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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT**

FABIAN LUCIANO SANCHEZ, an individual, by and through his guardian ad litem, MARIA SANCHEZ,

Plaintiff,

v.

VICTOR ELEMENTARY SCHOOL DISTRICT, a public entity;

Defendant.

Case No. CIVDS1719667
The Hon. Wilfred J. Schneider, Jr., Dept. 32

**PLAINTIFF'S TRIAL BRIEF**

| | |
|---|---|
| FSC Date: | June 13, 2019 |
| Time: | 8:30 a.m. |
| Trial Date: | June 25, 2019 |
| Time: | 10:00 a.m. |
| Dept.: | S32 |
| Action Filed: | October 10, 2017 |
| Trial Date: | June 17, 2019 |

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## I. INTRODUCTION

On the morning of February 3, 2017, Fabian Sanchez arrived at Puesta Del Sol, his elementary school in Victorville, California, a beautiful and vibrant young boy. Fabian had some cognitive deficits that impacted his ability to learn and his ability to safely get to and from school alone. Defendant Victor Elementary School District ("the District") was well aware of Fabian's limitations. It established an Individualized Education Program ("IEP") for him and, through its review of Fabian, determined that he needed "curb-to-curb transportation" to ensure that he safely made it to and from school each day. The District knew that allowing Fabian to walk home alone was both dangerous and illegal, violating the highly detailed state and federal laws applicable to his IEP. Nonetheless, after school got out on February 3, 2017, District personnel escorted Fabian to the edge of campus, walked him across a street, and then left him to walk home alone. Tragically, but not unexpectedly, Fabian was struck and gravely injured by a car while crossing Village Drive, a four-lane road with a speed limit over 40 miles per hour located just a few blocks from Puesta Del Sol. This life-altering event resulted in severe catastrophic injuries, including a severe traumatic brain injury that has required him to be fed through a G-tube and be completely dependent on others for his care.

As outlined below, the evidence demonstrates that the District is liable for Plaintiff's damages because its and its employees' breach of the admitted duty they owed to provide Fabian with curb-to-curb transportation on February 3, 2017 was a substantial factor in causing his harm. The Court previously recognized this duty in its order denying the District's motion for summary judgment, and even the District admitted in its briefing for that motion (which it has since incorporated as substantive evidence in support of a verified discovery response) that Fabian "had a learning disability which required [the District] to pick him up and drop him off by school bus" and that, as a result of Fabian's IEP, the District was "mandated" by state and federal law to provide curb-to-curb.

The District's admissions reflect the clear law applicable to IEPs: Once Fabian's mother, Maria Sanchez, consented to his 2016-17 IEP, the District had a duty to "implement" Fabian's curb-to-curb transportation immediately, and was bound by that duty until the IEP was modified or revoked. It is undisputed that Ms. Sanchez consented, that the District did nothing to implement the service, and that the IEP's provision of curb-to-curb service was never modified nor revoked. No wonder that the

District agrees that, if it owed the duty it has already admitted it had and that the Court has already found, it breached that duty (because it did not provide curb-to-curb) and that the breach was a proximate cause of Fabian's harm (because, had he been transported curb-to-curb, he would not have had to cross Village Drive and would not have been struck). Since it is clear that the District owed Fabian a duty on February 3, 2017 to provide curb-to-curb transportation, it is equally clear that the District breached and thereby caused Fabian's devastating injuries. That analysis necessarily concludes in a finding of liability against the District.

The District claims that the duty it owed Fabian was something other than that imposed by clear statutory law. First, it argues that Ms. Sanchez's purported "failure" to "exhaust administrative remedies" leaves Fabian without an "actionable" duty against the District. Undoubtedly aware that it lost this argument on summary judgment, and that neither the facts nor the law have changed such that a different result is warranted, the District now tweaks the argument. Rather than claiming that Plaintiff should have resorted to administrative remedies after he was injured, the District now argues that Ms. Sanchez's "failure" to formally or informally "complain" ***before*** Fabian's life-altering injuries effectively erased its duty. The argument fundamentally misunderstands IEP law. The District's duty to Fabian arose from Ms. Sanchez's consent to its determination that, due to his specific cognitive deficits, Fabian required curb-to-curb transportation, and that duty remained in place from the moment Ms. Sanchez signed Fabian's IEP to the moment he was tragically struck by the car. The District offers no authority for its novel "actionable" duty precept, and none exists. Instead, the law is inapposite, and unsurprisingly compels the District to abide by the IEP regardless whether a parent "complains" or resorts to "administrative remedies."

The District's other attempt to escape its clear and unambiguous duty—its "parent choice" argument—is likewise unsupported by legal authority or the evidentiary record. Ignoring its duty to implement Fabian's IEP, and talking from the other side of its mouth from its admission of its duty, the District argues that its only duty was to determine Fabian's "eligibility" for curb-to-curb transportation and then wait for his mother to "elect" to "access" the service. It frequently and misleadingly argues that adherence to the duty arising from Fabian's IEP would transform him from a student to a prisoner, placed on the bus against his parents' will and in furtherance of bureaucratic

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compliance. That hyperbole is neither Plaintiff's argument nor how the law works. Parental consent is the *sine qua non* for the provision of IEP services, and it is undisputed that the District ***received that consent from Ms. Sanchez*** when she signed the 2016-17 IEP with the express acknowledgment that the services to which she consented "WILL BE IMPLEMENTED" by the District. That consent gave rise to the District's duty to implement, and there is no evidence that Ms. Sanchez ever indicated that she no longer wanted curb-to-curb service, let alone revoked the service in the manner provided by law (and which the District stipulates did not happen).

Undeterred by the clear law and stipulated evidence, the District offers some stray documents and oral statements it claims reflect Ms. Sanchez's "decision" to "forego" curb-to-curb. Chief among those specious arguments is its myopic focus on Ms. Sanchez's completion of a generally-applicable "Annual Information Update and Emergency Authorization" form (referred to herein as the "emergency contact form"). That argument is quickly revealed as an after-the-fact, attorney-driven argument to avoid liability. While the District makes much of the form now, there is **no evidence** that it viewed it as a "parent election" when it was completed in 2016—after all, it is an emergency contact form provided to ***all*** students (not just IEP students) that is indisputably used as a reference for information needed in an "emergency." Nothing about the document indicates that it "elects" anything, let alone limits or eliminates services guaranteed by state and federal law. Even so, it was not possible (save for time travel) for the District to have relied on the "walker" box (checked in October 2016) to avoid "immediate implementation" of Fabian's IEP when it was completed in May 2016. And despite the stark dichotomy between Fabian's IEP (constant supervision from home-to-school and vice versa) and the emergency contact form (unsupervised walking), there is **no evidence** that the District **ever** communicated with Ms. Sanchez about her purported "election," including the District's newfound concern that providing Fabian with curb-to-curb service would somehow contravene her wishes. The evidence suggests instead that, after this lawsuit was filed, the District (or its lawyers) discovered this document and made it the centerpiece of an invented duty argument.

Ms. Sanchez's testimony about the emergency contact form slams the door shut. Instead of expressing a desire to remove Fabian from curb-to-curb service, the evidence is that Ms. Sanchez checked the parent pick-up and walker boxes on the emergency contact form because she "had no

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choice" because District personnel informed her that Fabian's proximity to school made him ineligible for bus transportation. Although the District now claims that its admitted two-mile policy was inapplicable to special education students, it offers no contemporaneous evidence to support that. It cannot. The policy facially applies to all students without distinguishing general and special education. The communications about the policy contained no exceptions. And when Fabian lived at a different address (Jurassic Place, more than two miles walking distance from the school), the District provided him with curb-to-curb transportation based solely on his IEP and not "additional documents" from Ms. Sanchez or completion of an additional form to "elect" Fabian's "access" of the service. Simply put, the evidence is that—consistent with the letter of its policy and its communications to parents—the District applied the two-mile policy to all students regardless whether they had an IEP.

Sadly, while the District touts its mission statement as "Learning for All... *Whatever it Takes*!," it knew precisely "what it took" to protect Fabian but failed to comply with its duty to provide it. Instead, it has tried whatever it can to rewrite its admitted, mandatory duty to provide Fabian with curb-to-curb transportation on February 3, 2017, pointing to inapplicable administrative remedies, an emergency contact form never relied upon by the District for the sweeping change to Fabian's IEP it now argues it meant, and even its decontextualized interpretation of statements Ms. Sanchez made in a hospital just hours after kneeling on the asphalt of Village Drive, cradling her bleeding, unresponsive son after he was injured in the exact manner the District had predicted when it obligated itself to provide him with a safe way home. The District's acknowledged breach of that duty caused Fabian's harm, and no one but the District shares in that responsibility.

## II. TESTIMONY AND EVIDENCE

### A. Fabian's 2016-17 IEP: Facts and Legal Framework

IEPs are a legal vehicle governed by highly specific federal and state laws and regulations, including: the federal Individuals with Disabilities Education Act ("IDEA"), codified at 20 U.S.C. section 1400 *et seq.*; regulations promulgated by the federal Department of Education pursuant to IDEA's authority, contained primarily at 34 C.F.R. section 300 *et seq.* (often referred to as "Part 300"); and Title 2, Division 4, Part 30 of the California Education Code (section 56000 *et seq.*). These laws cover the waterfront for the genesis, implementation, modification, and revocation of IEPs.

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Congress enacted IDEA in order "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). IEPs are the central vehicle to achieve IDEA's goals. An IEP is a "written statement" that contains an assessment of a student's needs, improvement goals, and the education and related service needs that a school district must implement for the child during the period covered by the IEP (usually a school year). *See generally* 20 U.S.C. § 1414; 34 C.F.R. § 300.320; Educ. Code § 56032; *see also Schaffer ex rel. Schaffer v. Weast* (2005) 546 U.S. 49, 53 ("Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide."). Such "related services" may include transportation to and from school. 34 C.F.R. § 300.34(a), (c)(16); Educ. Code § 56363. A student "eligible to receive special education and related services … shall receive that instruction and those services at no cost…" Educ. Code. § 56040(a).

