; teachers must make sure that it is clear to [Student] what she did right or wrong and provide feedback on her strengths and any gaps; test corrections for full credit will be allowed for all quizzes and tests without any grading penalty; corrections will be allowed for all assignments, quizzes, and tests for 100% credit; and tutoring would be provided as needed.

14. The IEP team's rationale for the program was to continue Student's progress in the general education setting with the necessary supports and accommodations to address Student's disabilities, especially visual processing, Irlen Syndrome, and dyslexia. Accommodations were particularly designed to address Student's difficulties demonstrating her level of understanding of the material in traditional testing settings, allowing for the use of test corrections, as opposed to test retakes as a foundational means of assessing Student. Accommodations were also designed to ensure that Student had the necessary levels of feedback, support, and

assistance on her work to allow her to successfully access her education and be fairly assessed as to her understanding and mastery of the material.

#### PRE-CALCULUS WITH MS. SHARP

15. Following the transfer, Student completed the first semester of pre-calculus with Ms. Sharp, including the semester final, and then continued with Ms. Sharp for the second semester of pre-calculus. Ms. Sharp obtained a bachelor's degree in mathematics with an emphasis in education from California State University, Long Beach in 2009. She taught at Long Beach since 2010. She was one of a group of approximately four teachers that taught the pre-calculus curriculum at Milliken, and who collaborated on assisting students taking the course.

16. Ms. Sharp was unaware that Student had an IEP until Student's father brought the IEP to her attention in an e-mail dated December 14, 2017. The e-mail referenced the class syllabus that Student had received and its variance from the accommodations in Student's IEP. Thereafter, Ms. Sharp reviewed Student's IEP accommodations.

#### IMPLEMENTATION OF ACCOMMODATIONS

17. Ms. Sharp refused to provide test corrections as described in the IEP, as they were understood by Parents and Student to include use of notes, textbooks, prior tests, and other relevant Student work. During hearing, Ms. Sharp testified that she was willing to implement the IEP accommodations only for the test retakes of questions answered incorrectly. However, she refused to allow Student any other variance on the assessment methodology, despite what was called for in Student's IEP. Ms. Sharp also disputed that teacher feedback for all assignments, quizzes, and tests, included any one-to-one assistance by teacher to Student, other than in passing during regular office hours, and testified that she did not reteach material to students individually. Ms. Sharp



provided slashes to indicate a wrong answer, and an annotation of the correct answer as feedback to Student on quiz and test performance, but no explanation of what was done incorrectly, although the IEP required Student to receive much more thorough and individualized feedback from the teacher.

## SECOND SEMESTER - FINAL EXAM

18. The final exam for the pre-calculus class was on Tuesday, June 12, 2018. Student's father had e-mailed Ms. Sharp on June 4, 2018, in an attempt to arrange an alternative method of testing Student on the final. Other than allowing the exam to be read aloud to Student, Ms. Sharp did not offer any other accommodations for Student. Student went to the doctor, and then the hospital, on June 12, 2018, due to stress. That same day, Millikan co-principal Alejandro Vega offered to allow Student to make up the final on Wednesday, June 13, 2018, and to allow assessment of Student both through written answers and by way of oral explanations provided by Student during the final. Student took the final on June 13, 2018, without any accommodations. She earned 43 points out of a possible 100 points on the final.

19. Subsequently, Student's father attempted to secure the opportunity for test corrections for Student for the class final. Following exchanges of e-mails, Dr. Erin Simon, Long Beach Director of Student Support Services, wrote a letter to Parents on July 19, 2018, offering to allow a test retake on one of two days in August 2018, immediately prior to the beginning of the 2018-2019 school year. Student did not accept a retake of the final as offered by Long Beach, and ultimately filed the instant request for due process.

## LOST POINTS

20. Student took five tests, including the second semester final, during the second semester of pre-calculus with Ms. Sharp. There were a total of 500 points

available on the five tests, and Student earned only 254 of those points. The other assignments (quizzes, homework, and the like) totaled 1309 points of which Student earned 1196 points. For the second semester, based upon Student's pre-calculus "Student Scoresheet", Student earned 1448 out of a possible 1809 points, or very slightly in excess of 80 percent. The "Student Scoresheet" listed Student's percentage score as 60 percent, and assigned her a grade of D<sup>4</sup>. Her final grade for the semester was a D.

21. On February 28, 2018, Student received a grade of 34 out of 100 points on the Chapter 4/5 test. She later added 20 points by completing a test retake. She also submitted test corrections for the Chapter 4/5 test to Ms. Sharp, but the corrections were not graded, and she was unable to improve her score on that test.

22. On March 19, 2018, Student received a grade of 33 out of 100 points on the Chapter 7 test. She later added 11 points by completing a test retake. She also submitted test corrections for the Chapter 7 test to Ms. Sharp, but the corrections were not graded, and she was unable to improve her score on that test.

23. On April 29, 2018, Student received a grade of 69 out of 100 points on the Chapter 9 test. She submitted test corrections for the Chapter 9 test to Ms. Sharp, but the corrections were not graded, and she was unable to improve her score on that test.

24. On May 25, 2018, Student received a grade of 44 out of 100 points on the Chapter 10 test. She did not have the opportunity to complete test corrections on the Chapter 10 test.

25. Student also submitted test corrections to Ms. Sharp for two quizzes. On the Chapter 8-1 quiz she scored 6 out of 20 points on the quiz, but her corrections were

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<sup>4</sup> There was no testimony addressing this apparent discrepancy at hearing. The issue for the case remains limited to whether Student received IEP accommodations.

not graded, and she was unable to improve her score on that quiz. On the Chapter 9-5 quiz, she scored 6 out of 19 points, but her corrections were not graded, and she was unable to improve her score on that quiz.

26. Father e-mailed Ms. Sharp on June 4, 2018, regarding allowing test corrections for Student and mistakenly did not attach the test and quiz correction attachments. He e-mailed Ms. Sharp again on June 5, 2018, this time attaching Student-corrected tests and quizzes for regrading by Ms. Sharp. Ms. Sharp responded on June 6, 2018, stating that she would allow only a partial retake of the tests, not test corrections, and indicating that she was "extending" the IEP to even allow the retake of only incorrect questions, not a full retake. Student's father sent two additional test corrections to Ms. Sharp on June 8, 2018, attaching test corrections for the Chapter 4/5 test and the Chapter 9 test to the e-mail.

27. Student tried to hand deliver the corrections to Ms. Sharp, but at the time of the hearing, Ms. Sharp had no recollection of receiving them. Ms. Sharp received the test corrections for the above-identified test and quizzes well before the end of the semester on June 14, 2018. Her testimony to the contrary at hearing is not found to be credible.

#### STUDENT'S GRADES

28. On her December 5, 2018 unofficial high school transcript, Student had an overall grade point average of 3.74, and an ACA course grade point average of 3.68. With the exception of classes/grades in team sports for swimming and water polo, and as an office assistant for two semesters in 11<sup>th</sup> grade, all of Student's classes were so-called "A-G" courses, and included two honors classes, three AP classes, and four accelerated classes. She had completed Spanish 1-2 and Algebra 1-2 in middle school prior to entering Millikan High School for ninth grade.

29. For the first semester of Student's ninth grade year, Student earned an A

in Draw & Paint 1-2; an A in Photo 1-2; an A in English 1-2; an A in Spanish 3-4; a B in Geometry; an A in Water Polo; and an A in Biology 1-2. She completed 35 units and earned a grade point average of 3.83 for the semester. For the second semester of Student's ninth grade year, Student earned an A in Draw & Paint 1-2; an A in Photo 1-2; an A in English 1-2; an A in Spanish 3-4; a B in Geometry; an A in Water Polo; and an A in Biology 1-2. She completed 35 units and earned a grade point average of 3.83 for the semester.

30. For the first semester of Student's 10<sup>th</sup> grade year, Student earned an A in English 3-4; an A in Spanish 5-6; an A in AP World History; an A in Algebra 2; an A in Water Polo; an A in Chemistry 1-2; and an A in AP Environmental Science. She completed 35 units and earned a grade point average of 4.00 for the semester. For the second semester of Student's 10<sup>th</sup> grade year, Student earned an A in English 3-4; an A in Spanish 5-6; an A in AP World History; an A in Algebra 2; an A in Water Polo; an A in Chemistry 1-2; and an A in AP Environmental Science. She completed 35 units and earned a grade point average of 4.00 for the semester.

