

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2016060036

DECISION

The Clovis Unified School District filed a request for due process hearing with the Office of Administrative Hearings on May 27, 2016, naming Parents on behalf of Student.

Administrative Law Judge Charles Marson heard this matter in Clovis, California, on July 12, 13, and 14, 2016, and by telephone on July 25, 2016.

Cynthia D. Vargas and Kathleen A. McDonald, Attorneys at Law, represented Clovis. Theresa Pafford, Clovis's Administrator of its Special Education Local Plan Area, alternated with Joanne Fiedler, Clovis's Assistant Director of Special Education, in representing the District throughout the hearing.

Deborah Pepaj, Attorney at Law, represented Student. Student's Mother attended throughout the hearing, except for brief absences. Student did not attend the hearing.

OAH granted the parties' request for continuance of this matter on July 14, 2016. After the last day of hearing, the matter was continued again, at the parties' request, until August 10, 2016, for submission of written closing arguments. A further request for extension of time to file Student's closing argument was granted and the matter was continued again from August 15 through August 19, 2016, when the record closed.

ISSUE

Does the individualized education program of March 16, 2016, as amended on April 18, 2016, offer Student a free appropriate public education in the least restrictive environment, so that Clovis may implement it without Parents' consent?

SUMMARY OF DECISION

Clovis proved that the program it offered Student in its proposed IEP would provide her a FAPE. It proved that the annual goals in its proposed IEP met all of Student's needs and were appropriate and measurable. It proved that the accommodations and related services it offered were sufficient for her needs. Finally, Clovis proved that Student cannot be satisfactorily educated in general education academic classes, and that its proposed placement, which would blend non-academic general education classes and activities with academic classes in a special day class, would be in the least restrictive environment. Clovis will be allowed to implement the proposed IEP without parental consent.

FACTUAL FINDINGS

Jurisdiction

1. Student was a 14-year-old girl who lived with Parents within the boundaries of Clovis at all relevant times. She was eligible for and receiving special education and related services in the category of intellectual disability. She attended Clovis's Kastner Intermediate School, where she was expected to enter the eighth grade soon after the hearing.

2. In the seventh grade and earlier, Student's IEP's placed her in general education classrooms with supports and services, including resource support for some academic subjects. In seventh grade, she took two academic classes, science and history, in general education classrooms.

3. On March 16 and April 18, 2016, Clovis proposed an IEP that would place Student for eighth grade in a mild-to-moderate special day class for all academic subjects, somewhat increasing the time she would spend outside of the general education environment. The parties reached agreement on Student's speech and language program, and Parents agreed to specific IEP provisions concerning speech and language, so this Decision does not address Student's speech and language program. However, Parents did not agree with the rest of the proposed IEP; they want Student to remain in general education classrooms for at least some academic subjects.

Student

4. Student had Down syndrome, a condition affecting cognition, speech and other basic functions, and Hashimoto's disease, a condition affecting the thyroid gland. She was cognitively delayed, so that at fourteen years of age, she could read at kindergarten or first grade level, and had similar limitations in math and writing. Her full scale IQ was about 40.

5 Notwithstanding her disabilities, Student was generally a happy and active child who was sweet, polite, popular, social and friendly. She particularly enjoyed drawing and art projects, was successful in non-academic general education electives and PE class, and was active in athletics. She participated in Special Olympics throughout the year, could swim, ski, bowl, and participate in track, and attended a school dance. She was compliant and well-behaved, and not disruptive in class.

6. Student's educational program was governed by her last triennial IEP, which was agreed to and implemented in March 2014, while Student was a sixth grader in Clovis's Maple Creek Elementary School. In fall 2014, she made the transition to seventh grade in Kastner Intermediate, but the parties could not agree on a new IEP. Student's program in seventh grade consisted of one elective, lunch, breaks and physical education in general education, history and science in general education, and math and language arts in a resource class. She always had a one-to-one aide.

The Offer for Eighth Grade

7. Clovis's proposed IEP was a blended program of general and special education environments. It would remove Student from general education academic classes and related resource instruction, and place her in a mild-to-moderate SDC for 42 percent of her school day, where she would be instructed in an alternative curriculum consisting of math, science, language arts (including reading and writing) and functional skills. The rest of her day would be spent in the general education environment in two non-academic electives, lunch, physical education, and breaks. She would continue to have a one-to-one aide throughout the school day.

8. In its written content, the proposed IEP addresses all the subjects that the Individuals With Disabilities in Education Act and related laws require it to address. It contains an identification of Student's disability; a statement of how it affects her involvement in the general education curriculum; her present levels of academic achievement and functional performance, including strengths, weaknesses and assessment data; descriptions of her progress on previous goals; a statement that she will participate in alternate statewide assessments and curriculum; 10 goals that include baselines and short-

term objectives; a variety of supplementary aids, services, accommodations, modifications and supports; and related services, including the aide, extended school year, and transportation. The proposed IEP contains everything the law requires it to contain, and Student does not argue otherwise.

9 The proposed IEP was the product of IEP team meetings on March 16 and April 18, 2016. Each meeting was attended by an administrator representing the school district; at least one of Student's general education teachers; at least one of her special education teachers; individuals who could interpret assessment results; at least one parent; and other individuals invited by Clovis or Parents. The March meeting lasted five hours. The April meeting was somewhat shorter, but it included substantial discussion of the IEP, and Clovis made some amendments at Mother's request. Mother participated actively and at length in both meetings. Student does not contend that Parents were deprived of any procedural rights in the notices for, or conduct of, those meetings.

THE OFFERED SPECIAL DAY CLASS

10. The mild-to-moderate SDC proposed for Student has been taught by Dava Parks since 2009.¹ In her career, Ms. Parks has taught between eight and 10 students with Down syndrome, usually for several years each, and was familiar with the difficulties that condition can present. She observed Student eight to 10 times in an elective class on exploring technology in the fall of her seventh grade year, and eight to 10 times in her elective art class in the spring. She was also familiar with Student's records and history. Her testimony was specific and meticulous and her fund of knowledge considerable. Cross-examination did not produce any reason to doubt her. Ms. Parks's testimony is entitled to substantial weight here.

11. Ms. Parks established that her SDC usually had ten to twelve students whose functioning varied from pre-kindergarten to second or third grade. She had an instructional aide who helped all the students, and some students also had one-to-one aides. Under the proposed IEP, Student would retain her one-to-one aide.

12. In Ms. Parks's class, under the proposed IEP, Student would receive instruction in reading, writing, and math in the morning, and also attend one of her two general education electives and physical education. After lunch, Ms. Parks would teach

¹ Ms. Parks had a bachelor's degree in liberal studies and a master's degree in special education from California State University at Fresno. She had a clear education specialist Level II instruction credential and a resource specialist credential. She came to Clovis in 1991, and held a variety of positions there, including instructional assistant, general education teacher, special day class teacher, resource specialist and vision impairment specialist. She received several awards and grants for her work in the SDC.

writing and sometimes science, for which she used videos and manipulatives. For example, she had the students move around with balls representing the sun and various planets. Her teaching included science and history as well. All of her students had iPads as the result of a grant she obtained, and she individualized the software for each student.

13. Ms. Parks testified about each of Student's goals in the proposed IEP and described credibly how she would implement them. She recognized that Student was not independently motivated to work and required constant prompting from her one-to-one aide. She established that Student was on "the higher end" of the need for prompting in comparison to others in the class.

14. Ms. Parks placed considerable emphasis in her class on the teaching of functional skills, and most of Student's goals involved functional skills. She would learn these skills along with other students of similar abilities and needs.