The IEP is created following a meeting of the "IEP Team." 20 U.S.C. § 1414(d)(1)(B). The IEP Team usually consists of a child's parent(s), special education teacher, and a school administrator (usually the principal). *See* 34 C.F.R. § 300.321(a); Educ. Code § 56341. In this case, the IEP Team included Plaintiff's mother, Plaintiff's special education teacher (Nicholas Clayton), Karina Quezada, and a former Puesta Del Sol principal who left the District prior to the commencement of the 2016-17 school year. Nicole Anderson assumed the role of principal beginning in 2016-17.

**1. Fabian's 2016-17 IEP and Maria Sanchez's Consent to the District's Offer of Curb-to-Curb Transportation**

Following the IEP Team meeting, the IEP is reduced to the "written statement" provided by 34 C.F.R. section 300.320. Fabian's 2016-17 IEP was created on May 10, 2016, and active for the 2016-17 school year. (Trial Exhibit ("Ex.") 11 at 19-20 (the District's Response to RFA No. 29).)

As part of that IEP, the District determined that Fabian required curb-to-curb transportation. That was not simply because he was subject to an IEP, as Mr. Clayton erroneously testified. (*Compare* Deposition of Nicholas Clayton Volume II ("Clayton Depo. II") at 21:1-6 *with* Deposition of Karina Quezada ("Quezada Depo.") at 25:17-20 ("**Q.** So just because you're an IEP student, doesn't

mean that you automatically get transportation services; correct? **A.** Correct.").) Instead, the District's internal policies provided that curb-to-curb transportation should be provided based upon a student's "health and safety needs." (Ex. 6 at 1.) Otherwise, a non-qualifying, disabled student could "use regular home-to-school transportation," which does not include curb-to-curb. (*Id.*)

Applying this policy, the District determined that Fabian's needs qualified him for curb-to-curb transportation. (Ex. 1 at 1.) That decision was not made in a vacuum. The District's psychologist, Karina Quezada, evaluated Fabian in April 2016 and determined that he suffered from cognitive deficits that impacted his ability to safely walk home. (Quezada Depo. at 26:6-27:2.) Ms. Quezada's written report confirmed the District's conclusion that Fabian suffered from deficits in planning, visual-motor coordination, and working memory:

**TRIENNIAL PSYCHOEDUCATIONAL ASSESSMENT REPORT**

*NAME: Sanchez, Fabian*
*BIRTHDATE: December 11, 2005*
*AGE: 10 years*
*GRADE: 4*
*REPORT DATE: May 2, 2016*

*SCHOOL: Puesta del Sol Elementary*
*TEACHER: Mr. Clayton*
*PRIMARY LANGUAGE: English*
*ETHNICITY: Hispanic*
*REFERRAL DATE: April 15, 2016*

However, deficits are found in the areas of cognition related to Planning, as measured by the CAS-2. Additionally, Fabian demonstrated significant deficits in the area of Phonological Memory and low average Phonological Awareness skills, as measured by the CTOPP-2.

Equally, Fabian demonstrated below average skills in the area of visual-motor coordination, as measured by the VMI-6.

WORKING MEMORY

Fabian's Working Memory score was substantially below the average range.

Respectfully submitted by:

Dr. Karina Quezada, Psy.D., NCSP, LEP#3470

(Ex. 4 at 1, 8, 11.) Plaintiff"s expert, Sharon Grandinette, who has longstanding experience with IEP services as both a special education teacher, school employee, and advocate for individual students, agrees that the deficits the District identified placed Fabian in great danger if he were permitted to walk home on his own. (Deposition of Sharon Grandinette ("Grandinette Depo.") at 150:14-151:21; *see also* Ex. 27 (Sharon Grandinette's *curriculum vitae*).)

Based upon Ms. Quezada's assessment and its observation of Fabian, the District's IEP Team

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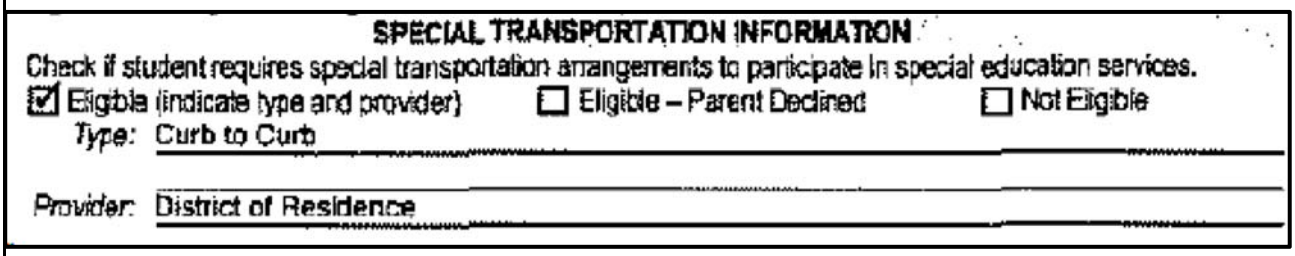
determined that Fabian should be provided with curb-to-curb transportation. Fabian's 2016-17 IEP clearly indicates that determination. (*See* Ex. 1 at 1.) It also indicates that, during the course of the IEP Team meeting, the District "made available" the curb-to-curb service for Ms. Sanchez to determine whether she would consent to it or not. The IEP eliminates any doubt about Ms. Sanchez's decision: the box marked "Eligible – Parent Declined" is **not** checked; the one marked "Eligible" is:



**SPECIAL TRANSPORTATION INFORMATION**

Check if student requires special transportation arrangements to participate in special education services.

☑ Eligible (indicate type and provider) ☐ Eligible – Parent Declined ☐ Not Eligible

*Type:* Curb to Curb

*Provider:* District of Residence

(Ex. 1 at 1.) Thus, based upon its assessment that Fabian needed curb-to-curb transportation, the District "made [it] available" to Ms. Sanchez at the IEP Team meeting and asked her to indicate whether Fabian would receive the service (and thus check "Eligible (indicate type and provider)") or whether she would decline the District's offer (and thus check "Eligible – Parent Declined"). She accepted as reflected in the checked box.

The IEP's reflection of Ms. Sanchez's decision to agree to the District's offer rather than decline it illustrates the role of parental consent in the IEP process. Because parental consent is a necessary component for IEP education and related services (including transportation), a school district "makes available" the services to a child and provides those services upon parental consent. IDEA's regulations define the parameters of the required consent, making clear that a parent must be "fully informed of all information relevant to the activity for which consent is sought." 34 C.F.R. § 300.9(a). A school district must obtain such consent prior to the initiation of IEP services. *See* Educ. Code § 56346(a) ("A public agency … that is responsible for making a free appropriate public education and related services to the child with a disability under this part shall seek to obtain informed consent from the parent of the child before providing special education and related services to the child…"); 34 C.F.R. § 300.300(b)(1); 20 U.S.C. § 1414(a)(1)(D)(i)(II).

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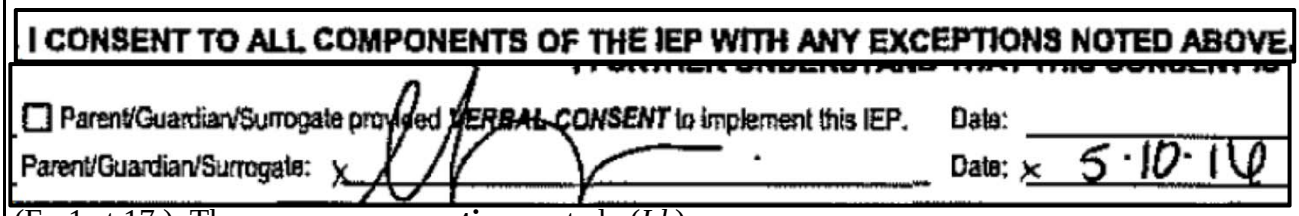
As shown below, Fabian's 2016-17 IEP clearly indicates that his mother's signature demonstrated her "consent to all components of the IEP" except those to which she objected:


I CONSENT TO ALL COMPONENTS OF THE IEP WITH ANY EXCEPTIONS NOTED ABOVE.

☐ Parent/Guardian/Surrogate provided VERBAL CONSENT to implement this IEP. Date:

Parent/Guardian/Surrogate: x Date: x 5·10·16

(Ex 1 at 17.) There were **no exceptions** noted. (*Id.*)

**2. Once a Parent Consents to the IEP Offer, the School District Must Implement the Consented Components of the Student's IEP**

Once a parent consents to IEP services, as Ms. Sanchez did here, a school district is "required immediately to implement 'those components of the [IEP] to which the parent has consented … so as not to delay providing instruction and services to the child.'" *B.H. v. Manhattan Beach Unified Sch. Dist*. (2019) 35 Cal. App. 5th 563, 247 Cal. Rptr. 3d 501, 519–20 (citing Cal. Ed. Code, § 56346, subd. (e)); *see also* Educ. Code § 56043(i) (school "shall … implement[] as soon as possible"). At that point, an IEP "embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." *M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197.

The law is clear that, once Ms. Sanchez consented to the services in the IEP, it was the District's obligation to implement them. That makes sense. After all, the District had already offered the service to Ms. Sanchez, and she agreed to the offer by consenting to the services on Fabian's IEP. Ms. Sanchez's consent to the services was "all [she] [had] to do" to trigger the District's obligation to "implement" the service:

> **Q.** Okay. And when there's an IEP, for example, transportation is there – in your experience is there [sic] subsequent forms that parents have to fill out to actually implement that?
> **A.** If they agree to the transportation on the IEP ***that's all they have to do***.
> **Q.** If the IEP says curb-to-curb eligible transportation, does the parent have to … fill out say a transportation form with the transportation department? Is that typical?
> **A.** Okay. The only thing a parent has to do is be a part of the discussion at the IEP meeting, whether or not they want the transportation, check the box that they want or don't want the transportation. ***That is all they have to do***.

(Grandinette Depo. at 78:4-79:11 (emphasis added).) The District's proffered expert, Carol Bartz,

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agrees, testifying in response to a hypothetical that, once a parent signs the IEP, it is incumbent upon a school district to implement those components, including by communicating with the designated personnel or department responsible for related services like transportation:

> **Q.** Okay. So now we're in an IEP meeting with a parent of an elementary kid student [sic], and in the IEP, it's agreed among everybody that the student is going to receive a special education class … some occupational therapy, a mental health component and busing transportation curb to curb in this hypothetical.
> **A.** Hypothetical, yes.
> **…**
> **Q.** Okay. And so it's signed by the parents. It's signed by the IEP team. Now it's on the District to implement those components?
> **A.** Yes.
> **Q.** And they are to communicate with the various specialties to implement on those components; correct?
> **A.** Yes.
> …
> **Q.** Okay. And similarly, it's the school that, then, communicates with, whether it's the transportation department or the transportation personnel, to then implement the transportation?
> **A.** Yes.
> **Q.** Okay. And then it's on the school to, then, make sure that that student goes into the special education classroom?
> **A.** Yes.
> **Q.** Okay. So that's implementing?
> **A.** Correct.
> **Q.** Right. And everything in the IEP needs to be implemented in that fashion?
> **A.** Yes.

(Deposition of Carol Bartz ("Bartz Depo.") at 23:6-25:6.) The District contemporaneously understood its duty to implement Fabian's IEP without delay, advising Ms. Sanchez that, unless she withheld consent, the "components" of her son's IEP "will be implemented" without any further input by her:

**I UNDERSTAND THAT THOSE COMPONENTS TO WHICH I CONSENT WILL BE IMPLEMENTED.**

(Ex. 1 at 17.) Tanya Benitez, the District's assistant superintendent who was the go-to person for IEP-related questions, agreed that "as part of the IEP process [Fabian] was to receive curb-to-curb transportation." (Deposition of Tanya Benitez ("Benitez Depo.") at 32:18-21.) The District also agreed in its summary judgment briefing—which it subsequently incorporated into substantive discovery responses justifying the positions it takes in this case—that its obligation to provide bus transportation was "mandated by federal law." (Ex. 19 at 7 (the District's Motion for Summary

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Judgment); Ex. 18 at 5-6 (the District's Second Supplemental Response to Plaintiff's 17.1 Interrogatory (RFA No. 34)).) Ms. Bartz also agrees with those basic principles:

> **Q.** And what is the purpose of an IEP?
> **A.** Okay. Every child with an identified disability, under education law, has an IEP. It is an annual plan that the parents and school district meet, talk about where the student is; they develop goals and they identify services.
> **Q.** And those services in an IEP meeting are then implemented?
> **A.** Yes.
> …
> **Q.** And it's important that that document actually be implemented?
> **A.** Yes. To the components that the parent agrees to, yes.

(Bartz Depo. at 15:16-16:6.) Thus, the law clearly defines two separate duties school districts have at two different times: first, the duty to "make available" services to parents for their IEP-eligible students at an IEP Team meeting; and second, the duty to "implement" any such services to which a student's parents consent.

**3. There Are Only Two Ways to Change an Existing IEP—Modification and Revocation of Consent—and Neither Happened with Fabian's IEP**

Federal and state law provides specific, detailed rules for how an IEP may be changed or consent revoked. An IEP may not be "changed unilaterally," but remains binding upon a school district as written until properly modified or a student's parent revokes his or her consent to some or all of the services. *M.C.*, 858 F.3d at 1197. The evidence demonstrates that Fabian's 2016-17 IEP was neither modified nor revoked, and the District now concedes that there was no modification or revocation. (Reporter's Transcript of June 17, 2019 Motion *In Limine* Hearing ("RT") at 5:1-5.) Consequently, it remained binding as written upon the District from May 10, 2016 (when it was signed) through February 3, 2017. *M.C.*, 858 F.3d at 1197.

**a. Modification May Only Be Accomplished in Two Ways: a Proper Amendment, or a Subsequent IEP Team Meeting**

Federal law provides that, once an IEP is generated and consented to by a parent—which it is undisputed occurred for Plaintiff's 2016-17 IEP—that IEP may only be modified or amended through two means: (1) a subsequent IEP meeting; or (2) an amendment in lieu of a meeting that complies with the requirements of 34 C.F.R. § 300.324(a)(4)(i). *See* 20 U.S.C. § 1414(d)(3)(F); 34 C.F.R.

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section 300.324(a)(6). Ms. Bartz agrees that those two methods are the "only two ways" to remove an IEP service. (Bartz Dep. at 58:4-10, 119:15-120:10.)

Neither happened with Fabian's 2016-17 IEP. Consequently, as the District has since stipulated, there was no modification to the curb-to-curb service provided by Fabian's 2016-17 IEP. (RT at 5:1-5; *see also* Ex. 11 at 15-17 (the District's Response to RFA Nos. 22-23); Deposition of Tanya Benitez at 46:15-21; Clayton Depo. II at 24:14-18 ("**Q.** Yeah. He was entitled to curb-to-curb transportation from 2016 through 2017; isn't that true? **A.** Yes. **Q.** And did that change? **A.** On the IEP, it did not change as far as I know."); Bartz Dep. at 95:6-19 ("**Q.** At no point in time was the [2016-17] IEP modified? **A.** Correct.").) In addition to agreeing that there was no modification, Ms. Bartz agrees that the District still had a duty to implement Fabian's original IEP:

> **Q.** And until [an] addendum is signed by everybody, that service is not changed and the original IEP is what governs?
> **A.** Yes.
> **Q.** And everything in that original IEP needs to be implemented?
> **A.** Yes.

(Bartz Depo. at 19:25-20:6.)

**b. Revocation Must Be in Writing, a Prior Written Notice Must Be Provided Before a Revoked Service Is Stopped**

As noted, parental consent is required for the provision of IEP services, and is therefore usually obtained (as it was here) in the initial IEP meeting. Consent may be revoked, and that revocation can eventually result in the elimination of services to which a child's parent previously consented. 34 C.F.R. section 300.300(b), which substantially mirrors Education Code section 56346 and IDEA on this topic, provides that revocation must be "in writing" and that the school district must provide Code-compliant notice "***before*** ceasing the provision of special education and related services" for which the parent has revoked consent. 34 C.F.R. § 300.300(b)(4)(i) (emphasis added); *see also* Educ. Code § 56346(d); Bartz Depo. at 142:5-15 (agreeing that prior written notice sent after revocation), 144:10-146:12 (agreeing that a hypothetical in which only one service was removed by revocation followed by prior written notice by the school district "accurately described the process").)

Thus, the order of revocation is clear. First, the parent must revoke in writing. Upon receipt of that revocation, the school district should cease services, but ***only after*** it provides the "prior written

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notice" described by 34 C.F.R. section 300.503 and mandated by 34 C.F.R. section 300.300(b)(4)(i). Failure to comply with those steps violates the law.

That did not happen with Fabian's 2016-17 IEP. The District's admissions plainly show that the requirements of 34 C.F.R. section 300.300(b)(4)(i) were not met. The District's proffered expert, Ms. Bartz, agrees. (Bartz Dep. at 146:13-147:2.) And, in response to Plaintiff's second motion *in limine*, the District has stipulated that "there was no … revocation [of] the curb-to-curb transportation contained in the IEP." (RT at 5:1-5.) Thus, like modification of an IEP, revocation of parental consent may only be achieved in a specific manner. The District admits that did not occur here.

**B. The "Emergency Contact Form" and Two-Mile Rule**

Despite its duty to implement Fabian's 2016-17 IEP, and its acknowledgement that the IEP was not modified or revoked prior to Fabian's injuries, the District points to Ms. Sanchez's execution of an "emergency contact form" as an indication that Ms. Sanchez made a "parent choice" to forego curb-to-curb for Fabian. This argument is legally and factually meritless as explained in full detail below. Moreover, given the irrelevance of the "Annual Information Update and Emergency Authorization" form to the relevant analyses in this case, Plaintiff has objected to its admission on relevance grounds. Even if that form were to be admitted, it must be viewed through the undisputed testimony that, once Fabian moved to Village Drive, District personnel informed Ms. Sanchez that he was ineligible for transportation because his new address was within two miles of Puesta Del Sol.

Ms. Sanchez clearly testified that, once she moved to Village Drive, Fabian no longer received curb-to-curb transportation because "[i]n the front office they told me that they don't do that for children that are less than a two mile range." (Deposition of Maria Sanchez ("Sanchez Depo.") at 31:14-32:2.) Ms. Sanchez did not make a "parent choice" to "not access" curb-to-curb, but instead was compelled to do so by the District's two-mile radius policy:

> **Q.** …So [the emergency contact form] just confirms your earlier testimony that you put in writing to the district that you would either pick up your son or let him walk home?
>
> …
>
> **A.** This does not confirm it completely, no.
>
> …
>
> **Q.** Is there something that's missing?
>
> **A.** Yes.

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**Q.** What's missing?

**A.** That this paper – the "Maria Sanchez" right here with the walker changed in October from August, of course, due to the fact that I – we had an IEP meeting and I told the teacher about Fabian being on the bus, and that's when they told me about the 2-mile ranger, that he – we didn't qualify for that. ***So I had no choice but to put that he will walk home***. That's when we decided that we would not do the after-school program. So that is the reason why we stopped the after-school program as well.

(Sanchez Depo. at 160:2-161:11 (emphasis added).) The same testimony likewise contextualizes Ms. Carter's testimony concerning the purported conversation she had with Ms. Sanchez in October 2016: Ms. Sanchez took the actions she did only because she was misinformed by the the District as to the application of its two-mile radius policy to her son.

The evidence also shows that the District's front desk personnel routinely informed parents of the two-mile radius policy without any exceptions noted. For instance, Linda Burleson, a front-desk employee for the District during the relevant time period, testified as follows:

**Q.** …If a student lives within two miles within it, is it correct that they cannot take the bus?

**A.** My understanding is that they don't ride the bus.

…

**Q.** If a parent says that they came in and asked you about whether their student or their child can take the bus, does that sometimes happen?

**A.** Sometimes.

…

**Q.** Okay. So would you share that policy, though, that we just discussed?

**A.** Yes.

(Deposition of Linda Burleson ("Burleson Depo.") at 20:9-21:8.) And since Ms. Burleson could not determine whether she was speaking to the parents of an IEP child, or whether any child was subject to IEP transportation, she could not have communicated exceptions even if she had known them. (Burleson Depo. at 18:21-19:2, 30:4-13.)

Although Ms. Burleson's understanding failed to account for the policy's improper application to IEP students, it was not because she omitted portions of the written policy or other communications disseminated to parents like Ms. Sanchez. Instead, the policy itself noted no exceptions:

> Elementary school students, grades K-6, who reside beyond a two-mile radius from the school, shall be eligible for transportation service to the school of their attendance area.

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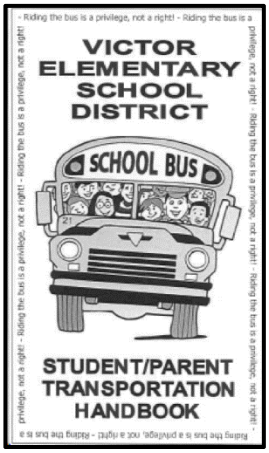
(Ex. 7 at 1.) The policy's general application was confirmed in a pamphlet distributed to parents about transportation options:




**Who Is Eligible To Ride The Bus?**

Current administrative regulations provide that students living more than two miles in a direct line to their school will be eligible for transportation as long as they reside within VESD boundaries.

(Ex. 8 at 2.) That pamphlet did not note any exception for IEP students, either. The failure to note exceptions was continued by Mr. Lester, who, in an August 6, 2016 letter to all parents of the District students (including Ms. Sanchez) reiterated the two-mile radius policy:

August 8th, 2016

Victor Elementary School District
Learning for All... Whatever it Takes

Dear Parents and Guardians,

As we look ahead to another outstanding year at Victor Elementary School District, the transportation department would like to welcome you back. We will continue to keep the same routes for the 2016-2017 school year.

- ☐ Transportation will be provided to any school in your quadrant
- ☐ Two mile walking radius remains in effect surrounding the School of Choice selected

Don Lester
Director of Safety, Operations, and Transportation
Victor Elementary School District

(Ex. 9 at 1.) Even Ms. Bartz agreed that the District sent "mixed messages" about the two-mile radius policy's application to IEP students and that Ms. Sanchez received "two different messages"—the curb-to-curb eligibility to Village Drive, and the absolute prohibition on busing to that address. (Bartz Depo. at 120:11-122:3.)

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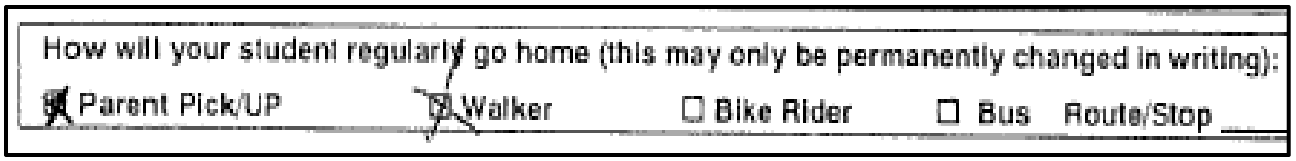
Beyond creating confusion, the evidence shows that the District applied its two-mile policy to all students, including Fabian, regardless whether they had an IEP. When Fabian first transferred to the District from Lynwood, California, he received curb-to-curb transportation to-and-from his residence on Jurassic Place per his IEP from Lynwood (which the District applied for 30 days after his transfer) and his 2014-15 IEP, which the District created and to which Ms. Sanchez consented in May 2014. (Ex. 3 at 1; Ex. 29 at 1; Sanchez Dep. at 29:15-30:5.) But the District stopped providing curb-to-curb service after Fabian and his family moved to Village Drive even though both his 2015-16 IEP and 2016-17 IEP provided that the District would implement that service for him. (Ex. 1 at 1; Ex. 2 at 1; Sanchez Dep. at 31:14-32:2.) The only thing that changed was Fabian's address.

Although that backdrop contextualizes the form, nothing on the document's face indicates that it revokes anything, let alone federally-mandated services to which Ms. Sanchez had already consented on Plaintiff's 2016-17 IEP. Indeed, the relevant portion of the form asks only a basic question of ***every student in the school***, not just IEP students like Plaintiff: "How will your student regularly go home[?]":


How will your student regularly go home (this may only be permanently changed in writing):
☒ Parent Pick/UP ☒ Walker ☐ Bike Rider ☐ Bus Route/Stop ___

As Ms. Sanchez explained at her deposition, she completed the form in the manner she did because District personnel had informed her that her son was not entitled to transportation because he lived too close to school and she was left with "no choice." (Sanchez Depo. 31:14-32:2, 160:2-161:11.) She did ***not*** execute the document to "revoke consent" to, decline, or otherwise modify the curb-to-curb transportation the District had the federally-mandated obligation to implement.

No one at the District testified that this form had the fundamental impact the District now claims it did, let alone that the District did anything in response to the purported "parent choice" or "election" it now claims the form embodied. There is **no evidence** that the District ***contemporaneously*** relied on the emergency contact form as determinative of the transportation provided to Fabian**.** The District has produced **no documents** reflecting any front-end effort to communicate with Ms. Sanchez about this form and its purported impact on the District's duty to

provide curb-to-curb transportation. In fact, the District **admits that no such documents exist**:

> ….the District is unable to admit or deny as it was Maria Sanchez who provided notice of plaintiff's mode of transportation to "parent pick up" or "walker" in the Emergency Authorization form signed and dated October 25, 2016 (produced as the District's CUM-0010-0011) ***which was the latest document concerning the mode of transportation prior to the incident***.

(Ex. 11 at 17 (the District's Response to RFA No. 25) (emphasis added).) The District's answer makes one thing clear: the "Annual Information Update and Emergency Authorization" form was the ***final*** document concerning Plaintiff's transportation in 2016-17. Consequently, there was no response by the District to what it now claims is a fundamental shift in the obligation it owed to Fabian, let alone "prior written notice" that complied with the law's requirements necessary for the District to treat this document as a revocation of Ms. Sanchez's consent and cease curb-to-curb transportation.

## III. PROCEDURAL POSTURE AND ISSUES BEFORE THE COURT

Plaintiff asserts two claims against the District: Negligence (fourth cause of action) and Breach of Mandatory Duty (fifth cause of action).

For the negligence claim, Plaintiff alleges that the District is liable for the negligent conduct of its employees committed within the course and scope of their employment. *See* Gov. Code §§ 815.2 (liability based upon act of an employee), 820(a) (public employee liable for injury to same extent as a private person). An action for negligence "consists of three elements: (1) a defendant's legal duty to use due care; (2) a breach of that duty; and (3) the breach as the proximate or legal cause of plaintiffs resulting injury." *George A. Hormel & Co. v. Maez* (1979) 92 Cal. App. 3d 963, 966. "School personnel have a duty to use reasonable care in supervising students in their charge-the standard being that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.'" *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Ca1. 3d 741, 747; *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Ca1 .3d 508, 513; *C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal. 4th 861, 865 ("Ample case authority establishes that school personnel owe students under their supervision a protective duty of ordinary care, for breach of which the school district may be held vicariously liable."). A special relationship exists between school personnel the students within their care "so as to impose an ***affirmative duty*** on the district to take all reasonable steps to protect its students." *Rodriguez v. Inglewood Unified School Dist.* (1986)

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186 Cal. App. 3d 707, 715 (emphasis added); *see also C.A.*, 53 Cal.4th at 869-70; *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal. App. 4th 508, 517. As explained by the Supreme Court in *C.A.*, "'[u]nder Government Code section 815.2, subdivision (a) of the Government Code, a school district is vicariously liable for injuries proximately caused by such negligence.'" 53 Cal. 4th at 869 (citing *Dailey*, 2 Cal. 3d at 747); *accord Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal. 4th 925, 932–933; *Hoyem*, 22 Cal. 3d at 513.

In addition to vicarious liability, Plaintiff alleged the District is directly liable for its negligence. *See* Gov. Code § 815.6; Educ. Code § 44808. Pursuant to Education Code section 44808, a school district is liable for injuries to a student occurring off school premises where the District or its personnel "has undertaken to provide transportation for such pupil to and from the school premises" or "has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances." Educ. Code § 44808. A school district may also be held liable for injuries suffered by a student off school premises and after school hours if the injury resulted from the school's negligence while the student was on school premises. *See, e.g.*, *Hoyem*, 22 Ca1. 3d 508; *Brownell v. Los Angeles Unified School District* (1992) 4 Cal. App. 4th 787; *Perna v. Conejo Valley Unified School District* (1983) 143 Cal. App. 3d 292.

The parties agree that the central issue of duty for both the fourth and fifth causes of action is whether, on February 3, 2017, the District had a duty to provide curb-to-curb bus transportation to Plaintiff as provided for in Plaintiff's operative IEP. As outlined below, it is without dispute that, pursuant to the IEP and as mandated by federal and state law, the District and its personnel—including Fabian's IEP team (Mr. Clayton and Ms. Anderson) and other District employees—owed a duty to provide curb-to-curb bus transportation to Plaintiff on the date of the collision. Indeed, pursuant to the IEP, the District undertook the affirmative duty to provide curb-to-curb bus transportation bus transportation to Plaintiff and did actually provide such services up and until his family moved within two miles of the school. While the existence of this duty is not truly in dispute, the District argues that the duty analysis further encompasses whether the IEP merely has to make curb-to-curb transportation available and it is upon the election of the parent to trigger such services. As explained below, not only is there no legal or factual such for such a position, but the only evidence before the Court is that

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Fabian's mother consented to the transportation service.

With respect to the issues of breach and causation, the facts are undisputed. The parties agree that, should the Court find that the District owed Plaintiff a duty to provide curb-to-curb transportation service on February 3, 2017, it breached that duty by not doing so and that its breach was a substantial factor in causing Plaintiff's harm.

As to any alleged comparative fault of others, the District has *stipulated* that Fabian was not negligent. With the exception of Plaintiff's mother, the District has further stipulated that no other party was negligent in causing Fabian's injuries. As to the purported comparative fault of Fabian's mother, the District has stipulated that Ms. Sanchez was negligent "in terms of her actions or inactions ***relating to [Fabian's] IEP***," *see* RT at 3:15-21, limiting the scope of her purported negligence to her conduct on February 3, 2017 immediately prior to the collision at Village Drive. The District fails to demonstrate that she was negligent and that such negligence caused or contributed to the injuries suffered by Fabian. Consequently, the District is solely liable for Plaintiff's harm.

To assist the Court with framing the issues before it, the parties have stipulated and agreed to the following questions to be addressed by the Court in this phase of trial:

**1. Did VESD owe a duty to provide Fabian Sanchez with curb-to-curb transportation on February 3, 2017?**

If the answer to this question is "yes," then breach of duty will not be in dispute because it is undisputed that VESD did not provide such transportation, thereby necessarily breaching the duty it owed (presuming, of course, that the Court makes that determination). There is likewise no dispute that, had Fabian been provided with curb-to-curb on February 3, 2017, he would not have had to cross Village Drive to get home and would not have been struck by Mr. Martinez's vehicle.

Thus, if the answer to Question No. 1 is "yes," then the Court would then answer Question No. 2. If the answer to Question No. 1 is "no," then the Court need not answer any further questions because there would be no liability for VESD.

**2. Was Maria Sanchez negligent?**

If the answer to Question No. 2 is "no," then the Court would answer no further questions. If the answer to Question No. 2 is "yes," then the Court would answer Question No. 3.

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**3. Was Maria Sanchez's negligence a substantial factor in causing harm to Fabian Sanchez?**

If the answer to Question No. 3 is "no," then the Court would answer no further questions. If the answer to Question No. 3 is "yes," then the Court would answer Question No. 4.

**4. How should fault be apportioned between VESD and Maria Sanchez?**

Plaintiff now discusses the issues of duty, breach, causation and comparative fault.

## IV. THE DISTRICT OWED A DUTY TO PROVIDE FABIAN SANCHEZ CURB-TO-CURB TRANSPORTATION ON FEBRUARY 3, 2017

It is clear that, on February 3, 2017, the District had a duty to provide Plaintiff with curb-to-curb transportation. This Court has already considered and decided this issue, and nothing about the evidentiary record or legal underpinnings of that decision have changed. As recognized by this Court in its order denying the District's motion for summary judgment, "pursuant to the IEP, the District undertook the affirmative duty to provide curb-to-curb bus transportation to Plaintiff. (Ex. 45 at 14:25-27.) "Here, District undertook a duty to provide Plaintiff with curb-to-curb bus transportation as evidenced by the IEP. Additionally, District ***admits*** that it was mandated by federal and state law to provide bus transportation to Plaintiff." (Exhibit 45 at 10:21-22 (emphasis added).)

The District does not dispute the nature of the duty it owed Plaintiff. In its summary judgment briefing—which it specifically incorporated into substantive *verified* discovery responses its briefing in connection with the summary judgment—the District admitted that "Plaintiff had a learning disability ***which required the school to pick him up and drop him off by school bus***." (Ex. 20, District Sep. Statement No. 10, at 3; see also Ex. 18 at 5-6 (the District's Second Supplemental Response to Plaintiff's 17.1 Interrogatory (RFA No. 34)), signed verification by Debra Betts.) Elsewhere in its summary judgment briefing, the District explained: "In general, school districts do not have a duty to provide bus service to all students. *Eric M. v. Cajon Valley Union School District* (2009) 174 Cal. App. 4th 285, 293. However, the exception is when ***students, like Plaintiff, have an IEP***. Federal law ***mandates*** transportation for students with an IEP, as set forth in Education Code section 56040 …" (Ex. 19 at 7 (emphasis added).) There is no meaningful dispute that the District owed a duty to provide curb-to-curb bus transportation to Plaintiff.

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The District's admissions, though dispositive for its contrary arguments, do nothing more than acknowledge the decades-old, black-letter law defining the duty owed to students, like Fabian, who are subject to an IEP. *See, e.g., B.H.*, 35 Cal. App. 5th 563, 247 Cal. Rptr. 3d 501, 519-20 (holding that a district is required to "immediately implement" services to which a parent consents on an IEP, and that "prompt implementation is imperative" (citing Educ. Code § 56346(e)). There is no dispute that Ms. Sanchez consented to the curb-to-curb transportation provided by Fabian's 2016-17 IEP, thereby triggering the District's duty to "immediately implement" that service. As noted, she selected the box marked "eligible" instead of "eligible – parent declined," an indication both that she affirmatively accepted curb-to-curb transportation and that the decision was made ***before*** she provided the written consent necessary to trigger the District's duty to implement. The District's warning to parents like Ms. Sanchez cements its duty to implement. After pointedly ***not*** declining curb-to-curb, Ms. Sanchez was advised her signature meant she "CONSENT[S] TO ALL COMPONENTS OF THE IEP" and that "THOSE COMPONENTS TO WHICH I CONSENT ***WILL BE IMPLEMENTED***." (Ex. 1 at 17 (emphasis added).) When it created Fabian's IEP—unlike now, years later, when it is trying every trick in the book to escape the federally-mandated duty it acknowledges it owed to Fabian—the District made the state of play clear to parents like Ms. Sanchez: sign here, and, unless you tell us otherwise, we will do the things listed on the IEP.

The District was therefore bound by the terms of Fabian's IEP until it was replaced by a new annual IEP, modified by a proper amendment, or revoked by Ms. Sanchez. *See M.C.*, 858 F.3d at 1197 ("An IEP, like a contract, may not be changed unilaterally. It ***embodies a binding commitment*** and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP [and] ***the District was bound by the IEP as written*** unless it sought to re-open the IEP process and proposed a different IEP." (emphasis added)). It goes without saying that Fabian's 2016-17 IEP was operative on February 3, 2017; his next annual IEP was not scheduled until May 2017. The District **expressly stipulates** that Fabian's 2016-17 IEP was neither modified nor revoked. (RT 5:1-5.) Thus, the District's obligation was clear: On February 3, 2017, it was bound by Fabian's 2016-17 IEP, and that IEP imposed a duty to implement curb-to-curb transportation.

///

## A. The District's Administrative Remedies Argument Is Legally Flawed and Without Any Factual Basis

### 1. The District's Post-Injury Argument Should Be Rejected Again As It Was When the District Moved for Summary Judgment

This Court has already found that the District's "administrative remedy" argument has no merit because Plaintiff was not required to exhaust such remedies before bringing the instant action. (Ex. 45 at 8-9.) As held by this Court: "Plaintiff is not challenging the IEP, nor is he claiming that District failed to provide him with a free appropriate public education. Thus, this is not an action under the IDEA. Rather, Plaintiff seeks monetary damages for his personal injuries." (*Id.*)

Nothing has changed factually or legally to alter that conclusion. As the District concedes, IDEA exhaustion does not apply simply because a complaint relates to an IEP, but instead only where the "gravamen" of a plaintiff's complaint "seeks relief for the denial of a free appropriate public education," commonly known as a "FAPE." *Fry v. Napoleon Community Schools* (2017) 137 S.Ct. 743, 755. Providing guidance to determine the gravamen, the Court explained that an officer at an IDEA hearing—a step in the process VESD argues Plaintiff should have exhausted prior to filing this action—may only award relief that is "available" under IDEA. *Id.* at 754. Thus, where "the hearing officer cannot provide the requested relief" due to limitations of IDEA, the "gravamen" of the complaint sounds in something other than "the denial of an appropriate education." *Id.*

The gravamen of Plaintiff's complaint is not the denial of a FAPE, but the personal injuries resulting from VESD's failure to follow its duties. As recognized by this Court, "Plaintiff seeks monetary damages for his personal injuries, ***which is not a remedy provided by the IDEA***." (Ex. 45 at 8-9 (emphasis added).) Furthermore, and as highlighted by this Court, "administrative remedies need not be exhausted where it would be a futile gesture, or where the available remedies do not provide the plaintiff with an adequate forum for securing redress of his grievances." (*Id*. (citing *Honig v. Doe* (1988) 484 U.S. 305).) That is precisely the situation here.

### 2. The District's New, Pre-Injury Exhaustion Requirement Has No Factual or Legal Support and Defies Common Sense

This time, however, the District appears to argue that "exhaustion of administrative remedies"

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was a prerequisite to its duty for Fabian's 2016-17 IEP. There is absolutely no legal basis for that argument. As discussed, a school has a duty to implement the components of a student's IEP to which that student's parents consent. *B.H.*, 2019 WL 2171129 at *15; *see also* Educ. Code § 56346(e); 34 C.F.R. § 300.103(c). The District's argument, like nearly all of the positions it takes, simply seeks to "add additional steps not contemplated in the scheme of the Act" before a duty can arise; that is legally improper. *Antkowiak*, 838 F.2d at 641.

It also makes no sense. The District circularly argues that a breach of its duty must be addressed administratively before the duty can exist at all—and, presumably, if duty were found through the administrative process, the District could breach again and claim that further administrative proceedings were necessary to impose the duty once more.[1] That argument is quickly revealed as a Catch-22: a parent must administratively exhaust before a duty arises, but, since a duty does not arise until administrative remedies are exhausted, then there is no basis for the parent's administrative claim that the school owes a duty. *Cf.* Joseph Heller, CATCH-22 at 46 (1961) ("Orr would be crazy to fly more missions and sane if he didn't, but if he was sane, he had to fly them. If he flew them, he was crazy and didn't have to; but if he didn't want to, he was sane and had to."). What's more, the District's argument is illogically concludes that Plaintiff should have exhausted administrative remedies ***before*** his injury—an impossibility revealing the absurdity of the District's argument. Neither framework is contemplated by IDEA or any other authority.

Instead, as *Fry* notes, IDEA's administrative remedies primarily exist to adjudicate disputes between parents and school districts as to the ***scope*** of the IEP services offered to students. For instance, if a school district refuses to offer a certain service that a child's parent believes he or she to need, that parent may pursue the administrative process. The distinction is worlds apart from this case. Unlike here, where the duty to implement existed from the moment Ms. Sanchez consented to

[1] Additionally, the District's reference to purported "failure" to exhaust administrative remedies during the 2015-16 school year fundamentally misunderstands IEPs. The District was required to meet "at least annually" to develop a new IEP, which would then replace the old one. *See* Educ. Code § 56043(j). Although there is no doubt that the purported "failure" to "complain" or "exhaust administrative remedies" is irrelevant to whether the District owed Fabian a duty, that is doubly true where the argument centers upon a purported "failure to exhaust" remedies applicable to an IEP that was not operative at the time of Fabian's injury.

