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November 22, 2016

Dr. David Rostetter, Independent Monitor
Office of the Independent Monitor
Modified Consent Decree
333 South Beaudry Avenue, 18th Floor
Los Angeles, California 90017

Re: October 13 and 14, 2016 ADA Site Visits

Dear Dr. Rostetter:

Thank you for your November 7, 2016 letter. District staff also appreciated the opportunity to meet and hold joint site visits on October 13 and 14, 2016, and found them productive as the District further explained its categorization approach to program access prior to and during the visits. This letter sets out our responses to the points raised in the November 7 letter, followed by an explanation of our views about our respective roles and responsibilities going forward.

1. Your statement that *comprehensive surveys will be carried out at all sites (groups 1-3). These findings will be the basis for determining barrier removal prioritization.*

   The Access Compliance Unit (ACU) will perform detailed surveys as appropriate for each school. Moving forward using the new model, the District has discussed with you that Category 1 schools would require a full and detailed survey of all spaces, as these schools would provide a high level of access. As we also discussed, Category 2 and 3 schools will undergo detailed surveys to identify barriers to be remediated to bring them up to the requirements (with details to be determined) for their respective categories.

   LAUSD is performing Initial Assessments (high level surveys) of District schools as a baseline to be used in determining what schools would be placed in each category. These surveys will not be the only basis for the Categorization of all LAUSD schools, but will inform the process of setting priorities.

2. Your statement that *any renovation and new construction must yield readily accessible conditions and meet all applicable codes. The ADA specifically states an*

intent not to apply lesser standards than are required under other federal, state, or local laws; therefore, the law which is the most stringent has precedence.

The District intends to follow all substantive and procedural requirements of all applicable laws, including the Americans with Disabilities Act and the California Building Code.

3. Your statement that *any access compliance work done previously must be surveyed to determine if it met applicable code at the time, and if not, these conditions must be corrected to meet the most current code.*

   Much of this work would already be included within the ACU survey. If this work is not already included, then this would be an issue to be addressed toward the end of the full effort of meeting the District's ADA Title II obligations. This ensures the District makes the most prudent use of public funds and utilizes the most cost effective methods in addressing this work.

4. Your statement that *all projects must include DSA close out and certification on previously done work (if applicable).*

   Please see the response to item 2 above.

5. Your statement that *all projects must have DSA close out and certification to be considered complete.*

   Please see the response to item 2 above.

You also stated your concern about different parts of facilities (in your example, an accessible route and a restroom) meeting different standards because of different alteration dates. However, this is not a concern under the ADA. Standards to be met are dictated by the date of alteration and there is a safe harbor for program accessibility purposes for elements that met the standard applicable when the space or element was constructed or altered, and the ADA regulation contemplates just these sorts of results. See 2010 ADA regulations, 28 CFR 35.150(b)(2)(i):

> *Safe harbor.* Elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 Standards or in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

See preamble explanation for this section:

> ... [B]y providing a safe harbor for elements already in compliance with the technical and scoping specifications in the 1991 Standards or UFAS, funding that would otherwise be spent on incremental changes and repeated retrofitting is freed up to be used toward increased entity-wide program access. Public entities may thereby make more efficient use of the resources available to them to ensure equal access to their services, programs, or activities for all individuals with disabilities.

We have had several discussions regarding the Standards and path of travel requirements. Your November 7, 2016 letter states, "The path of travel (POT) is a common component of work for all groups." As District staff has discussed with the OIM on several occasions, there appears to be confusion regarding POT and "accessible route" and the requirements/components for alterations (35.151) versus existing facilities (35.150). The definition you included in your November 7, 2016 letter is the POT definition but it is being used out of context. Alterations to the POT are required when a "primary function" area is altered, subject to the "disproportionality" limit (20% rule); and altering a primary function area does not trigger POT changes if the elements along the POT were altered and built in accordance with the standards applicable at the time (prior to March 15, 2012). Specifically, section 35.151(b)(4)(ii)(C) of the regulation states:

> Safe harbor. If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.

In addition, section 35.151 (b)(2) of the regulation specifically addresses this issue in the context of program accessibility:

> The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

Preamble explanation of this section states:

> In the Department's view, the commenters objecting to the path of travel exemption contained in § 35.151(b)(2) did not understand the intention behind the exemption. The exemption was not intended to eliminate any existing requirements related to accessibility for alterations undertaken in order to meet program access obligations under § 35.149 and § 35.150. **Rather, it was intended to ensure that covered entities did not apply the path of travel requirements in lieu of the overarching requirements**

> **in this Subpart that apply when making a facility accessible in order to comply with program accessibility.**

(Emphasis added.)

Of course, the District will make alterations along the route to an altered area if it is needed to provide program accessibility, but this is an obligation that stands apart from the path of travel requirement.

As to your concern about the authority of DSA and the IM to "exempt" items, the District will, as you suggest, address program access through this effort. In fact, that is the very purpose of the effort. However, it is not within the scope of the Independent Monitor's authority under the MCD to determine that something should or should not be exempted in this regard.

Similarly, your statements related to inclusion of staff parking in surveys are beyond the scope of the Modified Consent Decree (MCD). The purpose of the MCD is not to comply with the California Building Code or to ensure access by employees. The District agrees that as related to new construction, the CBC applies but not as to program access. Transition Plans and program access are about access to services, not to employment which is governed by Title I of the ADA. The 9th Circuit has clearly ruled that Title II does not cover employment. *Zimmerman v. State of Oregon Department of Justice*, 170 F.3d 1169 (9th Circuit 1999). If the employee parking lots were modified for the sake of program accessibility (e.g., if at times they are used by the public, parents, etc. and modifications are needed for program accessibility), then they would of course meet ADA Standards and the California requirements.

The District does intend to have a two-phase public input process. The first phase would involve obtaining early input from the public which is designed to shape the program, and help set priorities as it develops the Transition Plan. There will be a second opportunity for comments from the public once the programs are identified and priorities are set.

The District has worked to modify its approach to transition planning to align with priorities consistent with ADA Title II, Section 504 regulations and requirements while also attempting to address your concerns. However, at this point, the District respectfully requests that in your capacity as the Independent Monitor you monitor the District's efforts and not seek to direct or guide those efforts.

In order to ensure that the District's plan is comprehensive, timely, realistic and defensible, the Office of the General Counsel has obtained the required expertise by retaining a consultant who is considered one of the leading experts in the country in assisting agencies in performing Self-Evaluations and Transition Plans. The District is proceeding with meeting ADA Title II requirements in a manner that is consistent with what you acknowledged as your role in your March 25, 2016 letter wherein you stated,

> The OIM will soon be visiting more schools and reviewing the scopes of work submitted. Feedback on these efforts will be provided with a determination on whether each site meets the ADA requirements to ensure program accessibility.

> I have many more doubts about the District's plan, internal and external capacity, and organizational will for complying with the ADA. However, I do not believe that going back and forth on the plan's content will yield a better strategy, as it is apparent that the District believes in its plan and leadership to ensure compliance with law.
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> As I noted in the meeting, the Modified Consent Decree does not give the Independent Monitor (IM) the purview to approve the District's Transition Plan. However, it does charge me with determining, based upon my judgment, that the District has no systemic program accessibility problems that prevent substantial compliance with the program accessibility requirements of federal special education laws and regulations.
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> The implementation of a District-wide transition plan and compliance with the ADA cannot wait any longer. As I stated in the meeting, the District is free to implement any plan it deems fit to meet this obligation. I intend to monitor whatever plan the District chooses to implement and to determine if these efforts align with the letter and intent of the law to ensure compliance. Our agreement on an approach to achieve compliance is not necessary; however, the OIM will continue to monitor the District's independent progress utilizing national experts.

The MCD does not require that there be "agreement" regarding the District's plan or approach toward meeting its ADA Title II Transition Plan obligations. The MCD does require the District to come into "compliance with the Individuals with Disabilities Education Act (IDEA) and Section 504." Section 1.1. The MCD charges you as the federally-appointed court Independent Monitor with making a determination that will disengage the District from court oversight when compliance with the MCD is achieved. Specifically, as to access to facilities, Section 10 of the decree (paragraphs 76-78) requires that –

1. All new construction and renovation or repairs comply with Section 504 and the ADA.

2. The District enter into binding commitments to expend at least $67.5 million on accessibility renovations or repairs to existing school sites consistent with Section 504 and the ADA.[1]

3. The District establish a unit to address on-demand requests related to accessibility and expend up to $20 million for task orders related to requests for program accessibility. [2]

[1] The District met this requirement on August 10, 2011.

Section 17, para. 89, provides that (as to facilities) the MCD will terminate when the Independent Monitor certifies that in his judgment the District has met the special education-related outcomes, that the District has entered into binding commitments to spend the $67.5 million required by Section 10, and that the "District has no systemic program accessibility problems that prevent substantial compliance with the program accessibility requirements of federal special education laws and regulations."

The MCD focuses on the District's special education program and was entered into to complete the undertaking of bringing the District into compliance with the IDEA and Section 504 (section 1.1). Section 17 seems to suggest that there is a "program accessibility" aspect to the "special education" laws specifically stated in the MCD. In fact, Section 504 and the ADA, where the "program accessibility" requirements are found, are not "special education" laws. They are both nondiscrimination laws. Furthermore, the IDEA does not have a program accessibility requirement.

Over the past 25 months, the District has expended a great deal of District resources in an effort to address your views of the District's plans and your expectations regarding the District's satisfaction of its ADA Program Accessibility obligations. As a result of these efforts, the District has revised its draft Districtwide Transition Plan Updates several times as your expectations have changed. At times, those expectations have sought to impose conditions that exceed ADA Title II requirements. Throughout this time, much of the disagreement about the District's compliance has focused on your view of the District's commitment, capacity, and specificity of its plans. The District has provided more detail with each of the numerous successive draft updates and the issues have come to center more on the plan's specific approach, what program access requires, and a wide range of related issues. As suggested above, some of these issues (i.e., overseeing/checking DSA actions as to specific projects with regard to exemptions, close-out, and certifications, and requiring changes to employee areas) are not within the purview of the Independent Monitor's monitoring duties under the MCD.

As has been discussed with you, the District will be drawing from the San Francisco Unified School District model as a guide to create the LAUSD Transition Plan which will meet the requirements of the ADA, using an approach of Categorization for Program Access. This effort will demonstrate that the District has the capacity to comply with the transition plan requirements under federal regulations, as required for disengagement, by showing that it has a plan for complying with the federal requirements for transition plans by identifying barriers and including a schedule for the removal of those barriers.

As to the additional steps included on the last page of your letter, as part of its process, the District is actively identifying barriers to Program Accessibility and performing corrective actions as explained to the OIM in correspondence and during meetings in September and

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[2] The District met the requirement to establish a unit during the 2005-2006 school year; has met the requirement to expend up to $20 million for task orders related to requests for program accessibility with approved credit of $13,683,525 as stated in the Independent Monitor's Reports on the Progress and Effectiveness of the LAUSD's Implementation of the MCD. In addition, the District established the Rapid Access Program which is an ongoing program in place which continues responding to on-demand requests related to program accessibility.

October 2016. The process for determining programs will be included as part of the Transition Plan. In alignment with the schedule included in my September 22, 2016 letter, the District is looking forward to the OIM conducting periodic assessment of this work as set forth in items B.3-B.5 beginning May 1, 2017. The District has listed the OIM periodic assessment of this work as beginning in May 2017 because it will take until that time as it is set forth in the schedule to complete work so that an assessment is meaningful.

Improving program accessibility throughout the District is a top priority. To this end, the District's Board of Education has been approving projects to remove identified and prioritized barriers to program accessibility which have been and will continue to be proposed to the Board by the Facilities Services Division and Division of Special Education.

Sincerely,

D. Deneen Evans Cox
Associate General Counsel I

c: Superintendent Michelle King, David Holmquist, Mark Hovatter, Beth Kauffman, Robert Newman, Robert Myers, Catherine Blakemore