

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2019030744

DECISION

Los Angeles Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on March 19, 2019, naming Student.

Administrative Law Judge Robert Martin heard this matter in Van Nuys, California on April 30, 2019, and May 1, 7, 8, and 10, 2019. Patrick Balucan, attorney at law, represented LAUSD. LAUSD Litigation Coordinator Francine Metcalf attended the hearing on April 30, 2019, on behalf of LAUSD. LAUSD Research and Resolution Specialist Eric Young attended on May 1, 8, and 10, 2019, and Research and Resolution Specialist Anait Sinanian attended on May 7, 2019.

Mother (Parent) represented Student. Student attended the hearing on the afternoon of April 30, 2019.

The ALJ granted the parties' request for a continuance until June 3, 2019 to file written closing arguments. LAUSD submitted a timely closing argument. Parent contacted staff on June 4, 2019 and stated she had been unable to electronically file Student's closing argument, and would instead mail it on June 5, 2019. On June 12, 2019, Parent contacted staff and stated she had electronically filed a request to continue the

deadline for closing arguments on June 4, 2019, but staff could not locate the request. OAH received no closing argument or written request for continuance from Student as of the date this decision issued. The record therefore was considered closed on June 3, 2019, and the matter submitted for decision as of that date.

## ISSUE

Did LAUSD's August 16, 2018 individualized education program offer Student a free appropriate public education in the least restrictive environment appropriate for Student, such that LAUSD may implement the IEP without Parent's consent.

## SUMMARY OF DECISION

LAUSD failed to prove it complied with the procedural requirements of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) and the Education Code in developing Student's August 16, 2018 IEP. LAUSD admitted that it failed to provide Parent the statutorily required notice of the IEP team meeting until the meeting itself, which was a procedural violation. LAUSD also failed to prove it satisfied the procedural requirement of offering Student a single, specific program, in the form of a clear, coherent offer, because it provided Parent two versions of the August 16, 2018 IEP offering different testing accommodations for Student. LAUSD could not prove when the versions were created or provided to Parent, why both versions were provided to Parent, or whether either version, or both versions, were represented to Parent to be LAUSD's August 16, 2018 offer of FAPE to Student. LAUSD additionally failed to prove that it had developed measurable annual goals reasonably designed to meet all of Student's identified areas of need with respect to toileting. To address Student's lack of progress on her goal of raising her hand or using visual aids to signal her need to go to the bathroom, the IEP proposed a new goal to signal her need by using unspecified, to-be-agreed-upon strategies designed within her comfort level. This vague goal of employing

not-yet developed signaling methods was not clear or measurable, or reasonably designed to meet Student's needs. LAUSD developed no goal to address Student's need to learn the functional skill of cleaning herself after using the toilet. Each of these procedural failures interfered with Parent's opportunity to participate in the IEP process. LAUSD therefore failed to prove it offered Student a FAPE in the August 16, 2018 IEP, and its request for relief must be denied.

## FACTUAL FINDINGS<sup>1</sup>

### JURISDICTION AND BACKGROUND

1. At the time of hearing, Student was an eight-year-old second grader, eligible for special education under the disability category of autism. Student was a sweet, cooperative child of average intelligence, and eager to learn. Student lived with Parent within LAUSD's jurisdictional boundaries at all relevant times.

2. At age three, LAUSD found Student eligible for special education based on developmental delays. She was also diagnosed with autism, but was not found eligible for special education based on autism at that time. In spring 2016, Student enrolled in a pre-school program for children with moderate disabilities at her home school, LAUSD's Emelita Academy Charter School. Student attended a general education kindergarten class at Emelita Academy for the 2016-2017 school year.

3. LAUSD assessed Student in spring 2017 to help determine her first grade placement and services. Student demonstrated average intelligence and language skills. She tested in the low average range for thinking and reasoning. Student had weaknesses

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<sup>1</sup> At LAUSD's request in its closing brief, this decision takes official notice of the findings of fact made in the April 9, 2019 OAH decision involving the same parties in consolidated matters 2018060459 and 2018100624.

in attention processing, executive function, working memory, planning, and perceptual motor skills. Her weakness in working memory made it hard for her to retain information in any academic area, and she performed below grade level in reading, math, and written language. As a result of her disabilities, Student exhibited a severe discrepancy between her ability and her academic achievement. Student also exhibited a number of autistic-like behaviors. The assessor concluded Student met the criteria for the eligibility categories of specific learning disability and autism.

4. Student's IEP team met on April 3, 2017. The team changed Student's eligibility category for special education from developmental delay to autism. For the 2017-2018 school year, the IEP team offered Student placement at Emelita Academy in a special day class for students with mild-to-moderate specific learning disabilities, to be taught the general education core curriculum. The IEP also offered services of adapted physical education, resource specialist support, and an extended school year program. Parent consented to this IEP.