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curb-to-curb transportation, a school district necessarily does **not** owe a duty to implement a service it has **not** offered to a student. But, in this case, the District's duty existed regardless whether Ms. Sanchez pursued "administrative remedies," because it sprung from her consent to the terms of Fabian's 2016-17 IEP and remained "binding" until Fabian's 2016-17 IEP expired or was modified or revoked (which it was not). *M.C.*, 858 F.3d at 1197. That is all that matters for this case, because, as the Court has already found, Plaintiff does not challenge the 2016-17 IEP or seek remedies for the District's denial of a FAPE, but instead money damages for the personal injuries he suffered because of its negligence. Administrative exhaustion does not apply.

Ms. Bartz confirmed the District's misunderstanding, explaining that an administrative remedy would arise only when "the district refuses to offer" transportation:

> **Q.** Okay. So I just want to focus on the administrative remedy part.
> **A.** Okay.
> **Q.** And you answered that completely, which is for transportation, there is no need to exhaust an administrative remedy for that component of an IEP?
> **A.** ***Unless the district refuses to offer it*** and the parent thinks the child should have it. That would be an administrative remedy.
> **Q.** Okay. And in this case, there's no dispute about the fact that it has been offered by the District?
> **A.** Yes.

(Bartz Depo. at 22:14-23:5 (emphasis added); *see also* Bartz Depo. at 141:24-142:4.) As Ms. Bartz noted, the proper time to resort to administrative remedies is when a district "refuses to offer" the service, which, as she concedes, is not the case here. The District's administrative remedy argument misunderstands the law.

It also lacks any factual support. Ms. Sanchez's purported "failure" to "complain" or "exhaust remedies" sprung from the District's communication to her and other parents that only students residing more than two miles from the school were eligible for bus transportation. That is not just Ms. Sanchez saying it; the District's administrative regulations said that, the pamphlet it provided to parents said that, a letter from the District's director of transportation sent immediately before the start of the 2016-17 school year said that, and testimony from Puesta Del Sol's front desk staff confirmed that they would verbally communicate the policy to parents, too—all without any indication that IEP transportation was exempt from the restriction. That led to the "confusion" Ms. Bartz conceded at her

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depositions. (Bartz Depo. at 120:11-122:3.) There is **no evidence** that Ms. Sanchez was told anything different than the "mixed message" Ms. Bartz acknowledged, and the District has not produced a shred of contemporaneous evidence showing that it did not apply the two-mile radius policy to IEP students like Plaintiff. Instead, the only contemporaneous evidence indicates that the District applied the two-mile radius restriction to IEP students; after all, when Plaintiff lived at a different address, he received curb-to-curb transportation.

**B. The District's Efforts to Avoid Its Clear, Admitted Duty to Implement Fail**

The District contends that, despite Ms. Sanchez's consent to the curb-to-curb transportation provided by the IEP, it was not required to actually provide the service unless and until she did something else to indicate her consent to curb-to-curb transportation. At the motion *in limine* hearing in this matter, the District's counsel explained the District's position as: "**we agree that under the IEP, that there was -- call it a 'duty' or an 'obligation' to provide curb-to-curb transportation**, *but* our perspective is that under the IEP, *only makes the student eligible*, doesn't necessarily require that the District show up at the family home and put the child on the bus, if that is not the intent of the family." (RT at 10:21-11:1.) Again ignoring ***Ms. Sanchez's express consent to implementation of curb-to-curb transportation***, the District claims that a scattershot collection of misapplied "evidence" definitively demonstrates her "intent" to have Fabian ***not*** "put on the bus." The District's argument is legally incorrect; its duty was to "implement" the IEP once it received Ms. Sanchez's consent, not wait for ***further*** consent or treat an unrelated document as a "revocation" (either at the time or, as here, after-the-fact). Moreover, the evidence shows that the District did not rely on the "evidence" it now claims absolves it of any liability for Fabian's injuries.

**1. The District's Position Is Contrary to Decades of Clear Statutory and Decisional Law**

First, there is ***no legal authority*** to support the notion that a school district may indefinitely delay provision of an IEP service to which a parent has already consented. Despite multiple opportunities to do so, the District cites **nothing** to support its interpretation of the specific legal framework it admits is applicable to IEPs. The District's lack of authority for its position is not mere oversight; no authority exists. Instead, its position flies in the face of the District's duty "immediately

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to implement 'those components of the [IEP] to which [Ms. Sanchez] has consented … so as not to delay providing instruction and services to [Fabian].'" *B.H.*, 35 Cal. App. 5th 563, 247 Cal. Rptr. 3d 501, 519-20 (quoting Educ. Code § 56346(e)).

"Implement" means what it says: "carry out," "accomplish," and "to give practical effect to and ensure of actual fulfillment by concrete measures." "Implement." Merriam-Webster.com (accessed June 24, 2019); *see also People v. King* (2006) 38 Cal. 4th 617, 622 ["The words of a statute should be given their ordinary and usual meaning and should be construed in their statutory context. If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls."). That definition fits within IDEA's statutory context indicating that school districts are to "provide" services consented to by parents. In return for massive federal grants, school districts agree to "provide[] at public expense, under public supervision and direction" a "free appropriate public education," including "related services" such as "transportation," to which a parent has consented. *See* 20 U.S.C. § 1401(9), § 1401(26); *see also* 20 U.S.C. § 1414(a)(1)(D)(i)(II) (school district must "seek to obtain informed consent from the parent … before providing special education and related services to the child.").

The District contemporaneously understood that "implement" means to ***actually provide***; its Board Policy applicable to special education transportation mandates that the district "shall ensure that appropriate services are provided for students with disabilities." (Ex. 5 at 1.) Ms. Bartz concedes that "school staff" are "responsible" for ensuring the provision of services on an IEP, including at the end of Fabian's school day on February 3, 2017. (Bartz Depo. at 116:24-117:5.) And, in its motion for summary judgment, the District observed that while "[i]n general, school districts do not have a duty to provide bus service to all students … the exception is when students, like Plaintiff, have an IEP." (Ex. 19 at 7:22-25.) The District further acknowledged that "***federal law mandates***" this duty to provide. (*Id.* (emphasis added).) Merely making services available for parents to "access" by taking additional steps uncommunicated to them by the District does not comport with its legal obligation.

The District's seizure upon the word "eligible" likewise misses the point. Again, the District's argument misunderstands the sequential steps of the IEP process mandated by law: a school district's determination of educational goals and necessary services based upon a student's special needs (the

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determination of "eligibility"); the offer of such services (thus "making available" the "eligible" services); the parent's consent to some or all of the offered services; and the school district's obligation to "immediately implement" the services for which a student is "eligible" and to which a parent consents. Ms. Grandinette explained the District's fundamental misunderstanding:

> **Q.** Aside from relying on Mr. Lester's testimony is there any law that you're aware of which says after a student is eligible for curb to curb, whether it's the onus is on the parents or the school district to set up that plan?
>
> **A.** Okay. Let me explain what eligible means. Every service on here is the student is eligible for all of them. The special day class. The speech. Okay. The transportation. They're eligible for all of them. Once the IEP is signed this document has to be implemented as written.

(Grandinette Depo. at 180:21 to 181:6.)

Furthermore, the District's argument is legally untenable in light of its stipulation that there was no modification, revocation, amendment and/or addendum at any relevant time for the curb-to-curb bus transportation contained in Fabian's IEP, *see* RT at 5:1-5, which meant that it was binding as written upon the District on February 3, 2017. That renders extrinsic evidence ***irrelevant***; unless the documents were completed in conformity with the law applicable to IEPs (which they were not), they necessarily could ***not*** have changed Fabian's 2016-17 IEP. Likewise, because the District acknowledges that the IEP is clear and unambiguous, no extrinsic evidence is needed to interpret it. That is consistent with the purpose of an IEP; as Ms. Bartz explained, an IEP should be "unambiguous" because it is "the rule book" and a "freestanding document." (Bartz Depo. at 34:14-17, 110:4-111:13.) The District's assistant superintendent with responsibility for transportation, Debbie Betts, reiterated that an IEP—like Fabian's 2016-17 IEP—***serves as*** "**the directive to provide transportation**" ***to eligible IEP students***. (Deposition of Debra Betts ("Betts Depo.") at 33:25-34:5.) Since the District concedes that there was no modification, that clear and unambiguous "directive" never changed as a matter of law.

Thus, the District's position and its stipulations render its argument legally impossible. It had a duty to implement the IEP unless Ms. Sanchez revoked or modified it, and neither happened. There is no legal basis for its "parental choice" argument.

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**2. The District Presents No Evidence That It Considered Any of the Evidence It Relies on for Its "Parent Choice" Defense on the Front End, Let Alone Any Cogent Evidence Overriding Ms. Sanchez's Express Consent to Curb-to-Curb Transportation for Fabian**

Putting aside the complete lack of legal basis, and the fact that the "evidence" the District claims evinces Ms. Sanchez's "desire" to forego curb-to-curb transportation, there is **no evidence** that the District relied on any of that "evidence" as the basis for any action or inaction it took with respect to Fabian's curb-to-curb transportation in 2016-17. Instead, the District's arguments confirm what the evidence and law already clearly show: the District had a duty to provide curb-to-curb transportation to Fabian on February 3, 2017, and nothing that either he or Ms. Sanchez did altered that duty.

**a. The Emergency Contact Form**

As the Court noted at the motion *in limine* hearing, the emergency contact form has two different dates—August 2016 and October 2016. Neither is prior to May 2016, when the District's duty to "immediately implement" Fabian's IEP arose upon Ms. Sanchez's undisputed consent to all components. Given that Ms. Anderson testified that "when the transportation is noted on the IEP, a form is sent to the transportation department to ***initiate transportation immediately***," *see* Anderson Depo. at 150:3-16 (emphasis added), it is not possible for the District to have relied on a document only completed ***after*** that time as a parent "desire" that would purportedly prevent the District from "put[ting] [Fabian] on the bus." (RT at 10:21-11:1.) Moreover, the District presents **no evidence** that it followed-up with Ms. Sanchez about the document, let alone the effect it claims now that it had on Fabian's right to curb-to-curb transportation. In fact, the District admits that the emergency contact form itself was the "latest document concerning [Fabian's] mode of transportation prior to the incident." (Ex. 11 at 17 (the District's response to RFA No. 25).) That likewise dooms the District's efforts to disguise this document as the kind of "revocation" the District has stipulated did not happen. Because a true revocation requires "prior written notice" ***before*** cessation of service (not to mention a clear and unambiguous desire to revoke, which the emergency contact form does not express even partially), the District's admission that there was no follow-up fatally undermines its argument.

That lack of follow-up is astonishing given the legal significance the District now hopes the

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emergency contact form will bear. The "desire" the District says it communicates (unsupervised walks) is the polar opposite of the unambiguous consent to curb-to-curb transportation (wholly supervised bussing) that Ms. Sanchez had provided just months before. Yet no one at the District picked up the phone, wrote an email, or sent a letter to Ms. Sanchez about this supposed radical shift in her desire. (And even if they had, the District still would have been obligated to provide curb-to-curb until Ms. Sanchez modified or revoked the IEP.)

The inference to be drawn from that lack of evidence is that the District never treated the emergency contact form as anything other than a document the school could use "to contact parents in case a youngster is injured or some event happens at school that would require them to contact either an individual student or a large number of students." (Deposition of Rich Alderson ("Alderson Depo.") at 187:11-188:19.) It never was an IEP document, does not mention IEPs or special education anywhere on its face, or indicate that filling out the form in a certain manner may impact services to which parents have already consented. Even Ms. Bartz admits that Fabian's IEP Team would not receive the form. (Bartz Dep. at 68:10-21.) In sum, the document is not even close to the "statement of desire" the District claims it to be, let alone a statement on which the District relied.

What's more, the District cannot even agree on who had the obligation to implement Fabian's curb-to-curb transportation, casting significant doubt on its ability to have coherently viewed the emergency contact form and decided that it indicated curb-to-curb no longer applied. While Ms. Anderson testified that the District's Transportation Department, led by Director of Transportation Donald Lester and overseen by Assistant Superintendent Debra Betts, was responsible for implementing transportation (*see* Anderson Depo. at 150:3-16), Mr. Lester contrarily testified that the IEP Team (led by Ms. Anderson), and not his department, was responsible for implementing transportation. (*See* Deposition of Donald Lester at 49:8-17, 51:9-16.) Adding to the confusion, Ms. Bartz agreed with Mr. Lester. (*See* Bartz Depo. at 44:24-45:10.)

Confusion like that inside the District undoubtedly led to the "mixed messages" that created to confusion for parents (like Ms. Sanchez) trying to navigate the complicated and labyrinthine IEP process. That is particularly true in light of Ms. Sanchez's unrebutted testimony that she selected "parent pick-up" and "walker" instead of "bus" not to express her desire for those services over curb-

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to-curb, but instead because the District had informed her that transporting Fabian was against the District's generally applicable policy, leaving her with "no choice" but to select those options. (Sanchez Depo. 31:14-32:2, 160:2-161:11.) Other evidence about the two-mile policy—including the policy language itself, contemporaneous communications to parents in writing and via front desk staff, and Fabian's experience of losing transportation when he moved within the two-mile range—all indicate that, contrary to its witnesses' statements now, the District in fact applied the policy to all students irrespective whether they had IEP-provided transportation. That is the ***opposite*** of the "parent choice" the District claims now to have honored by not providing Fabian with the curb-to-curb transportation to which Ms. Sanchez unambiguously consented.

**b. The "Special Education Transportation Plan"**

Although the bulk of the District's argument centers on the emergency contact form, it also references a 2014 "special education transportation plan," arguing that Fabian did not receive curb-to-curb in 2015 and 2016 because Ms. Sanchez purportedly failed to complete a similar document for each year. For starters, the District never identified this document in discovery as a basis for its defense; it should not be permitted to do so for the first time at trial. (*See, e.g.*, Ex. 17 at 5 (the District's Response to RFA 34, part (d)).) In any event, its argument again highlights the *ad hoc*, after-the-fact nature of its defense; if it was ***this form*** that Ms. Sanchez had to fill out to get transportation, then why waste so much time discussing the purported import of the emergency contact form? And, of course, the argument that more documents needed to be completed flies in the face of IEP law, which prohibits "additional steps" uncontemplated by the statutory scheme before IEP services are provided. *Antkowiak*, 838 F.2d at 641.

These incongruities aside, the document is not what the District wants it to be. It is instead a stopgap document created only because Fabian transferred to the District from Lynwood, California in 2014, and, because the District did not create Fabian's operative IEP (Lynwood did), it needed to harvest the IEP's information to provide Fabian with the same services until it created its own IEP within 30 days of his transfer. (Grandinette Depo. at 172:12-177:6, 178:4-19.) Sure enough, approximately 30 days later, the District conducted its own IEP, determined that Fabian needed curb-to-curb transportation to his Jurassic Place address, and provided it to him using that IEP, which had

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superseded the stopgap "special education transportation plan." (Ex. 3 at 1; Grandinette Depo. at 172:12-177:6, 178:4-19.) Thus, far from demonstrating that further documentation was necessary to "access" curb-to-curb transportation, the District's misplaced reliance on the "special education transportation plan" only further confirms that "there are no documents that say 'this is what we will do' because the IEP serves as the directive to provide transportation." (Betts Depo. at 33:25-34:5; *see also* Bartz Depo. at 34:14-17, 110:4-111:13.)

Finally, the District again cannot show that the lack of "special education transportation plan" documents for 2015 and 2016 actually led to the District's breach of its duty to provide curb-to-curb transportation to Fabian per his IEP. It does not produce blanks of those documents. There is no evidence that anyone from the Distict followed up with Ms. Sanchez to alert her that her "failure" to complete such documents meant that she could not "access" curb-to-curb transportation. There are no letters in the file transmitting these forms, nor testimony explained how parents of IEP students could access them. Instead, as Ms. Anderson testified, ***the District*** sends a form to transportation "immediately" when the IEP is completed. (Anderson Depo. at 150:3-16.) That is consistent with the logistical realities of planning curb-to-curb service, a process that necessarily occurs within the District and not with parent involvement. (Alderson Depo. at 39:8-25.) Simply put, there is **no evidence** that the forms are necessary to commence curb-to-curb transportation, and **no evidence** that the District's failure to provide it stemmed from the lack of a "special education transportation plan."

**3. Ms. Sanchez's Purported Conversations About Fabian Walking Home**

Finally, the District identifies two conversations it claims demonstrate Ms. Sanchez's "desire" for Fabian to walk home instead of taking curb-to-curb transportation: a conversation with Danielle Carter around the time Ms. Sanchez checked the "walker" box on the emergency contract form, and a conversation between Ms. Sanchez and Ms. Anderson in the hospital just hours after Fabian's life was irrevocably changed by his grave injuries. These one-sided conversations do not carry the weight the District assigns to them. For starters, it is clear that oral statements are insufficient to alter the duties and obligations imposed by IEPs; for all intents and purposes, if it is not in writing, then it does not matter. These conversations are not relevant as a matter of law.

Not that the conversations the District's witnesses report move the needle. At best, the District

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presents evidence that Ms. Sanchez—at that time solely responsible for caring for both Fabian and his one year old sister during the day—knew that Fabian walked home by himself from school and that ***Fabian*** wanted to walk by himself. Neither matters. There is no doubt that Ms. Sanchez was aware that Fabian walked home; that does not mean she ***wanted*** him to do it, and, as explained above, she believed that she "had no choice" because the District's application of the two-mile policy. Likewise, whether ***Fabian*** wanted to walk home unsupervised is not the relevant question. Provision of IEP services is not up to the whims of students; the District would doubtless ignore a student's request to leave campus during school hours. Instead, what matters—and is the only thing that matters—is Ms. Sanchez's consent to the curb-to-curb service on Fabian's 2016-17 IEP. That ends the analysis, because the District's duty to implement arose the moment Ms. Sanchez finished signing.

Moreover, as with the emergency contact form and the special education transportation plan, there is no evidence that the District relied upon or followed-up with Ms. Sanchez concerning her purported "desire" supposedly expressed to Ms. Carter. (The alleged conversation with Ms. Anderson occurred after Fabian's injury and could not have been relied upon by the District.) At the time she purportedly spoke to Ms. Sanchez, Ms. Carter did not know that Fabian's IEP provided for curb-to-curb transportation and did not ask Ms. Sanchez if he was entitled to the service. (Deposition of Danielle Carter at 43:17-44:4.) There is no evidence that Ms. Carter or anyone else at the District followed up with Ms. Sanchez about her purported "election," either as a result of this purported conversation or due to the emergency contact form the conversation concerned. And, again, the District cannot show a legal basis indicating that, even if it had relied on Ms. Sanchez's alleged statements, it was permitted to ignore its duty to implement the services to which Ms. Sanchez had consented in Fabian's 2016-17 IEP. As with its other efforts to avoid that duty, the District fails.

## V. BREACH AND CAUSATION ARE ESTABLISHED

As outlined above, the parties agree and stipulate that the District did not provide curb-to-curb bus transportation to Fabian on February 3, 2017 and thereby necessarily breached the duty owed. There is likewise no dispute that, had Fabian been provided with curb-to-curb on February 3, 2017, he would not have had to cross Village Drive to get home and would not have been struck by Mr. Martinez's vehicle.

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## VI. THE DISTRICT FAILS TO DEMONSTRATE ANY PURPORTED CONTRIBUTORY NEGLIGENCE BY MARIA SANCHEZ

The District's sole affirmative defense is that Ms. Sanchez shares a portion of the blame for Fabian's injury. The District—which bears the burden of proof on this affirmative defense—cannot make the requisite showing of Ms. Sanchez's negligence.

### A. The Scope of the District's Argument Is Limited

In its 17.1 response to support its denial to Plaintiff's request for admission that Ms. Sanchez was not negligent, the District identifies the following facts in support of its denial:

> …Maria Sanchez did not exhaust her administrative remedies regarding alleged non-availability of curb to curb transportation as indicated in plaintiff's May 2016 IEP; acknowledged her parental rights and signed the emergency authorization form which indicates parent pick up and walker; directed plaintiff to walk home from school prior to and including this incident; she did not meet him halfway or help him cross as she advised him that she would on the date of this incident; she did not properly instruct him how to safely cross a street, taught him to jaywalk in lieu of crossing as a marked crosswalk.

(Ex. 18 at 6-7.) Later, after Plaintiff filed a motion *in limine* to limit the District's argument on this topic, the District stipulated to the motion and made clear that it would not argue that Ms. Sanchez was negligent "in terms of her actions or inactions relating to [Fabian's] IEP." (*See* RT at 3:15-21.) Accordingly, the arguments concerning "exhaustion of administrative remedies," "acknowledgement of parental rights" and "signing the emergency form," and Ms. Sanchez's "direction" to Fabian to walk home are each waived. Plaintiff therefore addresses the other arguments.

### B. Pursuant to Education Code Section 44808, the District Had Sole Responsibility for Fabian's Well-Being at the Time He Was Injured; Consequently, Ms. Sanchez Cannot Have Been Comparatively Negligent as a Matter of Law

As an initial matter, and for the reasons stated above, because the District undertook a duty to provide transportation to Fabian, the District assumed a duty under Education Code section 44808 to supervise Fabian during his school-to-home transit. Educ. Code § 44808 ("In the event of such a specific undertaking, the district … ***shall be liable or responsible*** for the conduct or safety of any pupil only while such pupil is or ***should be*** under the immediate and direct supervision of an employee of such district…" (emphasis added)). The statute makes clear that supervision of Fabian from school

to home was the District's sole responsibility, and the District's expert agrees. (Bartz Depo. at 116:23-117:5 (testifying that "school staff," and not parents, have the responsibility of ensuring students with curb-to-curb make it onto the bus). Had the District complied with its duty, it would have provided Fabian with curb-to-curb transportation, and the arguments it asserts now against Ms. Sanchez concerning her "instructions," failure to "meet him halfway," and purportedly unlawful instruction to "jaywalk" would have no application. Consequently, because the District had the sole duty to keep Fabian "under [its] immediate and direct supervision" at the time he was injured, Ms. Sanchez cannot be held comparatively liable.

**C. None of the District's Positions Have Substantive Merit**

**1. Ms. Sanchez Only Instructed Fabian to Walk Home Because the District Refused to Bus Him**

To the extent that the District's first criticism—that Ms. Sanchez "directed plaintiff to walk home from school prior to and including this incident"—is not barred by the District's stipulation that Ms. Sanchez was not negligent for matters arising from the IEP, it still rings hollow. As discussed above, Ms. Sanchez did not make an affirmative, independent decision for Fabian to walk home. Instead, the District left her "with no choice" because of its application of its two-mile policy to Fabian. (Sanchez Depo. 31:14-32:2, 160:2-161:11.)

**2. Ms. Sanchez Adequately Instructed Fabian, While the District Did Not Provide Any Training for Him**

The District's argument that Ms. Sanchez inadequately trained Fabian to walk home only casts an even brighter light on the District's failure to equip Fabian with ***any*** skills to mitigate the danger it knew walking home alone presented to him. It goes without saying that Ms. Sanchez and the District do not have the same training resources available to them. Ms. Sanchez trained Fabian on the basics familiar to any parent (and any child born after 1980 whose parents purchased a Raffi album): look both ways before crossing, do not go until it is safe to do so, and do not run into the street. (Sanchez Dep. at 76:25-77:16; *Cf.* Raffi, "Biscuits in the Oven" (BABY BELUGA, Troubadour Records 1980) ("Gonna look both ways before I cross the street; left, right. Gonna look both ways before I cross the street; right, left.").) The District offers no showing why Ms. Sanchez's instruction to Fabian fell short

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of the standard reasonably expected of a parent.

That same standard cannot be applicable to the District, which employed special educators, psychologists, and principals, including on Fabian's IEP Team for 2016-17. Yet, despite knowing that Fabian was entitled to curb-to-curb transportation based upon its own assessment that it was necessary for his safety, the District did not train Fabian to walk home alone or have any communications with Ms. Sanchez about it. (Anderson Depo. at 50:15-51:16, 61:9-18.) It did not accompany Fabian to ensure that he could safely make the journey. (*Id.* at 35:19-25.) It instead started the walk with him by escorting him off-campus through a public crosswalk and sent him on his way. (*Id.* at 33:24-35:25, 37:17-39:21, 40:2-4.) While the District's criticism of Ms. Sanchez rings hollow, it clearly indicates that, even after improperly refusing to provide Fabian with the curb-to-curb transportation obligated by federal and state law, the District did not do ***anything*** to mitigate the danger it knew permitting Fabian to walk home unsupervised created.

**3. The District's "Jaywalking" Argument Ignores the Law and Evidence**

The District's next criticism—that Ms. Sanchez "taught [Fabian] to jaywalk in lieu of crossing as a marked crosswalk"—ignores the evidence and the law. As an initial matter, the District essentially criticizes the route that Fabian used to take home, implying that it was inherently dangerous as opposed to other alternatives and that Ms. Sanchez negligently selected it. That argument ignores the District's direct involvement in determining the route for Fabian. As Ms. Anderson testified, "walkers" were directed to two different gates depending whether "they need to get to the south side of the crosswalk" across Puesta Del Sol Drive at Academy Street. (Anderson Dep. at 38:11-25.) That placed Fabian on the south side of Puesta Del Sol, forcing him to cross a street to reach the "marked crosswalk" the District says he should have used or setting his path for home on the route he took. (*See* Ex. 24.) The District's criticisms of the route Fabian took home ignore the large role the District itself played in determining that route.

The District's suggestion that Ms. Sanchez "instructed" Fabian to do something "illegal" ("jaywalking") is false. Jaywalking has a real statutory meaning. Vehicle Code section 21955 prohibits "crossing the roadway at any place except in a crosswalk," but that is only "[b]etween adjacent intersections controlled by traffic signal devices," which are "any device … by which traffic

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is alternately directed to stop and proceed." Veh. Code § 445. Thus, section 21955 means what it says. *See People v. Blazina* (1976) 55 Cal. App. 3d Supp. 35, 37-38 (reversing jaywalking conviction where pedestrian crossed between a controlled intersection and an uncontrolled alley). It is not disputed that Fabian crossed Village Drive between its intersections with Puesta Del Sol and Eto Camino, both of which are uncontrolled intersections without marked crosswalks. Consequently, he was not "jaywalking," but instead crossing the street where he was entitled by law to do so.

Ironically, despite its efforts to cast aspersions on Ms. Sanchez's lawful mid-block crossing, the alternative the District suggests ***would violate the Vehicle Code***. In discovery, the District argues that Ms. Sanchez should have instructed Fabian to cross as a "marked crosswalk." The only one of those in that area of Village Drive was at Blue Canyon Road, north of both Fabian's home and Puesta Del Sol. (Ex. 24; Sanchez Dep. at 168:14-23.) Had Fabian followed the District's advice, he would have crossed Puesta Del Sol from the south side to the north side, walked northbound on the east side of Village Road to Blue Canyon, crossed Village, and then walked southbound on the west side of Village. (Ex. 24.) Village Drive does not—and did not—have sidewalks, meaning that Fabian would have walked on the roadway itself. (Sanchez Dep. at 89:14-17.)

The District's suggested route would have forced Fabian to ***repeatedly violate the Vehicle Code***. Specifically, Vehicle Code section 21956(a) requires a pedestrian walking "upon the roadway" to do so on "his or her left-hand edge"—in other words, to face traffic, not to walk against it. *See, e.g.*, *Myers v. King* (1969) 272 Cal. App. 2d 571, 577-78 ("[Vehicle Code section 21956's] purpose was to require pedestrians to keep on-coming traffic in view so that they may take such action as may be necessary under the circumstances for their own safety and also to protect them from the quiet approach or confusion that may be caused by the noise of a vehicle approaching from the rear."). The District's route involves two violations of this law: first, the northbound walk on the east side of Village Drive (where Fabian would have his back to northbound traffic), and second, the southbound walk on the west side (where Fabian would have his back to southbound traffic). It defies logic that a route requiring several Vehicle Code violations is a better choice than one conforming to the law.

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**4. The District's Refusal to Bus Fabian Placed Ms. Sanchez in a No-Win Situation Curb-to-Curb Transportation Would Have Eliminated**

Finally, the District argues that Ms. Sanchez's specific actions immediately prior to the collision—such as not meeting Fabian halfway or not crossing to the other side of the road—are nothing more than hindsight arguments that ignore the facts. The facts are that, at the time Fabian was struck, Ms. Sanchez was tending to Fabian's sister, and that, over the span of just a few seconds, Fabian entered the roadway and was struck by the car. Although "negligence is not to be judged exclusively by hindsight," *McLaughlin v. City of Los Angeles* (1943) 60 Cal. App. 2d 241, 244, that is precisely what the District attempts to do here. In essence, the District argues that Ms. Sanchez should have left her months-old daughter alone at home to meet Fabian halfway or immediately drop her needs and rush to Fabian. That argument depends upon the hindsight knowledge that, when attempting to cross the street on his own only moments after Ms. Sanchez first saw him, Fabian was struck and gravely injured by a car. In the moment, however, Ms. Sanchez was juggling two kids with entirely different and mutually exclusive needs: Fabian's sister, who was crying and needed a diaper change; and Fabian, who was about to cross Village Drive. That no-win situation is the fruit of the District's refusal to provide Fabian with curb-to-curb transportation, and the evidence does not suggest that Ms. Sanchez unreasonably acted in the moment (without the benefit of the hindsight the District seeks to apply). Simply put, the District fails to carry its burden of demonstrating Ms. Sanchez's negligence on this point, too.

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## VII. CONCLUSION

Based upon the foregoing, Plaintiff respectfully submits that the District is solely liable for Plaintiff's damages.

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