

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WINTERS JOINT UNIFIED SCHOOL  
DISTRICT AND DAVIS JOINT UNIFIED  
SCHOOL DISTRICT.

OAH CASE NO. 2015080259

**DECISION**

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 31, 2015, naming Winters Joint Unified School District (Winters) and Davis Joint Unified School District (Davis). On September 1, 2015, Student filed an amended complaint.

Administrative Law Judge Alexa J. Hohensee heard this matter in Winters, California on October 22, 23, and 27, 2015.

Student's Parent represented Student and attended the hearing on Student's behalf.

Jan E. Tomsy, Attorney at Law, represented Winters. Sharon Ayón, Director of Educational Services for Winters, attended the hearing on behalf of Winters.

Jennifer R. Fain, Attorney at Law, represented Davis. Patrick McGrew, Director of Special Education for Davis, attended the hearing on behalf of Davis.

At the close of the hearing, a continuance to November 16, 2015, was granted for filing of written closing arguments. By that day, the parties timely filed their briefs, the record was closed, and the matter was submitted for decision.

## ISSUES<sup>1</sup>

### *Issues against Davis:*

1. Did Davis deny Student a free appropriate public education by failing to, as part of its speech and language assessment in February 2014, (a) accurately report Student's scores on one test instrument or (b) make an appropriate recommendation based on that assessment?

2. Did Davis deny Student a FAPE by failing to, as part of its academic achievement assessment in January 2014, (a) accurately report Student's scores on one test instrument or (b) make an appropriate recommendation based on that assessment?

### *Issues against Winters:*

3. Did Winters fail to offer Student a FAPE in the February 14, 2014, individualized education program by failing to:

- a. Include present levels of academic achievement and functional performance;
- b. Include annual measurable goals relating to the special education services offered;
- c. Include objective strategies to evaluate progress toward goals;
- d. Include a description of how progress toward meeting annual goals would be measured;
- e. Include a statement of when progress reports would be provided;
- f. Consider less restrictive placement options than a special day class;

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- g. Offer an appropriate placement in the least restrictive environment; and
- h. Provide a means by which to measure whether or not Student would obtain educational benefit?

4. Did Winters fail to offer Student a FAPE in the February 13, 2015 IEP, completed on April 14, 2015, by failing to:

- a. Consider Student's privately obtained reading assessment;
- b. Offer Student one-to-one instruction as proposed by an independent assessor; and
- c. Include the name of the specific reading program that would be provided?

Student seeks tuition reimbursement, tutoring reimbursement, prospective tuition through high school, prospective educational tutoring, reimbursement and prospective mileage, compensatory education for speech and language services and cost for supplies and mailings. Winters raises as an affirmative defense that at all times alleged herein Student was unilaterally placed at a private school with no entitlement to a FAPE.

#### SUMMARY OF DECISION

For the reasons set forth below, all of Student's requests for relief are denied.

Davis accurately reported Student's scores in its assessments of Student's language and speech needs and Student's academic achievement, and the recommendations of the assessors were appropriate based on the results of those assessments. Parent's speculation concerning testing irregularities was unfounded, and convincingly outweighed by evidence that the assessments produced accurate information regarding Student's abilities, functioning, and educational needs.

As to Winters, its obligation to make an offer of FAPE to Student, a parentally placed private school student, was triggered by Parent's request for assessment for eligibility for special education and related services and her intention to enroll Student in public school at the time of the 2014 and 2015 IEP team meetings. In the February 14, 2014 IEP, Winters procedurally erred by failing to include annual measurable goals, objective strategies to evaluate progress toward goals, a description of how progress toward goals would be

measured, a statement of when progress reports would be provided or a means by which to measure whether or not Student was making progress. However, these errors did not deprive Student of a FAPE because they did not result in a loss of educational opportunity or constitute a serious infringement of Parent's opportunity to participate in the IEP process. The February 2014 IEP also included present levels of academic achievement and functional performance, and the IEP team considered a continuum of placement options and offered Student placement in the least restrictive environment. As to the IEP of February 13, 2015, as amended on April 14, 2015, the evidence did not establish that Parent had provided a copy of a private reading assessment to Student's February or April 2015 IEP teams for consideration, or that the team members had failed to consider the recommendation of the independent psychoeducational evaluation for individualized instruction. Winters was not required to include the name of a reading program in the IEP.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student was eight years old during the course of the hearing. Student was diagnosed with speech and language impairment at all times relevant and was eligible for special education and related services on that basis.

2. Student lived with his parents within the boundaries of Winters at all times relevant to this proceeding.

### *The 2012-2013 School Year*

3. For the 2012-2013 school year, Parents enrolled Student and his twin brother in kindergarten at St. James, a private Catholic school within the boundaries of Davis.

4. On November 11, 2012, Parent wrote a letter to Davis, requesting an assessment of Student. She indicated that Student's teacher believed Student had issues with fine motor skills and speech.

5. Lisa D'Angelo, a highly qualified speech pathologist with Davis, performed a language and speech assessment of Student in February 2013. Ms. D'Angelo is a licensed language and speech pathologist, with over 25 years of experience in evaluating and treating language and speech disorders and 15 years of experience in assessing and providing speech therapy to students with language and speech impairment. Ms. D'Angelo found that Student's expressive language skills were average, but he had significant deficits in receptive language, including recall and following complex age-level directions. Student's articulation was in the normal range, although his rate of speech was slow and indicated slower fine motor development.

6. Patricia Newman, a highly qualified Davis resource specialist with 20 years of experience in assessing academic achievement and multiple credentials in teaching children with mild, moderate and severe learning disabilities, performed an assessment of Student's academic readiness skills. Student's teacher at St. James reported to Ms. Newman that Student had trouble grasping concepts, did not seem to understand the connection between letters and sounds, and needed much one-to-one assistance in the classroom. Ms. Newman found that Student had average skills in letter and word identification and spelling, but below average scores in reading comprehension and math problems. Student's adaptive/daily living skills were developmentally appropriate.

7. On February 15, 2013, Davis convened an IEP team meeting to review the assessment results and determine if Student was eligible for special education. Parent, administrators from both Davis and Winters, Ms. D'Angelo and Ms. Newman were present.

8. Ms. D'Angelo and Ms. Newman presented their assessment results to the team.

9. The team determined that Student qualified for special education and related services in the category of speech and language impairment. Davis offered Student a service plan through the end of the 2012-2013 school year that included a total of eleven 30-minute sessions of language and speech services and three 30-minute sessions of specialized academic instruction. The team agreed to reconvene with additional Winters members prior to making a FAPE offer. Parent consented to the service plan on February 21, 2013.

10. The February 21, 2013 service plan consented to by Parent included the following language, which is part of Davis' service plan form:

Student has been found eligible for special education services. By signing this document, the parent/guardian(s) have indicated to the District of Residence (DOR) that they have chosen to unilaterally enroll or continue to enroll the student in a private school without the consent of, referral by, or at the expense of the District. It is further acknowledged that the DOR has offered to develop an IEP when the parent/guardian(s) express an interest in enrolling the student in public school. The parents understand in accordance with IDEA 2004, their rights to due process do not apply to the private school setting.

11. Parent submitted a request to Davis for an interdistrict transfer so that Student could attend a school in Davis, where St. James and Father's place of employment were located. Davis denied the application.

12. Parent hired a special education teacher to tutor Student after school, from March 2013 through December 2013. Parent did not believe that Student received any educational benefit from that tutoring.

*The 2013-2014 School Year*

JANUARY AND FEBRUARY 2014 ASSESSMENTS BY DAVIS

13. Parent enrolled Student in first grade at St. James for the 2013-2014 school year.

14. On September 30, 2013, Parent consented to a revised service plan by Davis that added services for the 2013-2014 school year through February 14, 2014 (one year from the initial service plan offer). The service plan included one 45-minute session of specialized academic instruction in the form of consultation to Student's teacher at St. James and fourteen 30-minute sessions of speech therapy. The speech services were to be provided on a Davis elementary school campus.

15. Student's first grade teacher reported to Parent that Student was struggling, and in winter 2013, Parent asked Davis to reassess Student.

16. In February 2014, Ms. D'Angelo performed a speech and language re-evaluation of Student to see if Student had made progress. She used several of the same instruments she had used in February 2013 to measure receptive and expressive language, understanding of basic concepts, articulation, pragmatics and oral motor skills. Although Student showed some improvement in following instructions, he also displayed a decline in recall, and did not understand concepts expected for his age and needed for education, such as right, left, backward, separated, pair, equal, other and skip. Although Student's articulation was within age limits, some sounds were not fully developed, and Student's speech was weak and slow. Ms. D'Angelo worried that Student's hoarse voice indicated vocal cord nodules. Ms. D'Angelo recommended speech therapy two times per week, and evaluations with an ear, nose and throat doctor and audiologist.

17. As part of the language and speech reassessment, Student completed portions of the Boehm 3 Test of Basic Concepts. Student used a red marker and Ms. D'Angelo wrote her observations in the margins of the booklet with a red pen. On a black and white copy provided to Parent, the odd pages of the booklet were lighter than the even pages, leading Parent to suspect that different writing instruments were used on various pages, and that Ms. D'Angelo had mixed up two students' responses and attributed them to Student.<sup>2</sup> Parent also believed that Ms. D'Angelo's identification of Student on the front page of the booklet by first name and last initial left open the possibility that another student with the same first name and last initial as Student might have completed the booklet. The original Boehm 3

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<sup>2</sup> Parent believed that Ms. D'Angelo's margin notes demonstrated a third writing instrument, and a possible third responder.

booklet was produced at hearing and the red markings were consistent throughout. Ms. D'Angelo testified persuasively and convincingly that the entire Boehm 3 booklet was completed by Student, and only Student, and that although she identified Student on the front page by first name and last initial, Student was also uniquely identified by his date of birth on the scoring page. Student presented no evidence to contradict Ms. D'Angelo's testimony.

18. In February 2014, Ms. Newman evaluated Student's academic abilities. Student had low average rote skills, such as word attack and one-syllable word recognition, but below average skills in math and reading comprehension. Student's teacher reported to Ms. Newman that Student could perform rote reading, but had difficulty grasping concepts and generalizing his skills to other activities. He was well-behaved and tried hard when he understood what was expected, but could be distracted and off-task, and often needed prompting and one-on-one assistance to complete academic tasks. Ms. Newman recommended that Student receive instruction in a small group setting, with intensive academic instruction throughout the day.

19. Ms. Newman shared an office with a colleague. The day before Student was to be assessed, Ms. Newman put a blank Woodcock-Johnson III Tests of Achievement booklet on her desk so it would be on hand for the assessment. Her colleague picked up the booklet to prepare for another assessment and filled in the name of a student and school, and checked the gender box to indicate the responder was a girl. However, before her colleague used the Woodcock-Johnson III booklet, Ms. Newman arrived at her office, took back the blank booklet, crossed-out the other student's name and school, and wrote Student's information on the front page. Ms. Newman testified persuasively and convincingly that the "test session observations checklist" section and the remainder of the booklet were completed during the assessment of Student, and did not contain any observations or responses of the other student. Ms. Newman conceded that she had failed to cross out the box checked "female." Ms. Newman's testimony that the test observations were completed appropriately was corroborated by the appearance of the Woodcock-Johnson III test protocol admitted into evidence. The crossed-out information on the other student was written by a different writing instrument (apparently in ink), and the "female" box was marked with a straight line. Student's name and school, and the remainder of the test observation information, was obviously written in a writing instrument different from the one first used (apparently in pencil), and all test observation boxes were marked with a checkmark, not a straight line.

20. Student's annual review IEP team meeting was held at Davis on February 14, 2014. The team members included Parent, Student's teacher at St. James, Ms. D'Angelo, Ms. Newman, and administrators from Davis and Winters.

21. Ms. D'Angelo and Ms. Newman reported the results of their reevaluations and their recommendations for language and speech services and intensive academic instruction throughout the day.

22. Student's teacher reported that Student was the lowest performer in her class, needed one-on-one assistance to decode words and displayed weak reading comprehension. Student also required frequent one-on-one instruction from his classroom teacher. Student's delayed receptive language skills, including attention and working memory deficits, manifested in "stuttering" behavior, that is, an inability to attend long enough to formulate and ask questions. Student's teacher was concerned about Student's frustration level and self-esteem, particularly when compared to his twin, who was not struggling at school. Student excelled at athletic activities and was well-liked by his classmates.

23. The Davis and Winters team members recommended that Student be taught in a special education classroom, or "special day class," for students with mild to moderate learning disabilities for 90 percent of his school day, with inclusion in general education in nonacademic activities for 10 percent of his school day.<sup>3</sup> The IEP offered Student 330 minutes daily of specialized academic instruction in a special day class, with individual and group speech therapy for 1500 minutes per year (50 30-minute sessions).<sup>4</sup> Davis offered a service plan identical to that of the prior year.

24. Parent was unprepared for, and overwhelmed by, the recommendation that Student be educated outside of a general education classroom. She believed that Student was doing fine in school, and wanted to keep him close to his twin. She arranged with the Winters' administrator to observe a special day class at Winters the following week, and the team deferred the writing of goals to address Student's identified needs in the areas of reading fluency, reading comprehension, math facts and language and speech until after the observation. The reconvened IEP team meeting was to take place at Winters.

25. On February 18, 2014, Parent observed a special day class at Winters for four hours. The teacher assigned to the classroom was out that day, and Parent observed a substitute teacher. Parent's impression was that the students in the classroom had less educational skills than Student, and that the classroom was not appropriate for a student of average intelligence. Parent believed that there were going to be two teachers in the classroom, but there were not, and she volunteered to walk the students to the lunch room because she did not see anyone else available.

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<sup>3</sup> Winters further designates its special day classes for students with mild to moderate disabilities as additional resource, or "RSP" classes.

<sup>4</sup> The February 14, 2014 IEP stated that Student was to receive 330 minutes of specialized academic instruction *weekly*, although all team members understood that the offer was for 330 minutes of specialized academic instruction *daily*, and the IEP indicated that Student would be placed in a special day class for 90 percent of the school day. No issue was raised with regard to this typographical error.

26. After her observation of the Winters' classroom, Parent contacted a Davis administrator and was informed that a special day class for students with mild to moderate disabilities was opening at Davis in fall 2014. Parent submitted an interdistrict transfer application for Student to Davis for the 2014-2015 school year.

27. On March 5, 2014, Parent contacted Davis and Winters and declined the February 14, 2014 IEP. At her request, it was handwritten onto the IEP that Parent had submitted an application for an interdistrict transfer to Davis, and would consent to an IEP for special education services only if Student was accepted into Davis in fall 2014.

28. On March 10, 2014, Parent consented to the service plan offered by Davis, with consultation to Student's private school teacher and fourteen 30-minute speech therapy sessions. The February 14, 2014 service plan contained the same printed language as the previous service plan.

29. In April 2014, Parent had Student assessed by Michel Johnson of Savvy Reader, a tutoring service. Ms. Johnson did not testify at the hearing, and her qualifications to teach reading skills were not established. However, the unauthenticated resume attached to her assessment of Student does not indicate that she possessed any general or special education teaching credentials. Ms. Johnson found that Student was a slow reader with moderate accuracy, who comprehended less than half of what he read. Ms. Johnson recommended that Student receive tutoring four days per week, using the Orton-Gillingham methodology to improve his decoding skills and reading fluency. In May of 2014, Student began tutoring sessions with Ms. Johnson three times per week.

30. In June 2014, Student's report card reflected that he consistently or usually met grade level expectations in all academic areas except math and handwriting. St. James promoted Student to the second grade.

31. Parent did not initially re-enroll Student at St. James for the 2014-2015 school year, as she was hoping that he would attend a special day class in Davis. However, when Davis denied the interdistrict transfer, Parent re-enrolled Student at St. James.

#### *The 2014-2015 School Year*

32. Student attended second grade at St. James for the 2014-2015 school year. Student struggled academically, particularly with math and reading comprehension. In winter 2014, Parent informed Davis that she disagreed with its assessments of Student and requested independent educational evaluations. Davis agreed to fund independent evaluations in the areas of psychoeducational, language and speech and assistive technology.

33. Caren Hill, an assistive technology specialist who did not testify at hearing, conducted an evaluation in January 2015 to see if Student would benefit from assistive technology. As part of that assessment, she observed Student in his private school

classroom, where he was often distracted, required one-on-one assistance from the teacher to complete in-class assignments, had difficulty with the language arts and vocabulary assignments, and did not participate in large or small group discussions. She observed that Student read ahead of the class, and appeared to see decoding as the goal, as opposed to sentence or passage comprehension. Ms. Hill recommended classroom supports and accommodations, such as extra time, and interactive software to help Student learn listening, reading and thinking skills, and to practice comprehension and following directions.

34. Debbie Fung, a speech language pathologist who did not testify at hearing, conducted an independent evaluation of Student's speech and language skills in January 2015. Her assessment results were consistent with those of Ms. D'Angelo. Ms. Fung recommended speech and language therapy to meet the increasing demands of the classroom and everyday situations.

35. Dr. Jennifer Grimes, an educational psychologist who did not testify at hearing, performed a psychoeducational assessment of Student in February 2015. Parent told Dr. Grimes that Student could read words aloud without knowing what he read, and was particularly concerned with Student's reading comprehension, long-term retention of information and math abilities.

36. Dr. Grimes found Student to have average cognitive ability and processing speed. Student scored in the average range in all academic areas, with low average scores in reading fluency, reading comprehension and math calculation. In general, Student obtained higher scores when given more time to respond. Dr. Grimes found no attention problems of clinical significance, and that Student had average, age-appropriate behavior.

#### FEBRUARY 13, 2015 IEP TEAM MEETING

37. An annual review IEP team meeting was convened at Davis on February 13, 2015. The IEP team included Parent, tutor Ms. Johnson, AT specialist Ms. Hill, speech pathologist Ms. D'Angelo, Winters' new special education director Sandra Ayón, and a school psychologist. Team members understood that the IEP review would be done in two parts, on different days, because the independent assessors had not completed their reports.

38. The school psychologist and Ms. D'Angelo reviewed Student's present levels with the team. Parent told the team that Student had perseverance, wanted to succeed, was good at athletics, was doing well at school, and that she wanted to be sure Student got the services he needed. Her concerns and information were noted on the IEP. The IEP team had Student's scores from Dr. Grimes and Ms. Fung, and although the reports were not yet completed, opined that Student continued to require specialized academic instruction throughout the school day and speech therapy.

39. The team adjourned the meeting, to be rescheduled after the final independent reports were received and the independent assessors were available to attend. At the end of the meeting, Parent handed the Davis administrator a folder containing (i) a handwritten letter, (ii) a typed letter, and (iii) a “written notice,” all dated February 13, 2015, the day of the IEP team meeting.

40. The handwritten letter stated, as relevant here, that Student was in an “academic crises” but should remain at St. James with after school tutoring by Ms. Johnson because Student was also doing “well in school.” Parent did not want Student’s program changed, as she believed that a special day class would not teach Student to read.

41. The typed letter requested that Davis fund Student’s placement at St. James and private tutoring at Davis’ expense. In this letter, Parent also requested an arrangement to maintain Student’s placement at St. James for multiple years into the future.

42. The written notice requested reimbursement for the 2014-2015 school year of \$9,125 for tutoring, \$958 for mileage to tutoring, and \$3,911 for tuition at St. James.

43. On February 16, 2015, Ms. Johnson prepared a report of Student’s tutoring progress. The evidence was conflicting on whether or not Parent provided that report to the February 13, or April 14, 2015 IEP teams. Parent initially testified that she had presented the report to the February 13, 2015 IEP team, but the report is dated February 16, 2015, three days after that meeting. In Student’s closing brief, he contends that Ms. D’Angelo asked for a progress report at the first meeting and Parent had it prepared for Ms. D’Angelo and given to her. However, Ms. D’Angelo was not asked about the report by Student during cross-examination, and both Ms. D’Angelo and Ms. Ayón testified persuasively and convincingly that they had not received a copy of Ms. Johnson’s report or seen it prior to the due process filing. Parent organized her exhibits out of chronological order, according to perceived relevance and relatedness, and was sometimes confused about which documents (including Ms. Johnson’s February 16, 2015 report) had been presented to the school districts and when. Many of the documents provided to the school districts had the date of receipt stamped on them, but there was no receipt stamp on Ms. Johnson’s report. Ms. D’Angelo and Ms. Ayón were more credible than Parent on this fact. Parent did not provide a copy of Ms. Johnson’s February 16, 2015 progress report to Davis or Winters, and the report was not seen by the February or April 2015 IEP teams.