31. For the first semester of Student's 11<sup>th</sup> grade year, Student earned an A in English 5-6, an A in Law Intro, a B in AP US History, an A in Office Assistant, a C in Pre-Calculus; an A in Water Polo, and an A in Physics 1-2. She completed 35 units and earned a grade point average of 3.40 for the semester. For the second semester of Student's 11<sup>th</sup> grade year; Student earned an A in English 5-6; an A in Law Intro; an A in AP US History; an A in Office Assistant; a D in Pre-Calculus; an A in Water Polo, and a B in Physics 1-2. She completed 35 units and earned a grade point average of 3.20 for the semester.

#### FINITE MATH ASSESSMENT BY MR. LEWIS

32. Student was enrolled in Andrew Lewis' finite mathematics class for the first semester of the 2018-2019 school year. Mr. Lewis held a bachelor's degree in Economics

and a master's degree in mathematics. He also held a single subject teaching credential in math. He taught high school math for 21 years, including approximately 12 years at Long Beach. He attended Student's most recent IEP team meeting on December 12, 2018, as one of her general education teachers. He wrote the teacher summary included in the IEP. He reviewed her December 12, 2017 IEP, at the beginning of the 2018-2019 school year, and was familiar with Student's accommodations.

33. Mr. Lewis continually developed strategies and practices for assessing Student in his class. Initially, he marked errors on Student's tests and then discussed and conferenced with Student on the errors, reinforcing the materials with white board examples that he and Student worked through together. Student would then return later for a test retake with prior incorrect problems and answers available to Student. Student provided written answers to him and then explained her reasoning process verbally.

34. The initial assessment protocols Mr. Lewis developed evolved into a system that he felt represented a more complete assessment of Student. He e-mailed himself test notes for Student's initial attempt at assessment in a given area, and prepared a printed assessment from the notes that was given to Student to complete at home. Student would return with written answers and discuss the questions with him and provide a verbal explanation of her reasoning. His intent was to assess Student's understanding and mastery of the material and to try and engender synthesis of the material in Student. He never refused any request by Student to undertake test corrections of her work.

#### TEST CORRECTION VERSUS TEST RETAKE

35. The dispute at the heart of this case involved whether a functional distinction existed between a test correction and a test retake. Testimony from Student's witnesses regarding the difference between test correction and a test retake was more

credible than testimony from Long Beach's witnesses. Test correction consisted of Student having the opportunity to correct her incorrect work following discussion of her mistakes, and re-teaching of the material by the teacher, through the use of outside materials to show all of the required analysis along with the correct answer, to the incorrect questions.

36. In particular, Student and her father testified credibly that Student had been allowed to do test corrections, including the correction of incorrect answers on test and quizzes using notes, books, and other materials, in other classes, including in Student's 10<sup>th</sup> grade algebra II class. Student testified credibly that her teacher sent tests home in a sealed envelope to correct in her 10<sup>th</sup> grade chemistry class. Both Student's and Father's explanation that a test retake simply meant retaking a revised version of a failed test or a retake of only the incorrect problems also adheres to plain meaning interpretation of the distinction. Student's father testified credibly that he engaged in a lengthy discussion and explanation of the difference during Student's December 12, 2017 IEP. Mr. Lewis' testimony that his test correction assessment of Student included alternative means of assessment, and the use of outside materials, following intensive re-teaching and teacher feedback, corroborated Student's and Father's testimony.

37. Long Beach's position that the distinction between test correction and a test retake rested merely on the difference between retaking the entire failed exam or retaking only the questions answered incorrectly lacks credibility. Ms. Sharp's testimony that only her extending the meaning of test corrections allowed the latter interpretation was significantly less credible. Similarly, Mr. Quintana and co-principal Vega both testified, less than credibly, that the distinction was simply the extent of the amount of the test that was to be retaken.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>5</sup>

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.,<sup>6</sup> Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that 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 employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the

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<sup>5</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>6</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In 1982, the United States Supreme Court rendered the seminal and guiding decision in special education law. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034; 73 L.Ed.2d 690] (*Rowley*)). In the decision, the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) Instead, the Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the child's IEP, then the assumption is that the child's program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a "basic floor of opportunity." (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a "potential-maximizing education." (*Id.* at p. 197, fn. 21.) Stated otherwise, the educational agency must offer a program that "confers some educational benefit upon the handicapped child." (*Id.* at p. 200.)

