

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022030711

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PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

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DECISION

June 30, 2022

On March 21, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Los Angeles Unified School District. Administrative Law Judge Kara Hatfield heard this matter via videoconference on May 10, 11, 12, 16, and 17, 2022.

Attorneys Robert Burgermeister and Constance Zarkowski represented Student. Parent attended all hearing days on Student's behalf. Student attended on the afternoon of May 11, 2022. Attorneys Dee Anna Hassanpour and Anisha Asher

represented Los Angeles Unified. Due Process Specialist Patrick Johnson attended on May 10, 2022, on Los Angeles Unified's behalf. Early Resolution Specialist Juan Tajoya attended all other days on Los Angeles Unified's behalf.

At the parties' request the matter was continued to June 13, 2022, for written closing briefs. The record was closed, and the matter was submitted on June 13, 2022.

## ISSUES

Free appropriate public education is called FAPE. Individualized education program is called IEP.

As listed below, Issue 4 corrects the date of the January 2022 IEP from the May 2, 2022 Order Following Prehearing Conference. All issues that specified start or ending dates have also been adjusted to reflect the correct filing date of Student's complaint, which affects the two-year statute of limitations period. Additionally, Issue 7(b) corrects the end date of the alleged period of denial of FAPE. 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.)

1. Did Los Angeles Unified deny Student a FAPE by assigning Student to distance learning without continuing to provide Student in-person services from:
  - a. March 21, 2020, to the end of the 2019-2020 school year; and
  - b. The 2020-2021 school year to March 21, 2022?

2. Did Los Angeles Unified deny Student a FAPE by assigning Student to distance learning without providing Student the necessary accommodations from:
  - a. March 21, 2020, to the end of the 2019-2020 school year; and
  - b. The 2020-2021 school year?
3. Did Los Angeles Unified deny Student a FAPE from March 21, 2020, to January 2021, by not assessing Student prior to assigning Student to distance learning?
4. Did Los Angeles Unified deny Student a FAPE through the January 14, 2022 IEP by:
  - a. Failing to offer sufficient programs and supports; and
  - b. Failing to offer adequate goals to enable Student to receive an educational benefit?
5. Did Los Angeles Unified deny Student a FAPE March 21, 2020, to March 21, 2022, by failing to address Student's regression resulting from distance learning?
6. Did Los Angeles Unified deny Student a FAPE during the 2021-2022 school year to March 21, 2022, by:
  - a. Failing to offer Student a one-to-one aide;
  - b. Failing to offer Student:
    - i. Home applied behavior analysis therapy, and
    - ii. Clinical meetings?
7. Did Los Angeles Unified deny Student a FAPE by failing to offer Parent training during:
  - a. The 2020-2021 school year; and
  - b. The 2021-2022 school year, to March 21, 2022?

8. Did Los Angeles Unified deny Student a FAPE by predetermining the January 14, 2022 IEP offer?
9. Did Los Angeles Unified deny Student a FAPE during the 2021-2022 school year, to March 21, 2022, by failing to offer Student placement with neuro-typically developing peers to the maximum extent possible?
10. Did Los Angeles Unified deny Student a FAPE by denying Parent's requests at the January 14, 2022 IEP team meeting to:
  - a. Correct Student's marked absences during the Spring semester of the 2020-2021 school year, and Fall semester 2021-2022 school year;
  - b. Offer Student a Spanish language class; and
  - c. Remove from Student's school records any indication that Student had a diagnosis of attention deficit hyperactivity disorder?
11. Did Los Angeles Unified deny Student a FAPE by offering an IEP document at the January 14, 2022 IEP team meeting that erroneously stated that Student had a diagnosis of attention deficit hyperactivity disorder?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) All

subsequent citations to the Code of Federal Regulations are to the 2006 version, unless otherwise stated. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected.

(20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

## ELIGIBILITY HISTORY

Student was 15 years old and in ninth grade at the time of hearing. Student resided within Los Angeles Unified's geographic boundaries at all relevant times. Student was originally determined to be eligible for special education and related services in early 2010, when he was three years old, after he was referred to Los Angeles Unified by his local Regional Center because he received early intervention services for speech and language delays. The initial evaluation found Student demonstrated developmental delays of at least 25 percent in the area of social communication, compounded by decreased attention. At that time, he met the eligibility criteria for special education and related services under the category of developmental delay, which is only available for children up to the age of nine years. (20 U.S.C. § 1401(3)(B)). He participated in a preschool program that was a special day class, following the general education curriculum.

This documented history contradicts Parent's testimony that when Student was in first grade, Parent told his teacher she was worried about him because his older brother had been diagnosed with attention deficit hyperactivity disorder, the teacher put that in Student's records, and Student has wrongly been stuck in special education ever since. Parent claimed Student was "diagnosed" with Developmental Delay in first grade after Parent told the first-grade teacher Student's brother had a disability. But, after Student's attorney asked Parent when Student was "diagnosed" with "specific learning disability," Parent similarly said Student's first IEP, in elementary school, is when he was "diagnosed" with "specific learning disability." Neither Student's attorney nor Parent understood the difference between a medical diagnosis made by medical professionals,

and a team of educational professionals identifying whether a student meets any of the categories of eligibility for special education and related services set forth in the IDEA, California Education Code, and their implementing regulations.

Student's attorney asked Parent how severe Student's disability is, and Parent denied Student has a disability at all. Student's entire complaint is based on the premise that Los Angeles Unified failed to provide goals, special education, and related services appropriate to meet Student's significant needs, such as, allegedly, his need for a one-to-one behavior aide and home applied behavior analysis therapy. Yet Parent was adamant at hearing that Student does not have a disability and does not belong in special education. Parent believed the only reason Student was in special education was because his first-grade teacher mixed him up with his older brother based on Parent's one comment, and Student does not require special education and related services.

Three years after Los Angeles Unified first assessed Student and found him eligible for special education as a preschooler, Los Angeles Unified reassessed Student in 2013, when he was six years old. Student's test results identified weaknesses in

- auditory sequential memory,
- cognitive expression,
- sensory-motor integration,
- organizational skills,
- planning, and
- self-regulation.

Student relied heavily on external supports to assist him. Student met the criteria of an attention processing disorder, but he did not meet the eligibility category criteria for specific learning disability. However, he did meet the eligibility criteria of other health

impairment. But, incorrectly, the IEP document dated March 1, 2013, stated Student's eligibility category was specific learning disability. He continued to be placed in special day classes, following the general education curriculum.

When Student was nine years old, in 2016, his triennial IEP dated February 5, 2016, changed his eligibility category to other health impairment, as that was the finding of the 2013 psychoeducational assessment. Student's attorney asked Parent at hearing when Student was "diagnosed" with "other health impairment," and Parent stated she just learned he was "diagnosed" with "other health impairment" during the due process hearing.

On some later date, on or before February 1, 2019, for no reason that was established at hearing, the eligibility category stated on Student's IEP changed back to specific learning disability.

Los Angeles Unified conducted a psychoeducational assessment in February 2022. At the time of the hearing, that assessment report had not yet been discussed at an IEP team meeting because Parent had delayed the noticed IEP team meeting, preferring to finish the due process hearing matter first before discussing the assessment. The February 2022 assessment established that, as before, Student did not meet eligibility criteria under the category of specific learning disability, but, at the time of the hearing, Student was eligible for special education and related services under the category of other health impairment.



## ISSUE 1: DISTANCE LEARNING WITHOUT CONTINUING TO PROVIDE STUDENT IN-PERSON SERVICES

Student contends Los Angeles Unified denied him a FAPE after mid-March 2020 by “assigning him to distance learning” without continuing to provide in-person services while his middle school campus was closed due to the novel coronavirus pandemic, called COVID-19. Student claims the January 23, 2020 IEP, in place at the time school closed, was intended to be implemented in-person and the failure to implement it, and the next annual IEP of January 2021, in person denied Student a FAPE.

Los Angeles Unified contends it did not deny Student a FAPE after March 13, 2020, when the district closed schools due to the COVID-19 pandemic in response to lawful orders of the Governor and state and local health departments. Los Angeles Unified asserts it provided Student access to his program of special education and related services stated in the January 23, 2020 IEP via distance learning, in conformity with federal and state laws and guidance issued by federal and state education departments. Los Angeles Unified further contends it also provided Student access to his program of special education and related services stated in the next annual IEP, dated January 15, 2021, via distance learning, in conformity with federal and state laws and guidance issued by federal and state education departments, until school campuses reopened for in-person instruction at the start of the 2021-2022 school year.

### ISSUE 1(A): MARCH 21, 2020, TO THE END OF THE 2019-2020 SCHOOL YEAR

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or

guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*))

Where a student alleges the denial of FAPE based on the failure to implement an IEP, the student must prove that any failure to implement the IEP was material, which means the services provided to the child fell "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)).

There is no statutory requirement of perfect adherence to the IEP, and minor failures to implement an IEP do not constitute a denial of FAPE. "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Van Duyn, supra*, F.3d 811 at p. 815.) In *Van Duyn*, the court determined the school district's failure to provide five hours of math tutoring per week out of the ten hours specified in the

student's IEP constituted a material failure to implement the IEP. (*Id.* at p. 823.) A student is not required to prove the district's failure to implement the IEP caused him to lose educational benefits. (*Id.* at p. 822.)

Student attended Nightingale Middle School for sixth and seventh grades. An IEP team met while Student was in seventh grade on January 23, 2020, to develop Student's annual IEP, to be effective immediately upon Parent's consent. Student had been attending self-contained, special day classes for his four academic courses of English Language Arts, math, history/social studies, and science, following the California state content standards. Student also had been placed in the general education environment for homeroom, physical education, and two electives. In addition to following the common core curriculum standards for all classes, Student had one IEP goal in reading, one IEP goal in writing, and one IEP goal in math.

At the time of the January 23, 2020 IEP team meeting, Student met the three annual goals in his January 2019 IEP. According to the February 2022 psychoeducational assessment, Student's grades in the spring 2019 semester, sixth grade, were a C in math, B's in English, history, and science/health, and A's in physical education and one elective, with his grade for the second elective not in evidence. His "work habits" scores generally were "satisfactory," but "excellent" in physical education and the reported elective. His "cooperation" scores were generally "satisfactory," but "excellent" in physical education. His grades in the fall 2019 semester, seventh grade, according to the February 2022 psychoeducational assessment, were B's in math, English, history, and science/health, and an elective, with his grade for the second elective not in evidence, and an A in physical education. His "work habits" scores generally were "satisfactory," but "excellent" in math and the reported elective. His

“cooperation” scores were generally “satisfactory,” but “excellent” in English and the reported elective. Despite his good grades, Student’s results on the Smarter Balanced Summative Assessment taken during sixth grade were “standard not met” for both English Language Arts and math.

The January 23, 2020 IEP team maintained Student’s placement in special education for his four core academic courses, which totaled approximately 59 percent of his school day, and in general education for homeroom, physical education, and two electives, approximately 41 percent of his school day. Parent signed consent to the January 23, 2020 IEP on January 23, 2020. This was the IEP in effect when Nightingale Middle School closed due to the COVID-19 pandemic after March 13, 2020.

## EARLY FEDERAL AND STATE GUIDANCE ON PROVIDING SPECIAL EDUCATION DURING THE COVID-19 PANDEMIC

On March 4, 2020, California Governor Gavin Newsom declared a State of Emergency in California as a result of the COVID-19 pandemic.

On March 12, 2020, the United States Department of Education Office of Special Education and Rehabilitative Services, known as OSERS, published guidance to states for educating children with disabilities during the COVID-19 pandemic. (OSERS, March 12, 2020, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (OSERS Q & A), Answer to Question A-1.) OSERS advised local educational agencies they would not violate the IDEA if they closed schools to slow or stop the spread of COVID-19, and, if they did not provide educational services to the general student population, then they would not be required to provide services to students with disabilities during that same time period. (*Id.*, at p. 2, Answer

A-1.) Once school resumed instruction, the local educational agency was required to “make every effort to provide special education and related services to the child in accordance with the child’s IEP.” (*Ibid.*)

On Friday March 13, 2020, California Governor Gavin Newsom issued Executive Order N-26-20, which authorized school districts to continue educating students, to the extent feasible, through distance learning and/or independent study. The Order directed the California Department of Education, called CDE, to issue guidance on how to ensure students with disabilities received a FAPE. In response, CDE advised local educational agencies to “do their best in adhering to IDEA requirements ... to the maximum extent possible.” CDE encouraged local educational agencies to “consider ways to use distance technology to meet these obligations.” (CDE, *Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities* (March 20, 2020) (CDE March 20, 2020 Guidance).)

## MARCH 16 THROUGH JUNE 12, 2020, AT NIGHTINGALE MIDDLE SCHOOL, AND ADDITIONAL FEDERAL AND STATE GUIDANCE ON PROVIDING SPECIAL EDUCATION DURING THE COVID-19 PANDEMIC

As result of Governor Newsom’s declaration of a state of emergency, Los Angeles Unified’s school campuses were closed after school ended on Friday, March 13, 2020. Los Angeles Unified shifted all Students to distance learning on Monday, March 16, 2020, and provided Chromebooks to students, as well as wireless fidelity, called wi-fi, hotspots to families who did not have internet service at home. Families and students were informed of the emergency campus closure through a variety of methods

Los Angeles Unified typically used to communicate with families and students, including telling students at school on Friday, March 13, 2020, a district-sponsored home internet connectivity program called ConnectEd, telephone calls home, paper letters mailed home, the school website, and written notices students were given to carry home on Friday, March 13, 2020.

