

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

BALDWIN PARK UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2016050319

**DECISION**

Baldwin Park Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on May 6, 2016, naming Student. The matter was continued for good cause on May 27, 2016.<sup>1</sup>

Administrative Law Judge Judith L. Pasewark heard this matter in Baldwin Park, California on September 27 and 28, and October 4, 2016.

Sundee Johnson, Attorney at Law, represented District. Mary Beltran, Interim Director of Special Education, attended the hearing on behalf of District.

Deborah Pepaj, Attorney at Law, and Hamlet Yarijaian, Legal Assistant, represented Student. Student's father attended the hearing each day. Student's mother attended the hearing on September 27, and October 4, 2016. Student did not attend the hearing.

A continuance was granted for the parties to file written closing arguments and the record remained open until close of business on October 17, 2016. Upon timely receipt of the closing briefs the record was closed and the matter was submitted for decision.

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<sup>1</sup> On August 5, 2016, District's case was consolidated with Student's OAH Case No. 2016060925. Student amended his complaint on August 11, 2016, and the consolidated cases were continued on August 30, 2016. On September 20, 2016, Student withdrew OAH Case No. 2016060925, and the matter proceeded to hearing on District's OAH Case No. 2016050319 only.

## ISSUE

The sole issue in this due process hearing is as follows:

Did District's offer contained in the December 9, 2015 individualized education program, amended by the March 14, 2016 IEP, and clarified in the April 27, 2016 prior written notice, provide Student with a free appropriate public education in the least restrictive environment and may be implemented by District without parental consent, if Parents wish Student to receive special education and related services from District?

## SUMMARY OF DECISION

District contends the IEP's developed December 9, 2015, IEP, as amended on March 14, 2016, and clarified in the April 27, 2016 prior written notice, provided Student with a FAPE in the least restrictive environment. Parents contend District's offer of placement in the moderate/severe special day class in the Cornerstone program at De Anza Elementary School, does not provide Student with an education in the least restrictive environment. Instead, Parents suggest Student's least restrictive environment is full time inclusion in a general education third grade classroom, with appropriate supports and related services, or at minimum, placement in a mild/moderate special day class, rather than a moderate/severe program.

District met its burden of proof that its offer of placement and services as contained in its December 9, 2015, IEP, as amended on March 14, 2016, and clarified in the April 27, 2016 prior written notice, provides Student with a FAPE in the least restrictive environment. Student academic needs require significantly more individualized instruction and one-on-one academic time than can be provided in a general education classroom. Further, Student's unique needs prevent him from acquiring more than de minimus academic progress on a modified curriculum provided in a mild/moderate special day class. Student's needs require the assistance of a moderate/severe special education teacher, as well as a highly modified curriculum which emphasizes pre-learning academics and functional skills. Thus, District's offer of placement in a moderate/severe special day class in the Cornerstone program constitutes a FAPE, and may implement without parental consent.

While Student raised several procedural violations regarding the IEP's, these violations did not rise to the level of a denial of FAPE.<sup>2</sup>

Therefore, District's offer of placement in a moderate/severe special day class in the Cornerstone program constitutes a FAPE, and District may implement the IEP without parental consent.

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<sup>2</sup> Student also raised several other issues in his Closing Brief which were not addressed at hearing. This decision addresses only those areas presented at hearing.

## FACTUAL FINDINGS

### *Background*

1. Student is a seven-year-old boy with Down syndrome who qualifies for special education and related services under the category of intellectual disability. Student and his parents reside outside the jurisdictional boundaries of District; however, Mother is a special education teacher in District. Student has been granted an inter-district transfer, which allows him to attend school in District.

2. Student's comprehensive triennial assessments took place in 2014. Parents did not challenge the assessments, scores or results. The assessments confirmed that Student's cognitive functioning was severely delayed, falling below the first percentile in relation to his same-aged peers, which placed him in the cognitive range of nine months to two years of age. Student's language abilities were also in the delayed range. He demonstrated significant deficits in communication development. Student communicated his distaste for non-preferred activities by grunting or pushing away with his hands. He also communicated unwillingness to engage activities by vocalizing an approximation of "no," or spitting "raspberries." Student's adaptive skills were also in the extremely low range when compared to children the same age. As a result, Student required a one-to-one aide to assist him in completing academic tasks, and required continuous one-to-one support to engage in academic activities. Student's social abilities were his greatest strength, but were still in the extremely low range. He did not understand how to socially interact.

3. Based upon his last agreed upon IEP from 2013, Student attended a District mild/moderate special day class at Kenmore Elementary School. Pursuant to this IEP, Student received one-to-one support throughout the day, speech and language therapy, adaptive physical education and occupational therapy services. Beginning in 2014, Student struggled to make minor progress in this mild/moderate special day class. He was unable to meet his academic goals for the year.

4. District convened an IEP team meeting on March 16, 2014, due to concern regarding Student's lack of progress. District initiated an amendment of Student's IEP which offered a change of placement to the moderate/severe special day class in the Cornerstone program at De Anza Elementary School. District IEP team members agreed that Student needed a more restrictive placement which could provide a higher level of supervision and provide a different curriculum which could build skills. Marybel Velasco, the District school psychologist who assessed Student in 2014, opined Student was not receiving educational benefit in the mild/moderate special day class at Kenmore. At best, Student was not getting the educational benefit he should be getting, or could get in the moderate/severe special day class. Parents observed the Cornerstone program at De Anza, and felt the program offered no real instruction or opportunities for mainstreaming. Parents did not consent to the change in placement. Parents consistently maintain that for Student to begin to make real progress, he needs a more challenging program with higher expectations for learning, rather than being placed in a moderate/severe program where nothing is expected of him.

*December 9, 2015 IEP Team Meeting*

5. On December 9, 2015, District convened Student's annual IEP team meeting. The IEP team consisted of all required members, including an administrator, director of special education, speech and language pathologist, general education teacher, special education teacher, physical therapist, occupational therapist, adaptive physical education teacher, and both parents.

6. Present levels of performance were discussed at the December 9, 2015 IEP team meeting. The consensus of District members was that Student's performance on academic goals had not improved since 2013. Student made no more than marginal progress on academic and language goals. His skill level remained significantly below that of his peers in the mild/moderate special day class. On the other hand, Parents insisted Student had made appropriate progress at Kenmore. The IEP for 2013-2014, if taken as a whole, indicated Student had met six of 16 goals. The goals met, however, were in the areas of physical therapy, occupational therapy, and adaptive physical education. Further, as the 2014-2015 IEP was not signed, Student's progress on all goals was cumulative over a two year period.

7. LoLing Lozoya, District speech and language pathologist and assistive technology specialist presented her report at the IEP team meeting. Ms. Lozoya provided direct speech and language services to Student at Kenmore. Pursuant to Student's last agreed upon IEP from 2013, Student received both individual and group speech therapy sessions.

8. Student required primarily one-on-one speech and language services. Student was beginning to say the sounds when given an alphabet book. Ms. Lozoya initiated the use of a communicative device, the GoTalk. The GoTalk involved inserting pictures, hearing sounds, and pressing buttons to identify objects. Although the communication device was a preferred activity, Student was unsuccessful in its intended use. Student did not understand that pictures represent real things. Although he might identify a real object, he could not generalize the object to a picture or icon. District also tried other communication systems, such as the Picture Exchange Communication System. As example, Student was instructed to point to an icon for toileting as one of his goals. This was unsuccessful, as Student did not understand graphical representations.

9. Student made some progress in speech and language therapy, but did not meet his 2013-2014 goals. Student's attention span increased to 20-minutes on preferred activities. He participated better in desired activities, and attended better with technology or high technology tools. He could match body parts, colors and some clothes. Nonetheless, Student's language skills remained below the first percentile. He had virtually no expressive or receptive language skills. Student primarily communicated through grunts, gestures, and "raspberries;" his vocabulary was approximately 20 words, only 10 of which could be understood by an unknown listener.

10. Group speech and language sessions were largely ineffective. Student sought individual attention and would run around the room during group sessions. Additionally, Ms. Lozoya had difficulty finding an appropriate partner for Student in group; Student was lower functioning than all of her other students at Kenmore.

11. Marie Crook, District's adaptive physical education teacher, reported Student had met his 2013-2014 adaptive physical education goals. She proposed a new goal to address gross motor skills, such as jumping, balancing on one foot and hopping. Another goal was crafted to address object control skills, such as bouncing and catching a ball. These goals were appropriate and Parents consented to the adaptive physical education goals.

12. Jeannine Bell, an occupational therapist employed by Gallagher Pediatric Therapy, reported on Student's occupational therapy needs. Ms. Bell had provided Student occupational therapy services twice a week for two years. She reported Student's motor skills were inconsistent, however his fine motor skills were generally functional. Student met his 2013-2014 occupational therapy goals. Since Parents did not consent to the 2014 IEP, her proposed goals for 2014 were not implemented. Student had made little progress during the 2014-2015 school year. For the December 9, 2015 IEP team meeting, Ms. Bell revised Student's goals and recommended Student receive occupational therapy services only once a week, as motor skills were also addressed in the classroom. Parents did not express concern regarding the proposed cut in occupational therapy services or the proposed goals.

13. Melissa Swailes taught the first grade mild/moderate special day class at Kenmore. Ms. Swailes is a credentialed mild/moderate special education teacher, and has a sibling with Down syndrome. Ms. Swailes's mild/moderate classroom was a combined kindergarten/first grade special day class, which consisted of 12 students with varying disabilities and four adults, including herself, an instructional aide, and two one-to-one aides. Student and his one-to-one aide were in her class at the time of the hearing.

14. Ms. Swailes reported Student did not want to participate in academic activities. He remained detached in class. Student had his own modified lessons. Student rarely interacted with other students, preferring to play alone, and remaining on the classroom periphery, even during preferred activities, such as singing. When adults attempted to include Student in activities, he did not respond.

15. Student's classroom schedule was tailored to him. He worked better alone (with aide). When included in group activities, Student often became frustrated, and his behaviors increased. Student could not effectively communicate verbally, and when frustrated, he hit, kicked, and spit to gain attention. Student hit his aide daily, and became aggressive with other students at least once a week. Student did not understand personal space or boundaries. He did not know his own strength.

16. Ms. Swailes noted Student would participate in calendar and song during class, as his preferred activities. Student would move to the songs, but did not sing words or

understand the songs. Often during song time, Student would impulsively get up and wander. Ms. Swailes reported Student's attention span during non-preferred activities could be as short as three seconds.

17. During the December 9, 2015 IEP team meeting, Ms. Swailes reported that Student remained far below the other students in her class academically. Student could match letters of his name, but could not identify the alphabet. He could not identify numbers. Student was inconsistent with one-step directions, and required four to five prompts to comply. Student made no progress in toileting. Student was on a toileting schedule, but would not comply, and he could not communicate his toileting needs. Ms. Swailes emphasized Student did not meet any of his academic goals. Mild/moderate academics have the same curriculum expectations as general education. Student received only de minimis benefit from placement in the mild/moderate special day class, and his academic program was basically presented as a "program within a program" with one-to-one teaching at a very low level. Student could not follow his own classroom routine independently, and required constant one-to-one assistance. Student required an abundance of Ms. Swailes time, which negatively impacted the other students in class.

18. Ms. Swailes emphasized that Student's needs remained beyond the training received by a mild/moderate credentialed teacher. Student required significantly more functional activities and daily skills which should be addressed by a moderate/severe credentialed teacher.

19. Student's maladaptive behaviors began increasing in September 2015. These behaviors were based on Student's limited communication skills and understanding. The December 9, 2015 IEP team did not propose a behavior goal. Ms. Swailes acknowledged Student needed a behavior goal, but she did not know how to draft an effective goal. Regardless, a behavior goal or behavior plan would not have been sufficient to keep Student appropriately placed in the mild/moderate special day class. No additional modifications to Student's IEP would be sufficient to maintain him in the mild/moderate placement; Student's academic abilities were still too low to provide him access to the curriculum; his behaviors interfered with his ability to learn and negatively impacted the ability of his peers to access their education; and Ms. Swailes, as a mild/moderate special education teacher, did not have the training necessary to address Student's behaviors or academic needs. Parent's did not voice objection or concern over the lack of a behavior goal at the December 9, 2015 IEP team meeting.

20. Ms. Swailes opined that placement in the Cornerstone program at DeAnza was appropriate for Student. Once in the Cornerstone program, the moderate/severe teacher could determine if Student needed a behavior goal in this new setting. Further, a behaviorist consult could be utilized in the Cornerstone program to address Student's needs. Student could not correlate pictures to actions. He could not generalize, therefore the use of icons did not work with him; stories did not work; behavior charts did not work for him. Student did not understand positive behavior reinforcements, token economies or tangibles. The concepts were too abstract for him.

21. The December 9, 2015 IEP team meeting notes indicated the IEP team discussed placement options and least restrictive environment. The notes reflected Student required a more restrictive environment as he was not benefiting from his current placement in the mild/moderate special day class environment. Mother discussed the Cornerstone program, and expressed her concern about the support (or lack thereof) available, and opined that pulling Student out of the Kenmore special day class would be a disservice to him.

22. Rebecca Pares, District program administrator, attended the December 9, 2015 IEP team meeting, and took the meeting notes. The IEP team had a long discussion on placement and academic levels. In the mild/moderate special day class, students were exposed to grade level curriculum which is scaled down for each child. District team members agreed that Student had made minimal progress at Kenmore and required more intensive one-to-one teaching, and basic functional skills. The moderate/severe special day class in the Cornerstone program provided a more functional program, with more direct instruction. The classroom ratio was nine students to four adults.<sup>3</sup>

23. Abigail Cabrera, the former District director of special education, attended the December 9, 2015 IEP team meeting. Ms. Cabrera observed Student at Kenmore on several occasions. Student's functional levels were pre-academic. The Cornerstone program was specifically designed for students with pre-academic needs. The teacher held a moderate/severe credential and had more experience. The program addressed students with shorter attention spans, and more behavior skills were embedded in classroom activities.

24. Parents expressed their desire to have Student interact with higher functioning students. Ms. Cabrera pointed out that Student's curriculum in the mild/moderate program could not be appropriately modified for Student. Further, Student was receiving no social benefit at Kenmore due to his behaviors. He worked alone, and could not communicate with others. Even attending the Cornerstone program at De Anza, Student would not be the highest functioning student in the class. De Anza was a comprehensive elementary school and some Cornerstone students mainstreamed to general education classes for part of the day. Nevertheless, Parents rejected District's proposed placement in the moderate/severe special day class in the Cornerstone program at De Anza.

25. By the end of the December 9, 2015 IEP team meeting, the goals were accepted, and services approved by Parents, except for physical therapy. An independent

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<sup>3</sup> Three pages of the December 9, 2015 IEP document, which contained Student's present levels of performance, were missing from the evidence books. Mid-hearing, when the omission was discovered, District provided the missing pages to Student and the ALJ. Argument was heard on the last day of hearing regarding admissibility of the missing pages. The ALJ admitted the omitted pages into evidence to make the IEP record complete. The testimony reflected sufficient references to the complete IEP document, including present levels of performance, to conclude the omission was merely a copier error.

physical therapy evaluation was ordered. The IEP document did not specifically state District's placement offer as the moderate/severe special day class in the Cornerstone program at De Anza. On the signature page of the IEP, however, Mother indicated she did not agree with District's offer of special academic instruction (moderate/severe special day class) and placement (Cornerstone program at De Anza). Given parental resistance to District's offer, the IEP team agreed to defer further discussion until the independent assessment was completed and Parents able to observe the Cornerstone program.

26. In the meantime, Ms. Cabrera communicated with Parents several times after the December 9, 2015 IEP team meeting regarding possible placement alternatives. Parents observed the Cornerstone program at De Anza again. Parents observed LeRoy Haynes, a non-public school, and found it inappropriate for Student. Bonita Unified School District, Student's school district of residence, had no space for Student in their autism based special day class at Foster Elementary School, and a county-operated program in Azusa in its moderate/severe program, which was not acceptable to Parents.<sup>4</sup> Parents continued to request the mild/moderate special day class at Kenmore.

#### *March 14, 2016 IEP Team Meeting*

27. District reconvened the IEP team meeting on March 14, 2016. The IEP documents reflected the March 14, 2016 IEP team meeting as an Amendment or Addendum to the December 9, 2015 IEP. The IEP document further indicated the purpose of the meeting was to update speech goals and review the outside physical therapy assessment results. Mother attended the IEP team meeting by telephone. Father attended the meeting in person.

28. The speech and language goal was reviewed and discussed. The goal, which addressed Student's receptive and expressive language deficits was appropriate. Parents did oppose the proposed goal, but they did not provide written consent.

29. The March 14, 2016 IEP notes reflected an extensive discussion regarding the independent physical therapy assessment report. District and Parents continued to disagree about terminating Student's physical therapy service. Both Mother and Father participated in this IEP team meeting by asking questions, and providing information. Father felt they (parents) were getting nowhere with District. Mother also became upset with the direction the meeting was taking, and terminated parental participation in the IEP team meeting before its conclusion. It is unknown how long the IEP team meeting proceeded thereafter; however, parental participation terminated before the IEP team could reopen discussion of placement. Parents did not consent to the proposed changes in the December 9, 2015 IEP. District did not make any attempt to reconvene the IEP team meeting at a later date.

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<sup>4</sup> Parents completed their observations of alternative placements in February 2016.

30. At hearing, during Ms. Pham, District's physical therapist's testimony, Student stipulated that termination of physical therapy services was no longer an issue in determining denial of FAPE.

*April 27, 2016 Prior Written Notice*

31. On April 27, 2016, Ms. Cabrera sent prior written notice to Parents regarding the December 9 2015, and March 14, 2016 IEP team meeting to clarify District's offer of FAPE. The letter indicated that in addition to the two IEP team meetings, Ms. Cabrera and Angela Salazar, the assistant superintendent, also met with Parents to discuss their concerns about District's offer of placement. The letter referenced placement at Cornerstone Elementary School. However it is clear from the remainder of the letter, as well as from the prior IEP team meetings and parental observations of the proposed placements, that the offer was unintentionally misstated, and District's offer of placement was the Cornerstone program at De Anza. Neither parent had even noticed the error until it was pointed out at hearing.

32. The complete offer of FAPE contained in the April 27, 2016 letter was as follows: (1) placement in the moderate/severe special day class in the Cornerstone program; (2) adapted physical education for 30-minutes per week in a small group setting; (3) individual occupational therapy for 25-minutes per week, and an additional 25-minutes per week in a small group setting; and (4) speech and language therapy for 30-minutes per week of small group sessions, and an additional 20-minutes, twice a week for individual therapy. In addition, District offered to assist Student's transition to Cornerstone by having Student: (1) visit the proposed classroom; (2) meeting his new teacher; (3) meeting his new service providers; (4) taking a tour of the school campus; and (5) meeting his new principal.

33. The April 27, 2016 letter concluded with a request that Parents notify Ms. Cabrera by May 4, 2016, whether they would be providing consent to the December 9, 2015 IEP offer, as modified by the March 14, 2016 addendum, and clarified in the April 27, 2016 letter.

34. Parents did not respond to District's request. Parents did not consent to the IEP. District did not attempt to schedule any further IEP team meetings. Instead, District filed this request for due process hearing.

*Parental Input at Hearing:*

35. Father testified at hearing. Father is a seventh grade math/science teacher in a different school district. He has students with IEP's in his classes, and he regularly attends IEP team meetings for his special education students.

36. At the beginning of his testimony, the ALJ allowed Father to show a home video of Student. In the video, Student was identifying numbers and letters. The video was taken at a birthday party sometime during the summer of 2016.

37. At home, Father does homework with Student each day, and Student can access certain software programs independently. Student does not exhibit behaviors at home. Although Student cannot dress himself independently, he will comply and assist during dressing, i.e., holding up his arms. Student goes to the babysitter before school, and spends approximately 10 minutes each day with 12 other children at the sitter's home, and behaves appropriately.

38. Father observed the Cornerstone program three times. His last observation of De Anza occurred in February 2016. Father did not find the Cornerstone program appropriate for Student. Father provided no specific reasons for his rejection of the Cornerstone program. Instead, he expressed his belief that Student had made progress in the mild/moderate special day class, and had met his goals. If provided new goals, Student would continue to progress in the mild/moderate special day class.

39. Mother testified at hearing. Mother is a credentialed mild/moderate special education teacher in a high school within District. She has a master's degree in special education and has taught in a special education setting for 16 years. Mother currently has a case load of over 30 students. She attends IEP team meetings for her students, often running the IEP team meeting as case carrier, or taking notes as the scribe.

40. Mother's testimony was at times vague and contradictory regarding the goals and academic concerns. Mother was not involved with Student's homework or academics at home. She has seen Student exhibit skills at home, i.e., Student could recognize capital letters. Mother voiced her concerns about Student's academic goals at the IEP team meetings, but she felt shut down by District. However, she also testified that she did not inform the IEP team of her opinions that the proposed goals were inappropriate; nor did she request any changes in the goals.

41. Mother's testimony was more acute regarding her rejection of the Cornerstone program. The Cornerstone program at De Anza was held in a small, stark classroom. Although there were only six students in the classroom, it was chaotic. Five of the students were children with Down syndrome. Mother had exposure to the Cornerstone program on her high school campus, and admitted her negative feelings about the high school program may have influenced her opinion of the Cornerstone program in general. The Cornerstone program saddened Mother. She wanted Student to have more interactions with others. She did not believe the Cornerstone program involved students as much as it should. As example, students were segregated from their peers; meals were brought to the classroom. Instead, Mother wanted Student academically challenged and socially interacting with peers.

*Student's Expert Witness:*

42. Lynn Smithey testified as an inclusion specialist on behalf of Student. Ms. Smithey has extensive experience in numerous areas of special education. She holds special education teaching credentials in several states. She has previously been employed as

an inclusion specialist for school districts, has been a university instructor and lecturer on mainstreaming, and on children with moderate/severe disabilities. Ms. Smithey is currently a consultant with an emphasis on students with severe disabilities.

43. Ms. Smithey was retained by Student's attorney to prepare for a due process hearing with District. Ms. Smithey prepared a written Inclusion Consultation report dated August 29, 2016. As part of her consultation, Ms. Smithey reviewed documents, including the March 14, 2016 IEP, and the 2014 triennial assessment reports. Ms. Smithey did not assess Student, nor did she meet him until September 29, 2016, the day prior to the commencement of this hearing. Ms. Smithey did not speak with Student's teacher or service providers. An interview with Mother was anticipated, but did not occur prior to the completion of the inclusion report.

44. Ms. Smithey's report is primarily a position paper in support of inclusion. In essence, she believes expectations have a powerful effect on the learning outcomes of all children, with and without Down syndrome. Children who are expected to develop and learn, and who are provided with rich experiences and extensive opportunities for learning are much more likely to learn and achieve at a high level than those who are not.<sup>5</sup> Ms. Smithey then references a series of treatises and research information which supports raising educational expectations for children with Down syndrome. Without having assessed or observed Student, Ms. Smithey opined it was vital that those in Student's environment expect that he will be able to learn to read, and that their expectations are not limited to acquisition of functional reading skills. Ms. Smithey opined that such higher expectations are often reduced or absent when students with Down syndrome are educated in separate special education classes. Although there is considerable variation in the achievement of people with Down syndrome, an appropriate educational program should involve appropriately high learning expectations, an environment which can provide the least degree of restriction of learning opportunities, and learning objectives and support strategies appropriate for the particular individual's needs.

45. Ms. Smithey reviewed Student's goals and reported that each of the goals could be implemented in a mild/moderate special day class. She also provided a general framework outline for determining a successful plan for inclusion which was based upon her experiences in another school district. The outline was neither Student nor District specific.

46. Ms. Smithey observed Student on September 28, 2016. She found Student much more capable than what she was expecting based upon Student's IEP's and assessment reports. On the same day, Ms. Smithey observed the Cornerstone program at De Anza. She did not find it an appropriate placement for Student. Cornerstone was for students not making progress. She opined that Student needed higher language role models. Cornerstone did not have classroom peers able to model language. On the other hand, she noted that the

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<sup>5</sup> Smiley report, p. 4.

Cornerstone program students were very social and very communicative, but in non-verbal ways. She did not observe any attempts to facilitate interaction with general education peers. Ms. Smithey found the math lessons appropriately individualized for the students.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA*<sup>6</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)<sup>7</sup> et seq.; Ed. Code, § 56000 et seq.; Cal Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a 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).)

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

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<sup>6</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>7</sup> All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, 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. 951, fn. 10.)

4. An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child’s potential. (*Rowley*, supra, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 4654 F. 3d 1025, 1033.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 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].) In this matter, District had the burden of proof on the sole issue presented, whether its IEP’s offered Student a FAPE.

#### *Substantive Appropriateness of District’s IEP Offer*<sup>8</sup>

6. Under the IDEA, a FAPE is defined as special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the school standards of the state educational agency; (C) include an appropriate pre-school, elementary school, or secondary school in the state involved; and (D) are provided in conformity with the IEP required under section 1414(d) of the Act. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.)

#### REQUIREMENTS OF AN INDIVIDUALIZED EDUCATION PROGRAM

7. An IEP is a written document which details the student’s current levels of academic and functional performance, provides a statement of measurable academic and

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<sup>8</sup> For purposes of substantive discussion of District’s offer of FAPE, the December 9, 2015 IEP, as amended by the March 14, 2016 IEP and clarified in the April 27, 2016 prior written notice, shall be referred to as simply the December 9, 2015 IEP.

functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

8. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability.

9. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Id.* at p. 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*)

10. The December 9, 2015 IEP was based upon the results of Student's 2014 triennial assessments, as well as the personal observations of District staff and interactions with Student in the mild/moderate special day class at Kenmore. Parents did not dispute District's determination of Student's cognitive level in the less than one percentile, his language deficits or limited communication levels. Although Parents contended Student made adequate progress on his goals, Student's educational record did not support such a finding. District testimony and Student's educational records indicated Student met six of thirteen goals over a two-year period. Student met only the non-academic goals in adaptive physical education, physical therapy, and occupational therapy. Goals directed towards Student's academics, language, and communication needs were not met. Ms. Lozoya acknowledged Student partially met speech and language goals, primarily in attention if engaged in preferred activities. This progress was minimal, occurring over a two-year, rather than one-year period, with Student gaining no expressive or receptive language skills; his verbal communication remained limited to 10-20 words. Out of necessity, the December 9, 2015 IEP addressed Student's academic and language goals with similar, if not the same goals as in 2013. Parents consented to all proposed goals and services, except physical therapy. Further, Parents subsequently withdrew their opposition to District's proposed

termination of physical therapy. Parents' only remaining objection to the December 9, 2015 IEP concerned placement in a moderate/severe special day class in the Cornerstone program at De Anza.

11. Father's testimony at hearing was unpersuasive. Father, a teacher himself, worked with Student on academics at home. He provided no evidence of Student's academic progress at home nor had he observed Student at school. Other than a three-minute video of Student, taken at a birthday party during the summer of 2016, Father provided little information to support his contention that Student's speech and language and academic abilities in an educational setting was significantly different from that described by District, and discussed at the December 9, 2015 IEP team meeting. Further, Father acknowledged he provided little input at the IEP team meetings to persuade the IEP team differently. Therefore, even if Student was demonstrating substantially more skills at home, District had no notice of this at the time it developed its IEP offer.

12. Mother's testimony was equally unpersuasive. Mother is a credentialed mild/moderate special education teacher, yet at times, she inconsistently responded to questions, and provided vague and unresponsive answers, as if she had never before participated in an IEP team meeting. Factually, Mother provided little information. She did not participate in Student's homework or academics at home. Mother felt Student's abilities were above what District concluded, yet she consented to goals and services based upon Student's lack of appropriate progress as described by District.

13. Each of District's witnesses credibly described their personal observations of Student's failure to adequately meet his goals and his continuing needs for a more functional curriculum and placement in a moderate/severe special day class. Ms. Swailes, Student's teacher at Kenmore, provided the most reliable testimony describing Student's academic needs. Student required his own classroom schedule which provided extensive one-to-one teaching and considerable modification of the mild/moderate curriculum. Even with the creation of "a program within a program" for Student, he required a disproportional amount of teacher time yet, even with the increased teacher interaction, demonstrate little, if any, progress or academic success. Ms. Lozoya, Student's speech and language pathologist, reported similar needs for Student. Given his inability to generalize concepts, Student's communication abilities remained pre-academic. Student required constant individualized attention. Group speech sessions at Kenmore were impractical, as Student was much lower functioning than all others students at Kenmore. Student's inability to communicate impacted Student's ability to socialize, and led to negative behaviors when he became frustrated or was asked to perform non-preferred activities. Student's only observable group involvement in the mild/moderate setting consisted of Student participating in song time, by peripherally moving to the music, but not singing the words or understanding the songs, or interacting with his peers during singing time. Such does not constitute educational or social benefit.

14. Ms. Smithey presented as an interesting witness, however the late timing of her involvement in this matter limited the relevance of her testimony, and led to

compromised credibility. First, Ms. Smithey's opinions were not obtained through independent information or assessment of Student. Ms. Smithey was employed by Student's attorney in August 2016, to assist in preparing his case for hearing. Ms. Smithey's August 29, 2016 Inclusion Report was not child-specific to Student, nor was it ever presented to District or the IEP team prior to hearing. Instead, the Inclusion Report simply cited various studies and opinions which support inclusion. The issue in this matter is not whether inclusion is a good thing; District did not disagree with Ms. Smithey's broad statements regarding the benefits of inclusion. In this case, however, the issue is not so broad. Rather the issue is whether Parents' (and Ms. Smithey's) desire for Student's inclusion in a higher functioning classroom, can provide Student with more than de minimis progress or educational benefit.

15. Ms. Smithey's report provided a series of generalized methodologies which foster inclusion. These strategies were proposed before she met Student, observed Student at Kenmore, or observed the Cornerstone program at De Anza. It is also noted that Ms. Smithey's expertise with inclusion is based upon her credentials and experiences as a moderate/severe special education teacher, not a mild/moderate teacher. Even though Ms. Smithey opined that Student's educational program could be revamped for his inclusion with higher functioning peers, she did not dispel District's basic contentions. Student requires constant assistance and one-to-one teaching at a very low level. He requires an educational program which involves significantly more functional activities and daily skills, taught by a moderate/severe credentialed special education teacher specifically trained to address these needs. Thus, placement in a mild/moderate special day class was not appropriate for Student because he could not gain academic or social benefit from it.

16. The Cornerstone program at De Anza was designed to provide Student an education in a moderate/severe special day class which focused on functional skills and pre-academic skills. The teacher possessed a moderate/severe teaching credential, provided more one-to-one teaching, and had more experience with adaptive skills. The Cornerstone program embedded behavior skills in classroom activities. All of Student's IEP goals and services could be implemented in the Cornerstone program. Further, De Anza is a regular elementary school campus, with access available to general education peers where appropriate.

#### PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

17. In addition to providing a FAPE, a school district must ensure that "To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This "least restrictive environment provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*)) Under the LRE mandate, a school district must consider a continuum of alternative placements..." (34 C.F.R. § 300.115(b); Ed. Code, § 56342, subd. (b).)

18. Special education classes, separate schooling, or other removal of individuals with exceptional needs from the regular educational environment occurs only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Ed. Code, § 56040.1, subd. (b).)

19. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom.<sup>9</sup> (*Rachel H.*, *supra*, 14 F.3d at p. 1404.)

20. The IEP team appropriately considered a continuum of placements for Student. The December 9, 2015 IEP notes indicated the IEP team discussed placement options. Parents did not request a general education setting, but requested continuing placement in the mild/severe special day class at Kenmore. Parents wanted Student academically challenged and able to interact with higher functioning students. District IEP team members determined Student was not benefiting from placement at Kenmore and the mild/moderate curriculum could no longer effectively be modified for him. The Cornerstone program at De Anza was discussed, and rejected by Parents. Given Parent's rejection of the Cornerstone program at De Anza, District suggested three additional possible placements for Parents' consideration. Each of the three options was either unavailable or rejected by Parents prior to March 14, 2016, leaving only the Cornerstone program at De Anza on the table as District's offer of placement.

21. District appropriately considered the *Rachel H.* criteria in determining placement and least restrictive environment. District appropriately determined Student required placement in the moderate/severe special day class. Student required the individual attention of a moderate/severe credentialed special education teacher, in a smaller classroom designed to meet his needs for pre-academic and functional skills. Non-academic benefits of inclusion at Kenmore were virtually non-existent. Student did not participate in mainstreaming activities. Primarily non-verbal, Student did not interact with the other students in his Kenmore class. Like Kenmore, De Anza is a regular elementary school with typical peers. The Cornerstone program has the ability to provide Student with mainstreaming and inclusionary activities where appropriate. Several of the Cornerstone program students were mainstreamed for part of the school day. De Anza could provide Student more socialization opportunities. Even Ms. Smithey noted on her observation of the Cornerstone program at De Anza, that the students were social, and communicated with others, though mostly non-verbally.

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<sup>9</sup> Neither the District nor Student made any argument concerning the cost of Student's placement, so that subject is not addressed here.

22. As Ms. Swailes emphasized, Student's unique needs remain beyond the training received by a mild/moderate credentialed special education teacher. As indicated above in Legal Conclusions 13 through 16, the amount of time required to tailor Student's academic curriculum and provide one-to-one teaching took a massive amount of teacher time, and took educational time away from other students in the mild/moderate special day class. Even assuming, additional modifications were made to Student's IEP, his academic abilities were still too low to provide him access to the curriculum in a mild/moderate special day class placement. Thus, balancing the least restrictive placement factors, placement in the moderate/severe special day class in the Cornerstone program at De Anza, was appropriate as placement in least restrictive environment for Student.

### *Procedural Violations*

23. The Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. The analysis of whether a student has been provided a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the Act, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Rowley, supra*, 458 U.S. at p. 198.) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d at 977, 892.) To constitute a denial of FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parent's opportunity to participate in the IEP process. (*Ibid.*)

### REQUIRED PARTIES FOR IEP TEAM MEETINGS AND PARENTAL PARTICIPATION

24. The IDEA and state law explicitly require that parents be part of the IEP team which is charged with developing and implementing a student's IEP. (20 U.S.C. §§ 1401(14), 1414(d)(1)(B)(i); Ed. Code, § 56342.5.) Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].)

25. The Ninth Circuit has found that school districts must make every attempt to secure the presence of a student's parents at IEP meetings. In *Shapiro v. Paradise Valley Unified School Dist.* (9th Cir. 2003) 317 F.3d 1072, 1077, *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B) (*Shapiro*), the Ninth Circuit noted that "[t]he importance of parental participation in the IEP process is evident." In *Shapiro*, the school district refused to reschedule the child's IEP meeting to a date requested by the parent who was not available

on the date convenient to the district. The court in *Shapiro* held that the failure to reschedule the meeting constituted a procedural violation that amounted to a denial of FAPE. (*Id.* at p. 1075.) The court further held that the fact that the school district subsequently sent the IEP to the parent for approval did not cure the violation. (*Id.* at p. 1078.) The Ninth Circuit reiterated its ruling in *Shapiro* in the case of *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*), where a parent was unable to attend a scheduled IEP team meeting.

26. In instances when parents fail or refuse to cooperate, the school district is not relieved of its obligation to provide a FAPE to publically enrolled IDEA-eligible students. Therefore, the IDEA permits school districts to conduct IEP meetings without parental participation when the school district is unable to convince the parents to attend. (34 C.F.R. 300.322(d); *Cupertino Union School Dist. v. K.A.* (N.D. Cal. 2014) 75 F.Supp.3d 1088, pp. 1100-1102.)

27. Parents clearly participated in the December 9, 2015 IEP team meeting. During the December 9, 2015 IEP team meeting Parents provided information regarding Student; made known their request for continuing placement at Kenmore; and made known their rejection of District's offer of placement in the moderate/severe special day class in the Cornerstone program at De Anza. Parents also subsequently observed several other placement sites, and equally rejected those, in favor of their preferred placement at Kenmore.

28. Parents attended the March 14, 2016 IEP team meeting. The IEP team meeting was convened primarily to discuss the independent physical therapy assessment and present a new speech and language goal. It is clear from witness testimony that the IEP team intended to entertain further discussion of its offer of placement at De Anza. Finding further discussion with District members of the IEP team futile, Mother terminated the IEP team meeting before its conclusion which negated further discussion of placement.

29. The circumstances in this matter can be distinguished from *Shapiro* and *Doug C.* In *Doug C.*, parent had expressed his desire to attend the IEP team meeting. When parent was unable to attend the meeting due to illness, he objected to the school district holding the IEP team meeting without him, and attempted to work with the school district to reschedule the meeting. Here, Parents attended the March 14, 2016 IEP team meeting and fully participated until becoming angry about the direction the discussions were taking. Parents unilaterally terminated the IEP team meeting; they did not have a scheduling conflict; they did not request the IEP team meeting be rescheduled. Further, District's offer of placement had been made at the December 9, 2015 IEP team meeting and was rejected by Parents. District had no obligation to schedule another IEP team meeting to further discuss its offer of placement, especially since Parents informed District between the December 9, 2015 IEP team meeting and March 14, 2016 IEP team that they do not believe that the Cornerstone program was appropriate for Student.

30. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley, supra*, 458 U.S. at p. 207].) The focus is on the placement offered by the school district; not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at p. 1314.)

31. Parents are not special education neophytes. Their employment encompasses significant involvement with IEP team meetings. While Parents may or may not be justified in terminating the March 14, 2016 IEP team meeting, District remains responsible for providing FAPE. Parents clearly rejected District's offer of a moderate/severe special day class in the Cornerstone program at De Anza. District was not required to provide Student with a placement preferred by Parents. They may not hold District hostage, because they do not agree with District's offer of placement, by simply terminating an IEP team meeting or refusing to participate in required special education procedures.

#### SPECIFIC WRITTEN OFFER OF PLACEMENT

32. A school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith* (9th Cir. 1993) 15 F.3d 1519, 1526 (*Union*)). An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Id.*) In *Union* the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Id.* at 1526.)

33. An oral offer of placement at an IEP team meeting does not satisfy the legal requirements of the IDEA. The December 9, 2015 IEP document does not contain a written offer of placement. Nor does the March 14, 2016 amendment to the IEP. District's failure to provide a written offer of placement on the IEP document constituted a procedural violation under *Union*. District's procedural violation, however, did not rise to the level of a denial of FAPE. In *Union* the Ninth Circuit required a written offer to avoid factual disputes about what placement was offered, and where such placement was offered. In the matter at hand, as of the December 9, 2015 IEP team meeting, there was a description of District's proposed placement in the moderate/severe special day class in the Cornerstone program at De Anza; a thorough discussion of the reasons for the proposed placement; and parental discussion of the reasons they were rejecting the proposed placement. The parents are educated and articulate,

and knew exactly what placement District was offering. In further support of this finding, Mother signed the December 9, 2015, and specifically wrote that she agreed with the IEP with the exception of “*SAI, PT, and placement.*”

34. Further, the failure to denote the offer of placement did not prejudice Parents or prevent their participation in either of the IEP team meetings. Parents were aware that District offered the Cornerstone program at De Anza; they strenuously objected to it. Parents were aware of what was being offered to supplement the placement; they agreed with the remainder of the goals and services, and had previously observed the placement. Parents presented their objections and concerns regarding the placement, and Parents were already clearly alerted to their need to consider the appropriateness of the placement; they had already clearly articulated their preference for Kenmore. The consideration of other placements was in response to Parent’s rejection of District’s offer. It did not vacate District’s placement offer as of December 9, 2015. As a procedural violation, District’s failure to write down the placement offer was sloppy work indeed. However, it did not constitute a denial of FAPE, as Parents were acutely aware of what was being offered, and they vigorously participated in the IEP team discussions regarding placement. Ultimately, Mother confirmed her understanding of District’s offer of Cornerstone program by writing she did not agree with placement. Additionally, District confirmed the offer in its prior written notice of April 27, 2016.

35. The March 14, 2016 IEP team meeting was an addendum to the December 9, 2015 IEP. As the meeting was terminated by Parents and no consent provided to the addendum, no changes were made to the December 9, 2015 offer of placement, and Parents knew of District’s continued offer of Cornerstone program.

#### PRIOR WRITTEN NOTICE

36. Special education law requires a school district to give prior written notice to parents before the district (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (34 C.F.R § 300.503(a).)

37. The April 27, 2016 letter was sent to Parents to comply with prior written notice requirements regarding Student’s December 9, 2015 IEP and proposed change in placement. District’s prior written notice clearly and intelligibly referenced the December 9, 2015 IEP and March 14, 2016 IEP addendum and provided the required written confirmation of District’s offer of placement in the moderate/severe special day class in the Cornerstone program. The prior written notice contained all statutorily required information, and reiterated both the reasons for District’s offer of placement, as well as the other components of the IEP document being offered as a FAPE.

38. The prior written notice letter referenced placement at “Cornerstone Elementary.” Parents now contend that the failure to correctly name De Anza, confused them and made it impossible for them to understand what placement was being offered. Such contention is disingenuous. Parents were well aware of the offer of placement at De Anza. They physically observed the Cornerstone program at De Anza on several occasions.

39. In summary, the IEP team developed Student’s IEP’s based upon valid assessments and information relating to Student’s cognitive abilities, academics, social/emotional skills, speech and language deficits, and occupational therapy, physical therapy and adaptive physical education needs, which represented all areas of suspected disability related to his education. Each of the IEP goals comported with these needs, and the IEP was reasonably calculated to enable Student to receive meaningful educational benefit. Student’s academic needs required the more restricted environment of a moderate/severe special day class. Student’s IEP goals could easily be implemented in the placement in the Cornerstone program at De Anza. The December 9, 2015 IEP, as amended at the March 14, 2016 IEP team meeting, and clarified in the April 27, 2016 prior written notice, offered Student a FAPE in the least restrictive environment.

#### ORDER

1. The December 9, 2015 IEP, as amended at the March 14, 2016 IEP team meeting, and clarified in the April 27, 2016 prior written notice, offered Student a FAPE in the least restrictive environment.

2. District may implement the IEP, as clarified in the April 27, 2016 prior written notice, without parental consent.

#### 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, District was the prevailing party on the sole issue presented.

## RIGHT TO APPEAL DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56505, subd. (h).) The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATE: November 3, 2016

/s/

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JUDITH PASEWARK  
Administrative Law Judge  
Office of Administrative Hearings