4. The Supreme Court clarified its ruling in *Rowley* in the recent case of *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_ [137 S.Ct. 988, 996] (*Endrew F.*). The Court clarified that "[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable



the child to achieve passing marks and advance from grade to grade.” (*Id.* at 999 (citing *Rowley, supra*, 458 U.S. at pp. 203-04).) The Court went on to say that the *Rowley* opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to “progress smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances . . . ” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*) The Ninth Circuit recently affirmed that its FAPE standard comports with *Andrew F. (E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

5. 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, evaluation, 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, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student, as the complaining party, bears the burden of proof.

## FAILURE TO IMPLEMENT IEP ACCOMMODATIONS

7. Student contends that Long Beach denied her a FAPE by failing to implement the accommodations described in her two applicable IEPs for the 2017–2018 school year. Long Beach contends that the accommodations were implemented. Long Beach further contends that Student’s understanding of her accommodation allowing test correction would amount to a modification of the curriculum, rather than an alternative means of assessing Student’s understanding and mastery of the subject academic material.

8. A school district must implement all components of a student’s IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was “material,” which means that the services provided to a disabled child fall “significantly short of the services required by the child’s IEP.” (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) “There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.) “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” (*Van Duyn, supra*, 502 F.3d at p. 822.)

9. The methodology used to implement an IEP is left up to the district’s discretion so long as it meets a student’s needs and is reasonably calculated to provide

meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141,1149-1150; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 84 (*citing Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, 458 U.S. at pp. 207-208.) However, once a service, system, or device is included in a student's IEP, then the district is obligated to provide that component. (Ed. Code, § 56345, subd. (c).) Following the development of the IEP, the district must provide required services as soon as possible. (34 C.F.R. § 300.323(c)(2).)

10. Prior to the placement of pupils with exceptional needs in general education academic classes, the school district shall ensure that the teachers have access to the pupil's IEPs, are knowledgeable of the content of their IEPs, and are informed of their specific responsibilities related to implementing the pupil's IEP, and the specific accommodations, modifications, and supports that shall be provided for the pupil. (Ed. Code, § 56347.)

11. Here, the December 20, 2016 and December 12, 2017 IEPs are the operative IEPs for the 2017-2018 school year at issue. The relevant portions of each IEP called for Student to receive the above-referenced accommodations, including test correction and test retakes, both without grade penalty and for full credit in both testing and non-testing situations. Student and her teachers also had flexibility in both the time needed for testing and in the means of assessing her knowledge of the material.

12. The weight of the evidence demonstrated that Long Beach did not implement accommodations called for in the December 20, 2016 and December 12, 2017 IEPs. Student's pre-calculus teachers failed to materially implement Student's IEP

accommodations, including allowing test corrections and ensuring that Student had the necessary levels of feedback, support, and assistance on her work to allow her to successfully access her education and be fairly assessed as to her understanding and mastery of the material.

13. Mr. Quinones failed to allow Student to retake tests and quizzes or allow Student to redo work for full credit. Additionally, Mr. Quinones failed to grade or return four of Student's quizzes or tests, depriving Student of the opportunity to retake the quizzes or tests if need be, and denying Student the opportunity to earn a grade on the work at all.

14. Of greater concern was Ms. Sharp's refusal to implement the accommodations materially and with fidelity. She refused to allow Student to undertake test corrections. She also failed to provide Student with the academic support called for in the IEP. It may be that Ms. Sharp did not appreciate the binding nature of the IEP accommodations or that she felt she lacked the resources to furnish the needed amount of time to Student by way of explanation or re-teaching, but neither understanding excused her obligations to Student under the IEP. Student's test and quizzes were returned to her without adequate explanation of what she did wrong, or the necessary face-to-face teacher time to explain or reteach the areas Student did not understand.

15. An IEP is the means by which a student with special education eligibility is afforded access to their education, and as explained above, is designed to address a student's individual needs. Here, Student had several significant disabilities to overcome, and yet, she had earned a grade point average in excess of 3.90 in her first two years in high school. Her struggles in the two semesters of pre-calculus, resulting in the two lowest grades of her high school career, underscore the failure of the pre-calculus teachers to materially implement her accommodations. Long Beach's failure to ensure that Student was afforded the opportunity to access her education by failing to

implement her IEP accommodations constituted a material breach of her IEP and a denial of a FAPE for that reason.

16. Long Beach asserts that the accommodations as understood by Student, particularly the test corrections, amounted to an unfair and improper modification of the curriculum. This assertion misunderstands the thrust of the test correction accommodation, particularly as understood in the context of the totality of Student's accommodations. Those accommodations were designed to assist Student in overcoming her disabilities and accessing her education, not to afford her some unfair advantage over her typical peers. The accommodations were designed to allow Student, in light of her disabilities, to be fairly assessed by her teachers on the material in question, and to the standards as promulgated by the State of California. The implementation of the accommodations, as exemplified by Mr. Lewis' strategies for assessment of Student, underscore that the accommodations could be implemented without compromising academic integrity, while fairly assessing Student's understanding and mastery of the subject material.

## REMEDIES

1. Student proved by a preponderance of the evidence that Long Beach materially failed to implement the accommodations called for in the December 20, 2016 and December 12, 2017 IEPs, and thus denied Student a FAPE.

2. As a remedy, Student requested an order that Long Beach properly consider the test corrections made by Student, and submitted to Ms. Sharp, in issuing Student's final grade in the second semester of her pre-calculus course during the 2017-2018 school year. Student also requested an order that Long Beach allow Student to complete test corrections of her final exam from the second semester of her pre-calculus course during the 2017-2018 school year, and apply any improvement in test score to the calculation of Student's grade.

3. 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); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). 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.*, 557 U.S. 230, 244, n. 11.) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-371.) When school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA. ALJs have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; *Forest Grove School Dist. v. T.A., supra*, 557 U.S. at 244, n. 11.)

4. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County School Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

5. The IDEA does not require compensatory education services to be awarded directly to a student, so school district staff training can be an appropriate remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained

concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy violations that may benefit other pupils. (*Ibid.*)

6. Here, Student's requested remedies related to consideration of test corrections previously submitted to Ms. Sharp, along with an opportunity for Student to undertake test corrections of the pre-calculus course final, and to have both applied to her second semester grade, are reasonable and equitable remedies under the facts and circumstances of this case. Unfortunately, at this late date, with college applications having been long ago submitted, any upward change of Student's grade may be largely moot. Nonetheless, Student is entitled to the opportunity to earn the grade to which she was entitled under the terms of her IEP accommodations, and nothing less.

7. As discussed, above, there is broad discretion afforded an ALJ in fashioning equitable remedies. Here, given the apparent confusion or reluctance of general education teachers to implement Student's IEP accommodations in the general education classroom at Milliken High School, Long Beach, some training is warranted.

## ORDER

1. Long Beach shall grade Student's test corrections as submitted by way of the e-mails from Student's father to Ms. Sharp on June 5, 2018 and June 8, 2018, as further reflected in Long Beach Exhibits D-14 and D-19, and apply any additional points earned to the calculation of Student's pre-calculus grade for the second semester of the 2017-2018 school year. Such grading of the previously submitted test corrections shall be completed within 30 days of the issuance of this decision.

2. Long Beach shall arrange with Student within 30 days of the issuance of this decision for the submission by Student to Long Beach, within a reasonable amount of time not to exceed a further 30 days, of test corrections for the semester final test for the second semester of the 2017-2018 school year. Long Beach is to apply any additional points earned to the calculation of Student's pre-calculus grade for the

second semester of the 2017-2018 school year.

3. Long Beach shall issue Student's revised course grade, if applicable, for the second semester of the 2017-2018 school year within 30 days of the receipt of Student's test corrections of the course final, as described in paragraph 2 of this Order, above.

4. Long Beach shall provide two hours of training to staff and administrators to ensure that teachers timely receive IEP's for students they will be teaching and are trained in the implementation of IEP accommodations. Training participants shall include administrators and staff who oversaw or supervised Student's special education program during the 2017-2018 school year, and all general education math teachers who taught Student during the 2017-2018 school year.

#### PREVAILING PARTY

Pursuant to 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. Student prevailed on the only issue heard at hearing.

#### RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: March 29, 2019

/s/

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TED MANN

Administrative Law Judge

Office of Administrative Hearings