On Thursday March 19, 2020, Governor Newsom issued Executive Order N-33-20, directing all California residents “to immediately heed the current State public health directives,” including the requirement “to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” (Cal. Exec. Order N-33-20 (March 19, 2020).) Further, the California State Public Health Officer issued a list of designated “essential” workers who were allowed to leave their homes to support specified critical infrastructure sectors, which included workers teaching at “public and private ... K-12 schools,” but only for “distance learning.” As recently noted by the Ninth Circuit, Executive Order N-33-20 remained in effect until June 11, 2021, and California residents were prohibited from leaving their homes except to the extent State officials provided an exception. “[T]he ability to operate schools (or anything else) turned on what sort of permission State officials granted back either in the form of rules governing ‘critical infrastructure sectors’ or some exception to the stay-at-home order.” (*Brach v. Newsom* (9th Cir. 2021) 6 F.4th 904, 911.)

On March 21, 2020, the U.S. Department of Education’s Office for Civil Rights, called OCR, and OSERS issued supplemental guidance in response to reluctance by some school districts to provide any distance instruction because they believed that federal disability law presented insurmountable barriers to remote education. Recognizing that “educational institutions are straining to address the challenges of this national emergency,” OCR and OSERS assured school districts they should not opt to

close or decline to provide distance instruction. (OCR and OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020), at p. 1) (OSERS Supplemental Fact Sheet).) "To be clear: ensuring compliance with [the IDEA] ... should not prevent any school from offering educational programs through distance instruction." (*Ibid.*) "[T]he provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." (*Id.* at pp. 1-2.) The U.S. Department of Education emphasized that "federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities" and the "determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency." (*Ibid.*) The U.S. Department of Education encouraged parents and educators to collaborate creatively to meet the needs of students with disabilities, and to consider practices, "such as distance instruction, teletherapy ... [and] meetings held on digital platforms," and noted "there are low-tech strategies that can provide for an exchange of curriculum-based resources, instructional packets, projects and written assignments." (*Ibid.*)

The U.S. Department of Education acknowledged during the national emergency schools may not be able to provide all services in the same manner as typically provided, including some in-person services such as hands-on physical therapy, occupational therapy, or tactile sign language educational services. (OSERS Supplemental Fact Sheet, *supra*, at pp. 1-2.) It advised that many disability-related modifications, and services, may be effectively provided online, including "for instance, extensions of time for assignments, videos ..., accessible reading materials, and many speech or language services through video conferencing." (*Ibid.*) The U.S. Department

of Education encouraged parents and educators to collaborate creatively to meet the needs of students with disabilities, and to consider practices, "such as distance instruction, teletherapy ... [and] meetings held on digital platforms," and noted "there are low-tech strategies that can provide for an exchange of curriculum-based resources, instructional packets, projects and written assignments." (*Ibid.*)

Los Angeles Unified provided all students distance learning with a combination of synchronous, real-time instruction, and asynchronous, independent activities. Synchronous distance learning means students and teachers are not physically in the same place, but at the same time as each other are in a videoconference, called a Zoom classroom. Synchronous learning classes are pre-scheduled and students must log in to the videoconference classroom at the designated time. Asynchronous distance learning permits students to learn on their own schedule using pre-recorded instruction, written lessons, textbooks, or other classroom materials such as worksheets, within a certain timeframe and without interacting with teachers or other classmates.

Los Angeles Unified was closed for spring break from April 6 to 10, 2020, with distance instruction resuming on April 13, 2020. From mid-March 2020 through June 12, 2020, Los Angeles Unified allowed each teacher to choose how to continue providing instructional services to their students. For example, Student's case carrier and special education classroom history/social studies teacher, Molly Kim, provided her students, including Student, the specialized academic instruction required by their IEPs via Zoom in synchronous online meetings with each of her classes. Student's general education classroom art teacher, Susan Weinman, used asynchronous activities between March 16, 2020, and the end of the 2019-2020 school year. She used a learning management system called Schoology to post instruction and assignments weekly, with information about the week's assignment posted on Mondays and the students' Art



class work due by Friday. Because Weinman was not aware what art materials students had available at home, she modified whatever she normally taught in person for online instruction. She focused on skills-based activities. Students logged on to view the weekly project assignments and completed them at their own pace during the week. Some students rushed, and others took more time and were very thoughtful. Students uploaded their completed work.

The last day of school for the 2019-2020 school year was June 12, 2020. For the fourth quarter/spring semester final grades in June 2020, Los Angeles Unified required teachers to issue grades for all students, general education and special education alike, that were no lower than the last grade the student had before the campus closures, and no student was allowed to receive a failing grade.

The U.S. Department of Education advised school districts in its March 2020 guidance that closing to all students because of the pandemic did not violate the IDEA by closing to special education students. (OSERS Q & A, *supra*, p. 2, Answer A-1). The Department of Education's guidance was consistent with the Ninth Circuit's decision in *N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116-1117 (*N.D.*), which upheld a district court's denial of a motion by special education students to enjoin the state's shutdown of all schools on Fridays during a fiscal emergency. In Hawaii, all the schools on all the islands of the state are in one, whole-state, school district called the Hawaii State Department of Education. The Ninth Circuit rejected the students' arguments that ceasing services owed to them under their IEP's constituted a change of placement and violated IDEA's stay-put rule. The Ninth Circuit explained, "Congress did not intend for the IDEA to apply to system wide administrative decisions[.] Hawaii's furloughs affect all public schools and all students, disabled and non-disabled alike" and "[a]n across the board reduction of school days such as the one here does not conflict

with Congress's intent of protecting disabled children from being singled out." (*Id.* at p.1116.) The Court reasoned that the IDEA does not "give the parents of disabled children veto power over a state's decisions regarding the management of its schools." (*Id.* at p. 1117.)

Student failed to prove Los Angeles Unified denied him a FAPE by closing Student's middle school campus in compliance with lawful orders of the Governor and providing all students distance education using a variety of methods available under the emergency circumstances. For 10 years, Student demonstrated average cognitive abilities and earned average to above-average grades in his classes, all of which adhered to the common core, state content standards. Student failed to prove he had any particularly complex needs that made the distance education approaches provided by Los Angeles Unified, through his special education and general education teachers, uniquely inappropriate for him. Student did not demonstrate by a preponderance of the evidence that the educational services Los Angeles Unified provided Student by distance learning in the late spring of 2020 fell "significantly short of the services required by the child's IEP" in the circumstance of a global crisis. (*Van Duyn, supra*, F.3d 811 at p. 815.)

Student failed to meet his burden of proof to demonstrate Los Angeles Unified denied him a FAPE from March 21 through June 12, 2020, by assigning him to distance learning without continuing to provide in-person services.

## EXTENDED SCHOOL YEAR 2020

Student's January 23, 2020 IEP determined Student was eligible for extended school year. However, Parent did not enroll Student in extended school year during the

summer of 2020. As described during Parent's testimony, Parent did not enroll Student for extended school year for the same reason she had for many years not enrolled him in the extended school year services Los Angeles Unified offered him, related to Parent's lack of transportation. Parent's failure to enroll Student in extended school year 2020 was not related to whether services in the summer of 2020 would be provided in person on a school campus or by distance instruction, or any dissatisfaction Parent might have had regarding distance instruction.

Further, as described for the period March 21 through June 12, 2020, the distance education services Los Angeles Unified provided, which would have continued during extended school year 2020 for Student's specialized academic instruction only, were sufficient to provide Student a FAPE. Student failed to prove he had any particularly complex needs that made the distance education approaches provided by Los Angeles Unified, through his special education teachers, uniquely inappropriate for him.

Therefore, Student failed to prove Los Angeles Unified denied him a FAPE for the period of the 2020 extended school year by failing to provide Student in-person services.

## ISSUE 1(B): THE 2020-2021 SCHOOL YEAR TO MARCH 21, 2022

### THE 2020-2021 SCHOOL YEAR

Historically, instructional time requirements have included separate annual instructional day and annual instructional minute statutory requirements. Education Code section 46200 requires a minimum of 180 instructional days. Education Code section 46207, subdivision (a)(3), has required 54,000 annual instructional minutes for students in grades 4 to 8, inclusive, which is an average of 300 instructional minutes per

day. Education Code section 46207, subdivision (a)(4), has required 64,800 annual instructional minutes for students in grades 9 to 12, inclusive, which is an average of 360 instructional minutes per day.

Under the newly enacted Education Code section 43501, in effect only during the 2020-2021 school year, subdivision (c) specified the minimum school day for students in grades 4 through 12, inclusive, was 240 instructional minutes per day, with definitions for how to calculate those minutes depending on whether students received instruction in person, through distance learning as defined in Education Code section 43500, or a combined day of in-person instruction and distance learning. (Ed. Code, § 43502, subd. (e).) Education Code section 43502, subdivision (d)(1), waived the annual instructional minute requirements for the 2020-2021 school year, but local educational agencies still had to meet the annual instructional day requirements. For middle school students, including Student who was in eighth grade the 2020-2021 school year, the average school day was 20 percent shorter than before. For high school students, the average school day was reduced by 33.33 percent.

The IDEA does not explicitly require an IEP to include a plan for how special education and related services will be delivered if a school closure requires distance learning.

On June 29, 2020, Governor Newsom signed the 2020 Budget Act and accompanying budget implementing legislation, including Senate Bill 98, called SB 98 (Chapter 24, Statutes of 2020). SB 98 included important changes related to special education and distance learning. SB 98 amended Education Code section 56345 to require IEP teams to make an individualized determination about how an IEP would be provided under emergency conditions, in which instruction or services, or both, cannot

be provided to the student either at the school or in person for more than 10 school days. (Ed. Code, § 56345, subd. (a)(9)(A).) This description must be included in the development of each initial IEP or addressed during the regularly scheduled revision of an IEP and must take public health orders into account. (Ed. Code, § 56345, subd. (a)(9)(B).)

Los Angeles Unified's 2020-2021 school year began on August 18, 2020. All students of Nightingale Middle School, general and special education alike, received instruction through distance education methods as a matter of district policy and federal guidance because the campus remained closed due to the COVID-19 pandemic. Nightingale shifted from its prior scheduling system of every class or period, every day, to a system called block scheduling, with fewer classes daily and each of longer duration, on an alternating weekly schedule, by videoconference from their homes in compliance with Executive Order N-33-20 directing Californians to stay home unless specifically exempted.

For the 2020-2021 school year, students of Nightingale logged into their first, third, fifth, and seventh period classes daily during odd weeks, and their second, fourth, and sixth period classes, and homeroom, daily during even weeks. On Mondays, classes were 45 minutes each with a 5-minute break between classes, and a 30-minute lunch break after three classes, before the last class of the day. Monday classes were designated to be 25 minutes of synchronous instruction, and 20 minutes of asynchronous activity. On Tuesdays through Fridays, classes were 65 minutes each, with a 5-minute break between classes, and a 30-minute lunch break after three classes, before the last class of the day. Tuesday through Friday classes were designated to be 30 minutes of synchronous instruction, 25 minutes of asynchronous small group or independent activity, and another 10 minutes of synchronous instruction. During even

weeks, students participated in “homeroom,” broken into two 20-minute, synchronous sessions with a 5-minute break in between on Mondays, and broken into two 30-minute sessions on Tuesdays through Fridays, with 20 minutes synchronous and 10 minutes asynchronous in each session, with a 5-minute break between the two homeroom sessions. Nightingale teachers used Zoom for real-time, synchronous instruction. Teachers did parent outreach and held office hours on Monday afternoons for 35 minutes, and held office hours on Tuesday through Friday afternoons for 15 minutes each day.

Many teachers did not use asynchronous activities and remained on camera, live in the Zoom classroom the entire class period. Student’s case carrier and eighth grade special day class history teacher Kim remained live in the Zoom classroom the full duration of each class, with no asynchronous activities.

In addition to using Zoom for synchronous instruction, teachers had discretion to use additional platforms to benefit their classes. For example, Student’s eighth grade general education classroom art teacher Weinman used an interactive learning platform called Seesaw, available both as an application and as a website, to create student portfolios. Students uploaded their artwork there. She also used an application called Padlet, to which students uploaded a quick sketch when assigned. Weinman monitored if the students uploaded their assignments.

From April 26 to June 11, 2021, Nightingale offered students a hybrid schedule, allowing them to come on campus two to three alternating days a week, varying by the week and the homeroom to which the students were assigned. Student was assigned to Homeroom L and followed that schedule. The students who chose to come to campus did not receive in-person instruction, but physically sat in the classroom of their

homeroom teacher all day and still accessed their instruction on their individual computers wearing headsets, following a revision of the schedule described above. For students who chose to remain learning from home and not come to campus, their schedules included a homeroom session and periods 1, 3, 5, and 7 every day during certain weeks, and a homeroom session and periods 2, 4, and 6, and a tutoring hour, during the other weeks. Whether students were on campus or at home, all instruction was delivered through synchronous and asynchronous activities in what continued to be a distance learning method. This hybrid schedule allowed students to come to campus but still adhere to local health agency directives regarding minimizing movement and maintaining social distancing. Students left the homeroom classroom during the lunch break but remained grouped only with their homeroom classmates and did not mix with other students in the lunch-eating area.

For the students who remained at their homes, the homeroom videoconference was 30-minutes every morning, during which time students who went to campus arrived in staggered time slots and waited in their homeroom cohorts, outside. The homeroom session for remote students was followed by a 30-minute break, during which time the students on campus had their homeroom session. Then all students were together in online classrooms for all other class periods, which were 50 minutes each. There was a 10-minute break after the first class, and a 70-minute lunch break after the second class for students at home, during which time the students on campus had another 30-minute homeroom followed by a 40-minute lunch break. There was another 10-minute break after the third class, and then the final class of the day, which was seventh period during odd weeks, or 50 minutes of tutoring during even weeks.