#### SEPTEMBER 2017 SETTLEMENT

5. In June 2017, Student filed a request for due process hearing with OAH, naming LAUSD. While that action was pending, Student began the 2017-2018 school year in a mild-to-moderate special day class at Emelita Academy for students with specific learning disabilities. The class was taught by special education teacher Gabriel Serrano.

6. Shortly after the start of the school year, the parties reached a settlement of Student's complaint, documented in a written agreement dated September 7, 2017. In the settlement, LAUSD agreed to place Student in a general education classroom at Emelita Academy, supported by 240 minutes per week of resource specialist program services in math and English. LAUSD agreed to provide Student a full-time one-to-one aide for the 2017-2018 regular school year and the 2018 extended school year, to assist

Student with behavioral goals to be developed at a future IEP team meeting to be held to implement the settlement. The parties also agreed that the aide services were compensatory and for a fixed period, and would not be part of Student's "stay-put" educational program that Student would continue to receive while the parties resolved any future dispute over Student's IEP. LAUSD also agreed to provide eight hours of compensatory behavior intervention consultation services to assist Student's aide, teachers and staff in developing a behavior support plan for Student. LAUSD agreed to assess Student in the areas of assistive technology, occupational therapy, and social-emotional status, and to screen Student for recreation therapy. The settlement agreement stated that its agreed-upon services and reimbursements were not an admission of what constituted a FAPE for Student.

7. Parent and LAUSD agreed to convene an IEP team meeting within 30 days of the settlement agreement to incorporate the agreement's terms into Student's IEP. Parent and LAUSD also agreed to convene an additional IEP team meeting by November 6, 2017, to review the results of Student's assessments, address toileting and social-emotional concerns, discuss whether Student needed toileting or counseling goals, and discuss a behavior support plan for Student.

8. On October 3, 2017, Parent and LAUSD met to incorporate the terms of the parties' settlement in a new IEP for Student. In the settlement agreement, Parent had waived statutory requirements regarding notice and attendees for that IEP team meeting, and Parent met with a small group of team members: LAUSD administrator Michael DeMay, general education teacher Richard Estrada, and Mr. Serrano. The October 3, 2017 IEP incorporated the terms of the parties' settlement, except that it did not offer Student instruction during the extended school year, because LAUSD members of Student's IEP team did not think that Student needed to attend an extended school year program to prevent her from forgetting skills and information learned during the school year. Inconsistently, the IEP did provide Student the service of a one-to-one aide during the

extended school year.

9. LAUSD members of the IEP team also did not believe that the general education classroom called for in the settlement agreement was the least restrictive environment appropriate for Student, or offered Student a FAPE. They believed Student needed a smaller class size and more individualized attention to access her education. However, the October 3, 2017 IEP's least restrictive environment analysis stated without reservation that the supports, services, accommodations, and modifications in Student's IEP could be made available in a general education environment, and the October 3, 2017 IEP offered to place Student in a general education class.

10. Based on classroom observation and informal assessments of Student's present levels of performance, the IEP included six annual goals for Student to accomplish by October 2018: (1) a perceptual motor goal of hopping on alternate legs three times in ten seconds, to improve her balance; (2) a foundational goal of segmenting spoken single-syllable words into their complete sequence of individual sounds, and recognizing words of up to three sounds in context; (3) a reading comprehension goal of asking or answering two or more questions about important details in a grade-level text; (4) a writing goal of writing two or more sentences stating facts about a topic, with the help of a word list; (5) a math goal of adding two numbers with a sum up to 20; and (6) a behavioral goal of advocating for her wants and needs by raising her hand or using a visual aid to signal when she needed to go to the bathroom, drink water, or engage in another school activity.

11. Parent signed the October 3, 2017 IEP, consenting to all its terms. However, immediately after the meeting concluded, Parent told Mr. DeMay that she was not comfortable with Student attending a general education class and requested that Student continue to attend Mr. Serrano's special day class instead.

12. Mr. DeMay immediately agreed to Parent's request to keep Student in her current special day class, which he believed was more appropriate for Student. However,

in an oversight, he did not re-open the IEP team meeting or take any other action to amend Student's IEP to change the general education placement Parent had just consented to when she signed the October 3, 2017 IEP.

13. Student remained in Mr. Serrano's special day class after the October 3, 2017 IEP. LAUSD provided Student the one-to-one behavioral aide called for in the settlement agreement and the IEP. LAUSD did not provide Student the resource specialist program services called for in the settlement agreement and IEP, because those services had been intended to support Student's placement in a general education class.