15. Ms. Parks made extensive efforts to expose her students to nondisabled students. Several years ago, she noticed that special education students being mainstreamed in general education had a tendency to sit apart from nondisabled peers at lunch. To maximize their exposure to nondisabled students, Ms. Parks and her colleagues conceived of a class called collaborative mentoring. It involved pairing a screened and willing nondisabled student with a resource student or an SDC student for lengthy periods, so the disabled student could get help with her schoolwork, and at the same time have significant exposure to a typical peer. This model has been successful both in general education elective classes and in Ms. Parks's SDC, and has been widely copied. Under the proposed IEP, Student would be involved in collaborative mentoring, either in her class or in an elective.

16. Parents object to the proposed IEP on two grounds: that it fails to place Student in general education academic classes, which they regard as the least restrictive environment for her; and that her goals are defective because they are not measurable or adequately tied to grade level standards.

General Education and the Least Restrictive Environment

STUDENT'S ACADEMIC DEFICITS

READING

17. Student's triennial IEP in March 2014, and its accompanying assessments, established that Student was generally reading at a first grade level in sixth grade, with some specific variations up to second grade and down to kindergarten. On the Woodcock Johnson Test of Academic Achievement, her word identification was at the level of the first month of

second grade, while her passage comprehension skills were at the beginning level of first grade. On the Qualitative Reading Inventory, Student could decode words with 95 percent accuracy at kindergarten level, but only 60 percent at first grade level. She could read pre-kindergarten materials and answer comprehension questions with 80 percent accuracy, but could not comprehend a first grade level narrative passage. In resource class, she could read first grade level passages aloud with 90 to 95 percent accuracy, but her comprehension of those passages was only 53 percent, even when she had read the text and heard it read to her several times. Her reading fluency was inconsistent and slow.

18. Two years later, Student's reading skills were not much improved, and showed broad inconsistencies. By March 2016, her decoding was 100 percent accurate on pre-kindergarten materials; 75 to 85 percent accurate on kindergarten and first grade materials; and 40 percent accurate on second grade materials. Her comprehension of a first grade passage was 30 to 40 percent when she read a story once; with repeated readings it varied widely, from 30 to 80 percent. Her comprehension of a first grade story was between 20 and 30 percent accurate.

WRITING

19. By March 2016, Student could write a three-to-four word sentence, but only with substantial prompting and the use of word banks and sentence frames. She could not use capitals or punctuation despite many lessons. Writing frustrated her, and when asked to write a short answer to a question at a first grade level, most of the time Student copied down a random sentence from other materials. She could copy words, sentences, and definitions from a seventh grade text with explicit directions and considerable prompting, but she did not understand what she copied. Her writing was small but fairly clear.

MATH

20. By March 2016, Student could count from 1 to 30, but became confused with numbers higher than 30. She could orally identify two-digit numbers, though she often pronounced them one number at a time ("five four" for 54), and could not identify three-digit numbers. She could add single-digit numbers without regrouping, though her accuracy varied from 30 to 80 percent. Her one-digit subtraction was accurate between 10 and 30 percent of the time. She used a calculator successfully, and with it could add and subtract multiple digit numbers with 80 to 100 percent accuracy. She did not understand multiplication or division and could not accomplish it even with a calculator.

FUNCTIONAL SKILLS

21. By March 2016, Student was appearing at school neat and well groomed, could use the restroom independently, and could dress herself for physical education. She knew her class schedule and could follow its routine with the assistance of her aide, although she did not understand the relationship of time to her schedule. Student was unable to tell school staff her phone number or address without looking at examples; she would get frustrated after two numbers and guess the rest. She could write her name on a form, but not her telephone number or address. With daily practice, she was slowly learning to read her address and phone number from a card she carried. Student could state the date and month with 80 to 100 percent accuracy only after prompting and while looking at a calendar. She could read a digital clock, but not an analog clock, despite many lessons on the latter's meaning. She could identify individual coins and state their value, but could not add up the value of mixed coins. She could identify bills but could not add or subtract mixed bills. She required the assistance of her aide to navigate across the campus.

STUDENT'S EXPERIENCE IN SEVENTH GRADE GENERAL EDUCATION SCIENCE CLASS

22. Regena McLean was an experienced general education science teacher² who taught Student's seventh grade science class. Her testimony was careful and specific, consistent with contemporary records, and undisturbed on cross-examination. She was a credible witness and her testimony is given substantial weight here.

23. Ms. McLean established that Student stood out in her science class because she could not understand the material and was "very overwhelmed." She looked like she did not want to be there, and frequently put her head down on her desk and played with her hair. She was not engaged in instruction, although she tried a few times with the help of her aide, but she could not follow proceedings in the class.

24. Ms. McLean saw that Student required constant coaching from her aide, who would take notes, draw graphics, locate answers in the text and re-explain what Ms. McLean had just said. Student was unable to begin, continue, or complete any work independently; she required a continuous stream of one-step directions from her aide such as "open the text," "go to this page," and "get out your binder."

25 Ms. McLean attempted to modify the seventh grade science materials for Student's instructional level, for example by reducing an assignment to a single question, but found she could not modify the curriculum that much and still teach to seventh grade

² Ms. McLean had a master's degree in science from National University in Fresno and a clear multiple subject California teaching credential, and was a peer counselor. She taught at Kastner for 26 years, and usually had several special education students in her class.

standards. Student could only complete 20 to 25 percent of the modified materials with the active help of her aide. Student could not understand or complete regular class assignments; she would still be on the first question when the other students were on the 12th to 15th question. While the other students independently looked up scientific terms in a glossary, Student simply copied the definition from the glossary after her aide found it for her, without understanding it. Student would score between 20 and 25 percent on tests with extensive assistance from her aide and with a review sheet in front of her. Her comprehension was “very little . . . if any.” Both the textbook and Ms. McLean’s lectures were far above her reading and comprehension levels. She could copy but not comprehend regular curriculum material.

26. Ms. McLean taught her students in groups of four. The other three children in Student’s group would usually try to talk to her, involve her, or help her do the work, and sometimes did it for her. Then they would notice that their group was falling behind the other groups, turn away from her, and proceed with their work without her. Student could say “hi” to these children on the way into class, and enjoyed being around them outside of academic classes because they were warm and friendly toward her. But she could not converse with the other students about science; she did not have the vocabulary. When the other students attempted to engage her in social conversation, Student just giggled or put her head down on her desk. As the year proceeded and the work became harder, she withdrew from her peers and the class and frequently would not work with her aide. Ms. McLean saw Student regress as the year went on. She began to look “beat up” when she came into class, and Ms. McLean felt sad for her because she knew Student did not understand the material.

27. Ms. McLean could not attend the March 16, 2016 IEP team meeting, so she submitted her recommendations in writing. In that document, she informed the IEP team that Student had not gained any academic benefit in her class because she could not access the curriculum. She could not read or comprehend the textbook. The material was overwhelming and the class experience was “very defeating” for her. She “appears to be so intimidated by the curriculum, that she has totally shut down.” She had not gained any social benefit; instead she had “actually regressed in social skills.” At the beginning of the year, she would always make eye contact and respond to a question, but as the year went on she would not engage; instead she would “cover[] her face or put[] her head down, as if she is embarrassed to reply . . .” Ms. McLean avoided asking her any questions out of fear of embarrassing her in front of the class. She concluded her report by stating that “[i]t is sad to see [Student’s] personality diminish and her demeanor wilt.”

28. Ms. McLean had to give Student an “F” in her science class. Based on her experiences in attempting to teach Student, Ms. McLean opined that Student would be able to make substantial educational progress in Ms. Parks’s SDC, and that it was the appropriate placement for her.

STUDENT'S EXPERIENCE IN SEVENTH GRADE GENERAL EDUCATION HISTORY CLASS

29. Michele Shurtliff taught Student's seventh grade history class in the latter half of the school year.³ Her testimony was clear, forthright, undisputed and not undercut by cross-examination. She was a credible witness, and her testimony is given substantial weight here.

30. Ms. Shurtliff testified (and told the March 16, 2016 IEP team) that Student was unable to keep up with the seventh grade history curriculum. Because she could not read above a first grade level, she could not read the material herself. She could not comprehend much of it when her aide read it to her. She was not engaged in Ms. Shurtliff's instruction; her attention was directed to her aide. This was particularly true at the beginning of the week, in which Ms. Shurtliff had students read aloud. Student could not read the text aloud; her aide had to read it to the class. Ms. Shurtliff persuasively opined that eighth grade history curriculum could not be modified down to Student's instructional level and still comply with Common Core standards.

31. Ms. Shurtliff noticed that Student was not motivated to work independently; her aide had to give her detailed, single-step directions. Ms. Shurtliff found this distracting to the class. Once started, Student could not continue without further prompting. She was never able to complete even modified work on her own. When the work got too difficult, she would become frustrated and put her head down on her desk.

32. Ms. Shurtliff had to give Student an "F" in the history class. Based on her experiences in attempting to teach Student, Ms. Shurtliff opined that Student was not making progress in her seventh grade placement, but would be able to make substantial educational progress in Ms. Parks's SDC, which would be the appropriate placement for her.

33. Dr. David Weber was Clovis's lead school psychologist; he supervised a staff of numerous other school psychologists.⁴ He had evaluated approximately 100 students for

³ Ms. Shurtliff had a bachelor's degree in liberal studies from Fresno State University. She had worked for Clovis for 8 years. She taught academic bloc courses at Kastner and for two years was the Department Chair there. She has previous experience teaching fifth and sixth grades.

⁴ Dr. Weber had a master's degree from California State University at Fresno and a doctorate in psychology from Alliant International University. He was a state-licensed and nationally certified school psychologist and with credentials in school counseling. He also had a multiple subject teaching credential and was a Behavior Intervention Case Manager. He taught frequently at the university level and had six years of experience teaching in fourth through sixth grades. He worked for Clovis as a school psychologist for 20 years.

intellectual disability, 25 to 30 of whom had Down syndrome. His role required frequent observations in Clovis's special education classrooms. Because of his expertise and experience, and his careful and thorough testimony, he was a credible witness whose views are entitled to substantial weight.

34. After reviewing Student's educational records and IEP's, Dr. Weber observed her in seventh grade history class for about 30 to 35 minutes. She did not engage in the instruction or the assignment; there was no indication she listened to the teacher. She did not engage with peers at all. Although one of the two males in her group attempted to interact with her, she did not respond.

35. At the beginning of class, Dr. Weber noticed that Student was slow in getting the assignment out of her backpack. After prompting by her aide, she retrieved an assignment, but it was the wrong one. With her aide's help, she located the right assignment but could not put her name at the top of the page; her aide had to prompt her to get her identification out of her backpack so she could copy her name on the assignment paper. By then, the classroom assignment was well under way, and Student put her head down on her desk. She was not disturbing anyone but was passively defiant; it was apparent to Dr. Weber that she did not intend to do the assignment. She could not start, continue, or complete the work.

36. Based on his experience, his study of Student's records, and his observation of her in class, Dr. Weber opined that Student was not making educational progress in seventh grade but would be able to make substantial progress in Ms. Parks's SDC, which would be the appropriate placement for her.

STUDENT'S EXPERIENCE IN SEVENTH GRADE RESOURCE CLASSES

37. During seventh grade, Student studied math and English language arts in resource rooms. A resource (or "direct instruction") class at Clovis typically served about 18 students from general education classes who had IEP's. Their skill levels varied but were roughly at the fourth to sixth grade level. Their materials were somewhat modified but nonetheless based on state standards and the regular education curriculum. They were high school diploma track students, and the resource teachers aspired to have all of them graduate with a diploma.

38. Resource teacher Gabrielle Worden taught Student in English language arts.⁵ Ms. Worden was especially well informed about Student since she worked with her every

⁵ Ms. Worden had a master's degree in special education from Fresno State University and multiple subject, mild-to-moderate special education, and resource specialist

school day in the resource room and was also her case manager, responsible for drafting her IEP's. She also observed Student in science class a few times a month, in history almost every day, and frequently outside of class. Ms. Worden displayed a thorough familiarity with Student's history and accomplishments. Her testimony was clear and forthright, consistent with documentary evidence, and unshaken on cross-examination. It is entitled to substantial weight here.

39. Ms. Worden testified (and told the March 16, 2016 IEP team) that in the resource class she modified materials for all students, but Student could not understand the modified materials Ms. Worden used with the others. Ms. Worden modified the materials further in an attempt to teach Student at her instructional level. However, Ms. Worden eventually concluded that she could not modify the materials enough both to teach to her instructional level and still conform the materials to seventh grade state standards.

40. Ms. Worden noticed that in resource class Student was somewhat less frustrated by the material than in her general education classes, but she still saw that frustration when Student was working on "whole class" materials. As the materials got harder, Student's frustration grew. In a small group she was not engaged. She sat without talking and did not make eye contact with anyone, even though prompted and encouraged to do so.

41. In March 2016, Ms. Worden informed Student's IEP team that "when attempting scaffolded and modified standard based grade level curriculum in the general education and RSP direct instruction setting, [Student] is unable to complete the required assignments and is excused from the assignments to work on IEP goals with special education staff."

42. Student's grades reflected that she could not learn math or English language arts in the resource room. She received a "P" (for participation) in math, with the notation: "This grade is based on Participation of [Student] working toward IEP math goals and not on DI [direct instruction] standards based math curriculum." Student received a "Modified D" in language arts with the same notation.

43. Based on her experiences in attempting to teach Student, Ms. Worden opined that Student was not making educational progress with the resource room curriculum, but would be able to make substantial educational progress in Ms. Parks's SDC, which would be the appropriate placement for her.

credentials. Her special education credential includes a certificate in autism. She began as a resource specialist for Clovis in 2014 and managed a caseload of 24 to 28 students.

44. Donna Iturbe was the program specialist assigned to resource classes at Kastner during Student's seventh grade year.⁶ She observed Student many times in her resource classes, testified about her observations clearly and consistently, and her opinions were not damaged by cross-examination. Her testimony is entitled to substantial weight here.

45. Ms. Iturbe came to the same conclusions about Student's experience in resource classes as Ms. Worden had. Occasionally, Student would pay attention if the subject matter was of high interest, but as it got harder she would disengage. For example, if Ms. Worden was teaching complete sentences, Student could participate in identifying the nouns. But when the lesson progressed to predicates, verbs and adverbs, it was beyond her abilities and she would disengage. Student was unable to keep up with the class, and the material, as modified for the other resource students, was well past her ability level.

46. Based on her experience, her knowledge of Student, and her many observations of Student in class, Ms. Iturbe opined that Student was not making educational progress where she was, but would be able to make substantial educational progress in Ms. Parks's SDC, which would be the appropriate placement for her.

47. The Clovis witnesses whose testimony and qualifications are set forth above all credibly testified that Student would receive a FAPE in Ms. Parks's SDC. Each of these witnesses was familiar with Student's needs and abilities, and genuinely concerned that she was not learning in her present placement. They believed that she would be far better off in Ms. Parks's class, working with students of roughly her own ability level who were learning the same things, at roughly the same pace. Several of them stressed that a major advantage of placement in the SDC was that students were taught an alternative curriculum; there was more freedom to modify curriculum, and students' materials could accordingly be individualized more exactly than was possible in a resource class, where graduation with a diploma was the goal governing individualization. The witnesses also stressed that several areas of Student's needs related to functional life skills, which she could learn far better in the SDC than in resource or general education classes. Student's goals addressed reading, writing and math, but also addressed such matters as reading an analog clock, being able to identify her address and telephone number, and counting mixed coins and bills so that she could make purchases. None of these skills was taught in the general education or resource classes. The preponderance of evidence showed that all these perceptions of the Clovis witnesses were correct.

⁶ Ms. Iturbe had a bachelor's degree in home economics and child development from Fresno State University. She held a life secondary credential, a resource specialist credential and a multiple subjects teaching credential. She taught in a special day class at Kastner for two years, and was a resource teacher there for 10 years. She recently retired.

48. By the evidence summarized above, Clovis proved convincingly that Student was not receiving educational benefit in her general education classes, was regressing socially, and did not understand the general education curriculum or texts. Clovis proved Student could not satisfactorily be educated in general education academic classes or the related resource rooms.

STUDENT'S OBJECTIONS TO THE IEP

49. Student's Mother graduated from California State University at Fresno with a bachelor's degree in education, and taught bilingual and cross-cultural kindergarten classes for six years at two other local school districts. When Student was born, Mother stopped teaching to devote her full attention to Student and her two other children. It was apparent from Mother's testimony that she was devoted to Student and deeply involved in all aspects of her upbringing, care and education. Mother spent a great deal of time helping Student with her homework and supplementing her instruction, and was familiar with her course work and abilities. Parents also employed private tutors for Student in reading and math.

50. Mother testified that Student should remain in general education classes because she was making progress on her goals there and was learning portions of state-standard curriculum. When she came home, for example, she could say she learned about "DNA" in science class. Mother perceived that Student was making progress in history because she was exposed to the concepts of other countries and merchants. Mother also testified that Student was happy in her general education classes, enjoyed being with the students there and in the resource room, and would be upset and saddened if she had to leave those classes.

51. Mother correctly pointed out that Student had made some progress on some of her goals. Student's 15 goals from her 2014 triennial IEP, written when she was in the sixth grade in elementary school, were still in effect, and her progress on them was summarized in the March 2016 IEP. Student met a substantial minority of her 2014 goals, and made progress on some others. For example, a 2014 goal envisioned that she would be able to follow functional routines within the RSP and general education classrooms with up to two-step teacher directives, which she would be able to repeat with no more than two verbal prompts. Two years later, Student had met this goal. She could follow simple two-step directions with no more than two verbal prompts, as long as they were given in close proximity. She remained unable to repeat a two-step direction without prompting.

52. A 2014 writing goal required Student to write a three to four word sentence independently, with the help of a verbal prompt, a word bank, a sentence frame, visual or picture support, and word prediction software. Two years later, she met this goal, although she still required prompting and sometimes added in wrong words.

53. A 2014 math goal aspired to have Student orally count, read or write whole numbers up to 30, with 80 percent accuracy. By March 2016, Student could do that in three of five consecutive trials, although she occasionally became confused between 13 and 19.

54. However, Student made no apparent progress on other goals. By March 2016, she still could not complete 10 one and two digit addition problems without regrouping. Her subtraction in one and two digit problems was accurate only between 10 and 60 percent of the time. When given a set of coins of the same value, she could not add their value together by skip counting; for example, counting nickels by fives. And, although by 2015, with prompting and examples, she was able to state her phone number and address, she had lost that skill by 2016; she could state two numbers correctly and then would guess at the rest, even when given the number for practice. She still could not state her address or phone number independently, though she had been working toward that end for more than two years.

55. Mother testified that Student was doing well in science class. She had never observed Student in that class, or any other class, because she did not want to distract her. Mother's sources of information were Student herself, and an incident at an open house during which some science students approached her, said they were in Student's science class, and said that she was "doing great" there. That information was vague, and its reliability was far less than the specific testimony of Student's science teacher, Ms. McLean, buttressed by other observers of the science class.

56. Mother stressed in her testimony that Student greatly enjoyed her friends at school and making new friends. Hailee Santos, a college student and friend of Student's, testified that she had noticed in Student's recent years that her ability to form sentences grew, her language improved, she knew more words, and she made many friends. Ms. Santos did not connect these improvements to Student's general education classes, which she did not observe; she based them largely on contacts out of school. And Student's progress was relative; while Student's ability to speak may well have improved, she was still limited to utterances of three or four words. By March 2016, she was still unable to create a full sentence with a subject and a predicate without teacher support.

57. Finally, Mother stated that she thought Student would have better language models and role models in the resource room than in the SDC. She stated that she "had been told" that some of the SDC students were "not very verbal." She cited no specific source for this claim. Ms. Parks, who was better informed regarding the abilities of students in her SDC, disagreed. Ms. Parks testified that there was just as much conversation in her SDC as in the resource room, and that her students were very social.

58. Ms. Parks, Dr. Weber, and other credible witnesses established that Student would fit with the others students in the SDC. Their skill levels were about the same, and Dr. Weber established that there would be tremendous value for Student from working with others who were working on the same things together. Student did not introduce any specific evidence about her skill levels relative to the SDC students, and nothing in Mother's testimony would support a finding that the SDC students would be inadequate role models. To the contrary, evidence overwhelmingly showed that Student could make significant educational progress in the SDC.

THE OPINIONS OF PATRICIA MCVAY

59. Mother's view that Student can be educated satisfactorily in general education academic classes was supported by the testimony of Patricia McVay, who was the Chief Executive Officer of Down Syndrome Unites in Strasburg, Colorado, and had 37 years of experience in special education.⁷ Ms. McVay opined that Student could satisfactorily be taught academics in general education classrooms; that she did not need an alternative curriculum; and that she had a "right" to a grade-level, standards-based curriculum.

60. Ms. McVay's opinions were not persuasive, primarily because they appeared to be based in a general philosophy of inclusion rather than any careful consideration of Student's individual capacities and needs. Ms. McVay knew relatively little about Student. All her knowledge came from reading Student's recent IEP's, and one or two assessments from 2014. Ms. McVay had never met Student, or observed her in class, in interactions with peers, or anywhere else. She had never attended an IEP team meeting for Student, nor had she spoken to any of her teachers, service providers, instructional assistants or assessors. Ms. McVay's memory of Student's IEP's was poor. When asked to describe Student's current program, she could only state that Student spent most of her time working with her aide in the back of the classroom. That was inaccurate; in both of her academic classes Student sat with a small group of other students, not in the back of the class.

61. Ms. McVay assumed that Student had capabilities she did not have. When asked to describe what Student's day in eighth grade general education science class would look like, Ms. McVay testified that she envisioned that Student would be supported in the whole class or in a small group by a number of visual aids, such as a schedule, a step-by-step description of the group's expected work; preteaching; and photographs of the subject

⁷ Ms. McVay had a master's degree in special education from McGill University in Montreal. She was an instructional assistant; a high school teacher; an instructional, behavioral and inclusion consultant; a teacher of self-contained classes; a special education director and administrator; and a principal. She has been the Director of a federally-supported Outreach Center for Inclusive Education, has given many presentations on Down syndrome and inclusion, and received several awards for her work.

matter. If the class were studying nonvascular plants, for example, Student would look up nonvascular plants with a partner, find three photographs to use as “participation visuals,” and ask questions related to the photographs. Or, if the class were studying insects, she could find and bring in photographs of insects. With these aides, Ms. McVay testified, Student could be called upon by the teacher and could participate in the class discussion. She would not have or need an adult sitting next to her; her assigned aide would instead roam the classroom helping other students, prepared to intervene on Student’s behalf when she appeared to need it.

62. This vision was unrealistic. Nothing in the evidence supported a belief that possessing additional visual aids would allow Student to participate in the group discussion, or that preteaching, which Ms. McVay envisioned would somehow happen at home, would be any more effective than the frequent reteaching Student already received. Ms. McVay envisioned that Student would prepare for a class concerning worms, for example, by looking at the textbook, doing her own research online, and coming to class with three prepared statements about worms. The evidence showed that Student’s level of reading comprehension is between kindergarten and first grade and that she was unable to prepare in that manner. Both of her academic general education teachers testified that she could not understand their textbooks and lacked the vocabulary to participate in class. The evidence showed that Student could not look up photographs of plants and insects or draft statements or ask questions about them.

63. Ms. McVay did not realize that Student was unable to participate in general education academic class discussions and exercises, even with special attention from the teacher. Ms. McLean described to Student’s March 16, 2016 IEP team an incident in which she approached Student in her science class with a microscope worksheet and gave her explicit directions on what to do with it. She asked Student to use her book and a sample paper to write the appropriate labels on the worksheet. Student’s response was to write her name on the paper, spend 20 minutes copying some words, and then to color all of the blank parts pink and to color over the teacher’s example with black.

64. Ms. McVay envisioned that Student would participate in general education eighth grade science class without her aide by her side except when she appeared to need direction. But the evidence showed that Student needed her aide constantly. She must be given one-step directions to take material out of her backpack, write her name on paper, open the text, copy individual words, and the like. All the witnesses who actually observed Student interacting with her aide established that Student could not start, continue, or complete any assignment, at any level of difficulty, without constant prompting and intervention by her aide.

65. Ms. McVay's testimony showed that her belief in inclusion was virtually unqualified. She testified that only students dangerous to self or others should be placed in a special day class, and that any other student, no matter how cognitively challenged, can satisfactorily learn in general education academic classes. She testified that she would have the same view of Student's ability to succeed in general education academic classes if her full scale IQ were 10 instead of 40, and that she had seen students significantly more challenged than Student prosper in general education academic classes. And Ms. McVay had an all-purpose answer for school staff who thought otherwise: if a student appears unable to succeed in general education, it is always the fault of the school for not providing adequate services and supports. She stated of cognitively challenged students in general: "If she's not able to do the work, then we're not teaching her, she doesn't have the appropriate support to do it. It isn't about her ability; it's about appropriate support."

66. A corollary to Ms. McVay's view that any non-dangerous student can benefit from general education, no matter how cognitively challenged, was her stated opinion that eighth grade academic material can be modified for any student having any cognitive limitation, and that the contrary view is a "common myth." She referred to a lengthy document of official appearance but uncertain origin, describing "core content connectors," which states that it identifies the most salient grade-level academic content in Common Core state standards and identifies priorities in each content area. Ms. McVay claimed that the document showed that eighth grade Common Core materials could be modified with those connectors to Student's level. However, the document itself does not make anything remotely like that claim, and Ms. McVay never explained how this could be done. An example of the math required by these core connectors is: "Use numbers expressed in the form of a single digit times an integer power of 10 to estimate very large or very small quantities, and to express how many times as much one is than the other." The evidence showed, however, that Student cannot reliably count past 30 and cannot do multiplication or division even with a calculator because she does not understand the concepts. Ms. McVay admitted that Student would have to know some math in order to learn algebra, but did not explain how Student could learn algebra with the limited skills just described. The opinions of Ms. Iturbe, Ms. Shurtliff, and Ms. Worden that seventh and eighth grade academic material could not be adequately modified to Student's instructional level and still be based on grade-level standards were formed after extensive exposure to Student's personal learning capacity, and were therefore much more persuasive than Ms. McVay's.

67. Another corollary to Ms. McVay's opinions was her fixed belief that if Student's teachers believe Student cannot adequately be taught in general education, those teachers must not be adequately trained. Ms. McVay testified that she could tell from reading Student's IEP's that the teachers who thought Student could not succeed in general education were not properly trained. When asked how she could tell that, simply from reading IEP's, she could not identify anything in the IEP's that supported her claim, so she

offered the unpersuasive response that if the teachers had adequate training, they would put the details of their training in the IEP itself. This analysis was unwarranted and not applicable to the Clovis staff who work with Student. Nothing in Student's recent IEP's suggests that the Clovis staff who deal with Student are inadequately trained. Those who testified were uniformly well trained and experienced.

68. For the reasons above, Ms. McVay's opinions about Student's ability to be educated satisfactorily in eighth grade general education academic classes were not persuasive, and are not given substantial weight here.

The Goals in the Proposed IEP

69. The proposed IEP contains 10 goals for Student, in the areas of reading comprehension, writing, addition and subtraction, telling time from an analog clock, counting money, pragmatic language, life skills (address and telephone number), use of a calculator, reading fluency, and expressive and receptive language.⁸ These appear to address all her areas of need for goals, and Parents do not argue that any additional goal is needed.

70. The goals are derived from specific baselines, are described with an adequate level of specificity and numerical standards, and are supplemented by short-term objectives. For example, the baseline of Student's addition and subtraction goal is:

When given a mixture of 10 addition and subtraction problems, [Student] is able to solve the problems with 30% accuracy. She often works right to left, and is dependent on teacher review before starting a trial.

The related goal is:

By March 2017, given teacher review, when given a mixture of 10 addition and subtraction problems, [Student] will add single digit numbers and will subtract numbers within 20 without regrouping with at least 70% accuracy in 2 of 3 trials as measured by student work samples.

Three short-term objectives follow, which set benchmarks for three, six, and nine months into the school year that gradually approach the annual goal. For example, three months after implementation begins, Student would be expected to solve the problems with at least 40 percent accuracy in 2 of 3 trials. The other 9 goals are similarly quantified and specific. All of them are capable of numerical measurement throughout the year.

⁸ The language goal is not addressed here because the parties have agreed to it.

71. Ms. Iturbe, the program specialist, addressed each of the goals at hearing, explained why Student needed each one, and explained how progress on the goals would be measured. Her reading comprehension, for example, can be measured by frequent informal reading inventories, and her writing goal can be measured by analyzing student work samples. Ms. Iturbe credibly opined that all the goals were appropriate and measurable.

72. Ms. Worden, the resource teacher, also described Student's need for each of the proposed goals, explaining how each extrapolates an annual target from Student's present levels of performance. She, too, opined that all the goals were appropriate for Student and could be adequately measured.

73. Ms. Parks, who would be Student's SDC teacher, addressed the details of most of the goals at hearing, and described how she would implement and measure them in her class. She would measure Student's money-counting progress, for example, with calculators, menus, worksheets, and item prices. She would track Student's progress in addition and subtraction with manipulatives and "touch math." Ms. Parks agreed that all the goals are appropriate for Student and are measurable.

74. Ms. McVay testified that all of the goals were unmeasurable because they do not state how frequently data must be collected to measure progress or for how long Student must be able to demonstrate the skill. However, the goals do allow for such measurements. They set forth specific short-term objectives for quarterly progress that necessarily imply that data will be collected at least quarterly, and the testimony of Ms. Worden and Ms. Parks about how they would measure her progress indicated that they would be collecting data more frequently than that. In addition, the goals typically require that the skill be demonstrated repeatedly for a stated number of times. For example, Student's writing goal would require that she create a simple sentence with a subject and a predicate in four trials as measured by work samples. The consistency with which Student can demonstrate a skill would be measurable both by requiring the skill be demonstrated over four trials, and by measuring that ability at least quarterly.

75. Ms. McVay also faulted the goals on the ground that they are insufficiently tied to state grade level standards. The reading goal, for example, references the state standard "RL1.1," a first grade level standard, rather than an eighth grade reading standard. In Ms. McVay's view, Student has a "right" to a standards-based, grade-level curriculum. However, as shown above, the evidence convincingly demonstrated Student's need for an alternative curriculum because the grade-level curriculum was so far beyond her abilities it could not be adequately modified to her instructional level and still resemble grade level work.

76. In addition, as Ms. Iturbe established, first grade standards are aligned to eighth grade standards because they require the learning of prerequisite skills a student must have before moving up to higher grade level skills. Grade level standards are aligned progressively in that manner from first grade to graduation. Ms. Parks established that in individualizing the curriculum for her students, she adheres as closely to state standards as she can, and teaches such matters as science and history, albeit by different methods, as well as functional skills. The preponderance of evidence showed that the alternative curriculum Student would have in Ms. Parks's SDC was aligned to state standards.

77. Ms. McVay also made the sweeping and unexplained statement that Student's goals were "not relevant to her life, to her needs," because they were not related to grade-level curriculum. Since Student cannot learn grade-level curriculum, this claim was unpersuasive.

78. For the reasons set forth earlier, Ms. Iturbe, Ms. Worden and Ms. Parks were all well-qualified and persuasive witnesses having substantial experience with Student, and their combined opinions that the goals proposed in the IEP were appropriate and measurable are entitled to substantial weight. Ms. McVay's contrary opinions are not.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA⁹

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 et seq. (2006);¹⁰ 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 further education, 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; Cal. Code Regs., tit.

⁹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁰ All subsequent references to the Code of Federal Regulations are to the 2006 version.

5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability 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 specifies 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).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) 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, 950-951.) 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. 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.) 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].) By this standard, Clovis, as the filing party, had the burden of proof on all issues here.

Issue: Does the IEP of March 16, 2016, as amended on April 18, 2016, offer Student a FAPE in the least restrictive environment, so that Clovis may implement it without Parents' consent?

GENERAL REQUIREMENTS FOR VALID IEP'S

PARENTAL PARTICIPATION IN THE DECISION-MAKING PROCESS

5. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

6. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subs. (b)(1), (5-6).)

7. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

8. The evidence showed that, in formulating the offered IEP, Clovis provided Parents all of the procedural protections to which they were entitled, and involved them thoroughly in the process of formulating Student's program. Parents do not argue otherwise.

CONTENTS OF IEP'S

9. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345.) An annual IEP must contain, inter alia, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1) (2006); Ed. Code, § 56345, subd. (a)(1).) The statement of present levels creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

10. An annual IEP must also contain a statement of measurable annual goals, short-term objectives for a student taking alternative assessments, and appropriate criteria for evaluation progress. Those requirements are set forth in more detail below.

11. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

12. The evidence showed that the proposed IEP included all the content required by law. It showed that the accommodations, modifications, supports and related services in the IEP – which Parents do not challenge¹¹ -- adequately addressed Student's needs. The adequacy and measurability of the proposed goals are addressed below.

REQUIREMENT OF FAPE

13. Student argues that she would be denied a FAPE by the proposed IEP because the students in the resource room would be better language and behavior models than the students in the SDC. However, the evidence showed that Mother's desire that Student have "better" role models is a preference, not a necessity. No evidence supported the claim that the examples set by the other children in the SDC would be so deficient as to cause a denial of FAPE. In *Rowley, supra*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide

¹¹ Ms. McVay was critical of the proposed IEP because it did not contain the accommodations and supports she believed would allow Student to access the general education curriculum. Since this Decision holds that Student cannot do that, Ms. McVay's proposed accommodations and supports are not necessary in the IEP.

instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) In determining the validity of an IEP, a tribunal must focus on the placement offered by the school district, not on the alternative preferred by the parents:

Even if the [placement was] better for [Student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate. We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide [Student] with educational benefits.

(*Gregory K. v. Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.)

14. Clovis discharged its burden of proving that the proposed IEP substantively offered Student a FAPE. Ms. Parks is a skilled and dedicated teacher. The other students in the class, like Student, achieve academically at pre-kindergarten to second grade levels and need significant functional skills training. Student will receive academic training there, including in subjects like history and science, but Ms. Parks will be much more able than Student's general education teachers to modify her curriculum to Student's precise instructional levels. Student will be accompanied by her one-to-one aide. Importantly, she will spend 58 percent of her school day among the general population of the school, where she will have ample access to typical peers and opportunities to model their speech and behavior.

LEAST RESTRICTIVE ENVIRONMENT

GENERAL EDUCATION v. SDC

15. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

16. Placement in the least restrictive environment is not an absolute. In an appropriate case, it must yield to the necessity that a student receive a FAPE:

The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the

maximum extent appropriate. Mainstreaming is an important element of education for disabled children, but the IDEA does not permit, let alone require, a school district to mainstream a student where the student is unlikely to make significant educational and non-academic progress.

(*D.F. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571 [citation omitted].)
This is such a case.

17. Notwithstanding Ms. McVay’s opinion that every student not dangerous to self or others should be placed in general education, the IDEA recognizes that some students should not be placed there:

Despite this preference for “mainstreaming” handicapped children—educating them with nonhandicapped children—Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that “the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” § 1412(5). The Act thus provides for the education of some handicapped children in separate classes or institutional settings.

(*Rowley, supra*, 458 U.S. at p. 181, fn. 4[citation omitted].)

18. Consequently, in appropriate cases, courts frequently approve placements outside of general education, and some of these cases involve students with Down syndrome. (*P. v. Newington Board of Educ.* (2d Cir. 2008) 546 F.3d 111, 121-122 [approving placement of student with Down syndrome in special class for 20 to 26 percent of school day]; *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1118, 1136-1138 [approving temporary placement of student with Down syndrome and IQ between 50 and 70 in self-contained special education classroom]; *L. v. North Haven Bd. of Educ.* (D.Conn. 2009) 624 F.Supp.2d 163, 181 [approving placement of student with Down syndrome in special class for 20 percent of school day]; *Dick-Friedman v. Board of Educ. of West Bloomfield Public Schools* (E.D. Mich. 2006) 427 F.Supp.2d 768, 772, 782-783 [approving placement of student with Down syndrome and last-measured IQ of 36 in special class for academic subjects for half day]; see also *S.M. v. Gwinnett County Sch. Dist.* (11th Cir., March 24, 2016, No. 15–12862) __ Fed.Appx. __, 2016 WL 1138336, p. 1 [nonpub. opn.]; *A.G. v. Wissahickon School Dist.* (3d Cir. 2010) 374 Fed.Appx. 330, 333- 335 [nonpub. opn.]; *Devries v. Fairfax County School Bd.* (4th Cir.1989) 882 F.2d 876, 878-880.)

19. In cases like this one, when it is clear that a student cannot benefit academically or socially from general education, the Ninth Circuit has repeatedly interpreted its decision in *Rachel H., supra*, 14 F.3d 1398, to approve placements for all or part of a

school day in self-contained special education classrooms. (See *Baquerizo v Garden Grove Unified Sch. Dist.* (9th Cir, June 22, 2016, No. 14–56464) __ Fed.Appx. __, 2016 WL 3435270, pp. 1, 3, 6-7 [nonpubl. opn.][approving placement of autistic student in mild-to-moderate special class]; *A.R. v. Santa Monica Malibu Sch. Dist.* (9th Cir. 2016) 636 Fed.Appx. 385, 386 [nonpub. opn.] [approving placement of autistic student in special day class for part of school day]; *B.S. v. Placentia-Yorba Linda Unified Sch. Dist.* (9th Cir. 2009) 306 Fed.Appx. 397, 398-400 [nonpub. opn.][same]; *Ms. S. v Vashon Island Sch. Dist.*, *supra*, 337 F.3d at pp. 1136-1137; *Clyde K. v. Puyallup Sch. Dist.*, No. 3 (9th Cir. 1994) 35 F.3d 1396, 1398, 1400-1402 [approving placement of student with Tourette’s Syndrome in private school for disabled].)

20. Similarly, district courts in the Ninth Circuit regularly interpret *Rachel H.* to permit placements outside of general education in cases like this one. See, e.g., *K.K. v. State of Hawaii* (D.Hawai’i, July 30, 2015, No. 14–00358 JMS–RLP) 2015 WL 4611947, pp. 18-20 [nonpub. opn.]; *B.M. v. Encinitas Union Sch. Dist.* (S.D.Cal., Feb. 14, 2013, No. 08cv412–L(JMA)) 2013 WL 593417, pp. 6-9 [nonpub. opn.]; *L.S. v. Newark Unified Sch. Dist.* (N.D.Cal., May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, pp. 8-9 [nonpub. opn.]

21. *Hudson v. Bloomfield Hills Public Schools* (E.D.Mich. 1995) 910 F.Supp. 1291, is strikingly similar to this case. In *Hudson*, the student, a 13-year-old 7th grader, was intellectually disabled and had an IQ of 42. Although she had many positive social characteristics, her academic skills remained at the first grade level. (*Id.* at pp. 1293, 1304-1305.) She took general education classes, but she did not understand the curriculum and did not participate in the class or with her peers; instead she worked exclusively with her aide on her goals. (*Id.* at pp. 1304-1305.) The parent sought a general education placement with supportive services, arguing, as Mother does here, that her daughter could be satisfactorily educated in general education classes due simply to exposure to bits and pieces of the general education curriculum. (*Id.* at pp. 1297-1298). The school district proposed to place the student in a special education class for academic subjects and in general education for regular education gym, art, home economics, drama and music classes. (*Id.* at p. 1294.)

22. The District Court in *Hudson*, *supra*, 910 F.Supp. 1291, upheld the school district’s blended program as the least restrictive environment, noting that the student “could not participate in regular education, [or] take similar tests and achieve at a level comparable to other 7th grade students”; that she studied a different curriculum; and that as a result her academic progress was “minimal at best.” (*Id.* at pp. 1304-1305.) The Sixth Circuit Court of Appeal adopted the District Court’s opinion as its own, and the United States Supreme Court declined to hear the matter. (*Hudson v. Bloomfield Hills Public Schools* (6th Cir. 1997) 108 F.3d 112, 113; *cert. denied*, 522 U.S. 822.)

23. In *Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment: (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. (*Id.*, 14 F.3d at p. 1404.) In *Rachel H.* the Ninth Circuit held that an intellectually disabled student with an IQ of 44 should be placed full-time in a general education second grade class. Student argues that *Rachel H.* is dispositive here, but its facts are readily distinguishable, as shown by comparing the two cases according to the *Rachel H.* standards.

ACADEMIC BENEFIT

24. The record in *Rachel H.*, *supra*, 14 F.3d 1398, showed that the student “received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide.” (*Id.* at p. 1401.) In reaching this conclusion the court gave great weight to the fact that Rachel’s general education teacher testified in *support* of her placement in general education, saying that Rachel “was a full member of the class and participated in all activities.” (*Ibid.*) Here, by contrast, Student’s general education teachers both testified Rachel could not participate in their classes, could not understand the texts, did not have the vocabulary, and frequently withdrew and put her head down on her desk. The evidence here showed that Student received no benefit from the general education curriculum.

25. In addition, *Rachel H.*, *supra*, 14 F.3d 1398, did not involve a large and growing gap between the academic abilities of the student and her classmates, or the necessity of radical curriculum modification. The *Rachel H.* dispute originated with the student’s kindergarten program. The hearing officer ruled on her first grade program, and the courts on her second grade program. (See *Board of Educ. v. Holland* (E.D.Cal.1992) 786 F.Supp. 874, 876-877; *Rachel H.*, *supra*, 14 F.3d at pp. 1399-1400.) Student in this matter, by contrast, is now six to seven years behind her classmates in academic skills.

26. Student argues that because she made some minimal progress on her goals between 2014 and 2016, while sitting in a general education classroom working with her aide, she is deriving some academic progress in general education. However, the progress was not enough to show educational benefit. Student remained mired in kindergarten and first grade academic work, although she made some progress within that narrow range. Her reading comprehension, for example, rose from kindergarten level into first grade level, though with 20 to 30 percent accuracy.

27. Student's goals were not tied to the general education curriculum; they addressed either academics at the kindergarten to first grade level or practical life skills like learning to count money and read an analog clock. Student's physical presence in general education was unrelated to her progress on her goals, which occurred during constant interaction with her aide, the help of two private tutors, and help from an educated, involved Mother at home.

28. Student's very limited progress on her goals was not achieved because she was in a general education setting, and had nothing to do with the science or history curriculum. As the Fifth Circuit Court of Appeal said of a similar student, "The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student." (*Daniel R.R. v. State Bd. of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1049.) Student points out that in *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, the Court stated that the appropriateness of an environment should be measured by a student's progress on her goals. (*Id.* at p. 1467.) However, that was said in the context of a student who was meeting her academic goals but failing to make progress on emotional and psychological goals in a day treatment center. (*Ibid.*) It had nothing to do with a student sitting in a general education classroom, unable to access the academic curriculum there, working with her aide on goals that were not and could not be based on the curriculum studied by the rest of the class. If Student were right, every nondisruptive child who could make progress on her goals working with an aide would have to be placed in a general education classroom to do that work. That is not the law.

NONACADEMIC BENEFIT

29. In *Rachel H.*, *supra*, 14 F.3d 1398, the student was also deriving substantial nonacademic benefit from her presence in general education classes; she "had developed her social and communications skills as well as her self-confidence from placement in a regular class . . ." (*Id.* at p. 1401.) Here, Student socialized well with the other students in general education as they walked into the classroom, but once the class began, she was unable to converse with them on the subject matter, withdrew from the class and was increasingly isolated. Ms. McLean, Student's science teacher, testified that the general education class was "very defeating" for her and she actually regressed in her social skills during the year. When spoken to later in the year, she would cover her face or put her head down as if she were embarrassed to reply. Dr. Weber noticed her failing to respond to a peer in her history class. Ms. Worden, the resource teacher, saw that Student was not engaged in small group activities and did not look peers or adults in the eye even when prompted. The evidence showed that Student may have enjoyed her peers outside of academic classes, but once the classes began, she derived no social benefit from her presence there, was frequently embarrassed, and regressed in her social skills.

DISRUPTION

30. Student was not disruptive in her general education classes, and that factor weighs in favor of general education.¹²

31. Balancing the *Rachel H.* factors in this matter leads to the conclusion that Student cannot be satisfactorily educated in general education academic classes. She benefits not at all from the regular curriculum, which cannot be modified to her instructional level and still conform to grade level standards. The minimal progress she has made on her goals is unrelated to her presence in general education classroom or to the curriculum presented there. Once class starts she obtains no social benefit from her presence there; she lacks the ability to discuss the material with her classmates, becomes embarrassed and withdraws. Because she cannot understand the curriculum in general education, she is not receiving a FAPE there, and needs to be taught in a smaller, more structured environment among students with similar needs where repetition, individual attention, and practical skills are more available. These concerns substantially outweigh the fact that she is not disruptive; her education requires more than just allowing her to sit quietly in a classroom.

32. In addition, Clovis's proposed IEP exposes Student to typical peers as much as it can. She would spend 58 percent of her time in the general education environment with two electives, PE, lunch, recesses and breaks. Clovis has minimized the time she will spend outside the general education environment.

RESOURCE ROOM V. SDC

33. Student claims that the proposed IEP violates the preference for least restrictive environment because she could study academics in resource rooms for the same percentage of time that she could study academics in the SDC. But the evidence showed Student cannot learn academics in the resource room. When this became apparent, Clovis allowed her to work on her goals in the resource room with her aide, rather than on the modified academic curriculum given the other resource students. She was given a "P" for participation in math instruction with the notation: "This grade is based on Participation of [Student] working toward IEP math goals and not on DI [direct instruction] standards based math curriculum." She was given a Modified D in English language arts for the same reason.

34. The argument also misunderstands the least restrictive environment rule, which seeks to ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . ." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i).) The requirement is not intended to affect placement decisions between

¹² Neither party makes any argument concerning the fourth *Rachel H.* factor, the cost of the proposed placement, so that factor is not addressed here.

two classrooms each of which contains only disabled students. In *McLaughlin v. Holt Public Schools Bd. of Educ.* (6th Cir. 2003) 320 F.3d 663, a district court had ruled that a student's placement in a resource room would be a less restrictive alternative to that of a categorical [SDC equivalent] classroom. The Court of Appeal reversed that ruling, explaining that the requirement of least restrictive environment only affected the degree to which a student is mixed with nondisabled students. (*Id.*, 320 F.3d at pp. 669-672.) As the Court put it: "[T]here is no basis in the 'least restrictive environment' provision for evaluating the 'restrictiveness' of alternative special education placement options, all of which require separation from non-disabled peers." (*Id.*, 320 F.3d at p. 672; see also *Lebron v North Penn School Dist.* (E.D.Pa. 2011) 769 F.Supp.2d 788, 800 [least restrictive environment doctrine not relevant to dispute about competing supplemental services].)

VALIDITY OF ANNUAL GOALS

35. An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals.

36. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 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); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).)

37. For a student taking alternative assessments aligned to alternative achievement standards (like Student), annual goals must be broken down into short-term objectives. (20 USC § 1414 (d)(1)(A)(i)(I)(cc).) Short-term objectives are measurable, intermediate steps between the present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals. (U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).)

38. In addition, the IEP must include a description of the manner in which the progress of the pupil toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).)

39. Independent examination of the 10 goals in Clovis’s proposed IEP shows that they meet these standards. The proposed IEP states that Student’s intellectual disability affects her participation in the general education curriculum, due to her cognitive deficits, to such a degree that she requires an alternative curriculum. The goals meet each of the educational needs the evidence showed Student has, and Student does not identify any need the goals do not address. The IEP extensively describes her present levels of academic and functional performance in general, and then uses those levels to establish benchmarks for each of the 10 goals. The goals extrapolated from these baselines describe advances that Student, in light of her deficits, could reasonably expect to reach in a year. Each goal also contains a set of three short-term objectives, providing measurable intermediate steps toward the annual goals. Each goal describes in detail how progress will be measured and who will measure it. The goals do all of this with adequate specificity and precision, as illustrated in the Factual Findings.

40. The District introduced substantial evidence that the goals were appropriate and measurable. The combined testimony of Ms. Iturbe, Ms. Worden and Ms. Parks established in detail how the goals could be measured, and that they were appropriate for Student. They were credible and persuasive witnesses, for the reasons set forth in the Factual Findings.

41. Ms. McVay’s opinion that the goals lacked essential elements was unpersuasive. Notwithstanding her contrary claims, the goals do make sufficient provision for the frequency of data collection (quarterly) and the duration that Student must demonstrate a skill (over a specified number of trials). In addition, there is no legal requirement that those elements be included in annual goals. The requirement that the goals must be “measurable” is tied by statute to the requirement that goals adequately meet the needs that result from the student’s disability and enable her to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Nothing in that language requires a statement of the frequency of data collection or the duration of demonstrating a skill. Beyond the baseline and measurability requirements, “there is no legal authority requiring a particular level of specificity in the statement of annual goals.” (*O’Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 706.) The statutory requirements for the contents of an IEP end with the rule of construction that “[n]othing in this section shall be construed to require . . . (I) that additional information be included in a child's IEP beyond what is explicitly required in this section . . .” (20 U.S.C. § 1414(d)(1)(A)(ii); see also Ed. Code, § 56345, subd. (i).)

42. For students with the most significant cognitive disabilities who take an alternative assessment, a State may employ alternative academic achievement standards, as long as they are “aligned” with the State’s academic content standards and promote access to the general curriculum. (34 C.F.R. § 200.1(d)(1).) The IDEA and its implementing regulations repeatedly authorize alternative curriculum standards and alternative assessments for students with severe cognitive impairment. (See 20 U.S.C. § (20 USC § 1414 (d)(1)(A)(i)(I)(cc); 34 C.F.R. §§ 200.1(d), 300.160(c); Ed. Code, § 56345, subds. (a)(1)(C), (a)(6)(B).) Ms. McVay’s view that Student has a “right” to a grade-level standards-based curriculum does not conform to these laws.

43. Student’s argument, that the alternative curriculum Student would have under the proposed IEP is not based on state standards, had no evidentiary support beyond the testimony of Ms. McVay; who did not claim to have any familiarity with the alternative curriculum taught in Ms. Parks’s SDC. She appeared to believe that a goal is insufficiently tied to state standards unless it explicitly references standards at the grade level of the student, no matter how far beyond the student’s capabilities those standards may be. However, while alternative curriculum must be aligned with state standards, there is no requirement that annual goals in an IEP must affirmatively demonstrate that alignment or reference those standards.

44. In addition, the references in the goals to first grade standards impliedly incorporate eighth grade standards because, as established by Ms. Iturbe, the standards of first grade involve concepts that are prerequisite to the standards of the higher grades. First grade level standards are aligned to eighth grade standards because they contain prerequisites to the performance of the eighth grade standards, and thus promote access to those standards. Student must first learn to multiply and divide in order to learn algebra and geometry. Student’s proposed goals address reading, writing, and math. Ms. Parks individually tailors her students’ work with as much exposure to state standards as she can. She has an alternate way of teaching astronomy, for example, by using videos and manipulatives and having students move around imitating the movements of the sun and planets, but she is still teaching astronomy.

45. The goals are not legally invalid because they reference grade levels that accurately reflect Student’s present levels of performance and reasonable expectations for improvement in that performance over a year. Just the opposite is true. Had Student’s goals been strictly aligned to eighth grade standards, they would have been invalid because they would not have been sufficiently individualized. (*Jefferson County Bd. of Educ. v. Lolita S.* (11th Cir. 2014) 581 Fed.Appx. 760, 763-764 [nonpubl. opn.][holding that a reading goal derived from state standard for ninth-grade students denied FAPE because it was not individualized for student at first grade reading level].)