Student was invited to return to campus from April 26 to June 11, 2021, and had the option of attending distance learning instruction from the Nightingale Middle

School campus or from home. Parent wanted Student to stay home because she was afraid Student would catch COVID-19 at school. Parent knew people were dying from COVID-19 and she believed it was safer for him to stay home. Student continued to receive all distance learning from his home for the remainder of the 2020-2021 school year.

Based on Student's continued participation throughout the 2020-2021 school year in his four special education classes, and three general education classes and homeroom, the percentage of Student's day spent outside the general education environment did not change and was delivered at the percentages specified in his January 23, 2020 IEP, and later his January 14, 2022 IEP.

Molly Kim was Student's special education teacher for his history/social studies classes. Kim was also his case carrier, for sixth, seventh, and eighth grades. Kim's special education classroom, like all special education classrooms at Nightingale Middle School, had a special education assistant, both before and during the campus closure. Kim taught Student the full school year before the campus closure, the seven months of seventh grade before the campus closure, the rest of seventh grade after the campus closed, and all of eighth grade, the 2020-2021 school year of distance learning. Kim was very familiar with Student and thought highly of him. She described Student as smart and funny with a sense of humor, and very well-behaved and respectful, credit for which Kim gave to Parent. Kim described Parent as always grateful, and Parent made Kim feel good about herself. Sometimes Parent called Kim on a Sunday and Kim always answered her calls. Kim described Parent as a good, solid, nice person.

Student conversed well, was talented, volunteered to be the class reporter, had a lot of confidence, and was well-liked by his teachers. Kim did not see any decline in



Student's abilities or behavior during distance learning. Student turned on his camera and Kim saw him and his face throughout class. Student raised his hand and liked to chat in the chat box of Zoom, constantly writing in that feature of the Zoom classroom. Kim sometimes played quick games to break up the time, and Student loved games, especially competitive games. Kim appreciated Student's participation during distance learning and they high-fived on the screen together.

Student had a laptop or Chromebook and Kim found Student to be very adept at using technology, which she surmised was because he was in a video class as a general education elective. Kim did not recall Student having any difficulty logging in or logging out, getting on Zoom, turning on his video camera, or muting himself. Kim thought Student did really well and did not agree with the statement in Student's complaint that Student did not adapt to distance learning. Student's grades did not fall in her class, and if they did, Parent would have called Kim because Parent was attentive to Student's education and teachers. Kim was a careful teacher and, if Student's grades had fallen, Kim would have thought it indicated a problem and called Parent.

Kim taught six periods a day, with a total of about 60 students. Student's class had 10 students, with the two adults – Kim and the classroom aide. Student had accommodations in his IEP, and Kim delivered them to Student during distance learning. Many of his accommodations were supports already embedded in the special day class. One of Student's accommodations involved pairing Student with another bright student, and Kim frequently paired Student with peers he was friendly with, Student R and Student E. In distance learning, Kim paired Student with Student R or Student E if there were pairings or groups.

Student liked to rush and needed frequent reminders, a few to several times per hour, to slow down while writing and take things one step at a time because writing was a multi-step process. Kim provided Student those frequent reminders during distance learning. Kim checked his writing, asked what he had written so far, sometimes asked him to read it to her, and sometimes asked him to share his screen, which he readily did. During distance learning Kim supported Student with brainstorming and pre-writing activities by asking him questions and giving him prompts to guide him to organize his thoughts, focusing on three things he wanted to talk about instead of all 12 ideas he had. Student's spelling needed work and during distance learning, Kim had a white board, played hangman, and did other activities for spelling exercises.

Kim described Student as needing a lot of reteaching, reminders of what had already been taught. He struggled to recall information, so Kim filled in gaps for him. Kim saw Student make a lot of progress from sixth through eighth grades, and become "a different kid."

Susan Weinman taught Student's general education classroom art class for sixth, seventh, and eighth grades. His eighth-grade class was called Art Production. Weinman's art classes typically had 30 to 38 students per class. In the past, she had up to 42 per class, and during Zoom instruction in the 2020-2021 school year she had 45 students per class, without a classroom aide. Approximately 30 percent of Weinman's students had an IEP. Weinman adapted her art classes during the 2020-2021 school year for live instruction via Zoom and asynchronous work by students. During live Zoom instruction, she presented about famous artists, and demonstrated art techniques. Students drew, painted, made collages, drew with online programs, and created art from household items.

During seventh and eighth grades, Weinman had no concerns with Student's behavior, and she had no concerns with Student's participation during distance learning in the spring of 2020, and the entire 2020-2021 school year. Initially in the fall of 2021, Student had some challenges getting on the Seesaw platform. Students had to sign up and it took Student "a couple" attempts to successfully register to upload his assignments. Weinman was not aware of any other difficulty Student had. Starting in October 2020, Student uploaded his work and managed the technology fine thereafter. In the first reporting period for fall 2020, Weinman gave Student a grade of M, meaning "meets standards," a mark allowed during a first reporting period. Student earned a B for the final grade of the fall 2020 semester, a B in the first reporting period of the spring in 2021, and an A as the final grade for the spring semester of eighth grade.

Weinman was familiar with Student and attended Student's IEP team meetings in January 2020 and January 2021 as the general education teacher. Knowing Student for three years, Weinman described him as a generally very happy student. He had friends in class and interacted appropriately with Weinman. Weinman had no concerns about Student during the 2020-2021 school year.

Los Angeles Unified convened an annual IEP team meeting for Student on January 15, 2021, which Parent attended. At the time of the January 15, 2021 IEP team meeting, Student met the three goals in his January 2020 IEP. His grades in the spring 2020 semester, seventh grade, as reported in the February 2022 psychoeducational assessment, were C's in math, history, science/health, and physical education, and B's in English and one elective. His grade for the second elective was not in evidence. His "work habits" scores generally were "satisfactory," but "excellent" in the reported

elective, and “unsatisfactory” in physical education. His “cooperation” scores were generally “satisfactory,” but “excellent” in the reported elective, and “unsatisfactory” in physical education.

His final grades for the fall 2020 semester, eighth grade, reflected on the 2020-2021 report card were C’s in math, physical education, and his elective “Investig. Video Prod.,” B’s in science, history, and his elective Art Production, and an A in English. His “work habits” scores were generally “satisfactory,” and “excellent” in both electives. His “cooperation” scores were “satisfactory” in physical education, science, and history, and “excellent” in math, English, and both electives. The grades and scores from Student’s 2020-2021 report card for the fall semester of eighth grade were not accurately reported in the February 2022 psychoeducational assessment report and this Decision relied on the grades reflected on the report card itself.

The IEP team developed three new annual goals for Student to achieve by January 2022, adhering to grade-level standards for Student’s next grade level in one year’s time, in areas of need particular to Student’s challenges in reading, writing, and math.

As required by new state law, the January 15, 2021 IEP added an Alternative Remote/Distance Learning During Emergency Conditions page, addressing how Student’s individual needs might impact the provision of services in emergency circumstances. In the event instruction or services, or both, could not be provided either at the school or in person for more than 10 school days due to emergency conditions – caused by fire, flood, impassable roads, epidemic, earthquake, imminent major safety hazard as determined by local law enforcement, a transportation services strike by a non-school entity, or other official order issued to meet a state of emergency or war –

the IEP would be provided by alternate means, depending on the emergency circumstances present at the time of emergency conditions.

For Student, the means of delivering specialized academic instruction and related services in emergency circumstances could include any of the following:

- asynchronous, teacher-posted lessons online or other media;
- synchronous virtual class meetings;
- personalized learning tools of virtual or paper packets as available;
- scheduled teacher appointments, virtual or in-person as available;
- scheduled email check-ins for parent or student; and
- drop-in virtual office hours for parent or student.

These same methods of delivery were indicated for Student's supplementary aids and services provided in general education classes and other general education environments. The Alternative Remote/Distance Learning During Emergency Conditions indicated it did not "constitute a change to the District's offer of FAPE or IEP."

The January 15, 2021 IEP again offered Student placement in special day classes for his 4 academic subjects, and general education classes for homeroom, physical education, and electives, with approximately 59 percent of his time in a special education environment, and 41 percent in general education.

Los Angeles Unified received Parent's written consent to the January 15, 2021 IEP on January 26, 2021.

With respect to the Alternative Remote/Distance Learning During Emergency Conditions, Student argues, "District has not offered additional consideration, nor have the Parents consented to District's unilateral modification of the offer of FAPE." The

contract concept of “consideration” has no application in the context of a special education student’s IEP. Furthermore, no “consideration” was required for Los Angeles Unified to comply with the new requirements imposed by SB 98 through Education Code section 56345. And finally, Parent fully consented to the January 15, 2021 IEP on January 26, 2021, without any written exceptions.

Student’s grades for the spring 2021 semester of eighth grade, reflected on the 2020-2021 report card, were C’s in math, science, physical education, and his elective “Investig. Video Prod.,” B’s in English and history, and an A in his elective Art Production. His “work habits” scores were generally “satisfactory,” and “excellent” in his art elective. His “cooperation” scores were “satisfactory” in physical education, science, English and history, and “excellent” in math and both electives. The grades and scores from Student’s 2020-2021 report card for the spring semester of eighth grade were not accurately reported in the February 2022 psychoeducational assessment report and this Decision relied on the grades reflected on the report card itself.

Student’s Issue 1 concerns implementation of the January 23, 2020 IEP, which was developed at a time when everyone, district representatives and parents alike, assumed education would always be delivered by the means it had continuously been delivered for the prior 10 years – on campus and in-person – despite the existence and availability of distance education technology and methodology during that time. Student’s IEP did not state the educational services had to be delivered in person, but Student was not enrolled in an independent study program or with an online charter school. Despite the lack of any explicit words stating the educational program was intended to be provided in-person, the concept of in-person instruction was baked into Student’s January 23, 2020 IEP because the “Least Restrictive Environment Analysis” page concluded the

supports, accommodations, and/or modifications in Student's IEP could "be made available on a general education site in a special day program" and that Student did not require placement "in a special school setting."

Student's Issue 1 is premised on the idea that despite the global outbreak of a highly contagious and too-often fatal virus resulting in multiple State and local executive officers declaring a state of emergency and ordering citizens and residents to stay at home, he was entitled to continue to receive his education exactly the way he previously had, and any change to being in the physical presence of his teachers was illegal.

The January 15, 2021 IEP was developed after schools closed due to the pandemic, but it was written the same way all IEP's developed before the unprecedented school closure had been written, and included the newly required options for providing special education, related services, and supplementary aids and services provided in general education classes and other general education environments, with the explicit qualification that in the event of emergency conditions, "the IEP will be provided by one or more of the means it stated below, to the greatest extent possible in light of the emergency circumstances and District policy," and "the specific means by which the IEP shall be provided in a future emergency will be determined at the time, and light of the circumstances."

Student's position in Issue 1 is inconsistent with existing law under *N.D., supra*, and *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (superseded on other grounds by statute) (*Ms. S.*), as well as the federal and State guidance provided to local educational agencies at the beginning of the pandemic. It was not possible to implement Student's IEP as written to be provided "on a general education site", and

Los Angeles Unified was obligated to offer a temporary placement and program that “closely approximated” Student’s last educational placement. (*Ibid.*) Student’s primary complaint regarding education in the spring of 2020 and the entire 2020-2021 school year is that it was provided as distance education during school closure because of COVID-19. But as explained in *N.D.*, the IDEA does not “give the parents of disabled children veto power over a [school district’s] decisions regarding the management of its schools.” (*N.D.*, *supra*, F.3d at p. 1117.) CDE encouraged local educational agencies to continue providing special education and related services as outlined in a student’s IEP through a distance learning model. (CDE March 20, 2020 Guidance, *supra*, Frequently asked Question 1.) CDE acknowledged that the unprecedented COVID-19 pandemic might lead to learning being provided that did not mirror the offer of FAPE in a student’s IEP. While CDE guidance is not binding on school districts, it is instructive when considering a school district’s obligations during this time period. (See *Cyrus Csutoras v. Paradise High School* (9th Cir. 2021) 12 F.4th 960.)

Los Angeles Unified delivered instruction via distance learning to Student during the COVID-19 school closure in the 2020-2021 school year. Los Angeles Unified campuses remained physically closed to all students through the end of the 2019-2020 regular and extended school year, and at Nightingale Middle School from the start of the 2020-2021 school year until April 26, 2021.

The United States District Court for the Central District of California denied a student’s request for a temporary restraining order and rejected her request for in-person IEP services during the COVID-19 pandemic. (*E.M.C. v. Ventura Unified School District* (C.D.Cal. October 14, 2020, No. 2:20-CV-09024-SVW-PD) 2020 WL 7094071 (*E.M.C.*)) Like Student alleges in this case, the student in *E.M.C.* experienced difficulties with distance learning and alleged she regressed academically and behaviorally. Relying



on the Ninth Circuit's decision in *N.D.*, *supra*, the court reasoned even if the student's IEP provided for in-person services, the program had been modified by the statewide public health restrictions prohibiting in-person instruction. (*E.M.C.*, *supra*, at \*6.) The court rejected student's argument that restrictions on in-person learning in counties on the statewide monitoring list did not excuse a school district from its obligation to provide in-person IEP services.

The court's reasoning in *E.M.C.* is instructive for this case. Here, Student's IEP was modified by the statewide public health restrictions prohibiting in-person instruction. Whether Parent did not prefer, want, or like distance instruction is not determinative of Student's claims. The adaptation to alternative means of delivering education to all students, along with special education and related services for students with IEP's, based on lawful orders of the Governor defeats Student's claim that Los Angeles Unified denied him a FAPE by failing to provide his educational program in the exact same manner as before schools closed after March 13, 2020.

Providing Student the group specialized academic instruction in four academic subjects in his special education classroom placement, and providing Student general education in homeroom, physical education, and two electives, as specified in the January 23, 2020 IEP, and the January 15, 2021 IEP, by means of distance education through synchronous instruction using Zoom while Student was physically located in his home and his teachers – and in his special education classes, classroom aides – were physically located outside his home did not result in a material failure to implement Student's January 23, 2020 IEP from August 18, 2020, through January 15, 2021, or Student's January 15, 2021 IEP from January 16, 2021, or January 26, 2021, when Los Angeles Unified received Parent's consent, through the end of the 2020-2021 school year on June 11, 2021. Los Angeles Unified provided Student a program that closely

approximated his last educational placement as required by *Ms. S.*, with four academic courses in the special education setting and three courses and homeroom in the general education setting, using methodologies implemented in public schools nearly statewide due to the COVID-19 pandemic and in compliance with lawful orders of the Governor and public health officials, and applied equally to general and special education students as permitted by *N.D.*

Student failed to establish Los Angeles Unified materially failed to implement Student's January 23, 2020 IEP from August 18, 2020, through January 15, 2021, or Student's January 15, 2021 IEP from January 16, 2021, through the end of the 2020-2021 school year on June 11, 2021. Student failed to prove Los Angeles Unified denied him a FAPE by keeping Student's middle school campus closed in compliance with lawful orders of the Governor and providing all students, general education and special education alike, distance education using a variety of methods available under the statutes the California legislature enacted to meet the needs of all students during the unique emergency circumstances of the COVID-19 pandemic. For 10 years, Student demonstrated average cognitive abilities and earned average to above-average grades in his classes, all of which adhered to the common core, state content standards. Student failed to prove he had any particularly complex needs that made the distance education approaches provided by Los Angeles Unified uniquely inappropriate for him. Student did not demonstrate by a preponderance of the evidence that the educational services Los Angeles Unified provided Student by distance learning in the 2020-2021 regular school year fell "significantly short of the services required by the child's IEP" in the circumstance of a global crisis. (*Van Duyn, supra*, F.3d 811 at p. 815.)

Therefore, Student did not prove Los Angeles Unified denied him a FAPE for the period of the 2020-2021 school year by failing to provide Student in-person services.

## EXTENDED SCHOOL YEAR 2021

Student's January 15, 2021 IEP determined Student was eligible for extended school year. However, Parent did not enroll Student in extended school year during the summer of 2021. Parent did not enroll Student for extended school year for the same reason she had for many years not enrolled him in the extended school year services Los Angeles Unified offered him, related to Parent's lack of transportation. Parent's failure to enroll Student in extended school year was not related to whether services in the summer of 2021 would be provided in person on a school campus or by distance instruction, or any dissatisfaction Parent might have had regarding distance instruction.

Further, as described for the period of the 2020-2021 regular school year, the distance education services Los Angeles Unified provided, which would have continued during extended school year 2021 for Student's specialized academic instruction only, were sufficient to provide Student a FAPE. Student failed to prove he had any particularly complex needs that made the distance education approaches provided by Los Angeles Unified uniquely inappropriate for him.

Therefore, Student failed to prove Los Angeles Unified denied him a FAPE for the period of the 2021 extended school year by failing to provide Student in-person services.

## 2021-2022 SCHOOL YEAR TO MARCH 21, 2022

Los Angeles Unified resumed on-campus, in-person instruction for all students at the beginning of the 2021-2022 school year on August 16, 2021.

Student failed to prove Los Angeles Unified denied him a FAPE for the period of the 2021-2022 school year through March 21, 2022, by failing to provide Student in-person services. The fact that Los Angeles Unified resumed on-campus, in-person instruction for all students at the beginning of the 2021-2022 school year on August 16, 2021, was a known fact at the time Student filed his request for due process hearing on March 21, 2022. Student's claim that Los Angeles Unified denied him a FAPE by failing to provide Student in-person services during the time period of the start of the 2021-2022 school year through March 21, 2022, is therefore frivolous.

## ISSUE 2: DISTANCE LEARNING WITHOUT NECESSARY ACCOMMODATIONS

Student contends Los Angeles Unified denied him a FAPE by failing to "provide the accommodations needed to enable Student to be able to obtain a FAPE in a distance-learning environment." Student argues he "made no progress toward Student's goals and in fact shows significant regression."

Los Angeles Unified contends it provided Student the accommodations stated in his applicable IEP's during distance learning and that no further accommodations were required to enable Student to access his education during distance learning.

### ISSUE 2(A): MARCH 21, 2020, TO THE END OF THE 2019-2020 SCHOOL YEAR

Student's January 23, 2020 IEP included instructional accommodations for Student of clear expectations, clear directions, prompting and reinforcements, allowing him to have responsibilities in the classroom, individual monitoring of reading comprehension, peer help for reading, leadership positions, and reteaching of math concepts.

Student failed to prove Los Angeles Unified, through Student's special education and general education teachers, failed to provide Student the accommodations of his January 23, 2020 IEP during distance education from March 21 through June 12, 2020.

Further, Student failed to offer any evidence of additional accommodations he required to access the curriculum during distance learning. Student failed to prove Los Angeles Unified denied him a FAPE by assigning him to distance learning without providing him the necessary accommodations from March 21, 2020, to the end of the 2019-2020 school year.

## ISSUE 2(B): THE 2020-2021 SCHOOL YEAR

### AUGUST 18, 2020, TO JANUARY 15, 2021

Student's January 23, 2020 IEP, still in effect during the fall semester of the 2020-2021 school year, included instructional accommodations for Student of clear expectations, clear directions, prompting and reinforcements, allowing him to have

- responsibilities in the classroom,
- individual monitoring of reading comprehension,
- peer help for reading,
- leadership positions, and
- reteaching of math concepts.

Student failed to prove Los Angeles Unified, through Student's special education and general education teachers, failed to provide Student the accommodations of his January 23, 2020 IEP during distance education from August 18, 2020, through January 15, 2021. Special education teacher and case carrier Kim persuasively testified she provided Student all his non-math accommodations in her class during distance

education. No evidence established, as it was Student's burden to do, Student's other teachers failed to provide the accommodations of his January 23, 2020 IEP during distance education from August 18, 2020, through January 15, 2021.

Further, Student failed to offer any evidence of additional accommodations he required to access the curriculum during distance learning. Student maintained average to above-average grades, work habits, and cooperation in the fall 2020 semester in distance learning. He met the three goals of his January 2020 IEP, and the IEP team developed three new goals pegged to grade-level content standards in Student's specific areas of need in reading, writing, and math for Student's next grade level, indicating the IEP team predicted Student would continue to make ordinary progress, even during distance learning. Student failed to prove Los Angeles Unified denied him a FAPE by assigning him to distance learning without providing him the necessary accommodations from August 18, 2020, to January 26, 2021.

#### JANUARY 26 TO JUNE 10, 2021

Student's January 15, 2021 IEP, to which Parent consented on January 26, 2021, included instructional accommodations of clear directions, reteaching of math concepts, use of technology available for basic math computations, clear expectations and rules, and individual monitoring of reading comprehension.

Student failed to prove Los Angeles Unified, through Student's special education and general education teachers, failed to provide Student the accommodations of his January 15, 2021 IEP during distance education from the time Parent consented to that IEP on January 26, 2022, through June 10, 2022. Special education teacher and case carrier Kim persuasively testified she provided Student all his non-math

accommodations in her class during distance education. No evidence established, as it was Student's burden to do, Student's other teachers failed to provide the accommodations of his January 15, 2021 IEP during distance education from January 26 through June 10, 2021.

Further, Student failed to offer any evidence of additional accommodations he required to access the curriculum during distance learning. Student maintained average to above-average grades, work habits, and cooperation across the 2020-2021 school year in distance learning. He met the three goals of his January 2020 IEP, and the IEP team developed three new goals pegged to grade-level content standards for Student's next grade level, indicating the IEP team predicted Student would continue to make ordinary progress, even during distance learning. Student failed to prove Los Angeles Unified denied him a FAPE by assigning him to distance learning without providing him the necessary accommodations from January 26, 2021, to the end of the 2020-2021 school year on June 10, 2021.

### ISSUE 3: ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT FIRST ASSESSING STUDENT

Student contends Los Angeles Unified denied him a FAPE by not assessing Student before assigning him to distance learning. Throughout the hearing, Student's attorney's questions focused on whether Los Angeles Unified had assessed whether Student was "fit" for distance learning before assigning him to distance learning, and in closing argument Student urges that Los Angeles Unified was required "to determine whether [special education students] are fit to take classes in a distance learning setting." In closing argument, Student asserts he "was not evaluated to determine the

effects of [his] disability on [his] ability to get a FAPE in the distance-learning environment.” Student failed to present any legal foundation for this argument.

Los Angeles Unified contends it was not obligated to conduct any assessment of Student before complying with lawful orders of the Governor and state and local health officials to immediately close school campuses in March 2020 and provide instructional services to all students only through distance education methods. Los Angeles Unified further argues Student’s abilities and disability did not give Los Angeles Unified any reason to think Student would not be able to access distance learning at any time prior to, or after school closures. Student made satisfactory progress and advanced from grade to grade during distance learning despite the lack of any assessment of Student before, or during, distance learning.

A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant information (20 U.S.C. § 1414(b)(2)(A)), and shall not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)). Assessments 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 of the child. (34 C.F.R. § 300.304(c)(6).) The school district must use technically sound testing instruments. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).)

After a child has been deemed eligible for special education, reassessments must be performed if the district determines that is warranted by the child’s educational or



related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) Upon parent request, the local educational agency must conduct a reassessment, even when the school determines that no additional data is needed to determine the student's educational needs. (20 U.S.C. § 1414(a)(2)(A)(ii); Ed. Code, § 56381, subds. (a)(1) & (d); 34 C.F.R. § 300.303(a)(2).)

To the extent Student contends a reassessment was required before Los Angeles Unified began providing him distance learning when Nightingale's campus closed in compliance with lawful government orders, the contention is without support in any of the law and guidance cited above. Before SB 98 was enacted at the end of June 2020, none of the federal or state guidance concerning the unique COVID-19 circumstances indicated an assessment was required before providing distance learning while school campuses were closed. SB 98 explicitly authorized distance learning. Had the legislature intended that distance learning should not be undertaken without an assessment of each student receiving special education and related services, it could have so stated. It did not.

Moreover, *E.M.C.*, in finding that stay-put did not prohibit distance learning, indicated distance learning did not in and of itself constitute a change of placement. (*E.M.C.*, *supra*, 2020 WL 7094071 at \*3-4.) Thus, merely delivering Student's educational program by distance learning due to the closure of school campuses because of the COVID-19 pandemic did not trigger the duty to reassess.

Finally, none of the three circumstances triggering an assessment applied for Student in early March 2020. Los Angeles Unified did not determine that reevaluation was necessary at that time, Parent did not request a reevaluation, and the evidence did not establish whether more than three years had elapsed without Parent's consent since Student's last triennial evaluation. (See *M.S. v. Lake Elsinore Unified School Dist.* (9th Cir 2017) 678 F. App'x. 543 (unpublished).) None of the facts known to Los Angeles Unified triggered the duty to re-assess before distance learning began, and additionally, Student failed to specify any event or information during his experience with online learning that would have triggered the duty to assess.

Student failed to prove Los Angeles Unified denied him a FAPE by failing to assess Student before providing his educational program through distance education when school campuses closed due to the COVID-19 pandemic.

#### ISSUE 4: DENIAL OF FAPE IN THE JANUARY 14, 2022 IEP

##### ISSUE 4(A): "SUFFICIENT PROGRAMS AND SUPPORTS"

Student contends Los Angeles Unified denied him a FAPE in the January 14, 2022 IEP by failing to offer him "sufficient programs and supports." Student failed to offer any explanation or description of what "programs" or "supports" he required but was not offered.

Los Angeles Unified contends the January 14, 2022 IEP offered Student an educational program that was reasonably calculated to enable Student make progress that was appropriate in light of his circumstances.

In high school, Student attended a total of eight classes, divided on a block schedule. Student attended only four periods each day, 90 minutes per class, with periods 2, 4, 6, and 8 some days, and periods 1, 3, 5, and 7 on alternating days, and a 30-minute homeroom period on Thursdays and again on Fridays.

Student only called Parent and nine employees of Los Angeles Unified as witnesses. None of them testified Student required any additional or alternative program or support to what was offered in the January 14, 2022 IEP.

Based on the final grades for the fall 2021 semester, Student's grade point average was 3.57. The January 14, 2022 IEP offered Student continued placement in special day classes with a small class size and instruction by a credentialed special education teacher and one classroom aide for his English Language Arts, math, science, and history/social studies classes, to provide embedded supports, services, and accommodations that could not be made available in a general education classroom. Parent was pleased with the progress Student made and the good grades he earned in that environment. The January 14, 2022 IEP also offered Student continued placement in general education for physical education, electives, and homeroom.

Parent signed consent to the January 14, 2022 IEP without any exceptions on January 31, 2022, and Los Angeles Unified received Parent's signed consent on February 1, 2022. Student argues he "needed the programs and services sought by the Parents to offer a FAPE, but [Los Angeles Unified] did not." Student offered no evidence Parent proposed or requested any "programs and services" different than what Student had been receiving in the past and Los Angeles Unified again offered. To the contrary, Parent testified she believed Student did not have any disability at all, and had improperly been placed in special education from the beginning.

Consequently, Student failed to prove Los Angeles Unified denied him a FAPE by failing to offer him “sufficient programs and supports” in the January 14, 2022 IEP.

#### ISSUE 4(B): ADEQUATE GOALS TO RECEIVE EDUCATIONAL BENEFIT

Student contends Los Angeles Unified denied him a FAPE because the goals in the January 14, 2022 IEP were “nothing more than *de minimus* increases in goals at best.” Although the goals were developed after campuses reopened and Student had attended on-campus, in-person instruction for a full semester, Student argues the IEP’s goals “could not be achieved virtually on their face, and therefore were not genuine.”

Los Angeles Unified contends each of the goals in the January 14, 2022 IEP were measurable, appropriately ambitious, and tailored to meet Student's unique needs.

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child’s present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).) The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-CV-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].)

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D.Cal., May 2, 2017, No. CV16-04356-BRO (MRWx)) 2017 WL 2864945; see also 20 U.S.C. § 1414(d)(1)(A)(i)(II) & (III); Ed. Code, § 56345, subd. (a)(2) & (3).) An examination of the goals in an IEP is central to the determination of whether a student received a FAPE: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Student's case carrier and ninth grade special education classroom history teacher Jeffrey Treadway gathered information from Student's other teachers and documented their reports of Student's present levels of performance in his areas of need of reading, writing and math. Student was advancing from grade to grade and making anticipated progress, working at or near grade level. Treadway reviewed a list of tenth-grade State content standards for reading, writing, and math, and selected areas in which Student demonstrated difficulty as reported by his teachers, and proposed to the IEP team goals to address Student's unique needs regarding reading, writing, and math.

The January 14, 2022 IEP proposed that within one year, in the middle of tenth grade, in the area of reading, Student would be able to identify and evaluate the argument and specific claims in a text, assessing whether the reasoning was valid and the evidence was relevant and sufficient, and identify false statements and fallacious

reasoning, as measured by teacher observation, including of work samples and other informal methods of evaluation, in four out of five trials with 80 percent accuracy.

The January 14, 2022 IEP proposed that within one year, in the middle of tenth grade, in the area of writing, Student would be able to write two or more paragraphs in support of an argument to introduce claims and address at least one opposing claim, with valid reasoning and sufficient evidence to establish clear relationships among claims and counterclaims, as measured by teacher observation, as well as state assessments, work samples, and informal methods of evaluation, in two out of two trials with 90 percent accuracy.

The January 14, 2022 IEP proposed that within one year, in the middle of tenth grade, in the area of math, when given 10 equations, Student would be able to solve them by using the correct order of operations, as measured by teacher observations, including work samples and other informal methods of evaluation, in 8 out of 10 trials with 80 percent accuracy.

Each of these goals corresponded to areas Student's identified as particular areas of deficit or challenge for Student. They tied directly to Student's present levels of performance, detailed more thoroughly in Issue 5(a), below. Student demonstrated a relative need in finding and even understanding the value of evidence, and to support his writing claims and ideas. He also needed to improve identifying and properly gathering relevant information from multiple print and digital sources, assessing the credibility and accuracy of each source, and integrating the information while avoiding plagiarism. The reading goal of the January 14, 2022 IEP built on Student's demonstrated ability to read fluently at his independent reading level, Lexile level, as well as at his grade level and above. The goal targeted identifying and evaluating the

arguments and claims in a text, assessing whether the reasoning was valid and the evidence was relevant and sufficient, and identifying false statements and fallacious reasoning. This goal appropriately focused on Student's reading comprehension. The goal was measurable.

Connected to Student's reading goal was his writing goal, which built on Student's demonstrated ability to write arguments to support claims in an analysis of substantive topics or texts using valid reasoning. The goal targeted using the information Student comprehended from his research on a topic to write two or more paragraphs in support of an argument that introduce claims and address at least one opposing claim, using valid reasoning and sufficient evidence to establish clear relationships among claims and counterclaims. This goal appropriately focused on Student's writing. The goal was measurable.

In the area of math, Student needed to know more about the order of operations to be successful in performing the grade-level equations he worked on. The math goal centered on Student's ability to correctly perform mathematical functions according to the order in which various steps of the equation need to be performed to achieve the correct result. This goal appropriately focused on Student's mathematical abilities. The goal was measurable.

Student offered no evidence of additional areas of need that the January 14, 2022 IEP failed to address. The remedies Student requested in closing argument list goals in about 70 areas, including things that patently were not applicable to Student, such as "Reducing Hand over Hand, Counting, Saying the Alphabet, 2-Step Directions, Rhyming, ... Motor Imitation, ... Pouring, Put Things Away, Turn Taking, ... [and] Comprehending

Color and Number Adjectives and Attributes.” No evidence suggested these and the other goal areas in Student’s proposed remedies were areas of concern, and therefore no evidence suggested Student required goals in any of these areas.

Student also offered no evidence of more appropriate goals in the areas of reading, writing, or math, that were necessary for him to receive a FAPE.

Student failed to prove the goals of the January 14, 2022 IEP were not reasonably calculated to confer educational benefit appropriate in light of Student’s circumstances. Student therefore failed to prove Los Angeles Unified denied him a FAPE by failing in the January 14, 2022 IEP to offer adequate goals.

## ISSUE 5: FAILING TO ADDRESS STUDENT’S REGRESSION RESULTING FROM DISTANCE LEARNING

Student contends he experienced regression due to distance learning, and Los Angeles Unified denied him a FAPE from March 21, 2020, to March 21, 2022, by failing to address his regression resulting from distance learning.

Los Angeles Unified contends Student failed to demonstrate he regressed at any point during the relevant time period. Therefore, Student cannot prove Los Angeles Unified denied Student a FAPE by failing to address his regression, because there was none.

Student offered no evidence that during the period of distance learning from March 2020 through the end of the 2020-2021 school year in June 2021, he regressed in any academic area or other area of unique need. Further, Student offered no evidence



that during the 2021-2022 school year until March 21, 2022, he demonstrated any regression, let alone regression attributable to distance learning in prior school years.

In addition to Student failing to meet his burden of proof, the evidence demonstrated Student made anticipated progress, achieved his IEP goals, and advanced from grade to grade. In January 2020, Student's present levels of performance in his three areas of unique need, in which he had goals, indicated he had basic competencies in these areas and was working on grade-level State content standards, without significant impairment. In reading, he could read grade-level text independently. When he read aloud, he needed reminders to slow down and work on comprehending the text as he read. He sometimes struggled to recall basic details of text he read aloud. He needed some support for reading comprehension, and needed reminders or prompts to recall lessons learned on previous agendas for reading, reading comprehension, and word analysis, which affected his progress in the general education setting.

In January 2021, after Student participated in distance learning for some of the spring 2020 term and the whole fall 2020 semester in distance learning, Student's present level of performance in reading demonstrated strengths in the areas of decoding, word attack, phonetic foundation, and reading fluency. He was able to read grade-level text independently and read aloud with comfortable pace, but sometimes a little too fast as he demonstrated the ease of decoding. He was much better at pacing himself so he did not read too fast or become out of breath when finished. He made great progress in comprehension, as he was able to recall text details more readily.

During Zoom classes, Student showed consistent motivation and commitment to learn. He sometimes protested at first, but eventually worked on assignments with good focus and completed the tasks expected. He needed "some level of support" for

reading comprehension and worked best when paired with a strong student who was perceived as his equal in intellect. He seldom needed a teacher or an adult to review the reading and decoding tasks. Teachers reported he had been a great student the whole year and usually needed reminders or prompts to recall lessons learned on previous agendas. He had some difficulty retaining lessons learned in reading, reading comprehension, and word analysis, which affected his progress in the general education setting.

In January 2022, after another semester of distance learning and one semester back to in-person learning on campus, Student's present level of performance in reading as reported by his new high school teacher described Student as "one of if not the very best reader that I have had in any SDC class, that's not for his age or pound for pound, but just out right." The teacher noted Student's most recent Smarter Balanced Summative Assessment, from sixth grade, had an overall score reflecting "standard not met," and general reading was the only section in which he scored at or near standard, and every other section except listening was below standard. However, by the middle of ninth grade, Student decoded complex words at and well beyond his individual reading level, Lexile level, and grade level with relative ease. He inferred deeper meanings from a variety of texts, especially from famous and meaningful quotes. He showed an extreme strength with his fluency and his independent reading and Lexile level, as well as his grade level and above. He demonstrated a relative weakness with recall and reading comprehension. The teacher believed Student was so strong with his fluency that he tended to read the words as soon as they appeared in his sight and did not take his time to read for understanding. The teacher recommended Student practice reading

text at above his level. Student had difficulty retaining information which also adversely impacted his recall, and that negatively impacted his participation and progress in the general education setting.

Overall, Student showed significant progress in reading from January 2020 through January 2022, not regression.

In January 2020, Student's present level of performance in writing was that he could write a five-sentence paragraph with minimum requirements of an introductory statement, supporting details, and a conclusion sentence. He used spelling that usually met the requirements of a passing grade, but his spelling needed some work. He was working on writing a five-paragraph essay, for which he required ample support in organizing, writing to the rubric of standards, and self-editing. He required support in the details of writing, such as brainstorming of ideas and organizing in the pre-writing process. He had difficulty acquiring and retaining lessons learned in writing such as spelling, grammar and mechanics, paragraph composition, and writing process, which affected his progress in the general education setting.

In January 2021, Student's present level of performance in writing showed he could write a complete sentence with appropriate grammar and mechanics, and he demonstrated some elevated sentence composition. He wrote with some haste and needed occasional reminders to slow down and think about the process of writing. He was able to write a five-sentence paragraph about a given topic as a prompt. He wrote with minimum requirements of an introductory statement, supporting details, and conclusion sentence. His spelling usually met the requirements of a passing grade, but he needed editing support. He continued to learn and practice writing a five-paragraph essay, following the standard mechanics and content requirements. Student liked to

read, and that helped him generate ideas and be creative with his writing topics. He needed some guidance with maintaining organization of his writing, but that was a "minor issue." His spelling needed some work, and he was usually adept at using technology. He needed support in the details of writing, such as brainstorming ideas, and organizing in the prewriting process. Student was working on expository and persuasive writing, as well as continuing to work on supporting details and evidence. He had issues with acquiring and retaining lessons learned in writing, such as spelling grammar and mechanics, paragraph composition, and writing process, which affected his progress in the general education setting.

In January 2022, after another semester of distance learning and one semester back to in-person learning on campus, Student's present level of performance in writing showed progress. Student's case carrier and social studies teacher, Treadway, described at hearing that normally a student's deficits are glaring. But Treadway had to really look for things wrong because Student was performing very well. Student could

- use simple vocabulary at his reading level accurately,
- spell simple sight words with ease,
- convey thoughts and ideas well,
- was easily understood,
- his responses to writing prompts were coherent and well thought out, and
- he used correct structure with simple one- or two-sentence responses.

He used technology, including the Internet, to produce and publish writing and interact and collaborate with others. He showed strength in writing arguments to support claims in an analysis of substantive topics or texts using valid reasoning. He demonstrated a relative need in finding and even understanding the value of evidence, and to support his writing claims and ideas. He also needed to improve identifying and

properly gathering relevant information from multiple print and digital sources, assessing the credibility and accuracy of each source, and integrating the information while avoiding plagiarism. He needed to develop more complex writing because he seemed to stick with simple sentence responses. He needed to develop and strengthen his writing planning, revising, editing, rewriting, or trying new approaches. He had difficulty acquiring and retaining lessons learned in writing such as spelling, grammar and mechanics, paragraph composition, and writing process, which negatively affected his involvement and progress in the general education setting.

Overall, Student showed progress in writing from January 2020 through January 2022, not regression.

In January 2020, Student's present level of performance in math was near grade-level accuracy for addition, subtraction, multiplication, and division of whole numbers. He could recite multiplication facts for numerals 2 through 6, and at times needed a chart for classwork. Contrary to Parent's testimony at hearing that she showed Student fractions just the week before and he said he did not know what they were, the preponderance of the evidence proved while Student was in seventh grade he was able to add and subtract fractions with like denominators. Student

- computed math problems using the order of operations,
- added and subtracted using decimals,
- identified the properties of positive and negative integers on the number line, and
- found the value of unknown variables of a pre-algebraic expression.

Student reported it was difficult for him to work on more abstract and analysis aspects of math, such as variables, proportions and ratios, and word problems that required

multiple steps to solve. He needed support with identifying the calculations necessary for practical application. He made frequent errors with division and subtraction that required regrouping, and needed more practice with solving with percentages and fractions of a whole number. He had difficulty acquiring and retaining lessons learned in math such as basic computation, word problems, practical application, and irrational numbers, which affected his progress in the general education setting.

In January 2021, Student's present level of performance in math was reported identically to the statement of his present level of performance in January 2020, word for word. This fact did not support the conclusion that Student made absolutely no progress in math, but rather indicated no one provided a new and updated statement of his present level of performance. It was noted that Student met the math goal of his January 2020 IEP by the time of the January 2021 IEP, which is evidence of progress rather than regression. The IEP team developed a new annual math goal for Student that was tied to grade-level content standards, and expected that within one year, Student would be able to generate equivalent numerical expressions independently, as measured by student work samples in three out of four trials with 85 percent accuracy.

In January 2022, Student's present level of performance in math demonstrated mastery of basic math addition, subtraction, division, and multiplication. He was able to do those calculations without using a calculator. With relative ease he did well with word problems, owing to the fact that he was strong in the area of reading. He also exhibited strengths in basic calculations using fractions and decimals. Student needed to know more about the order of operations and also showed needs in expressions with exponents, ratios, multi-step problems, and knowing which formula to use for which problems or expression. Student showed great need when graphing from expressions or equations, less related to the order of operations and more a result of not using

correct formulas or not using them accurately. Student had difficulty acquiring and retaining lessons learned in math, such as basic computation, word problems, practical application, and irrational numbers, which negatively affected his progress and involvement in the general education setting.

Overall, Student showed significant progress in math from January 2020 through January 2022, not regression.

Student's end-of-semester grades across sixth, seventh, and eighth grades were consistent, without marked decline. He passed all his courses in seventh and eighth grade, earning mostly B's and C's in his academic courses following the common core curriculum but delivered in the small group setting of special day classes with a low student-teacher ratio, taught by a credentialed special education teacher and a classroom aide. Student achieved all three of his January 2020 goals by January 2021, and achieved all three of his January 2021 goals by January 2022.

Student's case carrier and ninth grade special education classroom social studies teacher Treadway testified that Student was bright and "regression is not a word I would use. He is one of the sharper students I have ever had." In preparing for the January 22, 2022 triennial IEP team meeting, Treadway looked at Student's goals and testified "it was clear he definitely achieved his goals."

Finally, Parent agreed with the school's witnesses and testified that she did not observe Student regress during the 2020-2021 school year.

Despite the lack of any evidence of regression, Student argues he must have regressed during distance education because Los Angeles Unified had always found him eligible for extended school year services. The January 2020, 2021, and 2022 IEP's each

indicate Student was eligible for special education during extended school year because “Student demonstrates areas of significant regression corresponding with limited recoupment after instructional break.” However, no other evidence suggested that was actually true. Parent never sent Student to extended school year because of transportation issues. None of the teachers who testified reported any issues with Student’s performance after instructional breaks. Even if some regression and difficulty with recoupment is assumed, Student failed to prove that any regression he experienced was the result of being assigned to distance learning as opposed to not attending extended school year.

Student failed to prove by a preponderance of evidence that he experienced any regression during distance learning or that Los Angeles Unified’s failure to address regression denied him a FAPE.

## ISSUE 6: FAILING TO OFFER STUDENT APPROPRIATE RELATED SERVICES DURING THE 2021-2022 SCHOOL YEAR THROUGH MARCH 21, 2022

### ISSUE 6(A): ONE-TO-ONE AIDE

Student contends Los Angeles Unified denied him a FAPE because it

“was aware that Student struggled at school, and that he would need an aide at home during distance learning, so that he can do his homework and submit it in time. Thus, District’s failure to offer Student an [sic] 1:1 aide during distance learning from January 2021 until the end of the 2020-2021 school year, as well as for the 2021-2022 school year, violates the IDEA and has denied Student a FAPE.”



Student's argument exceeds the issue, which only concerned the 2021-2022 school year, during which Student attended on-campus, in-person instruction at Abraham Lincoln High School. Student argues that he had no one-to-one aide, but fails to specify the reason he required one in high school during the 2021-2022 school year.

Los Angeles Unified contends Student did not need a one-to-one aide in any school year, including the 2021-2022 school year.

"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 designated instruction and services].)

Student's academic achievement and satisfactory-to-excellent work habits and cooperation throughout sixth, seventh, and eighth grades, including during a full year of distance learning, demonstrated Student was successful in accessing his education and was advancing grade to grade while performing near or at grade level, without a one-to-one aide. The small group instruction with a credentialed special education teacher and classroom aide for his core academic subjects afforded Student sufficient intensive instruction and prompting to enable him to access the curriculum. Neither his special education nor general education teachers reported any concerns about Student's behavior or performance that indicated he required a one-to-one aide to benefit from his educational program.

During ninth grade, Student performed well and his high school social studies and physical education teachers testified he was successful in their classes without a

one-to-one aide. Student's English teacher reported to the school psychologist who conducted Student's triennial reassessment in February 2022, shortly after the January 14, 2022 IEP team meeting, that throughout the first semester of the 2021-2022 school year, Student was able to concentrate for most of the class. He

- tried his best to complete assigned work,
- had no problems transitioning from one task to the next,
- was very good at organizing his thoughts and class assignments,
- worked well independently,
- tried his best to complete tasks with precise work,
- followed directions most of the time, and
- finish all assigned work.

Student was a strong self-advocate and requested help from adults whenever he needed support or clarification.

Student's math teacher taught Student for two periods per day, both math class and math lab. The math teacher told the school psychologist Student was able to work on a task for long periods of time, though his phone sometimes got in the way. Student was able to shift from one activity to the next with ease, was organized, completed classwork and up to about 75 percent of the homework, and followed directions. Student understood and followed instructions and understood new material easily, when it was scaffolded.

Student failed to present any witness testimony or documentary evidence to support his claim he required a one-to-one aide, in any class or environment, as a related service to benefit from special education.

Based upon the foregoing, Student failed to prove Los Angeles Unified denied him a FAPE by failing to offer him a one-to-one aide during the 2021-2022 school year, to March 21, 2022.

#### ISSUE 6(B)(I): HOME APPLIED BEHAVIOR ANALYSIS THERAPY

Student contends he required appropriate behavioral supports and services, including a home applied behavior analysis program, and that Los Angeles Unified denied him a FAPE by not offering home applied behavior analysis therapy.

Los Angeles Unified contends Student did not need applied behavior analysis therapy in any year, and not in the 2021-2022 school year.

Student's complaint alleged "correcting conduct like Student's [in] online classes is very difficult." Student's teachers from middle school and high school all testified Student was cooperative and well-behaved. None of his special education or general education teachers believed he needed intensive behavior interventions or applied behavior analysis while at school. Parent testified against this Issue, stating Student never demonstrated behavior problems, and she never heard a complaint from any teacher regarding Student's behavior. Parent offered no evidence Student presented any behavioral challenges at home that he might not have exhibited at school.

After completing a triennial psychoeducation assessment of Student in early February 2022, school psychologist Deadra Bouligny persuasively opined at hearing that Student did not need applied behavior analysis therapy at school or in the home.

Student failed to offer even a shred of evidence that he required any behavior support services at home in the 2021-2022 school year, let alone specifically applied behavior analysis therapy. Parent testified she thought home therapy would benefit

Student, but her testimony made clear she thought “home therapy” meant academic tutoring at her home by a teacher to help Student do his homework and “teaching him what he lacks in education.” Her testimony in no way supported Student’s claim that he required behavior intervention, applied behavior analysis therapy, or applied behavior analysis therapy at home during the 2021-2022 school year.

Student failed to prove Los Angeles Unified denied him a FAPE by failing to offer him home applied behavior analysis therapy during the 2021-2022 school year.

#### ISSUE 6(B)(II): CLINICAL MEETINGS

Student contends he required “clinical meetings” and that Los Angeles Unified denied him a FAPE by not offering clinical meetings. Student failed to define or describe “clinical meetings” or their purpose.

Los Angeles Unified contends Student did not require clinical meetings to benefit from his education.

Student’s teachers from middle school and high school all testified Student was cooperative and well behaved. None of his special education or general education teachers believed he needed intensive behavior interventions or applied behavior analysis while at school, or clinical meetings for any reason.

Student failed to offer a scintilla of evidence that he required any “clinical meetings” during the 2021-2022 school year. Although Student called 10 witnesses to testify during the hearing, none testified in support of this issue. Parent testified she did not know what clinical meetings were.

Student failed to prove Los Angeles Unified denied him a FAPE by failing to offer him “clinical meetings” during the 2021-2022 school year.

## ISSUE 7: FAILING TO OFFER PARENT TRAINING

Student contends Los Angeles Unified was “aware for the past year that Student didn’t achieve his academic goals and that he had problems not only at school, but also at home. Thus, District’s failure to consider Parent’s problem with Student at home for the 2020-2021 school year and her request for help, violates the IDEA and has denied Student a FAPE.” Student makes the same argument regarding the 2021-2022 school year.

Los Angeles Unified contends it offered Parent the related service called Parent Counseling and Training in both the January 2021 and January 2022 IEP team meetings, and Parent declined it.

### ISSUE 7(A): THE 2020-2021 SCHOOL YEAR

As recounted in multiple Issues above, Student achieved all his annual IEP goals every year and Student’s assertion that he did not is false. Further, Student failed to demonstrate he “had problems not only at school, but also at home.” Student’s closing argument fails to specify a single problem he alludes to with that conclusory assertion.

Student failed to prove Parent made any “request for help” either at the January 2021 IEP team meeting or at any other time during the 2020-2021 school year. Nevertheless, Los Angeles Unified offered Parent Counseling and Training at the January 2021 IEP team meeting. The IEP page for Eligibility, Placement, and Supports has the box checked “no” for Parent Counseling and Training. But Student’s case carrier and history/social studies teacher Kim persuasively testified the IEP team offered Parent

the related service of Parent Counseling and Training. Although Parent denied she was offered parent training, Kim's testimony was corroborated by the notes on the page for Summary of Services, which explicitly documented Parent was provided the Parent Counseling and Training invitation letter and parent portal instructions during the IEP team meeting. These notes were different than the notes from the January 2020 IEP, which stated, "[Parent Counseling and Training] was offered as part of the IEP services, however the parent declined." Therefore, the documentation in the January 2021 IEP of the efforts Los Angeles Unified made regarding the related service of parent training was not merely a duplicate or hold-over from a prior IEP, and it established by a preponderance of the evidence that Los Angeles Unified offered Parent Counseling and Training during the 2020-2021 school year.

Student failed to prove Los Angeles Unified did not offer Parent training during the 2020-2021 school year and therefore failed to prove Los Angeles Unified denied him a FAPE on this basis.

#### ISSUE 7(B): THE 2021-2022 SCHOOL YEAR TO MARCH 21, 2022

As recounted in multiple Issues above, Student achieved all his annual IEP goals every year and Student's assertion that he did not is false. Further, Student failed to demonstrate he "had problems not only at school, but also at home." Student's closing argument fails to specify a single problem he alludes to with that conclusory assertion.

Student failed to prove Parent made any "request for help" either at the January 2022 IEP team meeting or at any other time during the 2021-2022 school year through March 21, 2022. Nevertheless, Los Angeles Unified offered Parent Counseling and Training at the January 2022 IEP team meeting. The IEP page for Eligibility, Placement, and Supports has the box checked "no" for Parent Counseling and Training.

But Student's case carrier and history/social studies teacher Treadway persuasively testified the IEP team offered Parent the related service of Parent Counseling and Training. He explained that is a topic he addresses at every IEP team meeting, and he starts with the draft IEP document having the "no" box checked to avoid offending parents by seeming as if the district is pushing them to get counseling or training, or is criticizing them. Treadway did not specifically recall the discussion but was certain he asked Parent at the January 14, 2022 IEP team meeting if she needed counseling or training, and Parent must have said "no" for him to leave the IEP document's box check as "no" Parent Counseling and Training. Parent denied she was offered parent training, but a preponderance of the evidence established Los Angeles Unified offered Parent Counseling and Training during the 2021-2022 school year and as she did during the IEP team meeting of January 2020, Parent declined it.

Student failed to prove Los Angeles Unified did not offer Parent training during the 2021-2022 school year through March 21, 2022, and therefore failed to prove Los Angeles Unified denied him a FAPE on this basis.

#### ISSUE 8: PREDETERMINING JANUARY 14, 2022 IEP OFFER

Student contends Los Angeles Unified predetermined the January 14, 2022 IEP offer and thereby denied him a FAPE.

Los Angeles Unified contends Parent fully participated in the January 14, 2022 IEP team meeting and made contributions to the discussion, which affected the final offer of goals, placement, services, and accommodations. Los Angeles Unified asserts while Student's case carrier pre-populated some fields of the electronic IEP document to

facilitate discussion, he was open to changing things based on the IEP team's discussion. Los Angeles Unified argues it did not predetermine the January 14, 2022 IEP offer.

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 Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1485, *superseded in part by statute on other grounds*.) "Participation must be more than mere form; it must be meaningful." (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted] ("*Deal*").) A school cannot independently develop an IEP, without meaningful participation, and then present the IEP to the parent for ratification. (*Target Range, supra*, 960 F.2d at p. 1484.) A school district that predetermines the child's program, and does not consider parents' requests with an open mind, has denied the parents' right to participate in the IEP process. (*Deal, supra*, 392 F.3d at p. 858; *Ms. S., supra*, 337 F.3d at p. 1131.)

For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting and is unwilling to consider other alternatives. (*Deal, supra*, 392 F.3d at p. 857-858; *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486) (9th Cir. 2007) 239 Fed. Appx. 342, 344-345 [nonpub. opn.].) 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.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to bring to an IEP team meeting their questions, concerns, and recommendations as part of a full discussion of a child's needs and the services to be provided to meet those needs before the IEP is finalized. (*Assistance to States for the Education of Children Disabilities* (March 12, 1999) 64 Fed. Reg. 12478-12479.) School officials may permissibly 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, January 17, 2013, No. 1:11-CV-398) 2013 WL 209478, \*7.)

An IEP need not conform to a parent’s wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139 [IDEA did not provide for an “education ... designed according to the parent’s desires”] (*Shaw*); see *J.R. v. Sylvan Union School Dist.* (E.D.Cal., March 10, 2008, No. CIV S-06-2136 LKK GGH PS) 2008 WL 682595, \*\*10-11.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Shaw, supra*, 238 F. Supp. at p. 139.) A school district has the right to select the program offered, as long as the program is able to meet the student’s needs, and the district is ultimately responsible for ensuring a FAPE is offered. (*Letter to Richards* (OSEP January 7, 2010).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Ms. S., supra*, 337 F.3d at p. 1131.)

Parent fully participated in the January 14, 2022 IEP team meeting. Her testimony established she was engaged in the discussion and involved in all the decisions of the IEP team. The new annual goals were determined by everyone at the meeting, including the teachers, the counselor, and Parent. She was involved in the determination of the placement offer including both special education and general education classes. When Student’s case carrier suggested Student was ready to transition to general education academic classes, Parent preferred to continue Student’s placement in special education classes for core academic subjects for the remainder of the school year and convinced

the IEP team continuity for the school year and the potential for Student to continue earning high grades with intensive support justified not changing his placement yet. Parent agreed to transitioning Student to more general education in the next school year. Parent was involved in determining the services and accommodations. The IEP team asked Parent if she agreed to the IEP placement, services, and accommodations. Case carrier Treadway corroborated Parent's description of her participation in the January 14, 2022 IEP team meeting, stating Parent asked questions, was active, and "was ON everything we talked about." Like Student's former case carrier Kim, Treadway described Parent as "the sweetest most caring parent."

Student failed to prove Los Angeles Unified predetermined the January 14, 2022 IEP and denied Parent meaningful participation in the January 14, 2022 IEP team meeting. Los Angeles Unified did not deny Student a FAPE by predetermining the January 14, 2022 IEP.

## ISSUE 9: FAILING TO OFFER FULL-TIME PLACEMENT IN GENERAL EDUCATION

Student contends Los Angeles Unified denied him a FAPE by failing to offer him full-time placement in general education. Student incorrectly argues Los Angeles Unified "contends Student requires placement in a moderate to severe special day class for the majority of the school day to appropriately address Student's academic needs." Los Angeles never proposed to place or offered Student placement in any special education class for students with moderate to severe disabilities, and only offered

placement in mild-to-moderate special education classes with academic curriculum that adhered to common core, State content standards and pursued a regular high school diploma.

Los Angeles Unified contends the January 15, 2021 IEP, which included the placement offer for the start of the 2021-2022 school year when Student would start high school, offered Student placement in the least restrictive environment with a combination of special day classes and general education classes. Los Angeles further contends the January 14, 2022 IEP offered Student placement in the least restrictive environment for the duration of the 2021-2022 school year with a combination of special day classes and general education classes.

School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers; and that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); Ed. Code, § 56031.)

The continuum of program options includes, but is “not necessarily” limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;

- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication, and instruction in the home, in hospitals, or other institutions.

(Ed. Code, § 56361.)

In determining the educational placement of a child with a disability, a school district must ensure that:

- the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(34 C.F.R. § 300.116.)

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors:

1. the educational benefits of placement full-time in a regular class;
2. the non-academic benefits of such placement;
3. the effect the student has on the teacher and children in the regular class;  
and
4. the costs of mainstreaming the student.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)].)

However, the Ninth Circuit has also found that a general education placement is not the least restrictive environment for every special needs child. In *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830 (*Poolaw*), the Ninth Circuit considered the *Rachel H.* factors and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court stated:

In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations, continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment. This allows educators to comply with

the Act's main requirement – that the child receive a free appropriate public education. Thus, "the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom." (*Poolaw, supra*, 67 F.3d at p. 834, citing *Daniel R.R., supra*, 874 F.2d at p. 1044.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.)

Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) No one factor is determinative in placement, and parental preference cannot be either the sole or predominant factor in placement decisions. (See, e.g., *Letter to Burton* (OSERS March 20, 1991); *Letter to Anonymous* (OSEP April 20, 1994); *Letter to Bina* (OSERS November 5, 1991).) An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw, supra*, 238 F. Supp. 2d at p. 139 [IDEA did not provide for an "education ... designed according to the parent's desires."].) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater

educational benefit to the student. (*Ibid.*) A school district has the right to select the program offered, as long as the program is able to meet the student's needs, and the district is ultimately responsible for ensuring a FAPE is offered. (*Letter to Richards* (OSEP January 7, 2010).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Ms. S., supra*, 337 F.3d at p. 1131.)

The middle school IEP team that met on January 15, 2021, discussed Student's progress on his goals and in the general education curriculum. Student's case carrier and social studies teacher for all three years of middle school, Kim, informed the IEP team Student was a great reader and maybe was ready for more mainstreaming. The IEP team discussed the concern there was a lot already going on with changes due to the COVID-19 pandemic and the shift to distance education, and that perhaps transitioning Student to more time in general education classes was too much to do at that time. Parent attended the meeting and participated in the discussion. Ultimately, the IEP team decided to maintain Student's placement in the four special education classes for the core academic subjects and in the three general education classes, plus homeroom, for the balance of the 2020-2021 school year at middle school.

Student lived within the catchment area of the Northeast Zone of Choice. Parent informed the IEP team she wanted Student to attend Lincoln High School for the next school year and was submitting an application to the Zone school using the district's online application system based on student preference. Not knowing if Student was certain to be selected to attend Lincoln High, the January 15, 2021 IEP team still considered a program of placement, services, and accommodations for Student to start high school. The IEP team modified the time Student would attend special education classes proportionally to the increased duration of the school day in high school. The

January 15, 2021 IEP team expected a new IEP team to be constituted for Student at his high school, and the new IEP team could consider whether changes to Student's placement mixture was appropriate in high school.

Parent agreed, without exception, to the January 15, 2021 IEP, which continued Student's placement in a mixture of special education and general education classes into the start of high school.

Student failed to prove the analysis under the four factors of *Rachel H.* compelled the January 15, 2021 IEP team to increase Student's time in general education to full-time, or even any more than the three classes he had during the remainder of middle school. Student argued in the closing brief:

Significantly more integration in, and with the general education population is appropriate for Student, and would provide him more examples of good age appropriate verbal skills, compliance, socialization, improved behavior and academic benefit. Students who are impacted to a much greater extent than this Student have been successfully included the entire school day with neuro-typically developing peers. Experts stated that children give each other cues, language facial expressions during interactions that adults do not, such as, loud laughter, angry looks, physical prompts by taking Student's hand and leading them, "it's my turn," or, "come on let's go!"[,] "he's silly,"[and] Student will benefit from propinquity to neuro-typically developing peers in class. Research studies clearly indicate students taught with their general education peers showed more academic and social gains over student's [*sic*] in self-contained classrooms, and that Student could benefit from imitating typical peers.



These characterizations of Student did not match the evidence regarding Student's typical functioning as a 14-year-old young man with average intelligence and very competent social skills. He was not in need of neuro-typical peers to "imitate" or to take him by the hand and lead him anywhere. Contrary to Student's assertion in the argument quoted above, Student did not have any expert testify on his behalf, and there was no expert evidence as described. Finally, Student produced no research or testimony regarding research of the kind asserted in Student's argument.

Student failed to produce any evidence critical of the placement decision of the January 15, 2021 IEP team for the 2021-2022 school year, and therefore failed to meet his burden of production and his burden of persuasion.

In addition to finding that Student failed to meet his burden of proof for this Issue, the evidence established Los Angeles Unified reasonably placed Student in a mild-to-moderate special day class setting for his core academic courses. Consideration of the academic educational benefits of placing Student full-time in a regular class, based on the information available to the IEP team on January 15, 2021, indicated Student required supports, services, and accommodations that could not be made available in a general education classroom. While the idea of increasing Student's "mainstreaming" time by having him attend one or more general education classes in core academic subjects was discussed, ultimately, the people very familiar with Student determined the most satisfactory educational benefit for Student would be obtained by maintaining his placement in the special education setting for all his core academic classes, with an eye to increasing his general education course load after he transitioned to high school.

There did not appear to be a significant difference for Student in the non-academic benefits of full-time placement in general education versus in some general education. Student was well-behaved and did not require significant “modeling” by neurotypical peers to learn to comport himself well, follow directions, classroom rules, or social conventions. The general education setting for physical education, electives, and homeroom afforded Student ample opportunity to socialize with students without disabilities and gain non-academic benefits from those interactions.

The effect Student had on the teacher and children in the regular class was not a negative factor in Student’s placement consideration, nor was the absence of any effect itself a reason to compel full inclusion. Similarly, there was no indication it cost more or less to educate Student in special education or general education classrooms, and Los Angeles Unified did not improperly assign Student to special education classes for his core academic courses because it was any less costly than mainstreaming him.

In total, Student failed to prove based on the information available to the IEP team on January 15, 2021, Los Angeles Unified denied him a FAPE by offering him placement in special education classes for his core academic courses and in general education classes for physical education and electives to start the 2021-2022 school year in high school. The IEP team discussed Student might be approaching readiness to increase his general education course load to include core academic curriculum without the intensive supports of a small class size and low student-to-teacher ratio, with instruction from a credentialed special education teacher and a classroom aide. But as a group, including Parent, the IEP team decided to defer any change until after Student started high school. No evidence indicated that group decision, approved by Parent, was unreasonable and amounted to a denial of FAPE.

Los Angeles Unified did not deny Student a FAPE by offering him less than full-time placement in regular classes to start the 2021-2022 school year.

The high school IEP team that met on January 14, 2022, discussed Student's progress on his goals and in the general education curriculum. Student's new case carrier and social studies teacher for the fall semester of ninth grade, Treadway, informed the IEP team Student was doing very well in high school and raised a discussion of moving Student to general education classrooms, with special education resource support. Parent raised a concern about consistency for the school year. Parent and Student, who attended his IEP team meeting, were hesitant to move out of the special education classes because Student's grades were so good. The IEP team discussed the desire for the data from the triennial psychoeducational assessment, which, despite Parent's consent to the assessment plan on November 4, 2021, had not even begun by the time of the January 14, 2022 IEP team meeting.

Parent testified she did not ask the January 14, 2022 IEP team to place Student in general education classes because she wondered if he would do "OK" there with his learning, because of what Parent felt he "needs more hands-on with." The IEP team agreed that consistency was a good thing and understood Parent's and Student's desires to maintain the high grades Student was achieving in his intensively supported special education classes. For example, Treadway's ninth grade social studies class with Student had a total enrollment of five students, and one rarely attended, making the class size about four students, with Treadway as the teacher and also a classroom aide. There was small group instruction, but also a lot of time for one-to-one instruction and support.

The IEP team agreed to get the triennial assessment data and meet again to consider transitioning Student to general education academic classes for the start of the next school year, for tenth grade. The January 14, 2022 IEP offered Student continued placement in special education classes for his academic subjects, and general education classes for physical education, electives, and homeroom for the balance of the 2021-2022 school year, with the possibility of reconsidering that decision sooner upon review of the triennial psychoeducational assessment. Parent agreed, without exception, to the January 14, 2022 IEP, which continued Student's placement in a mixture of special education and general education classes for the rest of ninth grade.

Los Angeles Unified invited Parent to an IEP team meeting to review the results of the triennial psychoeducational assessment after Boulogny completed it. Parent declined the meeting and informed Los Angeles Unified she wanted to wait until after the due process hearing to hold the IEP team meeting.

Student failed to prove the analysis under the four factors of *Rachel H.* compelled the January 14, 2022 IEP team to increase Student's time in general education to full-time, or even any more than the several classes he had during the remainder of the school year.

Consideration of the academic educational benefits of placing Student full-time in a regular class, based on the information available to the IEP team on January 14, 2022, indicated Student required supports, services, and accommodations that could not be made available in a general education classroom. The IEP team discussed the idea of increasing Student's "mainstreaming" time by having him attend one or more general education classes in core academic subjects. But ultimately the people very familiar with Student determined the most satisfactory educational benefit for Student

would be obtained by maintaining his placement in the special education setting for all his core academic classes, with a plan to increase his general education course load after data was obtained in the triennial psychoeducational assessment at the earliest, or at the start of the next school year for tenth grade.

There did not appear to be a significant difference for Student in the non-academic benefits of full-time placement in general education versus in some general education. Student was well-behaved and did not require significant “modeling” by neurotypical peers to learn to comport himself well, follow directions, classroom rules, or social conventions. The several general education classes and homeroom afforded Student ample opportunity to socialize with students without disabilities and gain non-academic benefits from those interactions.

The effect Student had on the teacher and children in the regular class was not a negative factor in Student’s placement consideration, nor was the absence of any effect itself a reason to compel full inclusion. Similarly, there was no indication it cost more or less to educate Student in special education or general education classrooms, and Los Angeles Unified did not improperly assign Student to special education classes for his core academic courses because it was any less costly than mainstreaming him.

In total, Student failed to prove that based on the information available to the IEP team on January 15, 2021, Los Angeles Unified denied him a FAPE by offering him placement in special education classes for his core academic courses and in general education classes for physical education and electives for the remainder of the 2021-2022 school year in ninth grade. The IEP team discussed Student was poised to

increase his general education course load to include core academic curriculum without the intensive supports of a small class size and low student-to-teacher ratio, with instruction from a credentialed special education teacher and a classroom aide. But as a group, including Parent, the IEP team decided to defer any change until after the IEP team had data from the triennial psychoeducational assessment or the start of the next school year. No evidence indicated the group decision, approved by Parent, was unreasonable and amounted to a denial of FAPE.

Los Angeles Unified did not deny Student a FAPE by offering him less than full-time placement in regular classes for the remainder of the 2021-2022 school year.

#### ISSUE 10: DENYING PARENT'S REQUESTS AT THE JANUARY 14, 2022 IEP TEAM MEETING

Student contends Parent made three requests at the January 14, 2022 IEP team meeting and none of them lead to the result she wanted, and that Los Angeles Unified therefore denied Student a FAPE. Each is detailed below, in turn.

Los Angeles Unified contends Student's concerns regarding attendance and other school records and are not properly within the purview of an IEP team in that they do not concern a FAPE as that term is defined, and further that the IEP team had ample discussion regarding Parent's request that Student take Spanish classes to fulfil the foreign language requirement for high school graduation.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) A child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra*, 137 S.Ct. at p. 1000.)

"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 designated instruction and services].)

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education" and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has 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) [party has a right to present a complaint regarding matters involving

- a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child;

- the provision of a FAPE to a child;
- the refusal of a parent or guardian to consent to an assessment of a child;  
or
- a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].)

#### ISSUE 10(A): STUDENT'S MARKED ABSENCES DURING THE SPRING SEMESTER OF THE 2020-2021 SCHOOL YEAR, AND FALL SEMESTER 2021-2022 SCHOOL YEAR

Student asserts Parent requested, before the January 14, 2022 IEP team meeting, and at the IEP team meeting, that Lincoln High School change Student's attendance records from the 2020-2021 school year, eighth grade at Nightingale Middle School, to remove marked absences because Student was not absent or ill, he only had problems logging into the virtual learning system. However, Parent testified Student's attendance was not discussed at the January 14, 2022 IEP team meeting because "it was not an issue; it was not mentioned." Student failed to establish Parent asked Lincoln High School to change Student's attendance records from the prior school year during the IEP team meeting on January 14, 2022.

Even if Parent did specifically request changes to Student's attendance records from the prior school year, either at the January 14, 2022 IEP team meeting or before, Student failed to demonstrate how any failure or refusal to change the records denied Student a FAPE. The attendance records in no way prevented Student from being offered or receiving specialized instruction and related services. The attendance records and Student's complaint regarding them are not "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," or

"matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility,"

which are the only proper subjects of a due process complaint. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).)

Student failed to prove Los Angeles Unified denied Student a FAPE by denying any request by Parent at the January 14, 2022 IEP team meeting or failing to change Student's 2020-2021 attendance records. Because the subject was not a matter properly filed as a matter appropriate for resolution under the IDEA as not pertaining to FAPE, Student's Issue 10(a) is frivolous.

#### ISSUE 10(B): SPANISH LANGUAGE CLASS

Student asserts Parent requested, on the first day of school when Parent physically went to Lincoln High School, Student be registered for a Spanish class, and Lincoln High personnel informed Parent the Spanish class was already full and Student would have to wait for the next school year.

At the January 14, 2022 IEP team meeting, Parent asked for Student to be enrolled in a Spanish class. The IEP team discussed the foreign language requirement

for a regular high school diploma, which involved two years of the same foreign language. The IEP team discussed that most freshmen focus on other required courses first and take a foreign language later, and the district members of the IEP team supported Student being enrolled in Spanish during his tenth-grade year. Parent requested Student take Spanish for three years, and the IEP team discussed how Student would have the opportunity to take a third year of Spanish during his senior year if he chose it as one of his electives, which he would have more space on his schedule to do after completing more graduation requirements during 10th and 11th grades. The IEP team agreed to encourage Student, who also attended the IEP team meeting, to comply with Parent's preference and take a third year of Spanish class as an elective during 12th grade.

Los Angeles Unified was under no obligation, as a matter of affording Student a FAPE, to place Student in a Spanish class immediately upon enrollment in ninth grade, or during the middle of the school year based on Parent's request during the January 14, 2022 IEP team meeting. Further, Spanish was a general education elective class Student would have the opportunity to take in the 2022-2023 school year as part of the January 14, 2022 IEP's offer of placement in general education for homeroom, physical education – another graduation requirement up to a certain number of credits – and electives. Student failed to demonstrate how any failure or refusal to immediately offer Student a Spanish class denied Student a FAPE. The lack of a Spanish class during Student's freshman year in no way prevented Student from being offered or receiving specialized instruction and related services.

Furthermore, Parent's request for a Spanish class and Student's complaint regarding Los Angeles Unified's failure or refusal to immediately grant it is not "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,” or

“matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility,”

which are the only proper subjects of a due process complaint. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) Student’s “placement” in special day classes for core academic courses and general education classes for physical education, electives, and homeroom was not in dispute through Parent’s request for Student to take a Spanish class.

Student failed to prove Los Angeles Unified denied Student a FAPE by denying Parent’s request at the January 14, 2022 IEP team meeting for Student to take a Spanish class, especially since Student could take Spanish in 10th and 11th grades to meet the regular diploma graduation requirements. Because the subject was not a matter properly filed as a matter appropriate for resolution under the IDEA as it did not pertain to FAPE, Student’s Issue 10(b) is frivolous.

## ISSUE 10(C): REMOVING FROM STUDENT'S SCHOOL RECORDS ANY INDICATION STUDENT HAD A DIAGNOSIS OF ATTENTION DEFICIT HYPERACTIVITY DISORDER

Student's complaint alleged that at the January 14, 2022 IEP team meeting, Parent "asked to correct the mistaken ADHD diagnosis in Student's school record" and "shared that the IEP team made a terrible mistake. It is [Student's] older brother [ ] who has ADHD, [Student] has no ADHD!"

Student failed to prove by a preponderance of the evidence the IEP team discussed the topic of Student being identified as a student with attention deficit hyperactivity disorder. On October 29, 2021, Los Angeles Unified provided Parent a special education assessment plan that included a health and development assessment. Parent consented to the assessment plan on November 4, 2021. Shortly before December 6, 2021, school nurse Myung Sun Lee, R.N., conducted Student's health assessment. A Los Angeles Unified audiometrist did a routine screening of Student's hearing on September 7, 2021, and noted his passing results in the district's computer system. Nurse Lee reported those results in the present levels of performance summary she prepared for the January 14, 2022 IEP team meeting. Nurse Lee personally examined Student head to toe, checked his height and weight, and screened his vision. She did a telephone interview with Parent to get his health history and information regarding any current health issues. She input her health summary in the district's computer system on December 6, 2021.

Nurse Lee attended the January 14, 2022 IEP team meeting, shared her computer screen with everyone else attending the videoconference meeting, and displayed her health summary. She reported her findings that based on Parent's report and her

examination of Student, he had no health issues and health did not impact his education. Attention deficit hyperactivity disorder was not mentioned in Nurse Lee's summary, which was incorporated into the January 14, 2022 IEP document as Student's present level of performance in health. And after Nurse Lee's report, which did not mention attention deficit hyperactivity disorder, no one at the IEP team meeting talked about Student having attention deficit hyperactivity disorder.

Despite the allegations of Student's complaint and Student's pursuit of Issue 10(c) at hearing, Parent testified there was no discussion about Student being wrongly "diagnosed" with attention deficit hyperactivity disorder during the January 14, 2022 IEP team meeting. Parent testified she only learned after the meeting, when she received paperwork from the "psychiatrist," that anything about attention deficit hyperactivity disorder was "still there." Parent mistakenly, repeatedly, referred to school psychologist Bouligny as a psychiatrist. The paperwork Parent's testimony referred to was the written parent interview form, and the parent version of the Behavior Assessment System for Children, Third Edition, and the Conners-3 rating scales forms Bouligny sent Parent to complete as part of the triennial psychoeducational assessment. Bouligny did not begin to work on conducting Student's psychoeducational assessment until after the January 14, 2022 IEP team meeting. Parent testified she did not ask about any information regarding Student being labeled with attention deficit hyperactivity disorder during the January 14, 2022 IEP team meeting because she did not think she needed to until she received the forms from Bouligny.

Student failed to prove Parent asked the IEP team to correct any mistaken diagnosis in Student's school record. Even if she had, school records and their contents are governed by statutes and regulations beyond the IDEA. Los Angeles Unified correctly notes record retention is governed through an interplay of the IDEA, the Family

Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 C.F.R. § 99) and the Education Code. The IDEA and FERPA address control and access to student records of disabled students. (*See*, 34 C.F.R. §§ 99 [FERPA] & 300.610 *et seq.* [IDEA]; *see also* Ed. Code, §§ 49073 [state implementation of FERPA] & 56504 [request for student records under special education].) What records are to be maintained and how those records are to be maintained is governed by the Education Code and local district policy. (Ed Code, § 49062; Cal. Code Regs., tit. 5, §, 430, subd. (d)(1)-(3).) No law specifically addresses record retention as it applies specifically to special education records. Rather, the Education Code generally provides for three classes of records – mandatory permanent records, mandatory interim records, and permissive records – and speaks to the length those records can or must be maintained and under what circumstances records can be destroyed. (Cal. Code Regs., tit. 5, §§ 432, subd. (b) [setting forth class of records] & 437 [destruction of records].)

Beyond the additional statutory considerations regarding removing or “correcting” educational records, Student failed to demonstrate that Los Angeles Unified’s alleged failure or refusal to remove an allegedly erroneous diagnosis of attention deficit hyperactivity disorder from Student’s records led to a denial of FAPE at the January 14, 2022 IEP team meeting.

#### ISSUE 11: STATING IN THE JANUARY 14, 2022 IEP THAT STUDENT HAD A DIAGNOSIS OF ATTENTION DEFICIT HYPERACTIVITY DISORDER

Student contends Los Angeles Unified denied him a FAPE by stating in the January 14, 2022 IEP that Student had a diagnosis of attention deficit hyperactivity disorder.

Los Angeles Unified contends it did not offer an IEP document at the January 14, 2022 IEP team meeting that erroneously stated Student had a diagnosis of attention deficit hyperactivity disorder and therefore did not deny him a FAPE by doing so.

The January 14, 2022 IEP does not state, anywhere, that Student has or had a diagnosis of attention deficit hyperactivity disorder. Nor do the January 2021 or January 2020 IEP's state Student has a diagnosis of attention deficit hyperactivity disorder. Only the February 1, 2019 IEP, formulated outside the two-year statute of limitations for this case (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (/)) mentions attention deficit hyperactivity disorder in one place, and that is specifically to state in the school nurse's report of Student's present level of performance in health, "[Parent] denies student having ADHD or any medical diagnosis history or currently."

Student's claim that Los Angeles Unified denied him a FAPE by stating in the January 14, 2022 IEP that Student had a diagnosis of attention deficit hyperactivity disorder is therefore frivolous.

Student failed to prove the January 14, 2022 IEP erroneously stated Student had a diagnosis of attention deficit hyperactivity disorder, and consequently failed to prove Los Angeles Unified denied him a FAPE by stating in the January 14, 2022 IEP that Student had a diagnosis of attention deficit hyperactivity disorder.

## CONCLUSIONS AND PREVAILING PARTY

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

## ISSUE 1:

Los Angeles Unified did not deny Student a FAPE by assigning Student to distance learning without continuing to provide Student in-person services either from March 18, 2020, to the end of the 2019-2020 school year, or in the 2020-2021 school year through March 18, 2022.

Los Angeles Unified prevailed on Issues 1(a) and 1(b).

## ISSUE 2:

Los Angeles Unified did not deny Student a FAPE by assigning Student to distance learning without providing Student the necessary accommodations either from March 18, 2020, to the end of the 2019-2020 school year, or in the 2020-2021 school year through March 18, 2022.

Los Angeles Unified prevailed on Issues 2(a) and 2(b).

## ISSUE 3:

Los Angeles Unified did not deny Student a FAPE from March 18, 2020, to January 2021, by not assessing Student prior to assigning Student to distance learning.

Los Angeles Unified prevailed on Issue 3.



#### ISSUE 4:

Los Angeles Unified did not deny Student a FAPE through the January 14, 2022 IEP either by failing to offer sufficient programs and supports or failing to offer adequate goals to enable Student to receive an educational benefit.

Los Angeles Unified prevailed on Issues 4(a) and 4(b).

#### ISSUE 5:

Los Angeles Unified did not deny Student a FAPE March 18, 2020, to March 18, 2022, by failing to address Student's regression resulting from distance learning.

Los Angeles Unified prevailed on Issue 5.

#### ISSUE 6:

Los Angeles Unified did not deny Student a FAPE during the 2021-2022 school year to March 18, 2022, either by failing to offer Student a one-to-one aide, or failing to offer Student either home applied behavior analysis therapy or clinical meetings.

Los Angeles Unified prevailed on Issues 6(a) and both 6(b)(i) and 6(b)(ii).

#### ISSUE 7:

Los Angeles Unified did not deny Student a FAPE by failing to offer Parent training either during the 2020-2021 school year or the 2021-2022 school year, to March 18, 2022.

Los Angeles Unified prevailed on Issues 7(a) and 7(b).

#### ISSUE 8:

Los Angeles Unified did not deny Student a FAPE by predetermining the January 14, 2022 IEP offer.

Los Angeles Unified prevailed on Issue 8.

#### ISSUE 9:

Los Angeles Unified did not deny Student a FAPE during the 2021-2022 school year, to March 18, 2022, by failing to offer Student placement with neurotypically developing peers to the maximum extent possible.

Los Angeles Unified prevailed on Issue 9.

#### ISSUE 10:

Los Angeles Unified did not deny Student a FAPE by denying Parent's requests at the January 14, 2022 IEP team meeting either to correct Student's marked absences during the spring semester of the 2020-2021 school year and fall semester of the 2021-2022 school year, offer Student a Spanish language

class, or remove from Student's school records any indication that Student has a diagnosis of attention deficit hyperactivity disorder.

Los Angeles Unified prevailed on Issues 10(a), 10(b), and 10(c).

#### ISSUE 11:

Los Angeles Unified did not deny Student a FAPE by offering an IEP document at the January 14, 2022 IEP team meeting that erroneously stated that Student had a diagnosis of attention deficit hyperactivity disorder.

Los Angeles Unified prevailed on Issue 11.

#### ORDER

All of Student's requests for relief are denied.

#### RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Kara Hatfield

Administrative Law Judge

Office of Administrative Hearings