#### NOVEMBER 13, 2017 IEP – STUDENT'S LAST AGREED-UPON IEP

14. On November 13, 2017, Parent and Student's attorney met with Student's full IEP team to review Student's occupational therapy, assistive technology, and social-emotional assessments, and the behaviorist's observations of Student conducted by LAUSD, as required by the parties' settlement agreement. The IEP team met to consider possible amendments to Student's October 3, 2017 IEP based on the assessment results.

15. Student's assessors reported Student did not need occupational therapy, assistive technology, counseling, or other social-emotional services to access her educational program. The behaviorist reported that Student exhibited no behaviors of concern and did not need a behavioral aide, a behavior support plan, or any other behavioral services. The behaviorist's written behavior intervention consultation summary was devoted primarily to the issue of toileting. She observed that Student was learning to ask to go to the bathroom when she needed to, and had not recently soiled herself at school. The behaviorist recommended strategies for teaching Student to ask to go to the bathroom, including reminders to ask, modeling of an appropriate script for asking, praising Student when she asked to use the bathroom, and prompting Student to ask to use the bathroom if she soiled herself or seemed like she needed to go to the bathroom.

16. Based on the assessors' reports and behaviorist's observations, the IEP team

did not offer Student any additional services, nor did it make any changes to Student's goals. The team updated Student's present levels of performance to reflect the assessors' observations.

17. Student's eligibility, placement, goals, and services in the November 13, 2017 IEP remained unchanged from those in the October 3, 2017 IEP. The November 13, 2017 IEP team did not discuss the differences between the general education placement and resource specialist program services called for in Student's October 3, 2017 IEP, and the special day class placement, without resource specialist services, that Parent requested and LAUSD agreed to immediately after the October 3, 2017 IEP.

18. Student's November 13, 2017 IEP continued to find Student eligible for special education under the disability category of autism. The IEP's least restrictive environment analysis continued to state that the supports, services, accommodations and modifications in Student's IEP could be made available in a general education classroom, and the IEP continued to offer Student placement in a general education classroom at Emelita Academy, with resource specialist program services.

19. The IEP retained the October 3, 2017 IEP's six annual goals for Student to accomplish. To help Student reach her goals, the November 13, 2017 IEP offered Student services of: (1) 30 minutes per week adapted physical education to work on Student's perceptual motor goal; (2) two hours per week resource specialist services to work on Student's reading and writing goals, for which Student would be pulled from her general education classroom; (3) two hours per week resource specialist services to work on Student's math goal, also on a pull-out basis; (4) a full-time one-to-one behavior intervention implementation aide, to work on Student's goals in perceptual motor skills, reading foundational skills, reading comprehension, writing, and math. The one-to-one aide's services for the regular school year were set to end on June 8, 2018. The IEP also offered Student one-to-one aide services for the extended school year, with no end date for the services, but the IEP did not offer Student extended school year instruction.



20. The IEP provided Student would participate in standard statewide and districtwide testing of student performance in core curriculum subjects. As an accommodation when taking such tests, the IEP permitted Student to use text-to-speech software for math, and English language arts.

21. On November 27, 2017, Parent consented to all components of the November 13, 2017 IEP. The November 13, 2017 IEP was Student's last agreed-upon IEP at the time of hearing.

#### MARCH-JUNE 2018 LAUSD ATTEMPTS TO CONVENE IEP TEAM MEETING TO CORRECT STUDENT'S IEP

22. In March 2018, LAUSD Administrator Cindy Welden noticed that Student did not appear to be receiving the resource specialist services called for in her November 13, 2017 IEP. Following up with Mr. DeMay, Ms. Welden confirmed that Student was not receiving resource specialist services, and learned that Student was attending Mr. Serrano's special day class for students with specific learning disabilities, instead of the general education class called for in Student's IEP. Mr. DeMay explained that Student's IEP team agreed that the special day class was the most appropriate placement for Student.

23. Ms. Welden and Mr. DeMay agreed LAUSD needed to convene an IEP team meeting to correct the discrepancy between Student's IEP and her actual placement and services. Parent also wanted to convene an IEP meeting. Parent was concerned that Student did not seem to be progressing academically, was coming home from school soiled, and was not offered extended school year services for summer 2018.

24. On April 26, 2018, Parent's attorney sent Mr. DeMay an email requesting an IEP team meeting. After coordinating Parent and district team member schedules, Mr. DeMay sent Parent written notice on May 11, 2018, scheduling the requested IEP for May 22, 2018.

25. On May 21, 2018, Parent cancelled the May 22, 2018 IEP team meeting. Mr. DeMay asked Parent to let him know dates she was available to attend a rescheduled IEP team meeting, but Parent did not do so before the end of the 2017-2018 school year. Although Student's IEP did not offer her an extended school year program, Mr. DeMay enrolled Student in the extended school year program for June and July 2018 at Garden Grove Elementary School, where he was principal for the extended school year. Mr. DeMay attempted to arrange an IEP team meeting, but Parent refused to communicate with him, explaining in a final phone call with Mr. DeMay in June that she no longer trusted LAUSD's IEP process.

26. Ms. Welden also called Parent, and had several conversations with her about the need to hold an IEP meeting to discuss changing Student's IEP placement to a special day class, with one-to-one aide support. Ms. Welden encouraged Parent to meet with the IEP team, and offered to attend the meeting to help Student. Parent agreed to meet with Ms. Welden and Mr. DeMay.

#### AUGUST 16, 2018 ANNUAL IEP TEAM MEETING

27. On August 15, 2018, Ms. Welden called Parent and asked her to come to a meeting the following day. LAUSD did not send Parent any written notice of an IEP team meeting, and Parent thought that she would be meeting just with Ms. Welden and Mr. DeMay.

28. On August 16, 2018, Parent came to Emelita Academy for a meeting. Parent was surprised to find Student's entire IEP team was present to conduct Student's annual IEP team meeting, but she did not refuse to participate in the IEP team meeting. Mr. DeMay testified that he first gave Parent a written notice of the IEP team meeting at the meeting itself, and did so only as a formality. Parent signed the notice at the meeting.

29. All statutorily-required members of Student's IEP team attended the meeting. LAUSD team members told Parent that Student needed a new IEP to replace the existing

November 13, 2017 IEP. Otherwise, they explained, LAUSD would be legally required to implement the November 13, 2017 IEP because that was the IEP Parent had consented to, and Student would have to be placed in a general education class. Also, without a new IEP, Student would lose her one-to-one aide support for the 2018-2019 regular school year, because the existing November 13, 2017 IEP had terminated Student's aide support as of June 8, 2018.

30. Moving on to questions of the appropriate goals, services, and placement for Student, the team first considered her present levels of performance. Student's adapted physical education teacher, Jeffrey Wodin, began by reviewing her present levels of performance with respect to physical fitness. Student had met her annual goal in perceptual motor skills from her November 13, 2017 IEP, and could hop on alternate legs three times in ten seconds. At hearing, Mr. Wodin testified that Student did not have any physical fitness need as of August 2018 that impacted her educational program, or required adapted physical education. However, Student related well to Mr. Wodin, and he believed she benefitted socially and emotionally from participating in his class, and for that reason should continue in his class. At the August 16, 2018 IEP team meeting, Mr. Wodin reported to the IEP team that Student did not like exerting herself, and needed to develop her cardiovascular endurance. To justify continuing Student's adapted physical education services, Mr. Wodin recommended a new cardiovascular endurance goal for Student.

31. Mr. Serrano reviewed Student's present levels of performance in academics and behavior. Academically, Student was approximately one grade level behind a typical general education student in all subjects, and could not work independently on grade-level material. Student could write some words on her own, but could not read a complete sentence without adult prompting. Student had met her math goal, and could add two numbers with a sum up to 20, with intensive adult prompting. Student had made progress on her two reading goals and writing goals, but had not met her annual

goals. Mr. Serrano recommended new academic goals. Student had not made any progress toward her behavioral goal of advocating for her needs by raising her hand or using a visual aid to signal when she needed to go to the bathroom, drink water, or engage in another school activity. Mr. Serrano believed that Student had not made progress on her self-advocacy behavioral goal because she was uncomfortable using the goal's specified methods of raising her hand or using a visual aid to signal a need to go to the bathroom. He recommended that the team revise Student's behavior goal.

32. The IEP team discussed Student's placement, and, after discussing placement in a general education class with and without resource specialist program services, agreed Student required a smaller class with a high teacher-to-student ratio. The team agreed the least restrictive environment appropriate for Student was continued placement in a special day class for students with mild-to-moderate specific learning disabilities, such as Mr. Serrano's special day class. The special day class was designed to provide students individualized adult attention to help them work on core curriculum subjects at a pace of learning tailored to each student's needs. The class would provide Student intensive adult prompting and other supports that could be removed as Student made progress towards her goals. The team also agreed to add the service of a full-time one-to-one aide to Student's IEP. Although Student's one-to-one aide had helped Student with toileting during the prior school year, the November 13, 2017 IEP had stated the aide would assist Student only on her academic goals, and not on her behavioral goal. Without explanation, the August 16, 2018 IEP team essentially reversed the stated responsibilities of the aide, offering the aide to help Student only with her behavior goal of signaling when she needed to go to the bathroom, get a drink, or engage in another school activity, and not helping Student with any of her academic goals.

33. Parent expressed her concerns. She told the IEP team she was worried that Student could not read, and was not making good progress academically in any subject.

Student never brought home any completed schoolwork or homework, and Parent could not follow Student's progress in her subjects. Mr. Serrano agreed to email Parent at least weekly about Student's progress. Parent asked that Student's aide help Student with her academic goals, as had been provided for in Student's previous November 13, 2017 IEP, but the IEP did not offer this.

34. Parent was very worried Student was not making any progress in asking to use the toilet, or in using the toilet and cleaning up afterwards. Student had physical difficulty cleaning herself after going to the bathroom, and was inconsistent in her attempts to do so. The additional discussion section of the IEP noted that Parent and staff agreed Student would be encouraged to wipe herself when toileting, and her one-to-one aide would check Student and wipe her. However, no toileting skills goal was included in Student's IEP. Parent was also concerned that Mr. DeMay, instead of an aide, was the person who signed the logs that documented Student's one-to-one aide services during the 2017-2018 school year. Parent was unclear who had provided Student toileting assistance, and asked that Student be assigned a female aide to assist her in toileting.

35. The IEP completed at the August 16, 2018 IEP team meeting continued to find Student eligible for special education under the disability category of autism. The IEP's least restrictive environment analysis section described the least restrictive environment appropriate for Student as a special day program on a general education site. LAUSD offered Student placement at Emelita Academy, with her curriculum described as general education, her instructional setting as special education, and her program as being for students with specific learning disabilities. Student was offered accommodations of frequent checks for understanding, academic work presented in small amounts at a time with scheduled breaks as well as strategies for requesting breaks, positive praise and reinforcement, word banks, counters for math, manipulatives, and language frames. Student was to participate with general education students for music, science, dance, arts

activities, field trips, and assemblies. Student was also offered an extended school year program, with transportation, and parent counseling and training.

36. The August 16, 2018 IEP revised Student's six existing goals from her November 13, 2017 IEP. In addition to the revised academic goals, the IEP gave Student a new physical fitness goal of walking at a faster pace than normal around the school's track area two times without stopping, to develop her cardiovascular endurance. To address Student's reluctance to raise her hand or use a visual aid to signal her needs, her behavioral goal was revised to advocating for her wants and needs, such as having to use the restroom, drink water, or take a break, by using to-be agreed-upon "strategies designed within Student's comfort level," with adult prompting and encouragement as needed.

37. The August 16, 2018 IEP offered Student services of: (1) 30 minutes per week adapted physical education to work on Student's cardiovascular endurance goal; and (2) a full-time one-to-one behavior intervention implementation aide, to work on Student's behavior goal during the regular and extended school year.

TWO DIFFERENT VERSIONS OF AUGUST 16, 2018 IEP REGARDING TESTING ACCOMMODATIONS

38. At hearing, the parties' evidence included a total of seven non-identical copies of the August 16, 2018 IEP. Several IEP components were different between the seven copies, but the August 16, 2018 IEP provisions described in the preceding paragraphs were the same in each copy.

39. At hearing, LAUSD initially offered one copy of the IEP as representing the offer LAUSD made to Student at the August 16, 2018 IEP team meeting, then replaced it with a different second copy, and then a third, as inconsistencies between the IEP's were noted during testimony. Parent received from LAUSD, and presented as evidence, four copies of the August 16, 2018 IEP. From the absence or presence of Parent's signature on

the particular copy indicating that she did not consent to the IEP, and whether Student's services were stated to start on an unspecified "signature date," or on the September 11, 2018 date on which Parent signed and returned the IEP, it appeared LAUSD gave Parent two different copies of the IEP before she signed and returned it, and two additional different copies after Parent signed the IEP.

40. Most of the differences between the copies were of no significance to this case. However, the copies reflect two different versions of the IEP offer with respect to testing supports and accommodations. Both versions provided Student would participate in standard statewide and districtwide testing of student performance in core curriculum subjects. One version kept the testing supports and accommodations from Student's November 13, 2017 IEP, which permitted Student to use text-to-speech software for math, and English language arts. The other IEP version included additional supports and accommodations drafted by Mr. Serrano, including testing in a separate/smaller setting, and having an adult act as a scribe to write down test answers given orally by Student, as well as her notes and preparations for her answers.

41. LAUSD gave Parent one copy of each of the two versions of the IEP before she signed and returned the IEP, and one copy of each version after Parent signed and returned the IEP. Parent was confused by the different copies, and her confusion regarding the multiple IEP copies added to her distrust of LAUSD's IEP process. Parent received one of the copies at the IEP team meeting on August 16, 2018, and LAUSD sent additional copies home with Student on September 13, 2018 and October 15, 2018, but Parent did not know which copy she received on which date, or when she received her fourth copy of the IEP.

42. The identical Parent signature page dated September 11, 2018, was attached to five of the seven copies of the August 16, 2018 IEP. Three copies with Parent's signature included Mr. Serrano's additional test supports and accommodations, the other two copies with Parent's signature did not. LAUSD could not establish when Parent

received either or both of the two versions of the IEP, or which version Parent was responding to when she denied consent to the IEP. LAUSD represented that the last copy of the IEP that LAUSD offered at hearing was a copy of the IEP LAUSD gave Parent on August 16, 2018, and the IEP she reviewed and responded to. This copy included the additional test supports and accommodations. Although this copy came from Student's hard copy file at Emelita Academy, it could not be relied on to accurately reflect the IEP given to Parent on August 16, 2018. Mr. DeMay testified that he placed a hard copy of the IEP given to Parent at the team meeting in Student's file on or about August 16, 2018. He later replaced that copy on or about September 11, 2018, when Parent returned a signed parent participation and consent page for the IEP, indicating that Parent did not consent to the IEP. At that time, Mr. DeMay updated the electronic version of the IEP filed in LAUSD's Welligent computer software system, printed a new copy of the updated IEP from Welligent, and inserted Parent's signature page. Mr. DeMay then removed the existing August 16, 2018 copy of Student's IEP from her file and shredded it, replacing it with the new, updated copy of the IEP (which included Mr. Serrano's revised testing supports and accommodations).

#### PARENT DECLINES CONSENT TO THE AUGUST 16, 2018 IEP

43. As stated above, Parent did not complete the parental consent section of the August 16, 2018 IEP at the team meeting, but instead took the IEP home for further review. When she reviewed the IEP, Parent read that the IEP described the least restrictive environment appropriate for Student as a "special day program on a general education site," and Student's curriculum as "general education." From this language, Parent concluded – incorrectly – that the IEP offered Student placement in a general education classroom when it actually offered Student placement in a special day class for special education students, located on a general education school site. Parent also noted that the goals supported by Student's one-to-one aide no longer included physical



education, reading foundational skills, reading comprehension, writing, or math, and concluded – again incorrectly – that the August 16, 2018 IEP offered Student no related services, when it actually offered adapted physical education and a one-to-one aide to assist Student toward her self-advocacy behavioral goal.

44. On September 11, 2018, Parent returned a parent participation and consent page for the August 16, 2018 IEP. Parent checked and signed the portion of the consent form indicating that she did not agree to any part of the August 16, 2018 IEP. Parent wrote on the signature page that she disagreed with the IEP because she believed it placed Student in a general education class and removed all special education resources and/or services from Student. Although Parent expressed a number of concerns at the August 16, 2018 IEP team meeting, including concerns regarding Student's lack of progress in academics and toileting, and lack of aide support to assist Student with Student's academic goals, Parent's refusal to consent to the August 16, 2018 IEP was mostly based on her mistaken belief that the IEP offered Student a general education placement and no special education services.

45. As of the hearing, Student had attended only two days of class during the 2018-2019 school year. On September 13, 2018, Parent brought Student to school, and met with Mr. DeMay to discuss her disagreement with Student's August 16, 2018 IEP. Mr. DeMay explained again that Parent's refusal to consent to the August 16, 2018 IEP meant that Student's November 13, 2017 IEP would remain in effect, and Student would be placed in a general education classroom and lose her one-to-one aide. Mr. DeMay gave Parent another copy of the August 16, 2018 IEP. Student came to school for the second and last time on October 15, 2018. She attended a general education class, and came home with an additional copy of the August 16, 2018 IEP for Parent's files.

46. Student has not received an educational program since October 15, 2018.

47. LAUSD filed its due process hearing request in this matter on March 19, 2019.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>2</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability, developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and includes a statement of the special education, related services, and

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<sup>2</sup> All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_, 137 S.Ct. 988, 1000-1001 (*Endrew F.*). It explained *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) For a student not fully integrated into a regular classroom, the IDEA requires the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.) The Court noted, "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p. 999 [italics in original].)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the

identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case, LAUSD, as the complaining party, bears the burden of proof.

#### PROCEDURAL REQUIREMENTS

6. When, as in this case, the parent of a child receiving special education refuses to consent to the implementation of all or part of an IEP, Education Code section 56346 requires the district to prove in a due process hearing that its IEP, in its entirety, offered the child a FAPE. Section 56346 requires the district to: (i) provide prior written notice pursuant to Education Code section 56500.4 before ceasing to provide any current IEP component no longer consented to (Ed. Code, § 56346, subd. (d)(1)); (ii) continue to implement any components of the program to which the parent has consented (Ed. Code, § 56346, subd. (e)); and (iii) expeditiously initiate a due process hearing “in accordance with Section 1415(f) of Title 20 of the United States Code.” (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169.) (*I.R. v. Los Angeles*).

7. There are two parts to a district’s proof it complied with the IDEA in developing a Student’s IEP. First, the district must prove it complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the district must prove the IEP developed through those procedures was designed to meet the child’s

unique needs, and was reasonably calculated to enable the student to make progress appropriate in light of the child's circumstances. (*Ibid.*; *Andrew F.*, *supra*, 137 S.Ct. at p. 1001.)

8. An IEP is evaluated in light of information available to the district when it developed the IEP; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Id.*, citing *Fuhrmann v. East Hanover Board of Education*, *supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

9. Procedural compliance is closely scrutinized. "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." (*W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1485 (quoting *Rowley*, *supra*, 458 U.S. at pp. 205–06).)

10. The procedural safeguards protecting parents' rights to be involved in the development of their child's educational plan are among the most important. (*Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b).) Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001), 267 F.3d 877, 892.)

#### INADEQUATE NOTICE OF AUGUST 16, 2018 IEP TEAM MEETING

11. The IDEA and Education Code require school districts to provide parents advance notice of IEP team meetings early enough to ensure that the parents have an opportunity to attend the IEP meeting, and that the district schedule the meeting at a mutually agreed on time and place. (34 C.F.R. §§ 300.322(a)(1)-(2); 300.501(b)(2); Ed.

Code, § 56341.5, subds. (b) & (c).) The regulations do not state the amount of time that constitutes timely notice of an IEP meeting; however, ten-day advance notice is a general guide for timely notice. (*Letter to Constantian*, 17 IDELR 118 (OSEP 1990).) The notice of the meeting is not required to be in writing, but it must indicate the purpose, time, and location of the meeting, and who will be in attendance. The notice must inform the parents of the provisions in 34 Code of Federal Regulations part 300.321(a)(6) and (c), that give parents and districts the right to include persons with knowledge or special expertise about the child as members of the IEP team. (34 C.F.R. §§ 300.322(b); Ed. Code, § 56341.5, subd. (c).) Even if a parent attends an IEP team meeting and is given late but otherwise compliant notice of the IEP at the meeting at the meeting itself, the district's failure to provide the notice far enough in advance of the meeting denies the parent an opportunity to adequately prepare for the meeting. (*Salem-Leizer School Dist.*, 52 IDELR 149 (Ore. State Ed. Agency 2009).)

12. LAUSD admits it did not provide Parent the required advance notice of Student's August 16, 2018 IEP team meeting, but instead gave notice at the meeting itself, as a formality. This procedural violation denied Parent her opportunity to adequately prepare for the IEP meeting, and may have contributed to Parent's misunderstanding of LAUSD's IEP offer, her dissatisfaction with the IEP process for her daughter, and her decision not to consent to the August 16, 2018 IEP. The advance notice requirement of the IDEA and Education Code is not a mere formality, but is integral to a parent's participation in the IEP process. As a result of this procedural violation, LAUSD failed to prove its August 16, 2018 IEP offered Student a FAPE.

#### LACK OF CLEAR WRITTEN OFFER OF ACCOMMODATIONS FOR STATE AND DISTRICT ASSESSMENTS

13. An IEP must contain, among other things, a statement of individual appropriate accommodations that are necessary to measure the academic achievement

and functional performance of the pupil on statewide and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa); Ed. Code § 56345, subd. (a)(6)(A).)

14. The IEP's explanation of the student's testing accommodations must be specific and clearly stated. All IEP's must set forth a formal, specific written offer of placement. (*Union School Dist. v. Smith* (9th Cir, 1994) 15 F.3d 1519, 1526, cert. den., 513 U.S. 965 (*Union*)). The reasoning of *Union*, which involved an offer of placement, applies equally to require clear offers of services. (*S.H. v. Mount Diablo Unified School Dist.* (N.D. Cal. 2017) 263 F.Supp.3d 746, 762 (*Mount Diablo*)). The district must offer a single, specific program, in the form of "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi*, (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107-1108.) This requirement "should be enforced rigorously" as it creates a clear record to help eliminate factual disputes, and assist parents in presenting complaints. (*Union, supra*, 15 F.3d at p. 1526; see also, *Mount Diablo, supra*, 263 F. Supp. 3d at p. 764, 769 [district denied Student a FAPE by failing to specify whether the speech and language services offered in Student's IEP were group or individual].)

15. A district cannot amend or otherwise edit an IEP, even to correct a perceived mistake in the IEP, or to offer additional services, without re-opening the IEP process and giving the parent an opportunity to participate in the revision of the IEP. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197-1198, cert. den. *sub nom. Antelope Valley Union High School Dist. v. M.C.* (2017) 580 U.S. \_\_\_\_, 138 S.Ct. 556.)

16. LAUSD provided Parent two versions of Student's August 16, 2018 IEP. One offered Student accommodations for statewide and districtwide math and English language arts assessments that included the use of text-to-speech software, testing in a separate/smaller setting, and having an adult act as a scribe to write down test answers given orally by Student, as well as her notes and preparations for her answers. The other

version did not offer Student all the individual accommodations necessary to measure her academic achievement and functional performance, because it offered only the accommodation of the use of text-to-speech software.

17. LAUSD did not prove when these versions of Student's IEP were created or provided to Parent, why both versions were provided to Parent, or whether either version, or both versions, were represented to Parent to be LAUSD's August 18, 2016 offer of FAPE to Student. LAUSD therefore failed to prove that it complied with the procedural requirement of providing Parent a single, specific program, in the form of a clear, coherent offer which Parent reasonably could evaluate and decide whether to accept. As a result of this procedural violation, which interfered with Parent's opportunity to participate in the IEP process, LAUSD failed to prove its August 16, 2018 IEP offered Student a FAPE.

#### FAILURE TO DEVELOP APPROPRIATE TOILETING GOALS

18. An IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability, to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must also include a description of the manner in which the progress of the child toward meeting the annual goals will be measured, and when periodic reports on the child's progress will be provided. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The functional skill of independent toileting is a need that may be addressed through IEP goals. (See, e.g., *Amanda J.*, *supra*, 267 F.3d 877 at p. 884.)

19. A goal must be clear and measurable as written in the IEP, and cannot leave material aspects of the goal to be decided later. (See, e.g., *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769 [a generalized proposal of behavioral and



educational goals is not sufficient]; *M.C. v. Antelope Valley Union High School Dist.*, *supra*, 858 F.3d at pp. 1198-1199 [IEP that offered the student use of an assistive technology device, but did not specify what device was offered, was "useless as a blueprint for enforcement," infringed the parent's opportunity to participate in the IEP process, and denied the student a FAPE].)

20. One of Parent's longstanding concerns that she expressed to Student's IEP team was Student's difficulty with the functional skill of toileting independently. Student had difficulty asking to use the bathroom, and difficulty cleaning herself afterwards.

21. Student's November 13, 2017 IEP included a self-advocacy goal directed only to Student's first toileting issue, asking to use the bathroom. The goal called for Student to raise her hand or using a visual aid to signal a want or need, including the need to go to the bathroom. After Student made no progress on that goal during the 2017-2018 school year, Mr. Serrano and the IEP team revised the goal for the August 16, 2018 IEP to allow Student to use unspecified "agreed-upon strategies designed within her comfort level," to signal her needs, instead of specifying that she raise her hand or use a visual aid. This revised goal, which left determination of an appropriate signal entirely to the future, was not reasonably designed. LAUSD had observed throughout the 2017-2018 school year Student's complete lack of progress on her prior goal of signaling her needs through the simple, straightforward means of raising her hand or using a visual aid. To reasonably design a clear, measurable self-advocacy goal for Student, her IEP team was required to evaluate Student sufficiently, prior to the IEP team meeting, to find one or more signaling strategies that were within Student's comfort level, and specify those strategies. The IEP goal as written provided Student, Parent, and staff no clear method for Student to signal her needs as of the IEP date, and no way to measure Student's progress. Also, Student's prior difficulty with simply raising her hand or using visual aids to signal her needs suggested that the IEP team ultimately might be unable to identify any signaling method within Student's comfort level, which would leave her no way to

signal her needs, and no way to achieve her self-advocacy goal as written.

22. In addition to revising Student's self-advocacy goal of signaling her need to use the bathroom, Student's August 16, 2018 IEP acknowledged her need for adult assistance with the functional skill of cleaning herself after using the bathroom. The IEP stated in the additional discussion section that Student would be encouraged to wipe herself after toileting, and her one-to-one aide would check Student and wipe her. However, the IEP included no goal to help Student to develop the functional skill of cleaning herself, or to support the related service of the on-to-one aide helping Student achieve that skill. LAUSD's failure to develop any measurable annual goal to address Student's identified need to learn the functional skill of independent toileting, and its failure to design a clear, measurable goal to help Student learn to signal her need to use the bathroom, were procedural violations of the IDEA and Education Code that interfered with Parent's opportunity to participate in the IEP process.

23. LAUSD's procedural inadequacies with respect to providing advance notice of the August 16, 2018, a clear written offer of the testing accommodations necessary to evaluate Student, and reasonably-designed toileting goals, each interfered with Parent's opportunity to participate in the IEP process. LAUSD therefore failed to prove it offered Student a FAPE in the August 16, 2018 IEP, and its request for relief must be denied.

## ORDER

LAUSD's request for relief is denied.

## PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the sole issue presented.

## RIGHT TO APPEAL

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

DATED: June 21, 2019

\_\_\_\_\_/s/\_\_\_\_\_  
ROBERT G. MARTIN  
Administrative Law Judge  
Office of Administrative Hearings