

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022010333  
CASE NO. 2022060344

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THE CONSOLIDATED MATTERS INVOLVING  
  
PARENT ON BEHALF OF STUDENT, AND  
  
LOS ANGELES UNIFIED SCHOOL DISTRICT.

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DECISION

SEPTEMBER 23, 2022

On January 12, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Los Angeles Unified School District as respondent. OAH granted Student's motion to amend Student's complaint on June 2, 2022. On June 9, 2022, Los Angeles filed a due process hearing request, naming Student as respondent. OAH granted Los Angeles's motion to consolidate the parties' respective cases on June 16, 2022, making Student's case primary. On July 14, 2022, OAH granted Student's request for continuance of the due process hearing to August 2, 2022. Administrative Law Judge Claire Yazigi heard this matter via videoconference on August 2, 3, 4, 5, 8, 9, 10, 11, and 12, 2022.

Attorneys N. Jane DuBovy and Maeve Crommie represented Student. Parent attended all hearing days on Student's behalf. Student attended hearing during Parent's testimony. Attorneys Dee Anna Hassanpour and Anisha Asher represented Los Angeles. At all times during hearing, either Andrew Vazquez, Juan Tajoya, or Barbara Rainen attended as representatives on Los Angeles's behalf.

The parties' request to continue the matter to submit written closing briefs was granted. Closing briefs, not to exceed 40 pages, were due to OAH no later than 3:00 pm on Tuesday, September 6, 2021. Los Angeles timely submitted a closing brief within page limits. Student's closing brief was submitted six minutes late and was 41 pages. In this case, despite not complying with the undersigned orders, Student's closing brief was considered in its entirety. However, counsel is on notice that failing to comply with an ALJ's ruling regarding closing brief submission can result in the brief being stricken in its entirety. The record was closed, and the matter was submitted on September 6, 2022.

Student filed a "Revised Statement of Issues" with OAH on the first day of hearing. The undersigned did not consider that filing. The issues, as set forth below, reflect the clarifications made by the parties on the record at the beginning of hearing. At hearing, Student withdrew the claims pertaining to the 2019-2020 school year. Student shortened the claim period for the 2020-2021 school year to begin on January 12, 2021. Student also withdrew Issues 2.C. and 3.L. as set forth in the Order after Prehearing Conference. The issues have been reframed for clarity. The ALJ has authority to rephrase 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.)

## ISSUES

A Free appropriate public education is referred to as FAPE. The Individuals with Disabilities Education Act is referred to as IDEA. An Individualized education program is referred to as IEP.

### STUDENT'S ISSUES

1. Did Los Angeles substantially deny Student a FAPE from January 12, 2021, through the remainder of the 2020-2021 school year, including the extended school year, by:
  - A. Failing to meet its Child Find obligation;
  - B. Failing to find Student eligible for special education under the categories of Other Health Impairment, Specific Learning Disability, and Emotional Disturbance; and
  - C. Failing to make an IEP offer to Student throughout the school year?
2. Did Los Angeles substantially deny Student a FAPE during the 2021-2022 school year, through May 31, 2022, by:
  - A. Failing to have an IEP offer in place at the beginning of the school year;
  - B. Failing to provide an assessment plan within 15 days of Parent's November 2021 request;
  - C. Failing to provide all records in response to Parent's December 13, 2021, records request;
  - D. Failing to meet its Child Find obligation, until Los Angeles's assessment of Student in March 2022;

- E. Failing to provide a legally complaint prior written notice regarding Los Angeles's refusal to initiate a special education assessment until the time of the March 2022 academic assessment;
- F. Failing to provide Notice of Procedural Safeguards to Parent when Los Angeles refused to initiate assessments until March 2022;
- G. Failing to conduct a legally compliant academic assessment in March 2022;
- H. Failing to conduct a legally compliant psychoeducational assessment on May 5, 2022;
- I. Failing to conduct a legally compliant IEP team meeting on May 5, 2022, specifically by depriving Parent an opportunity to meaningfully participate in the IEP development process;
- J. Not providing a legally compliant prior written notice of its refusal to find Student eligible for special education under the categories of Other Health Impairment, Specific Learning Disability, and Emotional Disturbance; and
- K. Failing to find Student eligible for special education under the categories of Other Health Impairment, Specific Learning Disability, and Emotional Disturbance?

## LOS ANGELES'S ISSUES

1. Is Los Angeles's academic assessment, conducted in March 2022, and presented during the May 5, 2022, IEP team meeting, legally compliant such that Student is not entitled to an independent educational evaluation, IEE, at public expense?

2. Is Los Angeles's psychoeducational assessment, conducted in May 2022, and presented during the May 5, 2022, IEP team meeting, legally compliant such that Student is not entitled to an independent educational evaluation, IEE, at public expense?

## 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.)

The main purposes of 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 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 bore the burden of proof for Student's issues, and Los Angeles bore the burden of proof for Los Angeles's 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).)

Student was 14 years old and in ninth grade at the time of hearing, and had never been found eligible for special education. By all accounts, Student was bright and friendly, and enjoyed creative outlets like poetry and creative writing. Student attended a district middle school, and Los Angeles was Student's district of residence. At the beginning of Student's eighth grade year, Parent informed Los Angeles that Student had been diagnosed with Attention Deficit-Hyperactivity Disorder, Inattentive Type, in the summer of 2021, between her seventh and eighth grade school years. Los Angeles assessed Student for special education eligibility in the spring of 2022. Student's IEP team met on May 5, 2022, to discuss the results of the assessments and did not find Student eligible for special education.

LOS ANGELES'S ISSUES 1 AND 2 AND STUDENT'S ISSUES 2.G. AND 2.H.:  
LOS ANGELES'S PSYCHOEDUCATIONAL AND ACADEMIC ASSESSMENT,  
PRESENTED ON MAY 5, 2022, WAS LEGALLY COMPLIANT, SUCH THAT  
STUDENT IS NOT ENTITLED TO AN IEE AT PUBLIC EXPENSE

Los Angeles contended that its initial psychoeducational assessment of Student, including the academic assessment portion of the psychoeducational assessment, was legally compliant under the IDEA. Accordingly, Los Angeles contended Student is not entitled to an independent psychoeducational assessment at public expense. Student

contended that Los Angeles's psychoeducational assessment was not legally compliant because it was not sufficiently comprehensive, and, as a result, Los Angeles should be ordered to fund an independent psychoeducational assessment.

In their respective complaints, the parties both pled the academic assessment as separate from the psychological assessment. Los Angeles completed Student's academic testing in March 2022. It completed the other components of the psychoeducational assessment in May 2022. The two portions were combined into a single report that was presented at Student's initial IEP team meeting on May 5, 2022. The legal compliance of both portions is analyzed herein. The evidence established, however, that the academic assessment was a component of the psychoeducational assessment, and is analyzed as such in this Decision.

Parent consented to the assessment plan on March 18, 2022. Los Angeles completed Student's psychoeducational assessment in May 2022. At the time of assessment, Student was 14 years old. The psychoeducational assessment was conducted pursuant to agreement between the parties, following Student's reported diagnosis of attention deficit hyperactivity disorder, or ADHD. The categories considered in the psychoeducational evaluation were Other Health Impairment, Specific Learning Disability, and Emotional Disturbance. Student was assessed in the areas of cognitive ability, academic performance, language function, and social emotional status. School psychologist Rena Katz performed all components of the psychoeducational assessment except for the academic assessment. Steve Cranow administered the Woodcock Johnson Review IV. Katz incorporated the results of the Woodcock Johnson into the psychoeducational assessment report. The IEP team reviewed and considered

the results of the assessments on May 5, 2022, and the Los Angeles members of Student's IEP team determined that Student did not qualify for special education.

Legally compliant assessments are conducted by qualified assessors who select valid, reliable assessment instruments, and other means of evaluation, that avoid discrimination based on sex, race, or culture. The assessments must be administered according to the assessment producer's instructions, in a language and form most likely to yield accurate results regarding the student's academic, developmental, and functional abilities. (20 U.S.C. § 1414 (b)(3)(A); Ed. Code § 56320, subd. (a) and (b)(3).) Assessors are required to use a variety of technically sound assessment tools and strategies to gather relevant information, including information provided by a parent, to assist in determining whether the child has a disability; and, if so, the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. (20 U.S.C. § 1414 (b)(2)(A); Ed. Code § 56320, subd. (b).) Assessors are prohibited from relying on a single measure or assessment as the sole basis for determining whether a child is eligible for special education or the appropriate content of an eligible student's IEP. (20 U.S.C. § 1414 (b)(2)(A); Ed Code. § 56320, subd. (e).) Any psychological assessment, including individually administered tests of intelligence and emotional functioning, must be conducted by a credentialed school psychologist. (Ed. Code, §§ 56324, subd. (a), 56320, subd. (b)(3).)

The evidence established that Katz met the statutory requirements to conduct the assessment. Katz earned a Master of Science in education in 2007 and held a Clear California Pupil Personnel Service Credential in School Psychology. Katz had worked as a school psychologist with Los Angeles for over 14 years. Among her responsibilities were providing counseling services to pupils under their IEPs, conducting assessments, selecting and evaluating assessment tools, and drafting assessment reports. At the time



of hearing, Katz was typically performing 60 psychoeducational assessments per year. Katz worked with pupils with ADHD and was knowledgeable of Student's disability and was competent to perform the assessment (Ed. Code §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).)

## INSTRUMENTS USED TO ASSESS STUDENT'S COGNITIVE ABILITY

The evidence established that Katz assessed Student using the Cognitive Assessment System 2 because it measured Student's cognitive processes of intellectual functioning. The planning subtests measured cognitive control, utilization of processes and knowledge, intentionality, and self-regulation to achieve a desired goal. The attention subtests provided information regarding focused, selective cognitive activity and resistance to distraction. The simultaneous subtests provided information on operating on visual information. The successive subtests provided information on operating on orally presented material. Katz also assessed Student in the supplemental composite areas of executive function, working memory, and executive function with working memory. Student scored within the average range on all subtests except for the executive function with working memory composite score, where Student scored within the high average range, and the simultaneous processing scale where Student scored in the superior range.

The evidence further established that Katz administered the Test of Auditory Processing Skills, Fourth Edition, because it provided information about language processing and comprehension skills across the intersecting areas of phonological processing, auditory memory, and listening comprehension. Student tested in the average range in all three areas. Katz administered the Motor-Free Visual Perception Test, Fourth Edition because it compared Student's visual processing abilities to

same-age peers, using a series of non-motor visual-perceptual activities. Student demonstrated superior abilities on visual perceptual processing skills. Katz administered the Beery-Buktencia Developmental Test of Visual Motor Integration, Sixth Edition because it measured hand-eye coordination and could reveal poor visual perception and problems with fine motor coordination. Student scored within the average range on this test. Katz concluded that, at the time of assessment, Student functioned within the high average range of cognitive ability.

## METHODS USED TO ASSESS STUDENT'S ACADEMIC ABILITY

Resource Specialist Steve Cranow performed Student's academic assessment. The evidence established that Cranow met the statutory requirements to conduct the assessment. Cranow earned a Bachelor of Science in Political Science in 1991. Cranow held a multiple subject teaching credential as well as a special education credential to teach children with mild to moderate disabilities through high school. At the time of hearing, Cranow had been teaching for 26 years, and had been working as a resource specialist at Student's Los Angeles school for 18 years. Among his responsibilities were performing academic assessments, pushing into classes to serve IEP pupils, and ensuring IEP implementation. Cranow typically performed 20 to 30 academic assessments per year, performing 200 academic assessments total. Los Angeles established that Cranow was competent to perform the academic assessment.

Cranow spoke with Student's teachers, observed Student in English class, considered Parent's questionnaire responses, and reviewed Student's academic history, all as part of the academic portion of the psychoeducational assessment. Cranow also administered the Woodcock Johnson Review IV, assessing Student in the areas of reading, written language, and math. Cranow established he administered the

Woodcock Johnson because it was a norm-referenced, standardized assessment. Student scored within the far above average range in broad reading ability, the above average range in broad written language ability, and the average range in broad math ability. On the Woodcock Johnson IV Tests of Oral Language, Student tested within the very superior range for oral expression and in the high average range for listening comprehension. The evidence established that, using standardized measures, Student functioned within the average to high average range of academic ability.

## METHODS USED TO ASSESS STUDENT'S SOCIAL-EMOTIONAL FUNCTIONING

Katz administered the Behavior Assessment System for Children, or BASC-3, to assess Student's social-emotional functioning. Katz had four individuals complete rating scales for this test:

- Parent;
- Student;
- Maegan Rasner, Student's eighth grade Honors English teacher; and
- Jiji John, Student's eighth grade Honors Accelerated Algebra 1 teacher.

Parent expressed clinically significant concerns for anxiety, attention, adaptability, leadership, and activities of daily living. A "clinically significant" rating referred to a high level of maladjustment. Student self-reported several areas in the clinically significant range, specifically, attitude towards teachers and school, sense of inadequacy, attention, self-esteem, and self-reliance. Rasner did not report any social-emotional concerns regarding Student. John did not note any areas to be in the clinically significant range in her class, but did find Student was "at-risk" in the areas of anxiety, depression, atypicality, withdrawal, and adaptability. Katz persuasively established that an "at-risk"

rating meant either a significant problem that may not be severe enough to require formal treatment, or the potential of developing a problem that needed careful monitoring.

The evidence established that Katz administered the Connors-3, because it measured the presence and severity of ADHD behaviors and was an instrument appropriate for Student's age group. This instrument compared an individual's scores to a norm group. Rasner did not note any concerns. John noted very elevated levels of defiance/aggression and peer relations and elevated concerns for inattention. Parent noted inattention, executive functioning, and family/peer relations as very elevated areas of concern. Parent noted elevated concerns for defiance/aggression and hyperactivity/impulsivity. Student self-reported elevated levels of inattention and very elevated levels of hyperactivity/impulsivity.

Given the Connors-3 scores, Katz also administered the Children's Depression Inventory, Second Edition. Both Parent and Student rated Student as presenting with overall symptoms of depression. Both Rasner and John rated Student as not presenting with overall symptoms of depression. Katz concluded that any symptoms of depression were not evident in the class setting. Katz' conclusion was supported by Rasner and John's observations of Student in class. Katz administered the Multidimensional Anxiety Scale for Children, Second Edition, because it was a comprehensive assessment of anxiety appropriate for Student's age group. Per Student's self-report, as well as Parent's responses, Student experienced slightly more signs and symptoms of anxiety than others her age. A teacher rating scale was not available for this measure.

In addition to the above instruments, Katz interviewed Student and Parent, as well as teachers from two of Student's core classes. Katz observed Student in Student's

English core class, unstructured time, and in the assessment room, and reviewed Student's educational records. Katz, relying on the objective assessments, observations, and interviews, persuasively concluded that while Parent and Student both reported symptoms of depression in Student, the symptoms were not evident in the class setting.

## STUDENT'S EXPERT

Student attacked the validity of the psychoeducational assessment on several bases through testimony of her own expert, Dr. Nicholas Thaler. Thaler was an Assistant Clinical Professor at the UCLA Semel Institute for Neuroscience and Human Behavior. He also worked as a neuropsychologist in private practice, where he performed psychoeducational and neuropsychological evaluations for children. He held a doctoral degree in clinical neuropsychology and was a board-certified neuropsychologist. Thaler was not a credentialed school psychologist, and had never worked as one. Thaler did not assess Student or observe Student in a school setting. Thaler also admitted that he was unfamiliar with the legal requirements for assessments under the IDEA. Thaler's critiques of Los Angeles's psychoeducational assessment are fully analyzed below; however, in light of his limited knowledge of student and the laws governing special education assessments in an academic setting, his testimony was not accorded much weight.

The day before his testimony, Thaler spoke with Student and Parent through Zoom for about one hour to prepare for his testimony and conducted a documentary review of Katz's psychoeducational report. Thaler noted that Student's broad math score on the Woodcock Johnson was in the average range for her age, while Student's broad writing language and broad reading scores were in the superior and very superior ranges, respectively. Thaler opined that, even though Student's math scores fell within

the average range, math was an area of relative weakness for Student compared to her scores in written language and reading. Thaler asserted this warranted further assessment and probing. Thaler opined that Katz should have assessed the psychological processes related to math, specifically, verbal long-term recall, visual-spatial long-term recall, and processing speed. During her testimony, Katz persuasively explained that she did not assess further because Student's lower math score was still within the average range and Student was able to progress academically and access the general education curriculum.

Thaler also opined that either Katz or Cranow should have observed Student in math class because math was an area of Student's relative weakness and Student had struggled in that subject the year before. Student points to Los Angeles's obligation to observe Student "in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty." (34 C.F.R. § 300.310(a) (2017).) Student, however, did not provide any legal authority to support such a narrow interpretation. Both Katz and Cranow separately observed Student in English, a core academic class. Student did not establish that an assessor was required to observe a pupil in any particular class as part of the assessment, especially when Katz was looking for behaviors that were observable across classroom settings.

Thaler also pointed to Student's attention scale subtest scores on the Cognitive Assessment System, Second Edition. Specifically, Student scored in the low average range on expressive attention and in the high average range on number detection. This resulted in an overall attention score of average. Thaler opined that the discrepancy between the two subtest scores warranted further probing, and that Katz should have also administered that receptive attention subtest on the Cognitive Assessment System

and the Auditory Figure-Ground on Test of Auditory Processing Skills, Fourth Edition to explain the discrepancy between these two scores. Katz established, however, that even Student's lower score on expressive attention was still within the average range – albeit in the low average range – and Student was able to progress academically and access the general education curriculum.

Thaler also opined on Katz's analysis of whether Student needed Educationally Related Intensive Counseling Services. Thaler pointed to the fact that Katz's assessment report noted the inconsistency between Student and Parent reports of Student's depression on the Children's Depression Inventory versus teacher results on the Children's Depression Inventory. Specifically, both Parent and Student rated Student as presenting with overall symptoms of depression. Rasner and John both rated Student as not presenting with overall symptoms of depression. As a result, Katz noted on the assessment report that she could not conclude whether Student met the criteria of "marked or major depression" to indicate a need for Educationally Related Intensive Counseling Services. Thaler opined that, because of this, Katz should have probed further into Student's depression instead of recommending that Student did not qualify for Educationally Related Intensive Counseling Services.

This is not persuasive. First, Thaler incorrectly conflates a potential need for a related service to special education eligibility. Even if Student had exhibited depression and could have benefited from counseling, that finding does not equate with special education eligibility. Katz established she was aware of the distinction while Thaler was not. Additionally, the depression that Parent and Student reported were not evident in the classroom setting. The two rating teachers' testimony at hearing further supported the teachers' responses on the Children's Depression Inventory.

Diane Hernandez was a secondary school counselor for Student's middle school, and had been since October 2021 through the time of hearing. Hernandez held a Master of Science degree in school counseling. During the second semester of eighth grade, John referred Student twice to Hernandez for concerning behavior. In November of 2021, Student had written a sarcastic response to a writing assignment as a joke. John was unsure of how to interpret Student's response and referred Student to Hernandez for follow up, and Hernandez met with Student twice thereafter. Student was calm yet outspoken and shared the poetry she had written with Hernandez. Student expressed to Hernandez that she felt stressed because Student felt she never did as good of a job in school as she should, but Hernandez established that Student's feelings were normal for her age. Nevertheless, Hernandez made a point to observe Student on campus, looking out for "sad demeanor." During the times Hernandez observed Student go into choir class, Student was social and appropriately interacting with peers.

In May of 2022, John referred Student to Hernandez again because John was concerned about a drawing Student made. Hernandez met with Student, and Student explained that she had drawn a character from the Percy Jackson Greek Mythology series. Hernandez had no social or emotional concerns about Student after speaking with her. In this way, John was the only one of the two rating teachers to describe any potentially concerning in-class behavior. In John's class, Student kept to herself and was quiet, and, on one occasion, put her head down when a group project wasn't going her way. But at school, neither Rasner or John observed the depression that Parent or Student described, and Student was successfully accessing her education.

Thaler testified that several other test instruments would have been superior to the instruments Katz used, because they would have been more sensitive to executive



dysfunction in high achieving pupils such as Student. Thaler suggested that Behavior Rating Inventory of Executive Functioning – Second Edition, which would have distinguished associated features of ADHD and day-to-day executive impact. Another test Thaler suggested was the Developmental Neuropsychological Test, Second Edition, which only a neuropsychologist could administer.

Thaler noticed that the Test of Auditory Processing Skills suggested a mild auditory processing issue, and opined that Katz should have probed further to uncover whether Student had central auditory processing disorder, which he described as common among pupils with ADHD. Thaler also opined that Student's Test of Auditory Processing Skills scores, like the expressive attention, should have been compared to Student's other abilities. But Student's Test of Auditory Processing Skills scores reveal that Student tested solidly within the average range.

Thaler opined that Katz should not have simply included assessment scores in the assessment report, but should have interpreted them in a narrative summary to facilitate understanding for the IEP team. Similarly, Thaler opined that Student's self-reports should not have simply been included in the assessment report, but included in the assessment summary to highlight their significance to the IEP team. Thaler also opined that Katz's assessment report should have made clear to the IEP team that Student was taking Honors Accelerated Algebra 1 for the second time.

In conducting her assessment, Katz did not use a single evaluation to measure each component of the psychoeducation evaluation. For each component, Katz used a variety of assessment strategies, including assessment tools, parent interviews, parent questionnaires, in-person observation of Student, and records review of existing assessment data. Katz used technically sound instruments in accordance with the

instructions provided by the producer of the assessment that were valid and reliable for the purposes they were used, and she was qualified to administer them. The instruments were not racially, culturally, or sexually discriminatory. Katz assessed Student in English, her primary language. In selecting which instruments to use, Katz tailored the tests to assess Student's specific areas of need, Los Angeles established that its psychoeducational assessment, including the academic component, was legally compliant.

At issue in this case is not which test instruments would have yielded the most superior or detailed results, or what an assessor's best practices would have been, but whether Los Angeles's psychoeducational assessment of Student was legally compliant with the requirements of the IDEA. Los Angeles established that it was. Student did not establish that any of Thaler's critiques of Los Angeles's assessment were grounded in legal requirements under the IDEA. Not only was Los Angeles's psychoeducational assessment legally compliant, but the evidence established that the assessment was accurate, as borne out by Student's high achieving grades throughout the remainder of the eighth-grade school year.

## STUDENT'S ISSUES 1.A. AND 2.D.: LOS ANGELES FAILED TO MEET ITS CHILD FIND OBLIGATION FROM THE BEGINNING OF THE 2021-2022 SCHOOL YEAR TO MARCH 2022

Student argued that Los Angeles failed in its child find obligation by failing to assess Student for special education until March 2022. Los Angeles contended that Student was not eligible for special education, and thus it had no obligation to seek or serve Student.

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 California, special education is required for individuals who are defined in part as individuals whose “impairment ... requires instruction, services, or both, which cannot be provided with modification of the regular school program.” (Ed. Code, § 56026, subd. (b).) A child qualifies as an individual with exceptional needs if the results of an assessment demonstrate that the degree of the child’s impairment requires special education. (Cal. Code Regs., tit. 5, § 3030, subd. (a).)

A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities ... who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. § 1412(a)(3)(A); Ed. Code, § 56171, 56301, subds. (a) and (b).)

This duty to seek and serve children with disabilities is known as “child find.” A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*)). The threshold for suspecting that a child has a disability is relatively

low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

Student was in the seventh grade for the 2020-2021 school year, and was enrolled in the Individualized Honors Program, an academic program for highly gifted students. Like many others during this time, Student began the year in distance learning because of COVID-related shutdowns. Student did return to on-campus instruction in the spring of 2021, but not in the traditional sense. Pupils were organized into in-person homerooms for the school day with a supervising teacher, but spent the school day attending classes on computer, instructed by other teachers. In this way, Student was on campus but did not receive in-person instruction during the 2020-2021 school year.

Student's school issued progress reports to pupils approximately every five weeks until final semester grades were issued. On progress reports, teachers issued an academic letter grade as well as marks for pupil work habits and cooperation. A pupil's work habits, and a pupil's cooperation, could be either "excellent," "satisfactory," or "unsatisfactory." The school did not issue a progress report for the first progress reporting period of the school year because teachers did not yet have enough information on pupils' work to do so.

The first semester of Student's seventh grade year began on August 18, 2020, and ended on December 18, 2020. The second semester began on January 11, 2021, and ended on June 11, 2021. The period covered by Student's complaint began at the second semester of seventh grade, but Student's first semester grades are included here for context. Student regularly earned A's on her progress reports in choir and PE, and

ultimately received A's in those classes for the first and second semester grades. Homeroom was on a pass/no pass basis, and Student consistently received passing marks there for the first and second semester. Student routinely received "excellent" marks for work habits and cooperation in those classes.

Jinny Jung taught Student science for the first semester of seventh grade and health for the second semester. In science, Student received a C on the second progress report. Jung emailed Parent on October 26, 2020, to alert Parent that Student's grade was in decline due to "missing assignments, late submissions, and less than stellar quality of work." Student also received a C on the third progress report, where Jung noted that Student was receiving low scores and was not turning in assignments. Student was, however, able to raise her science grade to an A by the final semester report card. Student received a B for the second semester grade in health.

In history, Student received A's on all progress reports and for the final grade in the first semester. Student received "excellent" marks for work habits and cooperation. For the second semester, one of Student's progress reports in history reflected a C grade and a "satisfactory" in work habits. Student was able to raise these marks to a B and "excellent" work habits for the final second semester grade. Two of Student's classes, however, reflected a precipitous decline in academic performance.

## GEOMETRY

For the first semester in geometry, Student performed consistently. Student received C's on every progress report, resulting a final C grade. Ann Lawrence was Student's seventh grade geometry teacher. Parent emailed Lawrence during the first semester, on October 27, 2020, to address Student's struggles in math and to ask Lawrence for help. Lawrence observed that Student would have her camera off during

class and significant distractions at home, like rambunctious siblings and a barking dog, and that these things impeded Student's ability to focus. Lawrence also noted Student's negative mindset that Student was bad at math.

Student began the second semester of geometry consistent with her performance in the first semester. Student received a "meets standards" on her first progress report, equivalent to a C. Student received a C on her second progress report. By the third progress report, Student received a D because Student was submitting late or incomplete work or stopped submitting tests and assignments altogether. On May 11, 2021, Student attempted to get a hold of Lawrence multiple times during a geometry test. Student emailed Lawrence during the test expressing that she was having trouble, felt confused, and was ill prepared. Lawrence was unable to respond to Student in the moment, as she was in the midst of administering a pending test.

By the final second semester geometry grade, Student received an F. Lawrence included the following comment of the final second semester report card: "Experiencing difficulty in meeting the standards; does not complete assignments/tasks." Lawrence believed that Student's work habits and study skills throughout the year, as well as a lack of foundational algebraic knowledge, contributed to Student's low grade in geometry.

Despite this, Lawrence strangely gave Student "excellent" marks for work habits. Lawrence explained that she did so because of more lenient district-wide policies regarding homework during distance learning. This explanation was inconsistent with the below-passing letter grades Lawrence gave to Student or Lawrence's observations as to why Student deserved those grades.

## ENGLISH

For the first semester in English, Student received B's on progress reports, but Student's grade dropped down to a C for the first semester grade. Correspondingly, Student's English work habits dropped from "excellent" to "satisfactory." For the second semester in English, Student received a "meets standards" on her first progress report, a B on her second progress report, and then an F on the third progress report. Student's English teacher, Maegen Rasner, noted that Student did not complete assignments or tasks, and exhibited little effort to improve. Rasner gave Student an F grade as well as an "unsatisfactory" for work habits. Student ultimately received an F for the final second semester English grade. Rasner believed Student was capable of doing the accelerated coursework because Student had done well in English in the first semester and had done the work in a meaningful way. Rasner believed Student's decline in English academic performance during the second semester was due to Student's work habits and assignment avoidance. Rasner noticed that the same issues were surfacing in multiple classes for Student.

Parent emailed both Rasner and Lawrence throughout the spring of 2021 regarding Parent's concerns with Student's performance in geometry and English. Parent also communicated her concerns about Student's rapid decline in academics to several other school staff and administrators. Parent emailed Karissa Masmela, Student's school counselor, on April 27, 2021, asking for help because Student was "suffering greatly with at home learning during the pandemic" and had declining grades. Parent emailed Masmela again on June 4, 2021, after Parent became aware that Student was failing two classes. Parent sent a similar email to Robyn Friedman, Student's principal, on June 4, 2021, wanting to "get to the bottom of what has been

going on,” since Student was a strong Individualized Honors Program student that was failing English and geometry. Parent emailed Kirsten Awalt, the school’s social worker, on June 7, 2021, expressing academic concerns and asking that Awalt communicate with Student’s therapist to collaborate on school support for Student. Parent also met with Awalt and Masmela jointly toward the end of Student’s seventh grade year.

Masmela met with Student at Parent’s behest. These meetings occurred two times, for about 20 or 30 minutes each visit. Masmela believed that the stress that Student experienced to be academic, rather than related to mood or depression, and that Student’s social-emotional challenges were connected to academic challenges. Student was convinced that she needed medication to do better in school.

A disability is “suspected,” and a child must be assessed, when the school district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*); (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1194).) Notice of a suspected disability may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Timothy O., supra*, 822 F.3d at 1119-1120 [citing *Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796; *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].) The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) Once identified, it is extremely important to the education of children



that the assessment be conducted early, thoroughly, and reliably, or disabilities may go undiagnosed, neglected, or improperly treated in the classroom. (*Timothy O., supra*, 822 F.3d at 1110 [citing 20 U.S.C. 1400(c)].)

The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

Because of the unique and unprecedented circumstances of remote learning, Los Angeles encouraged teachers to give pupils more time to complete assignments and be more forgiving about late work. Lawrence even decreased the number of questions she gave on tests. That Student, a highly gifted pupil, received F's in two classes during this period of more lenient grading should have been more notable to Los Angeles.

Student's teachers cited other potential intervening factors that could have contributed to Student's decline in academics:

- Lawrence observed that Student's internet connection was spotty and that Student had a lot of background distraction, which disrupted her learning;
- Student had to cope with her parents' divorce; some teachers believed that one of Student's parents did not allow Student to work on homework during the time Student was with that parent;
- Student would leave Rasner's English class 10 or 15 minutes early to attend Beyond the Bell, a district after school program.

While such factors may have contributed to Student's academic challenges, it was not clear that they were solely responsible for Student's rapid academic decline. Student's academic performance should have improved once Student returned to on-campus distance learning. Instead, it worsened. Student returned to campus for hybrid learning sometime during the last week of April 2021 or the first week of May 2021. On campus, Student did not have the distractions she did at home. In fact, 85 percent of the English grade Rasner issued was based on in-class coursework, and yet this period is when Student's grades dropped the most. Student had an F in English by May 5, 2021, and maintained that F until the last day of school on June 11, 2021. In geometry, Student had a D by May 5, 2021, and an F by June 11, 2021.

Student's teachers noticed the same challenges across subject matter. Student did not turn in work on time, or at all, because Student struggled with organization, time management, executive function, and long assignments. Los Angeles should have suspected that these characteristics could be consistent with a disability. By the time of the final second semester report card in the seventh grade, Student had received sub-standard marks in more than one class, twice in a row. By the end of spring semester, Parent had communicated Student's academic challenges to Student's science, English, and geometry teachers, as well as the school counselor, principal, and social worker. Further, Student's school counselor noticed that Student had academic-related stress and that Student was seeking medication to help with her studies. Student demonstrated that Los Angeles had sufficient knowledge by the end of Student's seventh grade year to suspect that Student had a disability that may have required special education services.

Had Los Angeles referred Student for a special education assessment at the beginning of the 2021-2022 school year, it would have had 15 days to provide Parent

with an assessment plan and 60 days to complete the assessment and hold an IEP team meeting to review the results (Ed. Code, § 56043, subds. (b) and (c).) No party introduced evidence at hearing that Los Angeles had any instructional days during the summer break of 2021. The Los Angeles instructional calendar in evidence does not indicate any general education instructional days during the summer of 2021. Therefore Los Angeles's summer break was a vacation "in excess of five days", and summer break would not count toward the assessment timeline. The first day of the 2021-2022 term was Monday, August 16, 2021. Had Los Angeles referred Student for a special education assessment at the beginning of the 2021-2022 school year, it would have had 15 days to provide Parent with an assessment plan and 60 days to complete the assessment and hold an IEP team meeting to review the results. Student should have been assessed, and an IEP team meeting held, no later than November 1, 2021. Los Angeles's child find obligation was triggered on the last day of the 2020-2021 school year, or when final grades were issued shortly thereafter. Thus, Los Angeles failed in its child find obligation to Student from the beginning of the 2021-2022 school year to March 2022. The impact of this failure will be discussed more fully below.

#### STUDENT'S ISSUES 1.B. AND 2.K.: STUDENT WAS INELIGIBLE FOR SPECIAL EDUCATION UNDER THE CATEGORIES OF OTHER HEALTH IMPAIRMENT, SPECIFIC LEARNING DISABILITY, OR EMOTIONAL DISTURBANCE

Student contended that she was eligible for special education under the categories of Other Health Impairment, Specific Learning Disability, and Emotional Disturbance. Specifically, Student argued that although Student was a high achiever in a competitive academic program, ADHD impaired her executive function and ability to concentrate and complete lengthy or multi-step assignments. As a result, Student

contends that she was eligible for special education under the category of Other Health Impairment. Student also contended that the depression, stress, and anxiety associated with her academic struggles negatively impacted Student's ability to access her education, making her eligible for special education under Emotional Disturbance. Further, Student argued that she was eligible for special education under Specific Learning Disability in math. Student asserted that Los Angeles's failure to determine Student's eligibility under any of these categories denied Student a FAPE. Los Angeles contended that Student was a highly gifted pupil who consistently demonstrated her ability to access her education, and that the IEP team accurately determined Student ineligible for special education services.

"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 (2006); Ed. Code, § 56031.) A child with a disability includes a child that qualifies under the special education categories of other health impairment, a serious emotional disturbance, or specific learning disability, *and who as a result needs special education and related services*. (20 U.S.C. § 1401(3)(A)(i), (ii); 34 C.F.R. § 300.8(a)(1) (2017), emphasis added.) A child qualifies as an individual with exceptional needs if the results of an assessment demonstrate that the degree of the child's impairment requires special education. (Cal. Code Regs., tit. 5, § 3030, subd. (a).) While each disability category has its own different factors to determine eligibility, one common requirement for eligibility is a need for special education.

Student returned to in-person instruction for the eighth grade in the fall of the 2021-2022 year. That fall, Parent individually emailed Jung, Lawrence, Rasner, Masmela, and Awalt, as well as Student's eighth grade Honors Accelerated Algebra 1 teacher Jiji John, Student's Honors History teacher David Graham, and Student's diploma counselor

Samuel Lee. Parent informed them that, over the summer between seventh and eighth grades, Student had been diagnosed with ADHD, Inattentive type, with related anxiety and depression. Parent also informed them that Student had begun medication to treat the same. Had Los Angeles assessed Student in a timely manner, the IEP team should have convened no later than November 1, 2021. The IEP team would have had the benefit of having two eighth grade progress reports for Student at that time.

In the eighth grade, Student continued to struggle with

- attention,
- time management,
- starting tasks,
- being overwhelmed with large projects, and
- completing tasks in an unstructured environment when she was on her own.

Despite this, Student saw a marked improvement in grades and a return to where she historically performed before the dip during hybrid instruction at the end of seventh grade. For the first progress report of the eighth grade, some teachers issued letter grades, while other teachers opted for the "non-final marks" of "meets standards," "incomplete," or "no mark." Among the non-final marks, "meets standards" was the highest mark a pupil could receive.

In Honors U.S. History, Student received a "meets standards" on the first progress report and an A on the second progress report. In Honors English, Student received a "meets standards" on the first progress report and a B on the second progress report. In Theater, Student received an A on the first progress report and an A on the second

progress report. In Choir, Student received an A on the first progress report and an A on the second progress report. In PE, Student received a “meets standards” on the first progress report and an A on the second progress report.

In Honors Accelerated Algebra 1, Student received an A on the first progress report and a B on the second progress report. This was the second time Student had taken Algebra 1. Student had taken and passed Algebra 1 in the sixth grade. Los Angeles had Student repeat Algebra 1 in the eighth grade to remedy any weaknesses in foundational algebraic knowledge that could have contributed to Student’s poor marks in geometry the year before. The fact that Student received As in Algebra 1 in the sixth grade may not have reflected Student’s true algebraic knowledge toward the end of the year. The COVID shutdowns occurred during the second semester of Student’s sixth grade. Lawrence explained that Students’ final grades for that semester reflected a pupil’s last grade of record before the shutdowns occurred, and did not necessarily reflect a pupil’s academic achievement by the end of the year.

In Honors Integrated Science, however, Student received a “no mark” for the first progress report. For the second progress report, Student received an F and an “unsatisfactory” for work habits because Student was not turning in assignments for that reporting period. Notwithstanding Student’s F in science for one progress report, Student’s academic performance saw a significant trend upwards by November 1, 2021. Around this time, Parent privately enlisted the help of Judy Kapler, an educational coach. Kapler helped Student with executive planning, like breaking down larger assignments into smaller steps, time management, work habits, and organization. By November 1, 2021, Student had met with Kapler for two hours during the week of October 18, 2021, and for three hours during the week of October 25, 2021. The concerning dip in sub-

standard grades that Student experienced at the end of the seventh-grade year and that should have given rise to assessment were no longer present in the eighth-grade year, by the time the assessment should have occurred. Student did not establish a need for special education services.

Had Los Angeles assessed Student in a timely manner, the IEP team would not have had the benefit of seeing Student's grades for the rest of the first semester or the rest of the entire eighth grade year. But a look at the rest of Student's eighth grade report card further supports the finding that Student did not have a need for special education services.

By the time of the third progress report of the first semester, Student raised her science grade to a B and her work habits mark to a "satisfactory." Student maintained all A's and B's on progress reports for the remainder of the first semester, and maintained either "satisfactory" or "excellent" marks for work habits and cooperation. Student had the benefit of an education coach for approximately seven weeks of the first semester of eighth grade. Working with Kapler likely helped Student. However, the evidence established that the return to her historical grades was not attributable to this support. Student's second semester performance, without Kapler demonstrates that Student was able to maintain improved grades even while not working with an educational coach.

Student achieved all A's and B's for progress reports and final second semester grades in Honors Accelerated Algebra 1, Honors Integrated Science, Honors US History, Theater, Choir, and PE. Student achieved B's and C's during the second semester of Honors English, ending with a final semester grade of C. In all cases, Student at least satisfactorily met expectations in all classes. Student's teachers found her work habits

and cooperation to be “satisfactory,” if not “excellent.” David Graham, Student’s Honors US History teacher, noticed that Student employed a sophisticated work strategy regarding assignments, which was to prioritize working on assignments with the most points. At the end of the eighth-grade year, Student received an award for having a GPA higher than a 3.0, and won an award for best choir soloist. Student was successfully accessing honors curriculum above grade level in the eighth grade. Student did not demonstrate a need for special education in the eighth grade. As such, Student was not able to establish eligibility under any category.

## SPECIFIC REQUIREMENTS

In addition to failing to demonstrate a threshold need for special education services, Student would not have qualified under the specific requirements of each eligibility category.

## EMOTIONAL DISTURBANCE

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- a. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- b. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- c. Inappropriate types of behavior or feelings under normal circumstances.
- d. A general pervasive mood of unhappiness or depression.
- e. A tendency to develop physical symptoms or fears associated with personal or school problems.



- f. Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance. (34 C.F.R. § 300.8(c)(4) (2017); Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

Student did not present any evidence or allege that Student had an inability to learn or build and maintain relationships, or had inappropriate behavior or feelings, physical symptoms, or schizophrenia. However, Parent and Student's testimony regarding Student's depression diagnosis called into question "a general pervasive mood of unhappiness or depression", and Parent and Student's testimony regarding Student's anxiety called into question the characteristic of "fears associated with personal or school problems".

Parent testified that Student had received private therapy since the third grade. Parent also testified that Student had been diagnosed with depression during the summer between the seventh and eighth grade. No medical records were submitted nor did any medical professional testify establishing that Student was diagnosed with depression or anxiety. Even assuming Parent's report is accurate, Parent did not establish evidence of pervasive, marked depression in the school setting. Instead, several Los Angeles staff members testified to Student's positive mood, behavior, and functioning at school.

Awalt, the school's social worker, met with Student about three times in the eighth grade at Parent's behest. Student was communicative, expressive, and even-keeled. Sometimes Student would share fun or exciting information with Awalt. Lee was Student's diploma counselor, and met with Student in the eighth grade. Lee

observed that Student was overwhelmed by school, which was typical of an Individualized Honors Program Student, but Lee found Student to be calm, collected, and “a little bit funny.”

Student credibly testified she experienced anxiety when faced with a large assignment. Student struggled with low self-confidence when it came to physics and math, and Jung and Lawrence observed what a negative impact that mindset could have on Student’s ability to do their respective coursework. Student also felt embarrassment at having to retake Algebra 1, falling out of line with the rest of her honors cohort who would be taking Algebra 2. The evidence established that these struggles, while genuine, were typical for someone Student’s age.

By all accounts, Student was social, friendly, and well-spoken, and enjoyed creative outlets like poetry and creative writing. Thaler opined that Student should have qualified for special education under Emotional Disturbance because of Student’s and Parent’s reports of Student’s depression, but this is unpersuasive. While Student may have had depressed emotion, Thaler did not use the term “emotional disturbance” in its legal sense. Student did not establish that any school-related stress or anxiety Student may have experienced, or any negative thoughts about her academic ability, were more than what was typical for a high school-bound eighth grade pupil in an accelerated academic program, especially during a return to in-person instruction after COVID shutdowns. Student did not establish that any anxiety or depression she experienced met the threshold of being of a general and pervasive nature over a long period of time and to a marked degree. Even if an IEP team had timely met in November 2021, the

evidence established that Student would not have qualified for special education under the category of Emotional Disturbance. The results of the actual May 5, 2022 psychoeducational assessment further supports this finding.

## SPECIFIC LEARNING DISABILITY

A child is eligible for special education under the category of specific learning disability if the child has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written. (20 U.S.C. § 1401(30); Ed. Code, § 56337, subd. (a).) The basic psychological processes include

- attention,
- visual processing,
- auditory processing,
- sensory-motor skills, and
- the cognitive abilities of association, conceptualization, and expression.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) This type of disorder may result in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, and a severe discrepancy between intellectual ability and achievement in one or more academic areas. (Cal. Code Regs., tit. 5, § 3030, subd. (j).)

A California school district must use at least one of three methodologies adopted in section 3030, subd. (b)(10) as a component of its evaluation of a student for a specific learning disability, but may not rely on any of the methods as the sole basis for determining whether a student has a specific learning disability. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) and (C).) The methodologies are the “pattern of strengths and weaknesses” methodology (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)2.(ii)), the

"severe discrepancy methodology", and the "response to intervention methodology". (Cal. Code Regs., tit. 5, § 3030, subds. (b)(10)(B) & (C)2.(i).) The severe discrepancy, response to intervention, and pattern of strengths and weaknesses methodologies for evaluating specific learning disability are each considered a single measure or assessment.

## RESPONSE TO INTERVENTION METHOD

The response to intervention method looks at whether a student made sufficient progress to meet age or State-approved grade-level standards in one or more specified areas of academic achievement when provided a program of scientific, research-based interventions. (*Id.*, at subd. (b)(10)(C)2(ii).) No evidence was introduced that Los Angeles utilized this method or that Student was provided a program of scientific, research-based interventions.

## PATTERN OF STRENGTHS AND WEAKNESSES METHOD

For this methodology, an assessment must find that the student is not achieving adequately for the child's age or to meet State-approved grade-level standards in one or more of the eight areas of

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading fluency skills,
- reading comprehension,
- mathematics calculation, or
- mathematics problem solving.

(34 C.F.R. § 300.309(a)(1); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)1.) The assessment must also find that the student is achieving inadequately despite having been provided learning experiences and instruction appropriate for the child's age or State-approved grade-level standards. (*Ibid.*) If the assessment finds that the student is not achieving adequately despite appropriate experiences and instruction, the assessment must find that the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the IEP team to be relevant to the identification of a specific learning disability, using appropriate assessments. (34 C.F.R. § 300.309(a)(2)(ii); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(C)(2)(ii).)

Student asserts a Specific Learning Disability in math, and yet the evidence established that Student's academic achievement in math, as measured by the Woodcock Johnson, was in the average range. At the time of the psychoeducational assessment, Student had also taken two proficiency assessments that tested Student's abilities on State standards in math: the Smarter Balanced Assessment and the "NWEA." On the Smarter Balanced Assessment, Student's abilities on State-standards for eighth-grade math were "near standard". On the NWEA, Student tested above the mean, in the 81<sup>st</sup> percentile, in math achievement. Among the math instructional areas covered by the NWEA, Student demonstrated a relative strength in operations and algebraic thinking, while geometry was a suggested area of focus. But even Student's sub score on geometry was well above average achievement. Also, at the time of the psychoeducational assessment, Student was receiving A's and B's in Honors Accelerated Algebra 1, which was one year above grade level eighth grade math. Student did not show that Student was not achieving adequately in math for Student's age or grade-level

standards. There is no evidence that Los Angeles uses a pattern of strengths and weaknesses model; however, even if it did, Student did not demonstrate a pattern of strengths and weaknesses.

## SEVERE DISCREPANCY METHOD

The severe discrepancy method looks for a specified statistical difference, specifically, a standard deviation of 1.50, between a student's standardized test scores in intellectual ability, and the student's standardized test scores in one or more specified areas of academic achievement. (See Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).) If the standardized tests do not reveal the required statistical difference, the IEP team determining eligibility may still find that a severe discrepancy exists if it documents that a discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. (*Id.*, at subd. (j).)

Even when standardized tests do not reveal a severe discrepancy, the IEP team may nevertheless find that a severe discrepancy does exist based on a consideration of standardized assessment results, information provided by parents and present teachers, the pupil's performance in the classroom, the pupil's age, and any other relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).)

In support of the contention that Student was eligible for special education under the category of Specific Learning Disability, Thaler pointed to several discrepancies regarding Student's Woodcock Johnson scores. First, Thaler pointed to a standard deviation of 1.79 between Student's actual score of 106 on the math subtest on the

Woodcock Johnson and the predicted score of 120. Because of the deviation, the instrument identified math calculation skills as a “weakness”, even though Student’s score was still in the average range.

Second, Thaler pointed to a discrepancy between Student’s academic ability in math versus her ability in other areas assessed by the Woodcock Johnson, namely, written language and reading. Specifically, Student scored 127 in broad written language, in the above average range, and 135 in broad reading, in the far above average range. Student scored 106 in broad mathematics, in the average range. Third, Thaler also pointed out a discrepancy between Student’s average to superior cognitive ability on the Cognitive Assessment System and Student’s failing grades in seventh grade geometry.

This testimony further demonstrates Thaler’s lack of legal knowledge regarding how a severe discrepancy is calculated under California law. None of the discrepancies about which Thaler testified establish eligibility for Specific Learning Disability; the correct analysis would be a comparison between cognitive ability and academic achievement – not a comparison between actual and predicted academic achievement in the same area, or a comparison of academic achievement in different areas. Even a comparison between Student’s average to superior cognitive ability on the Cognitive Assessment System and Student’s failing grades in seventh grade geometry is not persuasive, as Student was receiving A’s and B’s in her retake of Algebra 1 at the time of assessment. Student did not establish a severe discrepancy between ability and achievement. As such, Student did not establish that Student would have qualified for special education under the category of Specific Learning Disability.

## OTHER HEALTH IMPAIRMENT

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance. (34 C.F.R. § 300.8 (c)(9) (2017); Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

Thaler unpersuasively opined that Student should have qualified for special education under the category of Other Health Impairment because of Student's ADHD diagnosis. Student did not establish a diagnosis of attention deficit hyperactivity disorder or any other chronic or acute health problem. The only mention of Student's ADHD was through Parent's hearsay testimony; Student's diagnosing health care professional did not testify, nor did Student introduce any documentary evidence of a diagnosis. Further, even if Student had established an ADHD diagnosis, Student did not establish that her educational performance was adversely affected for the reasons discussed above. Student was performing within grade level expectations in all subjects, if not higher. At times that Student was distracted by her phone or not on task in the Algebra 1 class, she was easily redirected with nonverbal cues by John. Even Student's consistent doodling in class did not impact Student's ability to learn. Student's challenges with attention did not adversely impact Student's performance to a degree that Student required services outside of the general education environment.



STUDENT'S ISSUES 1.C. AND 2.A: LOS ANGELES DID NOT DENY STUDENT A FAPE FROM JANUARY 12, 2021 THROUGH THE REMAINDER OF THE 2020-2021 EXTENDED SCHOOL YEAR OR FROM THE BEGINNING OF THE 2021-2022 SCHOOL YEAR THROUGH MAY 31, 2022 FOR FAILING TO MAKE AN IEP OFFER TO STUDENT

Student's academic decline toward the end of the seventh grade gave rise to Los Angeles's child find obligation to assess Student, but Student did not establish that Student was entitled to special education at any time from January 12, 2021 through the remainder of Student's seventh-grade year. And as discussed above, even if Student had been timely assessed by November 1, 2021, Student was not eligible for special education services at any time in the eighth grade through May 31, 2022. Generally, a public agency must have an IEP in effect at the beginning of each school year for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323 (2006).) Because Student did not qualify for special education, Los Angeles had no obligation to have an IEP offer in place for Student at any time covered by the present complaint.

STUDENT DID NOT ESTABLISH A FAPE DENIAL REGARDING THE PROCEDURAL CLAIMS MADE IN ISSUES 2.B., 2.C., 2.E., 2.F., 2.I., AND 2.J. AS STUDENT DID NOT ESTABLISH THAT SHE WAS ENTITLED TO FAPE

Student did not establish that Los Angeles denied Student a FAPE by failing to find Student eligible for special education. A child ineligible for IDEA opportunities in the first place cannot lose those opportunities merely because a procedural violation takes place. (*Nack ex rel. Nack v. Orange City School District* (6th Cir. 2006) 454 F.3d

604, 612) [procedural violation denies a FAPE “only if such violation causes substantial harm to the child or his parents”]; See also *R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 942

[“In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief .... Because we affirm the district court’s acceptance of the [Special Education Hearing Office’s] determination that R.B. does not qualify for IDEA relief, we hold the District’s procedural violation in the composition of R.B.’s IEP team is harmless error.”] (*Napa Valley*).)

Reaching Student’s remaining procedural issues, namely, issues 2.C., 2.E., 2.F., 2.I., and 2.J. would not change or alter Student’s remedies. Whether or not the remaining procedural defects were proven, the outcome does not change. As Student was not entitled to FAPE, she could not be denied a FAPE.

## 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. The issues not decided by this Decision are not included here.

### STUDENT’S ISSUE 1, SUBSECTION A:

Los Angeles did not fail to meet its Child Find obligation from January 12, 2021 through the end of the 2020-2021 school year.

Los Angeles prevailed on Student’s Issue 1, subsection A.

## STUDENT'S ISSUE 1, SUBSECTION B:

Los Angeles did not deny Student a FAPE by finding Student ineligible for special education under the categories of Other Health Impairment, Specific Learning Disability, or Emotional Disturbance from January 12, 2021 through the remainder of the 2020-2021 school year.

Los Angeles prevailed on Student's Issue 1, subsection B.

## STUDENT'S ISSUE 1, SUBSECTION C.:

Los Angeles was not required to offer Student an IEP from January 12, 2021, through the remainder of the 2021-2022 school year.

Los Angeles prevailed on Student's Issue 1, subsection C.

## STUDENT'S ISSUE 2, SUBSECTION A.:

Los Angeles was not obligated to have an IEP offer at any time from the beginning of the 2021-2022 school year through May 31, 2022.

Los Angeles prevailed on Student's Issue 2, subsection A.

## STUDENT'S ISSUE 2, SUBSECTION B.:

Los Angeles did not deny Student a FAPE by failing to provide an assessment plan within 15 days of Parent's November 2021 request.

Los Angeles prevailed on Student's Issue 2, subsection B.

## STUDENT'S ISSUE 2, SUBSECTION C.:

Los Angeles did not deny Student a FAPE by failing to provide all records in response to Parent's December 13, 2021, records request.

Los Angeles prevailed on Student's Issue 2, subsection C.

## STUDENT'S ISSUE 2, SUBSECTION D.:

Los Angeles failed to meet its Child Find obligation from the beginning of the 2021-2022 school year until its assessment of Student in March 2022.

Student prevailed on Student's Issue 2, subsection D.

## STUDENT'S ISSUE 2, SUBSECTION E.:

Los Angeles did not deny Student a FAPE by failing to provide a legally compliant prior written notice regarding Los Angeles's refusal to initiate a special education assessment until the time of the March 2022 academic assessment.

Los Angeles prevailed on Student's Issue 2, subsection E.

## STUDENT'S ISSUE 2, SUBSECTION F.:

Los Angeles did not deny Student a FAPE by failing to provide Notice of Procedural Safeguards to Parent when Los Angeles refused to initiate assessments until March 2022.

Los Angeles prevailed on Student's Issue 2, subsection F.

## STUDENT'S ISSUES 2.G. AND 2.H., AND LOS ANGELES'S ISSUES 1 AND 2:

Los Angeles conducted a legally compliant psychoeducational assessment of Student.

Los Angeles prevailed on Student's Issues 2.G. and 2.H., and Los Angeles's Issues 1 and 2.

### STUDENT'S ISSUE 2, SUBSECTION I.:

Los Angeles did not deny Student a FAPE by failing to conduct a legally compliant IEP team meeting on May 5, 2022, specifically by depriving Parent an opportunity to meaningfully participate in the IEP development process.

Los Angeles prevailed on Student's Issue 2, subsection I.

### STUDENT'S ISSUE 2, SUBSECTION J.:

Los Angeles did not deny Student a FAPE by not providing a legally compliant prior written notice of its refusal to find Student eligible for special education under the categories of Other Health Impairment, Specific Learning Disability, and Emotional Disturbance.

Los Angeles prevailed on Student's Issue 2, subsection J.

### STUDENT'S ISSUE 2. SUBSECTION K.:

Los Angeles did not deny Student a FAPE by finding Student ineligible for special education under the categories of Other Health Impairment, Specific

Learning Disability, or Emotional Disturbance from the beginning of the 2021-2022 school year through May 31, 2022.

Los Angeles prevailed on Student's Issue 2, subsection K.

## REMEDIES

Los Angeles failed in its Child Find obligation to Student. Under the IDEA, a school district's appropriate Child Find inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Cari Rae S., supra*, 158 F.Supp.2d at p. 1195.) But Student was not ultimately eligible for special education. Because Student was substantively ineligible for IDEA relief, the procedural error was harmless. (*Napa Valley, supra*, 496 F.3d 932 at p. 947.) As such, no remedy for the Child Find failure is awarded here. Los Angeles is advised, however, to take independent measures to ensure that its employees who serve high achieving pupils be aware of the requirements and procedures for Child Find under the IDEA as it relates to suspecting disability in high achieving pupils.

## ORDER

1. Los Angeles's psychoeducational assessment of Student, presented on May 5, 2022, was legally compliant such that Student is not entitled to an independent evaluation at public expense.
2. All other 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/

Claire Yazigi

Administrative Law Judge

Office of Administrative Hearings