44. Ms. Johnson had tutored Student three times per week since May 2014. Parent testified that Ms. Johnson followed the Orton-Gillingham reading program during tutoring sessions with Student, but Ms. Johnson’s reports do not indicate what reading programs or methodologies had been introduced to, or mastered by, Student, if any. The February 16, 2015 progress report charted Student’s literacy skills, and although Student’s reading fluency had increased to grade level, his already low reading comprehension scores had fallen by

half, to 24 percent. Ms. Johnson was pleased with the increased reading speed, but conceded that Student's comprehension dropped as reading demands increased. She recommended reading intervention three to four times per week, to work on vocabulary, grammar, and comprehension.

45. On March 30, 2015, Parent sent another letter to Davis requesting stay put and reimbursement for Student's tuition and tutoring, and requesting that Student stay at St. James because he had made good progress there.

#### APRIL 14, 2015 IEP TEAM MEETING

46. The IEP team reconvened on April 14, 2015. All team members from the February 2015 meeting were present, except Ms. Johnson. Additional team members included Dr. Grimes, Ms. Fung, the principal of St. James, and Student's teacher at St. James.

47. Parent requested that a summary in the notes from the February 13, 2015 IEP team meeting be corrected to reflect that Parent did not decline a service plan from Davis for the 2014-2015 school year. Student had not attended speech services at Davis because they were offered at a time that conflicted with Student's tutoring and physical education. Parent's clarification was written into the IEP notes.

48. Student's teacher reported to the team that Student read aloud well, but struggled with comprehension. Student responded well to one-on-one coaxing and follow-up questions, although his responses were often directed only to the last thing he had heard. Student needed to work one-on-one with the teacher's aide to do grade level math, and needed a chart to do addition and subtraction, although he did fine with that support. Student's handwriting was improving, he was happy, and had many friends.

49. Ms. Fung presented her speech and language evaluation to the team. Overall, she opined that Student had delayed articulation and moderate to severe impairments in auditory comprehension and expressive vocabulary. She recommended language and speech services.

50. Ms. D'Angelo presented proposed goals to address the areas of need identified in Ms. Fung's report to the team. These included goals for receptive language (following grade level directions), expressive language (produce complete sentences with appropriate syntax), and speech (produce all age level sounds in conversation). These goals appropriately addressed Student's speech and language needs and were adopted by the team. Ms. D'Angelo recommended that Student receive two 30-minute sessions of speech therapy per week, with individual and group sessions, and in-class collaboration for 30 minutes per quarter between Student's district speech pathologist and classroom teacher to ensure

carryover of Student's language and speech goals. These services were appropriate to support Student's language and speech goals. Neither Ms. Fung nor Parent disagreed with the proposed goals or the recommended level of speech therapy, and the team adopted Ms. D'Angelo's service recommendations.

51. Ms. Hill presented her assistive technology evaluation to the team. She opined that Student's academic difficulties were due to auditory/language processing issues and recommended that Student be given extra time on tests and assignments, assistance on assignments, and opportunities for repetition of new material. Ms. Hill recommended software for learning math, but had no familiarity with, or opinion on, a software program that Parent inquired about. The team adopted the classroom accommodations recommended by Ms. Hill.

52. Dr. Grimes presented her psychoeducational report to the team. She opined that Student had average cognitive ability, with weakness in auditory memory, oral vocabulary, phonemic awareness, and fluency in reading, writing, and math. Dr. Grimes recommended that Student receive continued support, accommodations, modifications, and services, including tutoring to develop phonemic awareness.

53. The school psychologist presented proposed academic goals drafted from Dr. Grimes' report, in subtraction, reading, writing, and multiplication. Parent did not raise any problems with the proposed academic goals, and they were adopted by the team.

54. The team considered various placement options for Student. The IEP team members from Davis and Winters determined that the least restrictive environment for Student was a special day class for students with mild to moderate learning disabilities, where Student would receive intensive academic instruction in a small classroom setting with a credentialed special education teacher for 90 percent of his school day. The remaining 10 percent of his school day would be in general education for nonacademic activities, such as recess and physical education. The team was particularly concerned that Student was falling behind in his current general education classroom and would fall further behind as educational demands increased. The special day class offered continuous intensive instruction throughout the day, including repetition of material, checks for understanding, small group and one-to-one instruction, and specialized instruction designed to meet the specific needs of each child in the classroom.

55. Parent requested time to think over Winters' FAPE offer. She requested that the Davis administrator discuss her request for reimbursement in her March 30, 2015 letter, but the Davis administrator referred her to Ms. Ayón, Winters' representative, for a response to her letter. Parent did not pursue the matter further at that team meeting. Parent did not consent to the February 13, 2015 IEP, as amended on April 14, 2015.

56. On May 6, 2015, Winters responded to Parent's demands to Davis, and declined to pay for Student's tuition at St. James or his tutoring expenses.

57. On September 31, 2015, Parent filed a request for due process hearing against Davis and Winters.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA*<sup>5</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;<sup>6</sup> Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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<sup>5</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>6</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

#### *Issue 1: Speech and Language Assessment by Davis*

5. Student contends that the language and speech assessment conducted by Davis in February 2014 was inappropriate because (a) one of the test booklets did not identify Student by last name, and (b) the assessor recommended that Student be placed in the restrictive environment of a special day class. Davis contends that the assessment was appropriately administered and the assessment report contained accurate and authentic information about Student.

6. A state or local educational agency must conduct a full and individual initial assessment before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.301; Ed. Code, § 56320.) After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

7. Generally, the district in which a student resides has the obligation to assess the student and make an offer of a FAPE in an IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, §§ 56300, 56321, 56344, subd. (c), 48200 and 56028.) However, this rule varies if the student is in the category of pupils known as “private school children with disabilities,” which refers to children with disabilities enrolled by parents in private schools or facilities. (Ed. Code, § 56170.) In that circumstance, the district in which the private school is located is charged with assessing the child and holding an IEP team meeting to consider the assessment and to determine whether the child is eligible for special education. (Analysis of Comments and Changes to 2006 IDEA part B Regulations, 71 Fed.Reg. 46591, 46593 (Aug. 14, 2006) (*Comments to Regulations*).) If the IEP team determines that the child is eligible for special education, then the school district where the child resides must convene an IEP team meeting to offer a FAPE to the child. (34 C.F.R. § 300.201; *Comments to Regulations, supra*, at 46593.)

8. The responsible state or local educational agency must conduct a full and individual initial assessment before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.301; Ed. Code, § 56320.) After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1)).

9. If the parent of a parentally placed child disagrees with an evaluation by the local educational agency in which the private school is located, the parent may request an independent educational evaluation at public expense from that agency. (*Comments to Regulations, supra*, at 46597.)

10. A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) It must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability

category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii).)

11. Student argues that because Student was not identified by his full last name on the Boehm 3 test booklet, and the ink lines varied from page to page, some of the test results were attributable to another child. However, Ms. D'Angelo testified persuasively and convincingly that Student, and only Student, completed the Boehm 3 test booklet in evidence. Student was the only student on her assessment caseload with Student's first name and last initial. Student's birth date was written on the last page of the booklet, where Student's responses were scored taking his age into account, confirming his identity. Ms. D'Angelo recalled that, near the end of the test, Student began outlining his picture choice responses rather than circling them, which was consistent with the outlined responses at the back of the booklet in evidence. On the color copy of the booklet admitted into evidence, it is apparent that a single red marker was used to circle responses. Parent was not present during testing. Student's argument that his first name and initial on the booklet, rather than his full name, and the varying line thicknesses of the circled responses raise an inference that the test was completed by another, possibly multiple, students was speculative and unsupported. Rather, the weight of the evidence established that the Boehm 3 test booklet was completed by Student, and only Student.

12. The evidence did not establish that Ms. D'Angelo's opinion regarding Student's needs, and the least restrictive environment in which to meet those needs, was inappropriate. Student presented no evidence to dispute Ms. D'Angelo's qualifications and competency to conduct the February 2014 language and speech reassessment, or the results of that assessment. Ms. D'Angelo testified persuasively that the results of the independent educational evaluation of Student's language and speech by Ms. Fung were consistent with her own findings. Ms. D'Angelo's report included her determinations that Student needed special education and related services, based upon Student's updated scores showing a decline in recall, a lack of concepts expected at his age and needed for education, delayed articulation development, and weak and slow speech strength. She observed Student during conversation regarding educational concepts, and determined that Student's decline in receptive and expressive language skills had a greater impact on Student's academic and social functioning as he became older. Ms. D'Angelo was an extremely well qualified language and speech pathologist who had worked with Student during speech therapy sessions pursuant to the Davis service plan over a period of two years, and her opinions of Student's needs, and where those needs could best be met, were given great weight. Ms. D'Angelo's opinion, based upon her February 2014 assessment and professional judgment, that a special day class would best meet Student's language and speech needs in the 2013-2014 and 2014-2015 school years was uncontradicted and persuasive.

13. More importantly, as discussed at Issues 3 and 4 below, the offer of FAPE came from Winters as Student's district of residence, not Davis, whose responsibility as the district of location for Student's private school was limited to assessment and a determination of Student's eligibility for special education and related services. The appropriateness of Ms. D'Angelo's assessment and recommendations on behalf of Davis was not impacted by the placement subsequently offered by Winters.

14. Student did not meet his burden of establishing by a preponderance of the evidence that the language and speech assessment performed by Davis in February 2014, or Ms. D'Angelo's recommendations based on that assessment, were inappropriate.

*Issue 2: Academic Achievement Assessment by Davis*

15. Student contends that the academic achievement assessment conducted by Ms. Newman in January 2014 was not appropriate because: (a) some or all of the test booklet observations and responses are attributable to another student, and (b) the assessor recommended that Student be placed in the restrictive environment of a special day class. District contends that the assessment was appropriately administered and the assessment report contained accurate and authentic information about Student.

16. Legal Conclusions 6 through 10 are incorporated herein by reference.

17. Student argues that a different writing instrument was used to complete the "test observation" section of the Woodcock Johnson III booklet than was used to complete the rest of the test booklet, indicating that the test observations are of a different child than Student. However, as found at Factual Finding 19, the writing by another examiner was limited to another child's name and school, and a line through the box for "female." Ms. Newman's testimony concerning how the other child's name, school, and gender were written onto the booklet, and then crossed out before the Woodcock Johnson III was administered to Student, was convincing and persuasive, as was her testimony that the assessor observations were her own and the responses those of Student. Parent was not present when Student completed the Woodcock Johnson III. Student's argument that another examiner had completed any portion of the booklet during the evaluation of another child was speculative and unsupported. The weight of the evidence established that Ms. Newman and only Ms. Newman had completed the test observation and scoring sections of the booklet, during her evaluation of Student.

18. The evidence did not establish that Ms. Newman's opinion regarding Student's needs, and the least restrictive environment in which to meet those needs, was inappropriate. Ms. Newman was an extremely well-qualified provider of specialized

academic instruction in reading to students with mild to moderate and moderate to severe learning disabilities, and was familiar with Student. Her opinions of Student's academic needs, and where those needs could best be met, were given great weight. Ms. Newman testified persuasively that the results of the academic achievement portion of the independent psychoeducational evaluation by Dr. Grimes were consistent with her own findings. Ms. Newman's findings and observations were also consistent with the reports of Student's teacher, that Student was performing in the average range in all areas except reading fluency, reading comprehension, math and writing. Ms. Newman had tested Student on two occasions and participated in two IEP team meetings for Student by February 2014, so was familiar with Student's needs and the views of multiple professionals when she opined to the team on Student's need for specialized academic instruction in a small classroom setting. Student presented no evidence to dispute Ms. Newman's qualifications and competency to conduct the January 2014 academic achievement reassessment, or the results of that assessment. Student did not call another credentialed special education teacher, psychologist or reading specialist to contradict Ms. Newman's well-qualified opinions.

19. Ms. Newman's opinion that a special day class would best meet Student's needs in the 2013-2014 and 2014-2015 school years was persuasive and uncontradicted. Ms. Newman determined that Student needed special education and related services, based upon Student's updated scores which showed that Student's skill acquisition was not keeping pace with the general education curriculum. She observed him in his classroom setting at St. James, and reported that he was not able to generalize his rote spelling and decoding skills to other activities, looked to peers for answers rather than attempting work himself, and would not request help or draw attention to himself. Ms. Newman noted that many academic tasks were language-based, and Student's receptive and expressive language delays contributed to his difficulties with increased academic demands. Her opinions were well-reasoned and supported by Student's academic achievement scores, teacher reports, her observations of Student in the general education setting and the input of the February 2014 IEP team members. The weight of the evidence established that Ms. Newman's assessment obtained an accurate picture of Student's academic strengths and weaknesses, and her professional opinions on the least restrictive environment in which Student's academic needs could be met was appropriate.

20. As discussed at Issue 1, above, the placement included in Winters' offer of FAPE did not render Ms. Newman's assessment of Student's academic needs, or her recommendations based on the results of that assessment, inappropriate.

21. Student did not meet his burden of establishing by a preponderance of the evidence that the academic achievement assessment performed by Ms. Newman in January 2014, or her recommendations based on that assessment, were inappropriate .

*Issues 3 and 4: Winters's Offer of FAPE*

WINTERS' AFFIRMATIVE DEFENSE

22. Winters asserts as an affirmative defense that Student was not entitled to a FAPE for the 2013-2014 and 2014-2015 school years from his district of residence because Parent parentally placed him in a private school in another district and had no intention to enroll Student in a public school program.

23. In 2013, Student was in a category of pupils known as "private school children with disabilities" that refers to children with disabilities enrolled by parents in private schools or facilities. (Ed. Code, § 56170.) The basic rule for such pupils is that the school district, or local educational agency, where the private school is located, rather than the district of residence, is responsible for providing the parentally placed private school child with special education services. (Ed. Code, § 56174.5, subd. (a).)

24. Winters argues that Parent's consent to a service plan clearly indicated an intention not to enroll Student in a public school program and resulted in a waiver of Winters' obligation to offer a FAPE to Student. The argument is unpersuasive.

25. In *Memo 00-14, Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools* (OSEP, May 4, 2000) (*Memo 00-14*), the U.S. Office of Special Education Programs provided specific guidance with regard to the obligation of public agencies to offer FAPE to parentally placed private school children.

26. In *Memo 00-14*, OSEP noted that when children with disabilities were placed at private schools by their parents with no intention of enrolling their children in public schools, a FAPE from the public program or placement was not an issue, and the individual child had no entitlement to special education and services.

27. However, OSEP interpreted the regulations regarding parentally placed children to allow that, when children with disabilities were placed at private school by their parents without the consent of, or referral by, the public agency because the parents believed that the public agency failed to offer their child a FAPE, "If a hearing officer or court agrees with the parent and finds that there has been a denial of FAPE, the parents may be able to obtain tuition reimbursement for part or all of the cost of their unilateral private school placement. (*Memo 00-14*, citing former 34 C.F.R. 300.403(c).)

28. OSEP explained that if a determination is made that a child needs special education and related services, the general rule is that an IEP must be developed for the child, with one important exception. If the parents make clear their intention to enroll their child at a private school and that they are not interested in a public school program or

placement for their child, the public agency need not develop an IEP for the child. (*Memo 00-14, ibid.*) Therefore, a parent's unilateral placement of a child eligible for special education and related services in a private school does not, as a matter of law, establish that the child is not entitled to a FAPE. Rather, whether the school district of residence is required to offer the Student a FAPE is dependent upon a fact-specific inquiry into whether the parents intended to enroll their child in a public school.

29. This interpretation was confirmed in recent guidance from the U.S. Office of Special Education and Rehabilitative Services for situations, such as Student's, in which the child attends private school in a district other than his or her district of residence:

If a determination is made through the child find process by the [local educational agency] where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private...school located in another [local educational agency], the [local educational agency] where the child resides is not required to make FAPE available to the child. (*Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, 111 LRP 32532 (OSERS April 1, 2011).<sup>7</sup>)

30. Winters argues that a parent's acceptance of a service plan is a clear indication that the parent intended to keep the student in private school. However, consent to a service plan is only one factor to consider in determining a parent's intentions, and the factual inquiry does not end upon evidence of a service plan.

31. Winters argues that Parent had no intention of enrolling Student in a public program at the time of the February 2014 and February 2015 IEP team meetings, citing Student's enrollment in a private school since kindergarten, Parent's consent to service plans from Davis to support Student in his private school setting, and the language of the service plans that by consenting to Davis' service plans Student would not be receiving a FAPE from Winters. Winters also argues that Parent expressly declined special education and related services from Winters on March 5, 2014, and enrolled Student at St. James for the 2014-2015 school year when the interdistrict transfer was denied rather than seeking services from Winters. Winters contends that Parent's requested reimbursement for private school tuition and tutoring on February 13, 2015, which included *prospective* tuition and tutoring expenses, was a predetermined rejection of any public school program.

32. However, other evidence more persuasively established that Parent did intend to enroll Student in public school, and continued Student's enrollment at St. James – at least past the end of the 2013-2014 school year – only because she felt that the placement offered

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<sup>7</sup> This OSERS guidance interprets the current regulations at 34 C.F.R. § 300.129, *et seq.*, effective October 13, 2006.

by Winters was not appropriate. Parent exhibited an interest in a public school placement as early as 2013, when she initially filed an application for an interdistrict transfer to Davis. Parent again showed an interest in a public school placement after the February 14, 2014 IEP team meeting, when she promptly arranged to view a special day class at Waggoner Elementary School just days after the special day class placement offer. Although Parent determined from her observation that the special day class at Winters was not appropriate for Student, she contacted Davis and expressed an interest in a new special day class scheduled to open on a Davis elementary school campus in fall 2014. Parent promptly renewed Student's application for an interdistrict transfer to Davis. Parent expressly requested that her signature declining the placement and services offered in the February 14, 2014 IEP include handwritten language explaining that she declined services from Winters, but was applying for an interdistrict transfer and would accept special education services from Davis in fall 2014. Parent did not renew Student's enrollment at St. James for fall 2014 in anticipation of his enrollment in a special day class at Davis. Each of these actions indicated a willingness and intention to enroll Student in a public school program for the 2014-2015 school year, and therefore Winters was obligated to offer Student a FAPE.

33. The weight of the evidence established that Parent expressed an intention at the February 14, 2014 IEP team meeting to enroll Student in a public school program, triggering Winters' obligation to offer Student a FAPE. The weight of the evidence also established that Parent declined to consent to the February 14, 2014 IEP a few weeks after the IEP team meeting because she believed that the placement offered by Winters was not appropriate. Once Student was found eligible for special education and related services at the February 14, 2014 IEP team meeting, Winters was obligated to offer Student a FAPE. Parent's subsequent determination that the IEP did not offer Student a FAPE did not retroactively absolve Winters' of its obligation to make an appropriate offer, and Winters' affirmative defense fails.

34. Thus, Winters was obligated to offer Student a FAPE. As discussed below, it complied with its obligations to do so.

#### ISSUES 3(a)-3(e) AND 3(h): PRESENT LEVELS, GOALS AND PROGRESS REPORTS

35. Student contends that the February 14, 2014 IEP is fatally deficient because it did not include (a) present levels of academic achievement and functional performance; (b) annual measurable goals; (c) objective strategies to evaluate progress towards goals; (d) a description of how progress towards annual goals would be measured; (e) a statement of when progress reports would be provided; or (h) a means by which it would be measured whether Student was receiving educational benefit. Winters stands by its affirmative defense on these issues.

36. Legal Conclusions 23-29, 33, 50-53 and 55 are incorporated herein by reference.

37. An annual IEP must contain a statement of the child's present levels of academic achievement and functional performance, including the manner in which the child's disability affects involvement and progress in the general education curriculum. (34 C.F.R. 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1)(a).) It must also contain measurable annual goals designed to: (1) meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general curriculum; and (2) meet each of the student's other educational needs that result from the student's disability. (34 C.F.R. 300.320(a)(2)(i)(A) and (B); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

38. In developing the IEP, the IEP team shall consider the strengths of the student, the student's concerns for enhancing his or her education, the results of the initial evaluation or most recent evaluation of the student, and the academic, functional, and developmental needs of the student. (20 U.S.C. § 1414(d)(3)(A).) The IEP must include: a statement of the present performance of the pupil; a statement of measurable annual goals designed to meet the pupil's needs that result from the disability; a description of the manner in which progress of the pupil towards meeting the annual goals will be measured; the specific services to be provided; the extent to which the student can participate in regular educational programs; the projected initiation date and anticipated duration; and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2),(3); Ed. Code, § 56345, subds. (a)(2), (3).)

39. The weight of the evidence established that the February 14, 2014 IEP included Student's present levels of academic achievement and performance. That IEP set out Student's present levels of both academic achievement and functional performance, based upon the assessments by Davis and the report of Student's first grade teacher. As discussed at Issues 1 and 2, the assessment results and the presentations of Ms. D'Angelo and Ms. Newman, were consistent with multiple sources of information, and there was no conflicting evidence to show that the information included in the IEP was inaccurate. Rather, the IEP correctly reported Student's present levels of academic achievement and functional performance, and correctly identified Student's areas of need as reading fluency, math facts, and speech.

40. The February 14, 2014 IEP also specified the intensive academic instruction and speech therapy services necessary to meet Student's identified educational needs and provide him with educational benefit, the dates those services would be provided, the frequency and duration of the services, and the extent to which Student would participate in general education. However, due to Winters' decision to defer drafting goals until another meeting with Winters' teachers, the IEP failed to include a statement of measurable annual goals, a description of how progress on those goals would be measured, or procedures for determining whether the instructional objectives or educational benefit were achieved, constituting a procedural error.

41. Despite these procedural errors, the IDEA requires that a due process decision be based upon substantive grounds when determining whether a child has received a FAPE. A procedural violation does not occur unless the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f)(2)); *Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

42. Here, the weight of the evidence did not establish that the lack of goals, or of measurements of progress on goals or instructional objectives, resulted in a loss of educational opportunity for Student. As discussed at Issues 3(f) and (g), all of the evidence consistently showed that Student required intensive instructional intervention throughout the school day, including specialized academic instruction in reading, math, and language and speech services, and Student provided no persuasive evidence that he required more or different services than offered in the February 14, 2014 IEP. The opinions of Ms. D'Angelo and Ms. Newman, which were persuasive and uncontradicted, established that the services offered, and a special day class setting, would have appropriately addressed Student's educational needs in reading fluency, reading comprehension, math, receptive language, expressive language, pragmatics and articulation, and would have provided Student with a FAPE.

43. Similarly, the weight of the evidence did not establish that the lack of goals, or of measurements of progress on goals or instructional objectives, constituted a serious infringement of Parent's opportunity to participate in the IEP process. Parent was at the February 14, 2014 IEP team meeting, and participated in the discussion and development of Student's IEP. Parent made no objection to the lack of goals, and instead wanted to immediately observe a special day class, which Winters arranged mere days after the meeting. The February 14, 2014 IEP team expressly contemplated reconvening the meeting to draft measurable annual goals, components of which would include measures of progress and procedures for determining if instructional objectives were achieved, preferably in fall 2014 with Student's teachers in place. However, before a second meeting could be arranged, Parent informed Winters on March 5, 2014 that she would not consent to special education and related services from any school district but Davis. The absence of goals did not delay or stop Parent from seeking an interdistrict transfer into Davis' special day class for the same specialized academic instruction and speech services. This evidence established that the failure of Winters to include annual goals, objective strategies to evaluate progress towards those goals, a description of how progress would be measured, when progress reports would be provided, or the means by which educational benefit would be measured in the IEP at the February 2014 meeting did not constitute a serious infringement of Parent's opportunity to participate in the IEP process.

44. The IEP of February 14, 2014, did include present levels of academic achievement and functional performance, but lacked annual measurable goals, objective strategies to evaluate progress towards goals, a description of how progress towards annual goals would be measured, a statement of when progress reports would be provided, or a means by which it would be measured whether Student was receiving educational benefit, which constituted a procedural error. However, Student did not meet his burden of proving by a preponderance of the evidence that the procedural errors in the February 14, 2014 IEP impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or deprived Student of educational benefits.

#### ISSUES 3(f) AND 3(g): LEAST RESTRICTIVE ENVIRONMENT

45. Student contends that Winters denied Student a FAPE at the February 14, 2014 IEP team meeting by failing to consider a continuum of placement options and offering a placement that was not the least restrictive environment. Winters stands on its affirmative defense on these issues.

46. Legal Conclusions 23-29 and 33 are incorporated herein by reference.

47. In determining the educational placement of a child with a disability, a school district must ensure that, in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs, and that the child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116(d) and (e).)

48. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of general education was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

49. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options.<sup>8</sup> (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

50. As to the first *Rachel H.* factor, the weight of the evidence did not establish that Student would receive educational benefit from a regular education placement. Student's private school teachers had consistently referred Student to be assessed for special education because he was struggling academically and required constant individualized instruction to keep up with his classmates. By February 2014, Student was developing a stutter and missing basic concepts necessary to perform in a general education classroom. Student's scores upon reassessment for language and speech and academic achievement showed declining performance, and the educational professionals on Student's February 2014 IEP team were justifiably concerned that Student would fall further behind as he progressed through elementary school, particularly due to reading comprehension deficits, once the general education curriculum advanced from learning to read to reading to learn.

51. The team considered the less restrictive general education environment, but as Ms. D'Angelo testified so persuasively, Student's receptive and expressive language impairment was becoming more severe over time and more obvious as he became older, and Student needed more support than a general education curriculum and tutoring could provide. Even with the support of the Orton-Gillingham tutoring, Student was not successful in general education, and a reading program would not address Student's inability to follow directions, support the expressive language development necessary for writing, or provide the necessary support in other academic areas.

52. As to the second *Rachel H.* factor, the nonacademic benefits of a general education placement, the February 2014 IEP team recognized that Student was adept at physical activities and interacted well socially with his general education peers. While this factor was not enough to warrant full-time placement in a general education classroom, where Student was falling further and further behind academically, the team did include 10 percent of Student's school day in nonacademic general education activities, such as recess and physical education, where he could excel in interactions with his peers.

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<sup>8</sup> "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

53. The third *Rachel H.* factor also weighed against a general education placement. Student had an adverse effect on the teacher and children in the regular classroom. Student needed constant attention and individualized instruction, taking the teacher and her aide away from their work with the other students in the classroom. There was no evidence that the fourth *Rachel H.* factor impacted the placement decision, as Winters willingly offered to mainstream student in general education for the nonacademic portion of his school day.

54. Applying the *Rachel H.* factors to the facts, Student could not have been satisfactorily educated solely in a regular education environment. Therefore, the least restrictive environment analysis requires a determination of whether Student was to be mainstreamed to the maximum extent that is appropriate per *Daniel R.R.*

55. The evidence showed that a special day class for students with mild to moderate learning disabilities, would provide Student with the intensive academic intervention, including repetition of material, small group learning and opportunities to practice language skills he needed, which a general education class would not. As discussed above, Student needed intensive academic and language skills intervention that was not available in age-appropriate regular classrooms, even with modifications in the general education curriculum or the Orton-Gillingham tutoring preferred by Parent. In his general education classroom, Student was distracted, exhibited off-task behavior, had difficulty grasping class instruction, was unable or unwilling to ask for help or draw attention to himself, and had developed a stutter. Ms. Newman persuasively opined that the specific academic instruction and small group instruction of a special day class would meet Student's needs and alleviate some of those behaviors. She also persuasively opined, without expert contradiction, that inclusion in general education for nonacademic activities for 10 percent of Student's school day was the least amount of time that Student could be outside of the specialized academic instruction of a special day class or speech therapy if his academic and language and speech needs were to be met. Ms. D'Angelo testified persuasively, and without expert contradiction, that Student needed to leave the classroom for speech services to be provided individually and in a small group, away from the full classroom environment, and that Student could not be mainstreamed during that time. Accordingly, the weight of the evidence established that placement in a special day class was the least restrictive environment for Student, and that the February 2014 IEP mainstreamed Student to the maximum extent possible by placing him in general education for nonacademic activities for 10 percent of his school day.

56. The evidence demonstrated that the February and April 2015 IEP teams considered Parent's concerns and information on her child, and provided for mainstreaming opportunities for 10 percent of Student's school day during nonacademic activities such as recess and physical education, in harmony with Parent's report that Student excelled at athletic activities and interacted well socially with his peers. A school district has the right to select the program offered, as long as the program is able to meet the student's needs, and the

district is ultimately responsible for ensuring that FAPE is offered. (*Letter to Richards*, 55 IDELR 107 (OSEP 2010).) The IDEA does not empower parents to make unilateral decisions about programs funded by the public. No one factor is determinative in placement, and parental preference cannot be either the sole or predominant factor in placement decisions. (See, e.g., *Letter to Burton*, 17 IDELR 1182 (OSERS 1991); *Letter to Anonymous*, 21 IDELR 674 (OSEP) 1994); *Letter to Bina*, 18 IDELR 582 (OSERS 1991).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) The February 13, 2015 IEP, as amended on April 14, 2015, offered offers Student a FAPE in the least restrictive environment.

57. Student did not meet his burden of proving by a preponderance of the evidence that the February 14, 2014 IEP failed to offer Student an appropriate placement in the least restrictive environment.

#### ISSUES 4(a)-(c): READING SUPPORTS

58. Student contends that Winters failed to offer him a FAPE in the February 13, 2015 IEP, completed on April 14, 2015, because the IEP team did not (a) consider Student's privately obtained reading assessment, (b) include the name of the specific reading program that would be provided to Student, or (c) offer Student one-to-one instruction as recommended by Dr. Grimes. Winters contends that it did not receive the February 2015 private tutoring report, that it was not required to identify instructional methodology in the IEP document, and that it appropriately considered Dr. Grimes' recommendations.

59. Legal Conclusions 23-29 and 33 are incorporated herein by reference.

#### ISSUE 4(a): PRIVATE READING ASSESSMENT

60. The weight of the evidence did not establish that Student had provided a copy of Ms. Johnson's February 16, 2015 tutoring progress report to either the February or April 2015 IEP teams for their consideration. Since the IEP teams did not have Ms. Johnson's report, it was not possible for them to consider it in making their determinations about Student's educational needs. Student has therefore failed to meet his burden of proof on this issue.

#### ISSUE 4(b): ONE-TO-ONE INSTRUCTION

61. Student contends that the 2015 IEP teams disregarded the recommendation by Dr. Grimes for one-on-one instruction. However, Dr. Grimes' report does not recommend one-on-one instruction, but that Student "remain in private tutoring to further develop his phonemic awareness abilities" for spelling purposes. Ms. D'Angelo and Ms. Ayón testified

persuasively that Student would receive specialized academic instruction for four hours per day in the special day class, which would address Student's academic needs, including the skills required for spelling and reading. Unlike tutoring from one specific reading program, the specialized academic instruction in a small special day class would provide Student with the repetition of material and intensive intervention in all academic areas, particularly the reading fluency, writing fluency, and math fluency challenges identified by Dr. Grimes. The February 13, 2015 IEP team meeting was expressly continued to April 14, 2015, to include Dr. Grimes as a member of the IEP team and give the other team members an opportunity to discuss her psychoeducational assessment results, participate in drafting goals, and determine appropriate services and placement for Student. There was no evidence that Dr. Grimes disagreed with any of the recommendations of the other IEP team members, or believed that a special day class would not provide Student with the necessary academic intervention and specialized instruction to meet the needs she had identified in her report.

#### ISSUE 4(c): READING PROGRAM

62. Student's contention that Winters was required to identify the specific reading program or programs that would be used by Student in the special day class is erroneous. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children. (See *J.W. ex rel J.E.W. v. Fresno Unified School Dist.* (9<sup>th</sup> Cir. 2010) 626 F.3d 431, 450; *Adams v. State of Oregon* (9<sup>th</sup> Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer School District* 155 F.Supp.2d 1213, 1230-32 (D. Ore. 2001); *T.B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.)

63. Student did not meet his burden of proving by a preponderance of the evidence that the IEP teams of February and April 2015 had received and disregarded a tutoring progress report by Ms. Johnson, had failed to consider Dr. Grimes' recommendations for specialized academic instruction, or were required to name the reading methodology that would be used in the special day class, and thereby deprived Student of a FAPE. Student failed to meet his burden of proof as to each of these issues.

#### ORDER

All of Student's requests for remedies are denied.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Davis prevailed on Issues 1 and 2, and Winters prevailed on Issues 3(a)-(h) and 4(a)-(c).

RIGHT TO APPEAL THIS DECISION

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

Dated: December 8, 2015

/s/

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ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings