

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2018030412

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 9, 2018, naming Los Angeles Unified School District. LAUSD served its written response to Student's complaint on March 30, 2018. Administrative Law Judge Robert G. Martin heard this matter in Van Nuys, California on May 3, 7, 8, 9 and 10, 2018.

Diane Weissburg, Attorney at Law, represented Student. Mother attended the hearing on behalf of Student. Student did not attend the hearing. Karl Widell, Attorney at Law, represented LAUSD. LAUSD Litigation Coordinator Natalie Hofland attended the hearing on behalf of LAUSD.

At the parties' request, OAH continued the matter to June 11, 2018, for written closing arguments. The record closed on June 11, 2018, upon timely receipt of closing briefs from the parties.

ISSUE¹

Did LAUSD predetermine Student's eligibility category for special education as autism/autistic-like behavior, by the time of Student's individualized education program team meeting held February 8, 2018, and thereby deny Student a free appropriate public education by:

- a. Significantly impeding Parent's opportunity to participate in the decision-making process; or
- b. Causing Student to be deprived of educational benefits?

SUMMARY OF DECISION

Student failed to prove that LAUSD predetermined Student's primary eligibility category. Student's IEP team initially discussed and agreed that Student should be made secondarily eligible for special education under the category of autism at the suggestion of Student's counsel, to address Mother's concerns over Student's difficulty relating to others. The team's subsequent decision to make autism Student's primary eligibility

¹ Student's closing brief argued new claims not asserted in Student's complaint or addressed at the prehearing conference. To the extent that evidence potentially relating to these claims was introduced at hearing, Student's counsel represented at hearing that the evidence was relevant to, and offered to prove, Student's claim of predetermination. Accordingly, LAUSD did not question witnesses with respect to the new claims raised in Student's closing brief, nor address these claims in its closing brief. This Decision does not address claims raised for the first time in Student's closing brief, since both sides did not have an opportunity to question witnesses and argue the new claims in their closing briefs. (See, e.g., *H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.] (*H.B v. Las Virgenes*)).

category was based on its understanding that Student's greatest needs were in the areas of socialization and communication, an understanding acquired in the course of discussing and developing Student's present levels of performance and IEP goals. The rationale for making autism Student's primary eligibility category to best identify his most significant needs was thoroughly discussed at Student's IEP team meetings. Mother's view that Student's most significant needs arose from his specific learning disability was forcefully expressed by Student's counsel during the meetings, and carefully considered and weighed by Student's IEP team. Student is not entitled to relief in this matter

FACTUAL FINDINGS

1. At all times relevant to the issue here, Student was a ninth-grader residing within the boundaries of LAUSD, eligible for special education, and privately-placed in a non-public day school by Mother, Student's sole educational rights holder. LAUSD became responsible for providing Student a FAPE in November 2017.

STUDENT'S SPECIAL EDUCATION PRIOR TO LAUSD'S RESPONSIBILITY TO PROVIDE STUDENT A FAPE

2. Student was first found eligible for special education in 2008 by Rosemead School District under the category of speech and language impairment. Student was placed in a general education classroom, and received speech and language therapy. To address social interaction problems, including difficulty socializing with his peers or understanding their point of view, Student received counseling starting in 2009. Parents exited Student from special education in September 2012, but in 2015 sought renewed eligibility for Student, which Rosemead granted. Student's September 2015 IEP from Rosemead offered Student general education placement with speech and language services.

Student's Placement at Westmark School

3. In December 2015, pursuant to a settlement, Rosemead agreed to fund placement for Student at Westmark School, a private school in Encino, California, for Student's 8th grade 2016-2017 school year. Parents agreed that if Student enrolled at Westmark, he would be considered a parentally-placed private school student, and his stay-put placement would not be Westmark, but the placement and services in his September 2015 IEP.

4. Student began attending Westmark in August 2016. In September 2016, Mother, who was divorced from Father, purchased a condominium in Encino, near Westmark, and within LAUSD's boundaries. Father continued to live in Rosemead.

5. At a January 18, 2017 hearing in the family law division of the Los Angeles Superior Court, Mother testified that she lived in Encino, and she obtained an order granting her sole legal custody of Student with respect to educational decisions only. Father continued to live in Rosemead, and otherwise continued to share physical and legal custody of Student.

Spring 2017 Assessments and IEP

6. In February and March 2017, in anticipation of a May 2017 IEP team meeting, Westmark assessed Student's academic achievement. Student's grades were in the average range. Mother obtained a private central auditory processing evaluation from doctor of audiology Bea Braun, and a private psychoeducational assessment of Student from licensed clinical psychologist Marguery Lyvers. Dr. Braun found that Student had a central auditory processing disorder consisting of a slight deficit in his ability to process sounds received in his left ear when different sounds were simultaneously presented to his right ear. Dr. Lyvers diagnosed Student as having a mixed receptive-expressive language disorder, deficits in executive functioning and verbal memory, and a specific learning disability in reading. Dr. Lyvers opined that

Student required frequent prompting and a small class structure.

7. In May, 2017, Rosemead held a transition IEP team meeting for Student with representatives of El Monte Union High School District, the high school district for students graduating from 8th grade in Rosemead. El Monte questioned whether Mother's residence in Encino made LAUSD responsible for providing Student a FAPE, since Mother was Student's sole educational rights holder.

8. El Monte arranged a July 13, 2017 IEP team meeting for Student that was to include representatives of LAUSD. Parents and Westmark had never contacted LAUSD about Student. LAUSD first learned of Student in June 2017 when contacted by El Monte. On July 12, 2017, LAUSD offered to conduct assessments of Student. LAUSD sought a teleconference with Student's attorney, Ms. Weissburg, to discuss which assessments needed to be done, schedule a school visit for Parents, and schedule an IEP team meeting after Mother had an opportunity to visit possible LAUSD school placements for Student.

9. Mother at this time had researched LAUSD's programs and concluded that LAUSD could not offer Student an appropriate placement and services. Mother intended that Student would continue at Westmark through high school.

10. On July 12, 2017, Student cancelled the planned July 13, 2017 IEP team meeting. Student filed a complaint in OAH Case number 2017070535, naming LAUSD and El Monte. Student contended both districts had failed in their child find obligations and denied Student a FAPE for the 2017-2018 school year by failing to timely assess Student in all areas of suspected disability, review the assessments at an IEP team meeting, and make an offer of FAPE prior to the end of the 2016-2017 school year. Student sought continued funding at Westmark as a remedy.

LAUSD'S OBLIGATION TO PROVIDE STUDENT A FAPE

11. Following a bifurcated hearing in case number 2017070535, OAH decided in Phase I that Student resided within LAUSD's boundaries as of January 18, 2017, the date on which Mother – Student's sole educational rights holder – testified in Superior Court that she resided in Encino.

12. Following OAH's residency determination, Mother delivered enrollment documents to LAUSD's Reseda High School on November 8, 2017, with a signed LAUSD assessment plan. On her consent for assessment, Mother added areas of suspected disability for LAUSD to assess, including central auditory processing disorder, mixed receptive-expressive language disorder, specific learning disorder in written expression and reading, and deficits in expressive functioning and verbal memory, as well other cognitive deficits specified in prior assessment reports she attached to the plan.

13. Following Phase II of the hearing, OAH held that LAUSD became responsible for providing Student a FAPE as of November 8, 2018, when Mother delivered enrollment documents to LAUSD. Prior to that time, LAUSD had complied with its child find obligations, and had reached out to Mother when it became aware of Student's presence in LAUSD, but Mother had not wanted LAUSD to either assess Student or offer him services, and had not asked for, or agreed to receive, a FAPE offer from LAUSD.

LAUSD ASSESSMENTS

14. In December 2017 and January 2018, LAUSD assessed Student's needs in the areas of psychoeducation, speech and language, central auditory processing, and academics.

Psychoeducational Assessment

15. LAUSD school psychologist and board-certified neuropsychologist Shelly Berger assessed Student's psychoeducational needs. Ms. Berger has 18 years' experience as a school psychologist. She earned a master's degree in education in the field of human development and psychology from Harvard University in 1993, and a pupil personnel services credential in school psychology in 2000. Ms. Berger prepared a thorough, detailed 45-page report for review by Student's IEP team.

16. Ms. Berger reviewed Mother's concerns, as stated in the consent to assessment that Mother returned to LAUSD, Student's special education history, two 2015 psychoeducational assessments from Rosemead, Dr. Lyver's February 2017 neuropsychological evaluation, and El Monte's June 2017 psychoeducational assessment. Ms. Berger learned that Student had a history of language struggles as well as difficulty working independently academically. He had challenges with social skills (understanding and interpreting peer's social cues, needs of peers or peers' emotions), coping with stress, remaining focused when competing noises are around him and had struggled with impulsivity and hyperactive behaviors.

17. Ms. Berger developed an assessment of Student that included approximately two hours of observation of Student in class and during lunch at Westmark, interviews of Student and his parents, teacher interview questionnaires, observations of Student in the course of administering to him seven standardized tests over four days, three standardized rating scales completed by Student's reading and algebra teachers, and Mother (Father declined to complete any rating scales), and four scales completed by Student's reading and algebra teachers, Mother and Student. The assessment was designed to evaluate potential eligibilities of autism/autistic-like characteristics, specific learning disability, and other health impairment.

18. Ms. Berger observed Student exhibiting typical behaviors during reading class and unstructured lunch time at Westmark. At lunch, Student sat at a table with a

girl and two boys. He ate while talking with the female student. He looked the female student in the eye, and used facial expressions and nods as well as language to communicate with her. He also engaged in face -to-face conversation with another student, established good eye contact and engaged in what appeared to be a comfortable back-and-forth social communication style.

19. Conversely, Student's teachers reported that he struggled with poor peer relations and seemed unhappy or moody. He was often withdrawn from socializing with other students who tried to include him in conversations, and often appeared lethargic and withdrawn from social interactions. He seemed indifferent about most topics other students like to talk about and often said "I don't care" to other Student's when they tried to engage him in conversation.

20. During his test sessions with Ms. Berger, Student's spontaneous conversation appeared labored, uncomfortable, and arduous. He seemed confused about why Ms. Berger would want to converse spontaneously; as if he thought there was no purpose for social conversation during the assessment. In his standardized tests, Student scored in the below average to well below average ranges in the areas of attention (cognitive flexibility), visual processing (memory), auditory processing (immediate memory and phonological processing), association, conceptualization and expression. Student scored below grade level in academic assessments of listening comprehension, reading comprehension, and written expression.

21. Social-emotional rating scales revealed clinically significant elevations for symptoms and behaviors including peer relations, cognitive flexibility, emotional problems (negative mood) and peer socialization at school. At home, Student exhibited clinically significant elevations in functional communication, inattention, hyperactivity/impulsivity, learning problems, executive functioning, peer relations, cognitive flexibility, inhibitory control, initiation, organization, planning, self-monitoring,

working memory, separation anxiety, panic, social communication, unusual behaviors and self-regulation.

22. Ms. Berger used the Developmental NEuroPSYchological Assessment-II (NEPSY-II) Affect Recognition Test to assess Student's ability to read emotional expressions in others, and the NEPSY-II Theory of Mind Test to measure his ability to recognize thoughts, ideas and feelings different from his own. Student had difficulty identifying emotional faces, often identifying a face as happy when it was not. This indicated that Student had difficulty reading emotions in children—a very important skill for maintaining reciprocal social interactions and reading non-verbal cues. Student also exhibited a well-below average ability to understand another person's perspective when given a social scenario, a skill integral to successful social interactions. Ms. Berger believed these deficits might be contributing to Student's social struggles reported since elementary school.

23. Ms. Berger used the Gilliam Autism Rating Scales, Third Edition, to assess the extent to which Student exhibited restricted or repetitive behaviors, social interaction, social communication, emotional responses, cognitive style, and maladaptive speech. Scaled scores from Student's reading teacher rated the probability of autism spectrum disorder as "unlikely," those from his algebra teacher rated the probability as "probable," and those of Mother as "very likely."

24. Ms. Berger concluded that Student was eligible for special education under the category of specific learning disability based on a processing disorder in attention, visual processing, auditory processing and association, conceptualization and expression. This disorder negatively impacted Student's skills in basic reading, reading comprehension, and written expression.

25. Ms. Berger was familiar with, and ultimately included in her report, the section of the California Code of Regulations that sets forth the criteria for special

education eligibility based upon autism.² In Ms. Berger's opinion, Student was not eligible for special education under the criteria for autism contained in the Regulations.

26. Ms. Berger noted Mother's responses to rating scales. These indicated Student's verbal and nonverbal communication, and social interaction, were significantly affected at home, and Student also exhibited characteristics often associated with autism, including resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. However, Ms. Berger personally observed Student communicate and interact socially with peers on the day she observed Student in class and at lunch at Westmark. Although teacher rating scales showed elevated scores in some areas, Ms. Berger ultimately concluded that Student's difficulties with communication and social interaction were not significantly affecting Student's verbal and nonverbal communication and social interaction at school.

27. Ms. Berger prepared a draft psychoeducational assessment report to be presented at Student's IEP team meeting to be held January 30, 2018. LAUSD sent a copy of Ms. Berger's draft report to Ms. Weissburg on January 26, 2018.

Speech and Language Assessment

28. LAUSD speech and language pathologist Pallavi Hullenahalli assessed Student's needs in speech and language. Based on interviews, observation, and

² The California Code of Regulations defines autism as: "[A] developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." (Cal.Code Regs., tit. 5, § 3030, subd. (b)(1).)

standardized testing, Ms. Hullenahalli concluded that Student had difficulties in the area of inferencing and language pragmatics that impacted his ability to form and maintain appropriate peer relationships in school. She concluded that Student met the special education eligibility criteria for speech and language services, and recommended speech and language services to address goals in the area of language pragmatics.

29. Ms. Hullenahalli prepared a draft report for presentation at Student's IEP team meeting. LAUSD sent a copy of Ms. Hullenahalli's draft report to Ms. Weissburg on January 26, 2018.

Central Auditory Processing Disorder/Audiology Assessment

30. On January 9, 2018, Student met with LAUSD audiologist Dr. Susan Diaz-Rempel at LAUSD's auditory processing center for the first day of a two-day audiological evaluation, impedance test, otoacoustic emissions test, and central auditory processing evaluation. Dr. Diaz-Rempel holds a doctorate in audiology, and is trained and qualified to perform all of the above tests.

31. After the first day of testing, Dr. Diaz-Rempel received a phone call from Father, who said that Student had told him Mother told Student to give wrong answers here and there during Ms. Diaz-Rempel's testing. In testimony at hearing, Mother did not deny telling Student to give wrong answers. Because valid test results could not be obtained without truthful student answers, Dr. Diaz-Rempel discontinued her testing. Dr. Diaz-Rempel compared the test results she had already obtained to those obtained by Dr. Braun in March 2017, and by audiologist Sherri Hoglin in June 2015. She found that all three tests showed a slight left ear weakness and integration disorder. Because of the questions regarding the validity of the test results she obtained, Dr. Diaz-Rempel did not reach a firm conclusion as to whether Student had a central auditory processing disorder. She recommended Student's IEP team review and discuss her current findings, and review past records and present goals to address Student's needs as the team

found appropriate. Dr. Diaz-Rempel prepared a report that included a summary of prior assessor's test results, which LAUSD sent to Ms. Weissburg prior to Student's January 30, 2018 IEP team meeting.

Academic assessment

32. LAUSD special education teacher A. Samuel Pitts observed Student at Westmark and assessed Student's academic achievement. Mr. Pitts' testing revealed some deficits in Student's reading comprehension that LAUSD potentially needed to address through special education services. Mr. Pitts prepared an academic assessor's report. The results of his observations and testing were incorporated in Ms. Berger's psychoeducational evaluation. LAUSD sent Ms. Weissburg a copy of Mr. Pitt's academic report on January 29, 2018.

2018 IEP TEAM MEETINGS

33. Student's IEP team convened on January 30, 2018, and February 5, 8, and 28, 2018. The IEP team was scheduled to re-convene on March 8, 2018, but LAUSD cancelled that meeting when Mother declined to participate.

January 30, 2018 IEP Team Meeting

34. LAUSD's first IEP team meeting for Student convened on January 30, 2018, from approximately 8:00 a.m. to 3:00 p.m. Father, Mother and Ms. Weissburg attended, as did Ms. Berger, Ms. Hullenahalli, Mr. Pitts, LAUSD administrative designee Lesley Shapiro, LAUSD general education teacher Erika Lai, LAUSD transition teacher Julie Ordin, LAUSD least restrictive environment specialist Amelia Cumulada, LAUSD audiologist Patty Klein, LAUSD school nurse Zenaida Alejandria, and LAUSD's attorney Mary Kellogg. Student's pediatrician of nine years, Dr. Grover, participated by telephone for a portion of the meeting. Prior to this and every subsequent team meeting, Ms. Shapiro notified Westmark of the meeting and invited Student's private school teachers

to attend, but a Westmark representative participated only at the IEP team meeting on February 28, 2018, by telephone.

35. At the January 30 meeting, Student's attorney, Ms. Weissburg, introduced the question of whether Student should be eligible for special education under the category of autism. After the IEP team reviewed LAUSD's assessment reports and Student's present levels of performance, it turned to the issue of Student's eligibility for special education. Ms. Berger's explanation of Student's test results in auditory processing and learning disabilities was interrupted by the arrival of Nurse Alejandria. Student's attorney, Ms. Weissburg, explained that she had asked that Ms. Alejandria attend the IEP team meeting because Ms. Weissburg was concerned about Student's inability to look someone in the eye, and wanted to know "whether there were some other autistic-like behaviors that were right underneath the surface and whether you had observed any of those." Ms. Alejandria said that she had met Student briefly while interviewing Mother on health issues and had not noticed anything odd. After a few more questions for Ms. Alejandria, Ms. Weissburg placed a call to Student's pediatrician, Dr. Grover, so that he could present his opinions to the IEP team regarding Student's symptoms and diagnoses, and services Student might need. Among other questions, Ms. Weissburg asked if Dr. Grover had ever observed autistic-like behaviors in Student, such as an inability to look someone in the eye. Dr. Grover said he had not.

36. After excusing Dr. Grover and Nurse Alejandria, the team returned to the question of Student's eligibility. Ms. Weissburg explained that Mother had identified some additional concerns including Student's inability to look somebody in the eyes and other behaviors. Ms. Weissburg wondered whether Student's behaviors met the criteria of autistic-like behaviors, mixed in with other disabilities

37. In response to Ms. Weissburg's questions, Ms. Berger and the IEP team reviewed ways in which Student exhibited difficulties with verbal and nonverbal communication and social interaction. Ms. Berger described Student's difficulties

recognizing emotional faces and taking another person's perspective in social situations, and Student's failure to understand why Ms. Berger would want to engage him in casual conversation. She noted that Student had told transition teacher Ms. Ordin that social development was his primary concern with respect to his future. She opined that Student needed direct services to address his ability to read social situations, social cues and non-verbal communication, including opportunities and structured situations to practice social skills.

38. Ms. Weissburg agreed. She thought Student's social deficits were longstanding problems that had never been addressed and would affect Student more as he got older. LAUSD attorney Ms. Kellogg noted that the IEP team had the job of identifying an eligibility category as the entry point for special education that best encapsulated Student's needs, while understanding that Student had complex needs. Ms. Weissburg thought the team should approach this task by first identifying Student's primary problem and the appropriate intervention, and then considering what eligibility category, or "label," should be applied to Student to ensure that he received the appropriate intervention. Observing that "sometimes you can't provide the intervention without the label," Ms. Weissburg asked Ms. Berger what direct services she would recommend for Student, in what environment, over what period of time, and whether Student would need a particular eligibility category to get the placement and services. Ms. Weissburg expressed concern about the emotional impact a label could have on Student.

39. A vote at this point in the meeting confirmed the IEP team's consensus that Student was eligible for special education under one or more eligibility categories. Ms. Kellogg asked what category Ms. Weissburg thought would best encapsulate Student's issues, and Ms. Weissburg reiterated her belief that the team should instead select the eligibility category necessary to get Student appropriate services for his needs. "[T]he question is, how do you get him the services he needs so he can perform

in a regular environment? If you want to be a surgeon you . . . better be able to talk to people, to look them in the eye, to have social interaction skills, to communicate with people.”

40. Ms. Kellogg assured Ms. Weissburg that Student’s needs, not his eligibility category, would drive the services LAUSD provided Student. Ms. Weissburg asked if it was possible to identify multiple eligibility categories without identifying a primary category. Ms. Kellogg confirmed that LAUSD required that a primary eligibility category be identified on Student’s IEP.

41. Ms. Weissburg responded that the IDEA did not require a district to identify a primary eligibility category.³ She suggested that, if one was necessary, Student should be given a primary eligibility category of specific learning disability, with autistic-like behaviors as a secondary category, because Student’s autistic-like behaviors were not as visible as his processing disorder. Ms. Kellogg explained that Student’s primary eligibility category would be indicated on the second page of his IEP, and the notes would identify additional eligibility categories in which Student would qualify for special education.

42. Ms. Shapiro felt that an autism eligibility would best convey Student’s needs. She asked least restrictive environment specialist Ms. Cumulada how the LAUSD’s social skills classes worked. Ms. Cumulada said that the social skills classes were embedded in certain classrooms, but were available to other students per their IEP. Ms. Cumulada did not say that LAUSD could not provide social skills classes or counseling for students not “labeled with autism,” as Student has contended.

³ “Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability . . . and . . . needs special education and related services is regarded as a child with a disability. . . .” (20 U.S.C. § 1412(a)(3)(B).)

43. At the January 30, 2018 meeting, Mother, Ms. Weissburg, and the LAUSD team members, agreed to qualify Student for special education under a primary eligibility category of specific learning disability, with the IEP notes to indicate that Student also qualified for special education under the eligibility category of "autistic-like behaviors."

44. Student's IEP team did not finish his IEP on January 30, 2018. The IEP team agreed to reconvene on February 5, 2018.

45. Following the January 30, 2018 IEP team meeting, Ms. Berger revised her psychoeducational report. Based on the information and discussions regarding Student's needs at the team meeting, Ms. Berger concluded that Student did qualify for special education under the category of autism, based on his difficulties with verbal and nonverbal communication and social interaction. Ms. Berger did not change the report's conclusion that Student also qualified for special education under the category of specific learning disability.

February 5, 2018 IEP Team Meeting

46. On February 5, 2018, Student's IEP team reconvened for a second day. This meeting focused on Ms. Hullenahalli's speech and language assessment, and developing speech and language goals. These goals primarily addressed Student's problems with social skills, understanding the feelings of others, and overall communication.

47. Student's IEP team meeting did not conclude on February 5, 2018. The IEP team agreed to reconvene on February 8, 2018.

February 8, 2018 IEP Team Meeting

48. On February 8, 2018, Student's IEP team reconvened for a third day. At the start of the meeting, Ms. Shapiro re-opened the issue of whether Student's primary

eligibility category should be autism instead of specific learning disability, and the team discussed the issue for the next half-hour. Ms. Shapiro noted that Student's IEP team had spent several hours on February 5, 2018, working on speech and language goals focused on improving Student's goals to improve Student's communication and social skills, where he exhibited deficits that resembled challenges faced by a student with autism. Based on the IEP team's two days of discussions on January 30, 2018 and February 5, 2018, Ms. Shapiro believed that characteristics of autism were impacting Student more than issues arising from his specific learning disability.

49. Mother and Ms. Weissburg objected to switching the previously agreed-upon priority of the two categories. Invoking Ms. Kellogg's assurance from the January 30, 2018 meeting that labels would not drive Student's services, Ms. Weissburg argued that, as far as LAUSD was concerned, there should be no need to label Student as autistic rather than having a specific learning disability, when both disabilities could be addressed regardless of their relative priority. Mother remained concerned that making autism his primary eligibility would cause everything to be driven primarily via the autism and not the learning disability, and Student would not receive adequate services for his learning disability.

50. Debate continued regarding the need and impact of having autism as Student's primary eligibility category. Ms. Berger emphasized the importance of Student's view of his primary needs: "[T]he only thing he asked for in all of the assessors was, 'I need social skills.' That's what he said. . . . I genuinely feel that we need to listen to the Student. He's telling us what he needs." Ms. Berger also noted that one benefit of having autism noted as Student's primary category of eligibility would be to alert future IEP teams to look for typically associated issues like deficits in attention or processing, and Ms. Kellogg added that making autism primary would guarantee that Student would receive services from special education teachers trained to teach students with

autism.⁴

51. Ms. Weissburg acknowledged that Student might benefit from an eligibility that guaranteed him instruction from teachers trained in autism. However, she emphasized that Mother's position was that Student's primary issue was his specific learning disability, and that should be his primary eligibility category. Mother was only comfortable with autism as a concurrent disability, as a compromise. The team agreed with Ms. Weissburg that Student did not exhibit stereotyped movements or other characteristics often, but not always, associated with autism.

52. The LAUSD members of Student's IEP team concurred that autism should be Student's primary eligibility category. Ms. Kellogg summarized the LAUSD team members' view as arising from their realization that Student's needs and goals were focused on his social communication and language difficulties. Ms. Kellogg stated that Student's reading comprehension and processing issues needed to be acknowledged, but were issues often associated with autism, while the reverse was not necessarily true as to social communication and language difficulties being associated with a specific learning disability.

53. The LAUSD members of the IEP team suggested that the issue had been extensively debated. They acknowledged disagreement and the inability to reach consensus. Ms. Kellogg suggested the meeting move on to a different topic. Ms. Weissburg objected and was told the subject of Student's primary eligibility could be revisited at a later time.

54. Student's IEP team meeting did not conclude on February 8, 2018. The IEP team agreed to reconvene on February 28, 2018.

⁴ Special education teachers must possess credentials specific to a child's primary disability. (*Weissburg v. Lancaster School Dist.* (9th Cir. 2010) 591 F.3d 1255, 1259 (citing Cal. Code Regs., tit. 5, § 80046.5).)

February 28, 2018 IEP Team Meeting

55. On February 28, the IEP team reconvened for a fourth day. The meeting focused on a speech and language articulation assessment completed by Ms. Hullenahalli, at Mother's request, and on revisions to Student's speech and language goals. The IEP team completed Student's speech and language goals.

56. Student's IEP team meeting did not conclude on February 28, 2018. The IEP team agreed to reconvene on March 8, 2018.

Cancelled March 8, 2018 IEP Team Meeting

57. On March 7, 2018, Ms. Kellogg emailed Ms. Weissburg a draft of Student's IEP incorporating all the IEP team's prior work. The draft IEP indicated Student had areas of need and related disabilities or suspected disabilities of: (i) inattention and hyperactive/impulsive symptoms possibly related to other health impairment; (ii) social communication difficulties possibly related to autistic-like characteristics; (iii) auditory, visual, attention, association, conceptualization & expression challenges possibly related to specific learning disability; and (iv) pragmatic language deficits possibly related to speech and language impairment. Draft present levels of performance in the areas of reading, written language, pre-vocational education, behavioral functioning, general ability/psychological processing, and social-emotional functioning all contained a description of "impact of disability" showing Student's disability to be "autistic-like characteristics."

58. The same day, Ms. Weissburg replied to Ms. Kellogg's email. She stated that the IEP team had not agreed to autistic-like characteristics as a primary eligibility and requested that language reflecting such an eligibility be removed from the draft IEP for the March 8, 2018 IEP team meeting.

59. On March 8, 2018, the LAUSD IEP team members assembled at the IEP team's meeting room. Mother and Ms. Weissburg went to the school where the meeting

was to be held, but did not enter the meeting room. According to Mother's testimony, she was expecting a further discussion at the IEP team meeting regarding whether autism or specific learning disability should be Student's primary eligibility category. However, Mother and Ms. Weissburg ultimately decided not to attend the March 8, 2018 IEP team meeting and left the school grounds, and LAUSD cancelled the meeting.

60. As of the time of hearing, Student's IEP was not completed. LAUSD remained willing to reconvene Student's IEP team meeting, complete Student's IEP, and present Student an offer of FAPE. Student had not consented to reconvene the IEP team meeting.

61. On March 9, 2018, Student filed his due process hearing request in this case.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act (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)⁶ et seq.; 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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for higher education, employment, and independent

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

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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)(A); 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 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 *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that

is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In *Endrew F. v. Douglas County School District* (2017) 580 U.S. __, __ [137 S.Ct. 988] (*Endrew F.*), the Court considered the meaning of the phrase “some educational benefit.” For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” (*Id.*, 137 S.Ct. at p. 999, quoting *Rowley, supra*, 458 U.S. at pp. 203-204.) For a child not being educated in a general education classroom, the Court rejected the contention that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress. The Court clarified FAPE as “markedly more demanding than the ‘merely more than the *de minimis* test’. . . To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 137 S. Ct. at p. 1001.)

4. 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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (j).) 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, 56-62 [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].) Student filed the complaint in this matter, and

therefore had the burden of persuasion.

ISSUE: PREDETERMINATION OF AUTISM AS STUDENT'S PRIMARY ELIGIBILITY CATEGORY

5. Student contends LAUSD predetermined Student's primary eligibility category for special education as autism/autistic-like characteristics by the time of Student's February 8, 2018 IEP. Student contends that LAUSD's predetermination denied Student a free appropriate public education because it significantly impeded Parent's opportunity to participate in the decision-making process, and caused Student to be deprived of educational benefits. LAUSD contends that it did not predetermine Student's primary eligibility category, and, even if it were found to have done so, that procedural error did not impede Parent's participation, or deprive Student of educational benefits, or deny Student a FAPE.

Applicable Law

6. Federal and State law require that a district must afford parents of a child with a disability the opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) The IEP team must consider the concerns of the parent for enhancing the student's education, and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) and (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904] ["[T]he informed involvement of parents" is central to the IEP process.]) Parental participation in the IEP process is considered "[a]mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*))

7. A school district is required to conduct, not just an IEP team meeting, but a meaningful IEP team meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485, superseded on other grounds by statute (*Target Range*); *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).) "Participation must be more than a mere form; it must be *meaningful*." *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 (emphasis in original). A parent who has an opportunity to discuss a proposed IEP and suggest changes, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.)

8. Predetermination is a procedural violation of the IDEA that occurs in connection with an IEP team meeting, when a district has decided on its offer prior to the meeting, such as when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes*, 239 Fed.Appx. 342, 344-345 A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, district staff do not have to arrive at an IEP meeting with a blank mind; they "can, and should, have given some thought" to placement before the meeting. (*Doyle v. Arlington County School Board* (E.D.Va. 1992) 806 F.Supp. 1253, 1262.) They do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693, fn. 3.)

9. District team members also may form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.) Staff may bring a draft of the IEP to the meeting as long as parents are provided an opportunity to discuss their questions, concerns, and recommendations,

before the IEP is finalized. (*Fuhrmann, supra*, 993 F.2d at p. 1036.) Developing an IEP that does not fully conform to a parent's wishes does not mean the district engaged in predetermination. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

10. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-206.) However, a procedural error results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484 ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."]; *Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*); *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910 (*L.M.*) [rejecting a structural defect approach and finding a procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation].) "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." (*Amanda J., supra*, 267 F.3d 877, 892.)

11. Predetermination causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910 at p.12. (citing *Doug C., supra*, 720 F.3d 1038, 1047).) A student is not required to prove that his placement or services would have been different but for the predetermination. (*Ibid.*)

12. Predetermination is an automatic violation of a parent's right of participation under the IDEA. Where predetermination has occurred, "regardless of the discussions that may occur at the meeting, the school district's actions would violate the IDEA's procedural requirement that parents have the opportunity 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child.'" (*H.B. v. Las Virgenes, supra*, 239 Fed.Appx. at p. 344, quoting 20 U.S.C. § 1415(b)(1).)

Analysis

13. Student failed to meet his burden to prove that the LAUSD predetermined his primary eligibility for special education would be autism/autistic-like behavior by the time of his February 8, 2017 IEP team meeting. LAUSD did not come to Student's first IEP team meeting on January 30, 2018, impermissibly and deeply wedded to making autism/autistic-like behavior Student's primary eligibility category. To the contrary, the evidence showed that LAUSD team members were not thinking of eligibility under the category of autism at all when the meeting started. LAUSD's school psychologist, Ms. Berger, had concluded in her original psychoeducational assessment report that Student did not qualify for special education under the eligibility category of autism. The evidence showed that Student's IEP team members – Mother included – retained an open mind at the January 30, 2018 IEP team meeting regarding Student's eligibility. When Ms. Weissburg raised Mother's concern regarding Student's inability to look somebody in the eyes, might meet the criteria for autistic-like behaviors, LAUSD team members, without hesitation, explored Ms. Weissburg's question. Ultimately, based on the information shared at the IEP team meeting regarding Student's difficulties with verbal and nonverbal communication, and social interaction, his IEP team concluded that Student met the criteria for eligibility under the category of autism or autistic-like characteristics. After extensive discussion, the team members, including Mother, reached

a consensus on January 30, 2018 to retain Ms. Berger's original eligibility recommendation of specific learning disability as Student's primary eligibility category, and to make autism/autistic characteristics a secondary eligibility.

14. Student presented no evidence that LAUSD developed an inflexible resolve to change Student's primary eligibility category to autism during the period between the January 30, 2018 IEP team meeting and the February 8, 2018 IEP meeting.⁷ Instead, the evidence is that Ms. Shapiro, who on January 30, 2018 had been a proponent of making autism Student's primary eligibility, found her opinion strengthened by the discussion of Student's many needs and goals in the areas of communication and socialization that occurred at the February 5, 2018 IEP team meeting. At the February 8, 2018 IEP team meeting, Ms. Shapiro re-opened the team's eligibility discussion, and a lengthy discussion ensued on whether the eligibility category of autism, or specific learning disability, best signaled Student's potential areas of need.

15. Mother's concerns with designating autism as Student's primary eligibility were forcefully presented by Ms. Weissburg. The IEP team considered Mother's position, and responded to Ms. Weissburg's arguments and questions. Ultimately, both sides agreed that Student's primary eligibility category should be selected to reflect the disability having the greatest impact on Student. Mother believed that to be Student's

⁷ Student intimated that LAUSD needed to make autism Student's primary eligibility category in order to provide him social skills classes he needed. To support this theory, Student contended that LAUSD Least Restrictive Environment Specialist, Amelia Cumulada, said that LAUSD would have to make autism his primary eligibility category in order to provide him social skills classes. However, the audio recording of the January 30, 2018 IEP team meeting shows Ms. Cumulada indicated that social skills classes were embedded in autism classrooms, but were available to other students per their IEP.

specific learning disability. LAUSD team members were persuaded that Student's greatest needs were in the area of social development impacted by autism, and would be best represented, and Student's interests best served, by a primary eligibility category of autism. A difference of opinion is not synonymous with predetermination.

16. At this point, LAUSD's draft IEP does not fully conform to Mother's wishes with respect to Student's primary eligibility category for special education. However, Student has not demonstrated that this tentative outcome was the result of LAUSD predetermination. Student is not entitled to relief here.

ORDER

LAUSD prevailed on the sole issue presented. Student's request for relief is denied.

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. Here, LAUSD prevailed on the sole issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: June 22, 2018

/s/

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings