

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

OAH Case No. 2018060459

LOS ANGELES UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018100624

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on June 11, 2018, naming Los Angeles Unified School District. The matter was continued for good cause on July 23, 2018, and October 5, 2018; consolidated on October 22, 2018; and continued for good cause on October 29, 2018, and January 14, 2019.

Administrative Law Judge Deborah Myers-Cregar heard this matter in Van Nuys, California, on February 5, 6, 7, and 12, 2019.

Patrick Balucan, Attorney at Law, represented Los Angeles Unified School District. Diana Massaria, Los Angeles' Administrative Coordinator with the Due Process

Department, Division of Special Education, attended the hearing on behalf of District.

Student's Parents represented Student. Mother and Father attended the hearing on February 5, 6, and 7, 2019. On February 11, 2019, Mother called OAH staff to ask about a continuance of the February 12 hearing date. OAH staff instructed her to file a written continuance request before the hearing began at 10:00 a.m. the following day, but she did not do so. Parents did not attend the hearing on February 12, 2019.

At the conclusion of the hearing, a continuance was granted until March 11, 2019 to allow the parties to file written closing argument. Notice of the opportunity to file a written closing argument was sent to Parents by OAH on February 13, 2019.

The record was also left open to allow a sworn witness to submit an additional declaration and exhibit. Los Angeles timely filed its written closing brief, as well as Student's Elementary Progress Report Card for the 2018 extended school year, authenticated by Michael DeMay's written declaration, marked as D-40 and D-41 respectively. Parents did not file a written closing brief or written objections to the declaration and exhibit. Exhibits D-40 and D-41 were admitted into evidence.

Upon timely receipt of the written closing argument, exhibits and declaration, the record was closed and the matter was submitted for decision March 11, 2019.

## ISSUES<sup>1</sup>

### LOS ANGELES' ISSUES

1. Whether Los Angeles' March 30, 2017 psychoeducational assessment was

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to 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.)

appropriate such that Student is not entitled to an independent assessment in that area?

2. Whether Los Angeles' November 6, 2017 assistive technology assessment was appropriate such that Student is not entitled to an independent assessment in that area?

3. Whether Los Angeles' November 13, 2017 occupational therapy assessment was appropriate such that Student is not entitled to an independent assessment in that area?

#### STUDENT'S ISSUES

4. Whether Los Angeles denied Student a free and appropriate public education by failing to comprehensively assess Student in its November 6, 2017 assistive technology assessment?

5. Whether Los Angeles denied Student a FAPE by failing to comprehensively assess Student in its November 13, 2017 occupational therapy assessment?

6. Whether Los Angeles denied Student a FAPE by failing to assess Student in all suspected areas of disability including dyslexia in the fall of 2017?

7. Whether Los Angeles denied Student a FAPE by failing to offer Extended School Year instruction and related services pursuant to the October 3, 2017 IEP as amended on November 13, 2017?

8. Whether Los Angeles denied Student a FAPE by failing to hold an IEP team meeting within 30 days of Parent's request of April 10, 2018?

#### SUMMARY OF DECISION

OAH does not have jurisdiction over the appropriateness of Los Angeles' March 30, 2017 psychoeducational assessment because the parties settled all claims prior to the September 7, 2017 agreement and waived their rights to challenge all claims prior to the operation of the agreement.

Student did not establish that Los Angeles did not assess for dyslexia. Ms. Bismejian's April 30, 2017, psychoeducational assessment tested Student's psychological, phonological processing, auditory processing, and visual processing skills, which screened for dyslexia. Student's scores were in the average and low average range. Student had all the skills necessary to read.

Los Angeles' assistive technology assessment is deemed appropriate, comprehensive and thorough such that Student is not entitled to an independent assessment. It did not deny Student a Free and Appropriate Public Education.

Los Angeles' occupational therapy assessment is deemed appropriate, comprehensive, and thorough, such that Student is not entitled to an independent assessment. It did not deny Student a Free and Appropriate Public Education.

Los Angeles did not fail to hold an IEP within 30 days of Parent's April 10, 2018 request, because there was no evidence Parent made that request. Rather, on April 26, 2018, Parent's attorney requested an IEP team meeting in writing, which Los Angeles timely responded to and scheduled for May 22, 2018 at 10:30 a.m., within 30 days of Parents' attorney's request.

Los Angeles procedurally denied Student a FAPE by initially failing to offer extended school year services for the 2018 school year. The September 7, 2017 settlement agreement and the October 3 and November 13, 2017, IEP documents required Los Angeles to provide 1200 behavior intervention implementation for the 2018 extended school year. Student did not meet most of her goals, was working below grade level, and often forgot or was unable to retain the information she learned. Her academic performance fell in the below average range, and she needed re-teaching frequently. These factors indicate Student would regress, with her limited recoupment capacity. However, Los Angeles finally offered the 2018 extended school year services to Student, and she fully participated. Parent did not establish compensatory education

was appropriate as a result in the delay of offering the extended school year services.

## FACTUAL FINDINGS

### BACKGROUND

1. Student is eight years old and in the Second grade. Student has resided with her parents within the boundaries of the Los Angeles school district at all times relevant to this Decision. Student has developmental delays and is diagnosed with Autism. She qualified for Early Intervention and Early Start services. Student previously attended school at the Emelita Academy Charter School. At the time of the hearing, Student had not attended classes since August 17, 2018, when the Parents stopped sending her to school after her August 16, 2018 IEP team meeting.

2. Student was initially found eligible for special education due to developmental delays when she was three and a half years old, at her initial September 20, 2014 IEP meeting. However, Parents did not enroll her in a school that provided special education or attempt to access recommended physical therapy or speech and language services until March 7, 2016.

3. An IEP team meeting was convened on March 7, 2016, so that Student could enroll at Emelita Academy Charter School and begin attending a program. The team agreed that Student continued to qualify for special education as a child with a developmental disability. Student had perceptual motor delays, social emotional delays, gross motor delays, and orthopedic issues. Student made progress in her speech and language skills. The IEP team recommended assessments in the areas of health, social emotional, cognitive, speech and language, and planned an IEP transition meeting at the end of the school year to transition her to first grade.

4. Student was offered continued placement in the Pre-School Moderate disability program at Emelita Academy Charter School, 560 minutes a week, and

received the instructional accommodations of language models, social engagement, and modeling. She also received extended school year services, speech and language services 30 minutes weekly, and adapted physical education 30 minutes weekly.

#### JUNE 6, 2016 CLASSROOM TEAM ASSESSMENT REPORT

5. Student's June 6, 2016 Childhood Special Education Classroom Team Assessment Report, developed by this team, confirmed her developmental delay eligibility. The report stated that Student's delayed social emotional and physical development impacted her access to the general education curriculum. Specifically, Student's cognitive development and language development were age appropriate. Student's literacy was emerging, as she had only been enrolled in preschool for three months. She had difficulty with math.

6. The report noted that Student became distressed when around active peers. She turned away to avoided physical contact. Student needed adult support to comfort her when a peer touched her, and it took time for her to recover. She required adult guidance to engage with her peers. Student's physical development was impaired. She had difficulty with spatial relationships, and with physical balance, which often resulted in tripping and getting hurt. Orthopedically, her feet were pointed outward. In September 2016, her doctor placed casts on her legs for several weeks.

7. The classroom team assessment report recommended a comprehensive assessment to determine Student's present levels of performance, her progress, and whether she had additional disabilities and could qualify under other categories.

#### AUGUST 1, 2016 IEP TEAM MEETING

8. Los Angeles convened an IEP team meeting on August 1, 2016, to discuss the classroom team assessment report and Student's transition from preschool to kindergarten. Student remained placed in a general education classroom and received

related services. The team agreed that she was to receive direct physical therapy 30 minutes weekly, 120 minutes per year of adapted physical education consultation, speech and language articulation therapy 60 minutes monthly, and a resource specialist program for language and written expression 45 minutes weekly.

9. Student's IEP included extended school year services for the 2017 summer session consisting of 120 minutes of physical therapy. The IEP team planned to assess Student for her next annual IEP team meeting under different eligibility criteria, because she would be six years old and entering First grade in 2017.

#### MARCH 30, 2017 PSYCHOEDUCATIONAL ASSESSMENT<sup>2</sup>

10. School psychologist Rebecca Bismejian conducted Student's psychoeducational assessment and completed a psychoeducational report dated March 30, 2017. Student was transitioning to First grade, and the IEP team believed she needed to be reassessed. Ms. Bismejian was a qualified, credentialed assessor. She earned a Master's degree in psychology, and held a pupil personnel services credential that allowed her to perform the duties of a school psychologist. She had worked for Los Angeles for 13 years.

11. Ms. Bismejian used a variety of assessment tools, instruments and procedures to complete the psychological aspects of the psycho-educational assessment. She observed Student in the classroom and on the playground, reviewed her records, and interviewed Student, Parents and her teacher. Ms. Bismejian administered a number of standardized, normed tests. However, only the

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<sup>2</sup> While the issue of whether this assessment was legally compliant was barred by a settlement agreement between the parties, the issue of whether the IEP team thoroughly evaluated Student for dyslexia is relevant.

Comprehensive Test of Phonological Processing-2nd Edition, and the Motor Free Visual Perception Test-3rd Edition, evaluated Student for dyslexia. Ms. Bismejian analyzed the data from those tests, in combination with the results of the Woodcock Johnson Tests of Achievement IV, and concluded that Student did not have dyslexia.

12. Ms. Bismejian noted Student had frequent absences and tardies. Student's special education teacher noticed autistic like behaviors and worried about her getting hurt during recess due to her poor balance. Student was afraid of getting hurt at recess and would walk around and visit other children. Student showed gross motor weakness.

13. The Cognitive Assessment System-2 assessed different areas of Student's function, including her planning ability, her simultaneous verbal and non-verbal ability, her attention processing, her ability to recall information in successive order, and her cognitive processes. Student performed below average in her ability to plan and complete tasks. Her attention processing ability to keep sustained attention was below average. Her successive ability to recall information in specific order was average. Student's executive functioning was well below average range. Her working memory, (information kept for a short period of time), was well below average.

14. The Comprehensive Test of Phonological Processing-2nd Edition assessed Student's phonological processing skills, (hearing the sounds of letters), and her auditory processing skills, (the ability to remember or process auditory information.) The test measured Student's ability to perceive and manipulate sounds to make up words, remember short term and long term verbal information, and perform tasks quickly. The Phonological Awareness subtest measured Student's awareness of and access to oral language. A deficit in phonological awareness would show whether she had an impaired ability to develop foundational reading skills, such as segmenting sounds, blending words; and rhyming and discriminating between speech sounds. Student's phonological awareness score of 88 fell in the low average range, in the 21st percentile, which was still

within the average range.

15. The Phonological Memory subtest measured Student's ability to code information temporarily stored in the short term working memory, and measured her brief verbatim storage of auditory information. Her phonological memory score of 95 was in the average range, in the 37th percentile. The Rapid Symbolic Naming subtest measured her efficient retrieval of phonological information from long term memory, and the execution of a sequence of operations quickly and repeatedly. It measured Student's skills when decoding unfamiliar words. Deficits in this area would indicate problems in reading fluency. Student's rapid symbolic naming score of 92, retrieving information from long term memory, was in the average range, in the 30th percentile. Her immediate memory was in the average range. Student's phonological awareness scores in the average and low average range meant she possessed the necessary skills to learn to read. Student has average abilities when compared with peers her age. None of her scores were in the below average range.

16. The Motor-Free Visual Processing Test-3<sup>rd</sup> Edition assessed Student's ability to process information, to recall something she was shown, and to distinguish different objects. Student's visual processing skills were demonstrated to be average for her age.

17. The Woodcock Johnson Tests of Achievement IV assessed Student's academic skills. All of her scores fell in the below average range. Her Academic Skills score was 75; her Academic Applications score was 73; her Broad Reading score was 70; her Broad Math score was 72; and her Broad Written Language score was 70, which included Spelling and Writing Fluency. Student had difficulty retaining how to write letters of the alphabet. She had difficulty retaining information on how to solve math equations. She did not retain academic information and needed re-teaching frequently.

18. Overall, Student demonstrated average intelligence. She had average

language skills. Student's cognitive function was below average in attention. She demonstrated an average ability to learn, but fell in the low average range for thinking and reasoning. Student fell below average in attention processing. Her fine motor and visual motor skills showed no area of need. Student needed redirection in the classroom, and had a weakness in executive function, working memory, and planning. Student had deficits in perceptual motor skills. Student had difficulties in reading, math, and written language. She had difficulties retaining information in all academic areas because of her weakness in working memory. She was performing below grade level. There was a severe discrepancy between her ability and achievement because of her attention processing disorder.

19. Student met the eligibility criteria for eligibility for autism and for a specific learning disability. Ms. Bismejian presented her assessment at the April 3, 2017 IEP team meeting and recommended the IEP team consider both eligibility categories, and determine which qualifying condition best addressed her current needs.

20. Ms. Bismejian credibly testified that she was never told that Student had dyslexia. She explained that dyslexia is a processing disorder that affects reading fluency. It is a learning disability characterized by deficits in phonological awareness. If Student had dyslexia, the results would have shown up on the Comprehensive Test of Phonological Processing, in the Phonological Awareness subtest, and the Rapid Symbolic Naming subtest. However, Student performed in the average range with a standard score of 92. The Phonological Awareness subtest was also designed to screen for dyslexia. However, Student performed in the low average range with a standard score of 88 on that subtest. Ms. Bismejian credibly testified that statistically, Student's low average score was still within the average range. Student's Phonological Memory subtest score of 95 was also in the average range. Based upon Student's results, Ms. Bismejian concluded it did not appear dyslexia was affecting Student in the school

setting. Ms. Bismejian concluded that Student had the necessary skills required to learn to read.

#### APRIL 3, 2017 IEP TEAM MEETING

21. On April 3, 2017, the IEP team met to discuss the results of Student's psychoeducational assessment, to determine and update her new eligibility, and to transition Student from kindergarten to First grade. Student was six years old.

22. The IEP team reviewed Student's present levels of performance and her progress on goals. She met her goals in language, adaptive behavior, and in articulation in her individual speech sessions. She needed more time to meet her written expression goals and her social language goals in a small group setting.

23. Ms. Bismejian reviewed her assessments, and the IEP team determined autism was the most appropriate eligibility category. Student would remain in general education until the end of 2017 school year. For the 2017-2018 school year, Student would be placed at Emelita Academy in a specific learning disability Special Day Class, 1500 minutes weekly, with 30 minutes of adapted physical education weekly. 15 percent of her time would be spent in general education. The IEP team determined that the restrictive environment was necessary, because Student's accommodations required a small classroom environment, re-teaching when necessary, and academic work presented in small amounts of time. Student would be in general education for assemblies, psychomotor skills, music, science lab, and academics, as appropriate.

24. Student's present levels of performance in reading and math noted it was difficult for Student to retain her skills in these areas, which impacted her ability to make adequate progress. The IEP document noted extended school year services were offered on 'Part 1 Eligibility, Placements, and Supports.' The document also noted on 'Part 4 Additional Discussion,' that Student was able to retain the majority of acquired skills during the summer session break, and noted that adapted physical education was not

needed.

25. At no time during the April 3, 2017 IEP team meeting did Parents raise a concern that Student might have dyslexia or raise concerns that the assessments had failed to properly evaluate Student's reading difficulties. None of the test results indicated that Student might have dyslexia. Thus, the IEP team did not discuss dyslexia as an area of concern or a suspected disability. Parents signed the IEP document on May 2, 2017, agreeing to all aspects of the IEP, except for marking the box for "assessment," without providing further detail. At no time prior to the filing of the request for due process did Parents ever raise concerns about Student having dyslexia or receiving inadequate reading instruction.

#### SEPTEMBER 7, 2017 SETTLEMENT AGREEMENT

26. On September 7, 2017, the parties entered into a final written settlement agreement pertaining to a prior case filed by Parents. The terms of that settlement agreement were confidential, but had exceptions for disclosures, "as required by law and as necessary to implement and enforce the Agreement."

27. The special education and related services included in the September 7, 2018 settlement agreement, were written into Student's October 3, 2017 Implementation IEP document during the October 3, 2017 IEP team meeting. The language of the settlement agreement includes a recitation that the agreement resolves all claims between the parties up to September 7, 2017. Parents released all existing claims against Los Angeles arising from Student's educational program to date, whether known or unknown.

28. Additionally, Parents also consented to Student's April 3, 2017 IEP document in its entirety, as modified by the agreement. Those modifications were incorporated into Student's IEP document during the October 3, 2017 IEP team meeting. If either party alleged the agreement was not being implemented, then the

confidentiality could be waived, as required by law and as necessary to implement and enforce the agreement.

29. The settlement agreement did not provide for any additional assessments for dyslexia or for an independent psychoeducational evaluation.

#### OCTOBER 3, 2017 IMPLEMENTATION IEP TEAM MEETING

30. An IEP team meeting was convened on October 3, 2017 to incorporate the settlement agreement into Student's IEP. Student's mother, Administrator Mr. DeMay, Student's special education teacher, and her general education teacher attended the Implementation IEP team meeting.

31. Going forward, the September 7, 2017 settlement agreement required an IEP team meeting to implement the new terms into an IEP document, which included in part; placement and related services would be changed to general education with resource specialist program services, 120 minutes per week of Math and 120 minutes per week of Literacy/English Language Arts; up to 1800 minutes per week of 'District' Behavior Intervention Instruction for the 2017-2018 regular school year and 1200 minutes per week during the 2018 extended school year; a block of eight hours of Behavior Intervention consultation to help in the development of a behavior support plan; Los Angeles would conduct an assistive technology assessment and an occupational therapy assessment; and an IEP team meeting would be held to discuss the results of those assessments, and to consider services for the remainder of the 2017-2018 school year.

#### Present Levels of Performance

32. The IEP team discussed Student's present levels of performance. In the area of reading, Student was working below grade level and often forgot or did not retain materials taught. She had difficulty retaining phonemic skills. She missed six of 26

letters and missed the majority of letter sound correspondence in her nonsense word fluency assessment. Student required instruction that taught her letter-sound correspondence and blending. As to writing, Student had difficulty retaining how to combine letters of the alphabet. She needed more practice in writing her letters with age appropriate sizing and spacing. Student had difficulty writing letters without seeing them first, due to her lack of letter retrieval skills. While she knew most of her letters, she could not retain the information. For math, Student could write some of her numbers, especially when she was looking at it. She could identify all her numbers up to 10. She had difficulty with single digit addition and subtraction. Student had difficulty retaining the information needed to solve math equations.

33. None of Student's present levels of performance indicated she had dyslexia. Dyslexia was not discussed as an area of suspected disability by any member of the IEP team. Parents presented no new information to Los Angeles to alert the IEP team that dyslexia was a suspected disability.

#### Extended School Year

34. The IEP team documented the terms of the settlement agreement in which Los Angeles would provide 1200 minutes per week of behavior intervention implementation during 2018 extended school year. The IEP team, including Parents, decided that Student did not require adapted physical education during the extended school year.

35. However, Los Angeles did not offer extended school year services for the 2018 summer session. Mr. DeMay testified the IEP team did not think Student required it. However, because the 1200 minutes per week of behavior services for the 2018 summer session was added to the IEP document, the written offer was unclear.

### Additional Assessments to be Conducted

36. Parent consented to an assistive technology assessment and an occupational therapy assessment. The IEP team agreed to discuss assessment results, develop goals and objectives, and develop a behavior support plan at the next IEP team meeting.

### Parental Consent to the October 3, 2017 IEP

37. At the end of the October 3, 2017 IEP team meeting, Student's mother asked the IEP team to keep Student in her current Special Day Class with the behavior intervention instructional aide, instead of placing her in a general education classroom, as agreed in the settlement. The IEP team agreed that the special day class was an appropriate placement for Student. However, they did not change Student's designated placement in the IEP document, which provided for a general education classroom to comport with the settlement agreement. Mr. DeMay testified that not including the change in the IEP document was an oversight.

38. Parents consented to the entire October 3, 2017 IEP document on October 10, 2017. Parents did not express any reservations about the IEP and did not request additional assessments or an independent educational evaluation in any area, including psychoeducation or dyslexia.

### NOVEMBER 6, 2017 ASSISTIVE TECHNOLOGY ASSESSMENT

39. Ms. Patricia Ford conducted Student's assistive technology assessment and issued a report dated November 6, 2017. Ms. Ford holds two Education Specialist Instruction Credentials for moderate to severe disabilities, a Preliminary Level I and a Clear Level II. She also holds an Assistive Technology Core certificate which allows her to conduct assessments. Ms. Ford has worked for Los Angeles for 19 years, twelve years as a special education teacher, and seven years as an assistive technology assessor.

40. Ms. Ford's purpose was to determine if Student required any specialized equipment to access her curriculum and, if so, to determine the best assistive technology to recommend to the IEP team for Student's needs. Assistive technology is an item, piece of equipment, or hardware or software systems that increases, improves, or maintains a student's functional capabilities. It can be any tool that helps a student access the curriculum, from a simple pencil grip, an electronic tablet, or a computerized eye-gazer assistive augmentative communication device.

41. Ms. Ford conducted the assistive technology assessment on October 26, 27, and November 2 and 3, 2017. She used the 'SETT framework' (Student, Environment, Tasks, and Tools): She looked at Student's needs; the classroom environment; the tasks that Student needed to complete; and the tools Student used to complete the tasks. Ms. Ford reviewed Student's IEP document including her services, baselines, and present levels of performance. Ms. Ford observed Student twice, in two environments. She observed Student's classroom setting and support. She interviewed Student's parents, teacher, and behavior intervention instruction aide, to understand their concerns and how they presented information to Student. Ms. Ford conducted trials to see what additional tools could help Student access her curriculum.

42. Ms. Ford interviewed Student's mother, who reported no specific concerns about Student's use of classroom tools. Mother was concerned that Student could not retain or remember information. Student's special education teacher also did not have assistive technology concerns. He reported Student read at a kindergarten level, tried to spell words, and could not independently write without copying. Student's aide reported Student could write, but sometimes reversed similar looking letters. Her aide noted Student had difficulty copying from the board because of her poor vision, as her glasses were broken and getting fixed.

43. Ms. Ford observed Student on October 26 and 27, 2017. She determined

that Student demonstrated good visual and fine motor skills when she created shapes. Student held her pencil with a good tripod grip with her right hand and steadied the paper with her left hand. She created sentences to a story with her aide and copied them from a whiteboard. Student produced legible writing samples with adequate letter formation and consistent sizing. She used a continual writing movement, positioned her pencil and paper consistently, and used good pencil pressure. She had good visual skills when she cut with a scissors on both straight and curved lines. Student had the necessary skills to produce acceptable written work in class.

44. Ms. Ford observed Student's timed alphabet writing tested for orthographic-motor integration. Student was also asked to type the letters for comparison. Student's keyboarding speed was about the same as her handwriting speed, because of the extra time required for prompts to find the needed letters. When Student was asked to free write, she could not spell the words and only wrote letters. She wrote slowly but legibly. When she used a keyboard with a word prediction program, she could not spell the words and instead randomly chose words from the program. The word prediction program was not appropriate, because Student did not have the underlying academic skills to choose the correctly spelled option.

45. Student's reading ability was screened using an electronic reader that allowed her to read a story and click a speaker icon for it to be read to her. It did not help increase her comprehension or improve her skills. Rather, Student responded best to adult supported reading.

46. Ms. Ford prepared a written report that concluded Student was not eligible for assistive technology related services, because assistive technology tools did not help Student with her reading or writing. Student was not prepared to use assistive technology devices to access her curriculum. Student needed to continue to work on foundational reading and writing skills, and to practice keyboarding skills before

assistive technology would benefit her. Student needed supports for taking notes and spelling, and small group instruction, which she would receive in a special day class. Ms. Ford provided her report to Parents at the IEP team meeting, when she discussed her assessment results.

47. At hearing, Ms. Ford elaborated about her conclusions, explaining that Student's areas of need were the foundational academic skills of reading and writing, and the use of assistive technology tools did not improve those skills or increase her independence. Ms. Ford suggested Student continue to work on foundational reading and writing skills, and practice keyboarding skills.

48. Parents did not present evidence supporting their claim that Student needed assistive technology at school.

#### NOVEMBER 13, 2017 OCCUPATIONAL THERAPY ASSESSMENT

49. Ms. Lori Wyler conducted Student's occupational therapy assessment and described her conclusions in her November 13, 2017 report. Ms. Wyler earned a Master's degree in occupational therapy and is a licensed occupational therapist. She is a certified ergonomic assessment specialist, with 20 years of experience in the field of occupational therapy. She has specialized in hand therapy and upper extremity therapy for 10 years. Ms. Wyler has worked for Los Angeles for 6 years.

50. Ms. Wyler assessed Student on November 6, 7, and 9, 2017, to determine whether Student required occupational therapy to help her access her educational curriculum. She used the 'Educational Framework for Child Success' recommended by the Guidelines for Occupational Therapy and Physical Therapy in California Public Schools, published by the California Department of Education. This assessment consisted of parent and teacher interviews, school and clinic observations, as well as reviews of work samples, standardized assessments, school records, and past IEP documents.

51. Ms. Wyler interviewed Student's mother, her special education teacher, and the Student. Parent was concerned about Student's messy writing, sensitivity to loud noises, difficulty buttoning pants and zipping jackets, and frequent falls. Student's teacher was concerned with Student's balance and her pencil control.

52. Ms. Wyler reviewed Student's IEP, including her present levels of performance, and the modifications of academic work presented in small increments of time. She observed Student in the classroom and on the playground. Student was motivated and appeared to put forth her best effort. In the classroom, Student sat at her desk, and walked to her aide for help. She walked back to her desk and dropped her pencil twice, but could pick it up from the floor herself. Her aide prompted her to use her glasses, and Student could retrieve them from her backpack, open the case, and put her glasses on her head. She could independently answer questions on her worksheet and complete it. She got up from her chair, walked to her teacher to turn in the assignment, and retrieved a picture game, Build and Learn Geometry Kit. She sat down at her desk and could build three dimensional cubes of various sizes. On the playground, Student played near the playground apparatus, laughing, running, and playing with three peers. She interacted socially. When the bell rang, she stopped playing, walked to a bench to get her lunch box, and stood in line. Student did not show any distress or anxiety with the loud bells, or when peers brushed up next to her during recess.

53. Ms. Wyler reviewed Student's prior March 17, 2017 occupational therapy assessment, which did not identify any areas of need. Student's April 3, 2017 health report documented Student's orthopedic issues, when she was placed in a bilateral leg cast to help straighten her legs in September 2016. Student had received weekly private occupational therapy from Kaiser Permanente, since 2013. Student was working on improving her sensory dysfunction, zipping her jacket, and buttoning her pants.

54. Ms. Wyler conducted the Sensory Profile-2, the Bruininks-Oseretsky Test of Motor Proficiency-2nd Edition, and the Test of Handwriting Skills, Revised.

55. The Sensory Profile-2 reflected Student's responses to various sensory experiences in the categories of sensory processing patterns, sensory behavior, and the classroom environment. Student's results showed that her responses to sensory experiences were typical of children her age. She required the same level of sensory support as others her age. Student was as alert and active in her learning environment as others her age. She tolerated changes in routine and responded to sounds, sights, touch, and movement the same as the majority of others her age. Student also exhibited behavior related to sensory processing just like the majority of others her age.

56. The Bruininks-Oseretsky Test of Motor Proficiency-2nd Edition measures the fine and gross motor skills of students age four through 21. A series of motor tasks are individually administered to evaluate and characterize motor performance, fine manual control, manual coordination, body coordination, strength, and agility. Student performed in the average range for fine manual control. She performed in the below average range for manual dexterity, and in the well below average range in upper-limb coordination. Student performed in the average range for body coordination.

57. The Test of Handwriting Skills, Revised, is designed to evaluate manuscript and cursive handwriting skills of students age six through 18. It assesses the neurosensory integration ability of the student based upon their manuscript and cursive writing. It requires a student to write the alphabet in upper and lower case letters in order from memory; and to write single digit numbers out of order. Student's overall performance was in the 63rd percentile, the average range. She scored below average in writing lower case letters from memory. She scored well below average in writing words from dictation. She scored in the average range in writing upper case letters from memory and from dictation. Student scored in the average range in writing lower case

letters from dictation and writing single digit numbers from dictation. She scored in the above average range in copying upper-case and lower-case letters from a model, and in copying words and sentences from a visual model.

58. Student's seating, positioning, and performance of physical activities were evaluated for neuromuscular foundation skills. This included primitive reflexes, postural control and stability, range of motion of joints, muscle tone, strength, endurance, and balance. Student presented with normal functional neuromuscular foundational skills in all areas assessed.

59. Student's visual skills, coordinated eye movements, and visual perceptual skills were evaluated for her ability to interpret relevant visual information for learning. Student exhibited functional visual discrimination and visual motor skills. Ms. Ford noted that Ms. Bismejian's psychoeducational assessment included the Motor-Free Visual Perception Test-3rd Edition, in which Student scored in the average range. Student could copy simple and complex shapes and designs, and her fine motor integration skills were in the average range. Student demonstrated functional visual skills for academic performance and school participation.

60. Ms. Wyler evaluated Student's ability to use classroom materials using fine motor skills, proximal stability, sensory processing, and praxis skills. Student exhibited strengths in sensorimotor skills to handle and manipulate classroom tools with ease. She had adequate functional muscle tone, strength, and muscular development to access her curriculum. She had adequate trunk strength and could sit at her desk for tabletop activities. Student did not have skeletal or joint abnormalities in her hands. She had average fine manual control skills, and had precise control of her finger and hand movements. She could draw, fold paper, and cut with scissors. Student's only score that fell below average was in manual dexterity, in which the test required her to reach, grasp, and bimanually control small objects. Overall, the standardized assessments

showed Student completed some tasks at a slower pace than her age related peers. However, Student showed adequate functional fine motor skills and coordinated movement of her hands and fingers, and she could complete all assigned tasks with independence. Ms. Wyler recommended as an accommodation that Student be allowed extra time to complete classroom tasks requiring manual dexterity.

61. Student's sensory and motor skills for written communication were also evaluated. Student was observed in writing activities, drawing pictures, and manuscript and cursive writing. Student used an efficient dynamic tripod grasp when holding writing utensils. Her overall score was in the average range. While she had deficits when writing numbers and letters from dictation and memory, she had strengths when copying words and sentences, with skills in the above average range. Student did not complain about fatigue during the exercises. She had adequate neurosensory integration to produce written communication. Student colored figures with a mature one stroke direction and within the lines. She produced accurate copies of texts without omitting letters or words. Her writing was legible with adequate adherence to line, consistent letter size, and spacing between letters and words. Student's work demonstrated fair sizing of letters and numbers, good directionality of letters, and sufficient muscle force used when writing. She wrote from left to right, and oriented her written work horizontally. As an accommodation, Ms. Wyler recommended Student have a visual model of the alphabet placed on her desk.

62. Ms. Wyler also evaluated Student's self-care during the school day. This included carrying lunch boxes, opening food containers and feeding herself. Student required assistance for toileting hygiene after bowel movements, but was independent in toileting hygiene after urination, including handwashing. She occasionally required help opening a yogurt container. She zipped and unzipped her lunch box independently. While Parent reported Student had troubling buttoning her pants and

zipping her jacket, Ms. Wyler gave Student specific instructions, and Student could then perform them independently. Student could connect the zipper together, and was able to button a pair of shorts placed on her lap. Ms. Wyler noted Student's pants were very tight, and therefore, did not think her difficulty was due to any fine motor deficits. Ms. Wyler noted that Student was receiving private occupational therapy to help her with buttoning and zipping clothes.

63. Student's sensory and motor skills were evaluated to determine whether she could generate an idea, plan a motor sequence, and carry out an unfamiliar task. She demonstrated functional sensory and motor skills for participating in school activities. She accessed playground apparatus, climbed a ladder, walked across a bridge, and descended from stairs using a reciprocal foot pattern. Student's body coordination fell in the average range. Student's upper limb coordination with catching, dribbling, and throwing, fell in the well below average range, and Ms. Wyler noted Student was addressing these skills with her adapted physical education therapist.

64. Ms. Wyler prepared a written report which determined Student was not eligible for occupational therapy services, because Student demonstrated no areas of concern or need. Ms. Wyler noted Student's gross and fine motor skills and balance during her observation. She noted Student's deficits in upper limb coordination would be addressed through her adapted physical education services. Ms. Wyler provided her report to parents at the IEP team meeting, when she discussed her assessment results.

65. Parents did not present evidence supporting their claim that Student needed assistive technology at school.

#### NOVEMBER 13, 2017 AMENDMENT IEP TEAM MEETING

66. An IEP team meeting was convened on November 13, 2017, to review the occupational therapy and assistive technology and assessments. Student's attorney, Cindy Brining, attended the IEP meeting with Parent. All other required members of the

IEP team were present.

67. Ms. Wyler presented the results of her occupational therapy assessment. She discussed her conclusion that Student did not have deficits requiring school based occupational therapy.

68. Ms. Ford presented her assistive technology assessment. She discussed her conclusion that Student did not require assistive technology to access her education curriculum.

69. The IEP team did not discuss dyslexia as a suspected disability. Neither Student's attorney, nor Student's parents raised any concerns about Student having dyslexia. The new assessment data was incorporated into Student's present levels of performance. Student needed more time to meet her reading, reading comprehension, writing, and math goals and objectives. Student's present levels of performance continued to document that it was difficult for her to retain information that she learned in the areas of math, writing, and reading. Student's services continued to note 1200 minutes weekly of behavior intervention implementation for the 2018 extended school year. Student was not offered 2018 extended school year services. Mother consented to all components of the IEP amendment on November 27, 2017. Student's attorney was present for the entire meeting.

70. At hearing, Parents did not present evidence that Student had dyslexia, might have dyslexia, or that they told the IEP team that Student could have dyslexia as a suspected disability.

#### PARENTS' APRIL 2018 WRITTEN REQUEST FOR AN IEP

71. Parents did not present any evidence that an IEP meeting was requested in writing on or around April 10, 2018.

72. However, Parent's attorney requested an IEP in writing by e-mail on April 26, 2018. Within five minutes, Mr. DeMay responded that he would check the IEP

calendar and provide available dates the following week. After coordinating schedules, on May 11, 2018, Los Angeles sent Parent a prior written notice scheduling the requested IEP for May 22, 2018 at 10:30 a.m. The May 22, 2018, date scheduled was within the 30-day timeline.

73. On May 21, 2018 at 3:30 p.m., Mother unilaterally cancelled the IEP meeting by emailing Mr. DeMay. Mr. DeMay immediately responded to her email acknowledging the cancellation. He requested Parent provide him with other available dates to reschedule the IEP. Parent did not provide Mr. DeMay with available dates to reschedule the IEP before the end of the 2017-2018 school year, June 8, 2018. The IEP team met on August 16, the second day of the 2018-2019 school year. Parent delayed the process by cancelling the May IEP at the last minute, and by not providing dates to reschedule the meeting.

#### 2018 EXTENDED SCHOOL YEAR SUMMER SESSION

74. Mr. DeMay explained that the October 3, 2017 IEP team and the November 13, 2017 IEP team, did not offer Student extended school year services for the summer of 2018, even though the settlement agreement required it. He recalled that when the IEP team reviewed Student's data and her present levels of performance, they believed she did not need the summer session to access her educational program. However, both IEP documents memorialized the settlement agreement, requiring extended school year services for 2018 in several sections, which created ambiguity in the offer.

75. Mother and Mr. DeMay recalled numerous undated conversation during the 2017-2018 school year when they spoke about the IEP document failing to offer extended school year services. By the end of the school year, Mr. DeMay agreed to enroll Student in the 2018 extended school year summer session, which Student attended.

76. Mr. DeMay served as the assistant principal of Emelita Elementary School, and the principal of the 2018 extended school year program at Garden Grove Elementary. He recalled that Student attended the 2018 extended school year program. Student's Elementary Progress Report Card for the 2018 extended school year session for Garden Grove Elementary showed she attended 16 of 19 days, and was absent three days. Student achieved a score of '2', making partial progress in English Language Arts, Math, and Social Skills. Student achieved a score of '3' making consistent progress in her effort and work habits. She showed improvement and could add and subtract with counters. She worked well with her peers and followed classroom routines.

#### AUGUST 16, 2018 IEP TEAM MEETING

77. The August 16, 2018 IEP team reviewed Student's present levels of performance, and developed annual goals and objectives. The IEP team offered Student placement in a special day class setting 1500 minutes per week for math, reading foundation, writing, behavior, physical fitness, and reading comprehension. Student would mainstream for music, science, dance, art, fieldtrips, and assemblies. The IEP team offered a behavior intervention implementation aide 1800 minutes weekly, and adapted physical education 30 minutes weekly. It offered extended school year services, with a behavior intervention implementation aide 1200 minutes weekly.

78. At hearing, Mr. DeMay noted that the IEP team offered the behavior intervention implementation aide as FAPE, even though those services had not been stay-put under the terms of the 2017 settlement agreement.

79. Parent disagreed with the IEP, claiming it took away all of her daughter's educational resources and services. Student unilaterally removed Student from school for the remainder of the 2018-2019 school year. As of the dates of the Due Process Hearing, Parent had not returned Student to the classroom.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, 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)<sup>4</sup> 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 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 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); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

designated instruction and services].) 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.)

4. In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child's "educational program must be appropriately ambitious in light of his circumstances." "[E]very child should have a chance to meet challenging objectives." (*Ibid.*) *Endrew F.* explained that "[t]his standard is markedly more demanding than the 'merely more than de minimis' test . . . . [¶] . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at

pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided. The Court further noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew 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).) 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. (l).)

6. The burden of proof in a hearing pursuant to the IDEA falls on the party who files the request for due process. Here, Student and Los Angeles each filed requests for due process hearings seeking relief; therefore, each party bears the burden of proof as to the issues they raised in this case. (*Shaffer ex rel. Shaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387].) A party must prove their case in an IDEA administrative hearing by a preponderance of the evidence. (20 U.S.C. § 1415(i)(2)(C)(iii).)

## LOS ANGELES UNIFIED SCHOOL DISTRICT'S ISSUES

### ISSUE 1: WHETHER LOS ANGELES'S MARCH 30, 2017 PSYCHOEDUCATIONAL ASSESSMENT IS APPROPRIATE SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT ASSESSMENT IN THAT AREA?

#### OAH Jurisdiction Over Matters Resolved by Settlement Agreement

7. Los Angeles raised the issue of whether its March 2017 psychoeducational assessment was legally compliant. However, it simultaneously argued that examination of the issue of the legal compliance and adequacy of the assessment was barred by the parties' September 7, 2017 settlement agreement.

8. Parents raised the issue of the offer and implementation of the extended school year placement and services for the 2018 summer session, documented in the settlement agreement and the fall 2017 IEP documents. Parents did not present their position regarding the effect the settlement agreement had on the issues.

9. Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under the IDEA. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) This limited jurisdiction does not include jurisdiction over claims which were mediated with a resulting written settlement agreement waiving prior claims at issue, or claims alleging a school district's failure to comply with a settlement agreement. (*Id.* at p. 1030.)

10. In *Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007, No. C05-04977 VRW) 2007 WL 949603, the District Court held that OAH had jurisdiction to adjudicate claims alleging denial of a free and appropriate public education as a result of a violation of a mediated settlement agreement that should be addressed by the

California Department of Education's compliance complaint procedure.

11. When the parties resolve a Due Process Hearing request, they execute a signed legally binding contract in State and Federal court. (Ed. Code, § 56502.) Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.)

12. The confidential, signed settlement agreement stated its terms may be disclosed as required by law; and as necessary when implementation and enforcement of the agreement are raised as an issue. Here, both parties raised issues regarding the implementation and enforcement of the settlement agreement terms. First, Los Angeles contends that its March 30, 2017 psychoeducational assessment should be deemed appropriate. Second, Parents contend that Los Angeles failed to offer extended school year services for the 2018 summer session provided for in the settlement agreement and the two fall IEPs. Both issues require disclosure of the terms of the settlement agreement for this matter. Both parties had notice and an opportunity to object. Therefore, the terms relevant to the current issues may properly be disclosed.

13. OAH does not have jurisdiction over matters which are the subjects of negotiated written agreements waiving such claims. The legal compliance and appropriateness of Los Angeles' March 30, 2017 psychoeducational assessment would have been subject to the September 7, 2017 settlement agreement. Therefore, OAH has no jurisdiction over this issue and the issue is dismissed.

#### GENERAL ASSESSMENT STANDARDS

14. Assessments must be administered by trained and knowledgeable

personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3); 20 U.S.C. § 1414(b)(3)(A)(iv), (v).) Assessments must be conducted in all areas of suspected disability. (20 U.S.C. § 1414 (b)(3)(B); 34 C.F.R. § 300.532(g); Ed. Code, § 56320, subd. (f).) The assessments must be conducted "by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student's suspected disability. (Ed. Code, § 56320, subd. (g).) Only a school psychologist may administer tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).)

15. No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational programming. (Ed. Code, § 56320, subds. (c), (e); 20 U.S.C. § 1414(b)(2)(B).) Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) The assessor must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(3)(C).)

16. The assessor must prepare a written report that includes: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an

appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (Ed. Code, § 56329, subd. (a)(3); 20 U.S.C. § 1414(b)(4)(B).)

ISSUE 2: WHETHER LOS ANGELES' NOVEMBER 6, 2017 ASSISTIVE TECHNOLOGY ASSESSMENT WAS APPROPRIATE SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT ASSESSMENT IN THAT AREA?

17. Los Angeles contends that its assistive technology assessment was legally compliant and, therefore, it may deny Parent's request for an Independent Educational Evaluation. Student contends that the assessment was not comprehensive.

18. An assistive technology device is any item, piece of equipment, or product system used to increase, maintain, or improve functional capabilities of an individual with exceptional needs. (Ed. Code, § 56020.)

19. Tests and assessments must be provided in the form most likely to yield accurate information about what the student can do developmentally and functionally. Additionally, assessments must be used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(1), (2).)

20. Los Angeles's assistive technology assessment was properly conducted by a competent, trained, and knowledgeable specialist, Ms. Ford. She was properly credentialed and certificated in the field of assistive technology. Ms. Ford was familiar with Student's disability, and she selected and administered assessments to best ensure the results accurately reflected Student's achievement level. Ms. Ford used technically sound instruments to assess Student's cognitive, behavioral, physical, and

developmental factors, as well as her academic readiness to use technology to assist with her school work. Ms. Ford used the 'SETT framework', the guidelines published by the Department of Education. She assessed Student's needs, her classroom environment, her expected tasks, and the tools she used. Ms. Ford relied on her observations of Student performing expected classroom tasks using classroom tools.

21. Ms. Ford prepared a written report that found Student was not eligible for assistive technology related services, because the assistive technology tools did not help Student with her reading or writing. Student's keyboarding speed was about the same as her handwriting speed. Student responded best to adult supported reading. Student needed supports for taking notes and spelling in a special day class. Ms. Ford provided her report to Parents at the IEP team meeting, when she discussed her assessment results.

22. Ms. Ford's findings that Student was not eligible for services were appropriate. Her assistive technology assessment was comprehensive. Further, Ms. Ford conducted the assessments properly, in the manner in which the tests were designed. Ms. Ford's assessments complied with all statutory requirements. Parents presented no evidence establishing that Ms. Ford's assessment was deficient.

### ISSUE 3: WHETHER LOS ANGELES'S NOVEMBER 13, 2017 OCCUPATIONAL THERAPY ASSESSMENT IS APPROPRIATE SUCH THAT STUDENT IS NOT ENTITLED TO AN INDEPENDENT ASSESSMENT IN THAT AREA?

23. Los Angeles contends that it conducted an appropriate occupational therapy assessment of Student and is not required to fund an independent assessment. Parent contends that the occupational therapy assessment was not comprehensive.

24. Los Angeles's occupational therapy assessment was properly conducted by a competent, trained, and knowledgeable specialist. Ms. Wyler had a Master's degree in occupational therapy, and was a licensed occupational therapist with 10 years of

specialization in hand therapy and upper extremity therapy. Ms. Wyler was familiar with Student's disability. She selected and administered assessments to best ensure the results accurately reflected Student's achievement level. Ms. Wyler used technically sound instruments to assess Student's physical and developmental factors. Ms. Wyler used the best practices model of the 'Educational Framework for Child Success' as her guide. Ms. Wyler conducted the Sensory Profile-2, the Bruininks-Oseretsky Test of Motor Proficiency-2nd Edition, and the Test of Handwriting Skills, Revised. She conducted her assessment over three days.

25. Ms. Wyler prepared a written report that found Student was not eligible for occupational therapy services. She explained the basis for her determination. She noted Student's gross and fine motor skills and balance during her observation. Ms. Wyler described the educationally relevant health, development, and medical findings. She discussed Student's deficits in upper limb coordination would be addressed through her adapted physical education services. Ms. Wyler saw no areas of concern or need. Ms. Wyler provided her report to Parent at the IEP team meeting, when she discussed her assessment results.

26. Ms. Wyler's findings that Student was not eligible for occupational therapy services were appropriate. Ms. Wyler conducted the occupational therapy assessments properly, in the manner in which the tests were designed. Tests and assessments must be provided in the form most likely to yield accurate information about what the student can do developmentally and functionally. Additionally, assessments must be used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(1), (2).) Ms. Wyler's assessment complied with these requirements.

27. Parents presented no evidence establishing Ms. Wyler's assessment was deficient. Rather, Los Angeles established its occupational therapy assessment was

conducted appropriately and therefore it does not need to fund an independent assessment.

28. The occupational therapy assessment is deemed appropriate, such that Student is not entitled to an independent assessment.

## STUDENT'S ISSUES

### Legal Standard for Denial Of FAPE

29. A procedural violation such as a school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural violation of the IDEA. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, denial of a FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

30. In determining whether a student has received a FAPE in compliance with the IDEA, both a procedural and substantive inquiry are conducted to consider whether the school complied with the procedures set forth in the IDEA. The IEP is also evaluated to determine whether the IEP (or lack thereof) was reasonably calculated to enable the child to receive educational benefit. When a procedural violation denying a student a FAPE is identified, the second substantive prong of the inquiry is unnecessary. *L.J. by and through Hudson v. Pittsburg Unified School Dist.* (9th Cir., 2017) 850 F. 3d 996, 1003[citations omitted].)

ISSUE 4: WHETHER LOS ANGELES DENIED STUDENT A FAPE BY FAILING TO COMPREHENSIVELY ASSESS STUDENT IN ITS NOVEMBER 6, 2018 ASSISTIVE

## TECHNOLOGY ASSESSMENT?

31. Student asserts that Los Angeles failed to conduct a comprehensive assistive technology assessment of Student and, in failing to conduct a comprehensive assessment Student was denied a free, appropriate public education. Los Angeles argues that its assessment was legally compliant, Student had no needs in the area of assistive technology and therefore, there was no denial of FAPE.

32. Student failed to meet her burden of proving either that the assistive technology assessment was not comprehensive or that Student had needs for assistive technology that Los Angeles did not provide. Student submitted no evidence that the assistive technology assessment was deficient, nor did Student prove that she had educational needs that only technology could meet. Student did not meet her burden of proving that Los Angeles denied her a FAPE; or that she was entitled to an independent educational evaluation in the area of assistive technology.

## ISSUE 5: WHETHER LOS ANGELES DENIED STUDENT A FAPE BY FAILING TO COMPREHENSIVELY ASSESS STUDENT IN ITS NOVEMBER 13, 2017 OCCUPATIONAL THERAPY ASSESSMENT?

33. Student asserts that Los Angeles failed to conduct a comprehensive occupational therapy assessment of Student and, in failing to conduct a comprehensive assessment, Student was denied a free, appropriate public education. Los Angeles argues that its occupational therapy assessment was legally compliant, Student had no needs for occupational therapy, and therefore, there was no denial of FAPE.

34. Student failed to provide by a preponderance of the evidence that either the occupational therapy assessment was inadequate, or that it failed to meet a legal standard. Nor did Student prove that she had educational needs for occupational therapy that were not being met. Thus, Student has not proven that she was denied a FAPE or that she was entitled to an independent educational evaluation in the area of

occupational therapy.

ISSUE 6: WHETHER LOS ANGELES DENIED STUDENT A FAPE BY FAILING TO COMPREHENSIVELY ASSESS STUDENT IN ALL AREAS OF DISABILITY, BY NOT ASSESSING HER FOR DYSLEXIA IN THE FALL OF 2017?

35. "Under the IDEA, the school district must conduct a 'full and individual initial evaluation,' which ensures that the child is assessed in 'all areas of suspected disability,' before providing that child with any special education services. The California Education Code, which incorporates the requirements of the IDEA into state law, similarly requires that the child be assessed 'in all areas related to the suspected disability.' This requirement allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child." (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F. 3d 1105, 1119 [citations omitted] *cert. denied*, 137 S. Ct. 1578, 197 L. Ed. 2d 704 (2017).)

36. A disability is "suspected," and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. (*Ibid.*) "Once either the school district or the parents suspect a disability, a test must be performed so that parents can 'receive notification of, and have the opportunity to contest conclusions regarding their children.'" (*Id.* at p. 1120.) "In evaluating a child with a disability, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. 300.304(c)(6).)

37. Parent contends that Los Angeles did not comprehensively assess Student for dyslexia after the Settlement Agreement in the fall of 2017. Los Angeles contends it did adequately assess Student for dyslexia, and that the data demonstrated she did not

have it.

38. A specific learning disability means a disorder in one or more of the basic psychological (and phonological) processes involved in understating or using written or spoken language, which manifests the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term specific learning disability includes conditions such as a brain injury, dyslexia, and developmental aphasia. Ed. Code, § 56334, 56337.)

39. A student who is assessed as being dyslexic and meets the specific learning disability eligibility criteria, shall be eligible for special education. (Ed. Code, § 56337.5.)

40. Because the determination of what tests are required to assess Student in all areas of suspected disability is made based on information known at the time, the first question is what Los Angeles knew about Student's learning disabilities, and when the IEP team learned about it. The first time Student was formally assessed as a school age student was during Ms. Bismejian's March 2017 psychoeducational assessment, which she discussed at Student's April 3, 2017 IEP meeting. Although the parties' settlement agreement waived claims before September 7, 2017, the psychoeducational assessment and IEP document provide valuable background information about whether Los Angeles suspected dyslexia was an area of disability for Student.

41. Ms. Bismejian administered valid, normed assessment instruments which screened for processing disorders including dyslexia. The results of the testing indicated that Student had the requisite skills to be able to learn to read. Specifically, as dyslexia affects reading fluency, weaknesses would have shown up on rapid symbolic naming. However, Student performed in the average range with a standard score of 92. Similarly, dyslexia would have been screened in the area of phonological awareness. However, Student performed in the low average range with a standard score of 88. Although on

the lower end, Student's average score is still within the average range. Student's scores on the Motor Free Visual Perception Test-3 were also in the average range, and her visual processing skills were average for her age. Based upon Student's results, Ms. Bismejian concluded that Student did not have the processing disorder resulting in dyslexia. She concluded Student had all the necessary skills to read.

42. Parents presented no evidence, testimony, assessments, reports, or diagnosis to support their claim that Los Angeles should have known Student had dyslexia prior to September 7, 2017. Nor did Parent present any evidence that they notified Los Angeles at any time between September 7, 2017 and November 13, 2017, that they had concerns about dyslexia.

43. Parent failed to meet their burden to prove either that Los Angeles should have suspected dyslexia as a disability impacting Student's ability to access her education, or that they notified Los Angeles that there was a basis for additional assessment to rule out dyslexia as a disability impacting Student's education. Parents have failed to establish that Los Angeles denied Student a FAPE by failing to conduct an additional assessment for dyslexia, or that Student should be entitled to an independent educational assessment of dyslexia.

#### ISSUE 7: WHETHER LOS ANGELES DENIED STUDENT A FAPE BY FAILING TO OFFER EXTENDED SCHOOL YEAR SERVICES AT THE OCTOBER 3, 2017 AND NOVEMBER 2017 IEP TEAM MEETINGS?

44. Student contends that Los Angeles denied her a FAPE by failing to offer her extended school year services for the 2018 extended school year session. Los Angeles contends that while it failed to offer the extended school year services at the October 3, 2017 and November 13, 2017 IEPs, it ultimately offered those extended school year services by the end of the 2017-2018 school year, and provided them to Student, who attended the entire summer session. Therefore, although there may have

been a procedural violation, there was no loss of educational benefit to Student, no denial of FAPE and no loss of a meaningful parental participation opportunity.

45. Extended school year services must be provided if a child's IEP team determines that the services are necessary as a provision of FAPE. (34 C.F.R. § 300.106(a)(2).) Extended school year services shall be provided when a student has a disability which is likely to continue indefinitely; interruption of the student's educational programming could cause regression; and when coupled with limited recoupment capacity, would render it unlikely the student would attain self-sufficiency and independence. (Cal. Code Regs., tit. 5, § 3043.)

46. Los Angeles denied Student a Free and Appropriate Public Education at the October 3, 2017 and November 13, 2017 IEP team meetings, by failing to offer extended school year services for the 2018 extended school session. The October 3, 2017 IEP team noted that Student had failed to meet most of her goals, was working below grade level, and often forgot or was unable to retain information learned. It was difficult for her to retain phonemic information. Based on these factors, Student met the criteria for extended school year services, and Los Angeles should have offered it in the Fall 2017.

47. Mr. DeMay established that District finally offered and provided extended school year services to Student during the summer of 2018. Student attended 26 of 29 days of the extended school year session at Garden Grove Elementary. Los Angeles monitored her progress and documented it in her 2018 extended school year session Elementary Progress Report Card.

48. Student failed to establish that Los Angeles' delay in initially offering the extended school year services denied Student an educational benefit or denied her a FAPE. Nor did Student establish that Parents were denied an opportunity to meaningfully participate in the IEP process, as Student attended the extended school

year session they wanted her to attend. Therefore, Student did receive extended school year services in 2018. Student did not establish a basis for compensatory education.

**ISSUE 8: WHETHER LOS ANGELES DENIED STUDENT A FAPE BY FAILING TO HOLD AN IEP TEAM MEETING WITHIN 30 DAYS OF PARENT'S APRIL 10, 2018 REQUEST?**

49. Student contends that Los Angeles did not hold an IEP team meeting within 30 days of Parents' written request on April 10, 2018. Los Angeles contends that Parents did not make a request for a meeting on April 10, 2018.

50. When a parent makes a written request for an IEP, it shall be held within 30 days, not counting school vacation days. (Ed. Code, § 56343, 56343.5.) Failure to hold an IEP team meeting within 30 days of a parent's written request is a procedural violation of the IDEA.

51. Student did not meet her burden to prove Los Angeles failed to hold an IEP team meeting within 30 days of Parent's April 10, 2018 request. Parents produced no evidence that they requested an IEP in writing on or near April 10, 2018. Parent failed to prove a procedural violation occurred.

52. Rather, Parent's attorney requested an IEP in writing on April 26, 2018. On May 11, 2018, Los Angeles sent Parent a prior written notice scheduling an IEP for May 22, 2018 at 10:30 a.m., which was within the 30-day timeline. This written request for an IEP team meeting is the only request established at hearing.

53. However, Parent unilaterally cancelled the IEP by email on May 21, 2018, at 3:30 p.m.. Parent did not provide Los Angeles with available dates to reschedule the IEP before June 8, 2018, the end of the 2017-2018 school year. School vacation days are not counted in the 30-day calculation.

54. Los Angeles held an IEP at the beginning of the 2018-2019 school year, on August 16, 2018, the second day of the school year. Parent's delay in rescheduling the IEP team meeting between the day she cancelled, May 21, and the end of the school

year, June 8, prevented Los Angeles from holding the IEP team meeting before the end of the school year, and thus tolled the 30-day statute. Los Angeles held the IEP meeting on the second day of the 2018-2019 school year, August 16, 2018. Los Angeles acted timely in holding the IEP at the beginning of the school year.

55. Therefore, Student did not meet her burden of proof, as Los Angeles met the statutory timelines for holding an IEP meeting within 30 days of her attorney's written request.

## ORDER

1. Los Angeles' Issue 1 is dismissed for lack of jurisdiction.
2. Los Angeles' appropriately assessed Student for dyslexia, assistive technology, and occupational therapy, and as such, is not required to fund independent assessments in those areas.
3. Student is not entitled to compensatory education for Los Angeles' delay in offering extended school year services.

## 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, Los Angeles was the prevailing party on Issues 2, 3, 4, 5, 6, 7, and 8. Issue 1 was dismissed for lack of jurisdiction.

## 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: April 9, 2019

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DEBORAH MYERS-CREGAR

Administrative Law Judge

Office of Administrative Hearings