

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

HEMET UNIFIED SCHOOL DISTRICT,

OAH Case No. 2013090788

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HEMET UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

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OAH Case No. 2014010760

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on September 23, 2013, naming the Hemet Unified School District.

Hemet filed a due process hearing request with OAH on January 22, 2014, naming Student.

OAH consolidated the cases on January 27, 2014, and determined that the timelines in Hemet's case governed the consolidated matter.

Administrative Law Judge Darrell Lepkowsky heard this matter in Hemet, California, on February 3-6, 2014.

Peter Sansom, Attorney at Law, represented Hemet. Leah Davis, Hemet's Director of Special Education, was present each day of the hearing.

Mother and Father represented Student. Vickie Smith, Executive Director for Area Board 12 of the State Council on Developmental Disabilities, was present on behalf of Student the first day of hearing. Tracy Amador, a consumer services coordinator with the Inland Regional Center, was present on behalf of Student for three days of the hearing. Student attended the first day of the hearing.

On February 6, 2014, the last day of the hearing, the ALJ granted the parties' request for a continuance in order to file written closing arguments and reply briefs. The parties timely filed their closing briefs on February 20, 2014. The parties filed their reply briefs on February 26, 2014, at which time the ALJ closed the record and the matter was submitted for decision.<sup>1</sup>

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<sup>1</sup> Student filed her reply brief approximately seven hours after it was due. In an Order dated February 28, 2014, the ALJ denied the Hemet's motion to strike Student's late reply brief as Hemet failed to demonstrate any prejudice by the short delay.

## ISSUES<sup>2</sup>

### STUDENT'S ISSUES

1. Did Hemet deny Student a free appropriate public education (FAPE) in the least restrictive environment because its May 6, 2013 individualized education program (IEP) failed to offer Student a preschool placement with typically developing peers at Hamilton Elementary School (Hamilton), Student's home school?
2. Did Hemet's May 6, 2013 IEP offer fail to meet Student's unique needs, therefore denying her a FAPE, because it required Student to travel too great a distance by school bus from her home to school?
3. Was Hemet required to accept Student into the California State Preschool (State Preschool) program at Hamilton or alternatively create a typical peer preschool program for Student there?

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<sup>2</sup> The ALJ has rephrased the issues for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

During the hearing and in her written closing argument, Student also contended, inter alia, that Hemet failed to implement her individualized education program (IEP) as written; failed to provide adequate accommodations and proper supports and services to implement the IEP's; failed to monitor progress toward IEP goals; disregarded Student's individual needs; and neglected procedural safeguards. However, Student failed to raise any of these issues in her request for due process hearing. Therefore, the only issues addressed by the ALJ in this Decision are those raised in the parties' respective requests for due process as clarified in the Order Following Prehearing Conference. (See, 20 U.S.C § 1415 (f)(3)(B), and Ed. Code, § 56502, subd. (i).)

## HEMET'S ISSUE

4. Does Hemet's IEP offer of January 8, 2014, constitute a FAPE in the least restrictive environment?

## SUMMARY OF DECISION

Student contends generally that Hemet should have offered to place her in a general education preschool classroom rather than offer a special day placement. Student contends that Hemet's offer of placement in a special day class preschool was not the least restrictive environment at any time at issue. Student further contends that due to her medical condition she cannot tolerate a long bus ride from her home, which is located in a remote rural area, to schools located in the city of Hemet, many miles from where she lives. Student maintains that whether Hemet offered her a general education placement or one in a special day class, the placement should have been located at Hamilton, even if Hemet had to create a specific classroom for her.

Hemet specifically contends that its May 6, 2013 IEP and January 8, 2014 IEP procedurally and substantively offered Student a FAPE.

This Decision finds, based upon the information available to it at the time of the May 6, 2013 IEP meeting, Hemet appropriately offered Student placement in a special day class. Hemet also addressed all of Student's issues regarding the long bus ride to its preschool, of which Hemet was aware at the time of the May 2013 meeting. However, this Decision also finds that Hemet has not met its burden of proof that a special day class was the least restrictive environment for Student as of January 8, 2014, when Hemet made its most recent offer of placement and services to her. Therefore, Hemet may not implement the IEP over the objection of Student's parents.

## FACTUAL FINDINGS

### BACKGROUND AND JURISDICTION

1. Student is a little girl who turned four years old in December 2013. She lives with Parents in a very rural and isolated area of Riverside County that is within Hemet's geographical boundaries. Student's community is often referred to as being "up the hill" from the city of Hemet.

2. Father is Student's primary caregiver. Mother is a registered nurse who works full-time out of the home. Mother also recently completed a master's of science degree as a nurse practitioner and, at the time of the hearing, was waiting to take her certification examination.

3. Soon after her birth, Student was diagnosed with the genetic condition trisomy 21, also called Down syndrome. Student is eligible for special education and related services under the categories of intellectual disability and speech and language impairment. Her eligibility is not at issue.

4. Student is a client of the regional center, which provided her with Early Start services until she was three years old.

5. In October 2012, the regional center referred Student to Hemet for purposes of assessment and development of an IEP if appropriate.

### STUDENT'S INITIAL SPECIAL EDUCATION ASSESSMENT

6. Hemet conducted an initial assessment of Student beginning in late October 2012 and continuing through early December 2012. Although the December 12, 2012 IEP is not at issue in this case, Hemet partially relied on the information from its fall 2012 assessments of Student and Student's present levels of performance developed by the IEP team for the December 12, 2012 IEP, in making its May 6, 2013 offer of placement and services to Student.

7. Hemet school psychologist Terri Foster<sup>3</sup> led the multidisciplinary team that conducted Student's initial assessment. The assessments are not at issue in the instant case.

8. The result of Ms. Foster's cognitive assessments indicated that Student exhibited significant cognitive delays. She was not able to put one toy aside when given another, did not exhibit sequenced related action when playing, could not match objects to their pictures or spontaneously name objects shown to her. Student could not sort or match objects by color, shape, or size. Her results on the cognitive assessments placed Student in the second percentile.

9. Student also demonstrated delay in her pre-academic skills. The academic assessments placed her in the third percentile. Student did not demonstrate an understanding of any numerical values, such as the concept of "one."

10. In adaptive and self-help areas, Student demonstrated a range of abilities. Student was not yet toilet trained. She was, however, able to drink from a cup, was able to feed herself somewhat, and was learning how to put on her clothing.

11. Although Student had low-average skills in the areas of engagement with others and showing initiative, she demonstrated significantly more delays in play skills and behavior, with some of her scores falling below the first percentile. Father's rating scales showed that Student was at-risk in the areas of attention, social skills, and functional communication. He rated Student in the clinically significant range in the area

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<sup>3</sup> Ms. Foster is a licensed educational psychologist and a nationally certified school psychologist. She has a Master of Arts degree in counseling and guidance. Ms. Foster has over 30 years of experience in school psychology, the last eight of which have been with Hemet.

of withdrawal because Student showed a fear of strangers, refused to join in activities that involved groups, and would cling to her parents in strange surroundings.

12. Student's most pronounced deficit was in the area of her communication skills. She scored in the third percentile for receptive language and below the first percentile in expressive language on the assessment administered by a Hemet speech language pathologist. Although Student could follow simple directions, point to body parts, and follow familiar routines when they were announced (such as "bath time"), she had difficulty understanding new words, and could not follow two-step directions. Student did not demonstrate an understanding of categories and could not pick an item from a group of five objects. Although Father indicated to the assessors that Student had a vocabulary of about 15 to 20 words at the time, Student only uttered one sound during the assessment. The speech and language pathologist therefore could not report an accurate mean length of utterance for Student as part of the speech assessment.

13. Student's greatest strengths were in the areas of fine and gross motor skills. Many of her scores in those areas were in the average range of development.

14. The assessment indicated that Student needed direct teaching of routine skills, with skills broken down into smaller parts, with repetition to practice the skills. In addition, directions needed to be simplified for Student if she did not appear to understand them, and gestures needed to be used to supplement verbal instructions.

#### STUDENT'S INITIAL IEP TEAM MEETING

15. Hemet convened an IEP meeting for Student on December 12, 2012, to review the results of her assessments and determine if Student was eligible for special education and related services.

16. The IEP team reviewed the last individualized family service plan developed for Student by the regional center on October 29, 2012, when Student was 34 months old. This plan indicated that Student had continued to demonstrate delays in

all areas, with significant delays in cognition, socialization, and communication skills. The IEP team incorporated information from the regional center's service plan into the IEP the team developed for Student at this meeting.

17. After reviewing Student's records and the results of Hemet's assessment, the IEP team determined that Student was eligible for special education and related services under the categories of intellectual disability and speech and language impairment. The team then developed present levels of performance for Student based upon a review of Student's records from the regional center, the results of Hemet's assessments, and input from Student's father, who attended the IEP meeting by telephone.

18. Based upon Student's present levels of performance, her IEP team developed three goals, all in the area of speech and language. The first goal addressed Student's expressive language delays. The second goal addressed Student's receptive language delays. Student's third goal was in the area of articulation.

19. The IEP team did not discuss any of Student's health issues other than how her Down syndrome affected her cognitive levels and ability to communicate. The regional center's last individualized family service plan for Student noted that Student was taking the medication famotidine, which is used to control acid reflux and related disorders. Based on this report, the IEP team knew that Student was taking famotidine for acid reflux. However, Father did not raise the issue of Student's reflux at this IEP meeting and failed to inform the IEP team that Student actually suffered from gastroesophageal reflux disease, known as GERD. Father did not inform the IEP team that the famotidine was not able fully to control the condition although Student was receiving the maximum dosage. Nor did Father discuss with the IEP team the fact that Student's reflux increased during long car trips. Hemet's IEP team members therefore



had no knowledge that Student's reflux was a serious issue or that she actually suffered from GERD rather than the more common acid reflux.

20. Hemet offered Student 50 sessions of speech and language therapy per year, for 20 minutes a session, in a group setting. It also offered 10 minutes a month of consultation between an early childhood special education teacher and Student's speech and language pathologist. Hemet did not offer any type of preschool placement to Student in this IEP. Father consented to the IEP.

#### MAY 6, 2013 IEP TEAM MEETING

21. In January 2013, Hemet speech language pathologist Maureen McElligott<sup>4</sup> began providing speech and language therapy to Student at Hamilton.

22. Parents became concerned that Student needed to interact with other children in order to stimulate her speech and language development. After only a few speech therapy sessions with Student, Ms. McElligott also became concerned that Student would not progress in her communication abilities without exposure to her

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<sup>4</sup> Ms. McElligott has a Master of Science degree in Communicative Disorders from the University of Redlands. She has specialized in providing speech and language therapy to preschool children for most of her almost 40-year career. Additionally, Ms. McElligott is a credentialed special education teacher who has taught special needs children of all different ages and disabilities, including preschool-aged children with cognitive impairments and communication deficits. She has also taught at the college level and supervised college and graduate students in the clinical setting. She holds a state of California license in speech pathology and has her certificate of clinical competence from the American Speech-Language-Hearing Association. Ms. McElligott has worked for Hemet since 2004, providing speech and language therapy primarily to preschool students such as Student.

peers. On February 1, 2013, Ms. McElligott wrote a note to Hemet administrators explaining Parents' concerns. She added that she agreed that Student would benefit greatly from interaction with other children in a structured setting.

23. Based upon the concerns expressed by Ms. McElligott and Parents, Hemet convened an amendment IEP meeting on May 6, 2013, to discuss a possible placement for Student. The IEP team included Father, Ms. McElligott, a counselor from the regional center, special education preschool teacher Diane Van Lue,<sup>5</sup> and former general education Head Start teacher Teresa Howland. Ms. Howland worked as a consultant for Hemet and attended IEP meetings as the general education teacher. She had been a Hemet Head Start teacher for approximately 25 years before retiring in 2008. After she retired, Hemet hired Ms. Howland as a general education consultant. She generally attended IEP meetings for preschool children as Hemet's general education representative.<sup>6</sup>

24. The majority of the discussion at this meeting focused on the benefits of Student attending a Hemet preschool special day class. Hemet only operated two preschool special day classes. Both were located in the city of Hemet, approximately 40 miles away from Student's home. Hemet did not operate a special day class preschool or its own general education preschool at Hamilton, Student's home school.

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<sup>5</sup> Ms. Van Lue started her career as a preschool teacher and director for private, general education preschools. She returned to college and obtained her Bachelor of Arts degree in child development in 2000, and her Master's degree in education in 2004. She has been an early childhood special education teacher for Hemet since 2001.

<sup>6</sup> Ms. Howland has a Bachelor's degree and a state credential as a pre-kindergarten teacher.

25. Ms. Van Lue taught the mild to moderate special day class at Little Lake Elementary. Her class consisted of eight preschool children. Generally, five or six of the children would have IEP's. Hemet always placed two or three typically developing preschool children in each of its preschool special day classes as role models for the children with IEP's. Ms. Van Lue's class had further mainstreaming opportunities during recess with children from the State Preschool class located at the school. Ms. Van Lue followed a preschool curriculum as much as possible, focusing on teaching the students colors, shapes, and the alphabet.

26. The IEP team discussed the information in Student's regional center records and her scores from Hemet's December 2012 initial assessment. The team also discussed Student's present levels of performance, based on her assessment scores, the information in her December 2012 IEP, and on her difficulties accessing Ms. McElligott's speech therapy sessions.

27. Father had brought Student to her speech sessions. Ms. McElligott generally asked parents to stay in the room during initial sessions with the preschool students so that they were not overwhelmed and learned to adapt to being with her. However, Student never reached a point where she would separate at all from Father during sessions where Ms. McElligott was the sole therapist present. Student was not happy if Father attempted to put her down or remove her from his lap. Student would just climb back on top of him. If Father put Student on the floor, Student would curl up in a ball. Student clung to Father and ignored Ms. McElligott. Even when Ms. McElligott tried sitting on the floor with Student to provide speech therapy, there was no response from Student. Ms. McElligott tried several different approaches with Student, but she was never successful in getting Student to participate in the speech therapy.

28. Although Student had begun to verbalize a few words at home, Ms. McElligott was never able to get Student to use any expressive language with her during

the speech sessions. During the four months Ms. McElligott provided speech therapy to Student, she was unable to see any signs that Student could make her wants and needs known; Student had made only minimal progress on her communication goals.

29. Student's unique needs at the time of the May 6, 2013 IEP meeting were based on her delays in the areas of receptive and expressive language and social skills. Student's communication skills were severely delayed at the time. She had not demonstrated an ability to understand any of the instruction given by Ms. McElligott during speech and language therapy and had not demonstrated any ability to communicate with Ms. McElligott through verbal language or other communication methods. Even with a one-on-one aide, Student would not have been able to access the class instruction or make any educational progress. The aide would not have the training to be able to teach Student individually or know how to communicate effectively with her.

30. Because of Student's significant communication delays at the time, a general education teacher and a one-on-one aide would not have the training to be able to assess Student's needs and instantly modify the instruction to meet those needs. Student would have been lost in a general education preschool environment and would not have made any progress in the curriculum.

31. Although Student did not throw tantrums, scream, or demonstrate any aggression, other behaviors would have interfered with her ability to access a general education classroom. Student's refusal to separate from Father, her inability to sit in a chair, her tendency to curl up in a ball on the floor, and her lack of participation in the speech therapy, indicated that Student's need for individual instruction and need for constant attention would interfere with the group instruction modality used in a general education classroom.

32. The testimony of Hemet witnesses such as Ms. McElligott and Ms. Foster confirmed Student's need for specialized instruction at the time of the May 6, 2013 IEP meeting. Ms. McElligott's testimony concerning Student's needs and abilities as of the May 6, 2013 IEP meeting was particularly persuasive in light of her extensive and varied experience as discussed above. Importantly, Ms. McElligott had been able to observe and assess Student's abilities during the four months she provided speech therapy to Student.

33. Ms. Foster has been a school psychologist for some 30 years. She has assessed numerous children with Down syndrome and has worked extensively with them. Her testimony that Student would not be able to make progress in a general education classroom was based on her assessments of Student and her observations during Student's speech therapy sessions. Ms. Foster's testimony corroborated that of Ms. McElligott, and was similarly persuasive.

34. Student did not offer any persuasive evidence that controverted the testimony of Ms. McElligott and Ms. Foster that Student was not capable of making more than de minimus progress in a general education classroom. Vickie Smith, who is the Executive Director for Area Board 12 of the State Council on Developmental Disabilities, testified on behalf of Student. Ms. Smith believed that Hemet should have offered a general education placement to Student because general education is always the least restrictive environment for a child. However, Ms. Smith is not a psychologist or an educator. She has never assessed Student or observed her in a classroom environment. She based her testimony solely on the fact that she believes that all children should be educated at their home school with supports. Ms. Smith did not base her opinion on any independent knowledge she had about Student's unique needs. Therefore, not much weight was given to Ms. Smith's opinion regarding what

constituted the least restrictive environment for Student as of the date of the May 6, 2013 IEP meeting.

35. Parents believed Student would have been able to make progress in a general education environment. Student was not aggressive, did not throw tantrums, and generally was compliant at home. As of May 2013, Student was using a few words at home, and was playing with her siblings and, occasionally with their friends. However, Father did not discuss any of this information with the IEP team during the May 6, 2013 meeting. Nor did he provide any information to the team concerning Student's ability to interact with other children or people in the community. Father did not discuss Student's compliant nature. He did not dispute any information the Hemet IEP team members had concerning Student's severe communication and social delays. Generally, a child's parents have valuable knowledge about their child that could inform an IEP team's decisions regarding placement options. In this case, however, Student's parents did not provide any such information to the IEP team on May 6, 2013, that would have supported placing Student in a general education classroom.

36. Based upon Student's significant cognitive and communication delays, her difficulties with interacting with others, her lack of a history of socializing with other children, and her inability to separate from Father during the speech sessions, Hemet's IEP team members believed that Student would be unable to function in a general education preschool class. Hemet therefore offered placement to Student in the mild-to-moderate preschool special day class for extended school year in summer 2013, and for the 2013-2014 school year. Hemet also offered to continue Student's speech and language therapy sessions at the same rate of 50 group sessions a year, for 20 minutes a session.

37. The extended school year preschool classroom offered as placement to Student was Ms. Van Lue's class located at Little Lake Elementary School, which was

almost 40 miles from Student's home. The preschool class for the 2013-2014 school year was going to be taught by special education teacher Cindy Munsey at Bautista Creek Elementary School, about 39 miles from Student's home. Hemet did not operate any preschool special day class closer to Student's home. Because the programs were not located at Student's home school, Hemet offered to provide round trip bus transportation for Student from her home to each of the schools. The bus ride would be at least an hour and 10 minutes each way.

38. Car rides exacerbate Student's reflux. Student's medication does not fully control her condition. Student's family only travels with her down the hill from her home when it is necessary, such as for medical appointments. Otherwise, Father remains in their community with Student. When Student does travel, Parents have to pull over to the side of the road frequently because Student often vomits or chokes because of her reflux. Student's reflux condition is related to her refusal to remain in her car seat.

39. However, Father did not inform the IEP team of any of this information during the May 6, 2013 IEP meeting. The only issue Father raised was the fact that Student would unbuckle the straps of her car seat and climb around the car. Father expressed concern that a long bus ride was not safe for Student. Therefore, the only information Hemet had was that there was a potential safety issue with Student riding the bus. The Hemet team members addressed the issue by offering to place an aide on the bus with Student or provide her with a harness during the bus ride. The harness zipped in the back and Student would not be able to reach the zipper. Father rejected both proposals. He felt Student would become anxious and react negatively to the restraints. He also was very opposed to the idea of subjecting Student to a bus ride that would take more than an hour each way.

40. The Hemet IEP team members then placed a telephone call to a Hemet program specialist who agreed to contact Hemet's transportation department to determine if Hemet could reimburse Parents for transporting Student themselves.

41. Hemet's final offer of FAPE for Student was a preschool special day class for the 2013 extended school year and the 2013-2014 school year. Hemet also offered speech and language services. The IEP team reserved a final decision on what type of transportation it was offering Student until it obtained an answer from Hemet's transportation department on whether Hemet could reimburse Parents for their mileage costs in driving Student to school.

42. Neither Father nor the regional center representative present at the IEP meeting suggested to Hemet's team members that Hemet should have offered Student a placement in a general education preschool class. Father signed his consent to the May 6, 2013 IEP. A few weeks after this meeting, Hemet confirmed that it could reimburse Parents for transportation costs.

#### EVENTS SUBSEQUENT TO THE MAY 6, 2013 IEP TEAM MEETING

43. Parents later regretted that Father had consented to the IEP. Sometime during summer 2013, they revoked their consent to the May 6, 2013 IEP offer. Parents requested another IEP meeting for Student in late May 2013. Due to conflicts in scheduling, the meeting did not occur before Hemet went on its summer break.

44. On May 30, 2013, Dr. Donna Krepak, who was Student's doctor, wrote a letter outlining her concerns about Student's education and Hemet's proposed school placement. Dr. Krepak opined that because of Student's age (she was about three and a half years old at the time), and her condition of trisomy 21, a long bus ride was not appropriate for Student. According to Dr. Krepak, it was difficult for Student to tolerate being in a vehicle for a long length of time because she was able to get herself out of her car seat, which posed a significant danger to Student. In addition, Dr. Krepak



believed that Student needed constant supervision, which Dr. Krepak did not believe was possible in the situation proposed by Hemet. Dr. Krepak's letter did not reference Student's acid reflux in any way or state that Student suffered from GERD. Dr. Krepak did not testify at the hearing.

45. Sometime after the May 6, 2013 IEP meeting, Parents became aware of the State Preschool classroom located at Hamilton. Hemet operates 10 State Preschool classrooms through contract with the Riverside County Office of Education. The California Department of Education (CDE) funds the program. Generally, preschool-aged children are eligible for the program if their school district does not operate its own general education preschools and if their parents meet income eligibility limits.

46. On August 26, 2013, Parents applied to Hemet to admit Student to the State Preschool program. Parents' stated income exceeded the eligibility limits of the State Preschool program for their six-member family by close to 30 percent.<sup>7</sup>

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<sup>7</sup> The eligibility requirements for the State Preschool are stated in Education Code sections 8235; 8263, subdivision (a)(1); and 8263.1; and in the CDE's Education's document "Funding Terms and Conditions and Program Requirements for Child Development Programs, Fiscal Year 2013-2014." One of the eligibility requirements for the program is that family income cannot exceed 70 percent of the state median income, adjusted for family size. Education Code section 8235, subdivision (c) permits the State Preschools to enroll up to 10 percent of its students from families earning no more than 15 percent above the income eligibility limit if there is room for the child after all children meeting initial eligibility requirements have enrolled. However, the income of Student's parents is also higher than that permissible even when factoring the additional 15 percent amount into the equation.

47. Robyn Fairfield is the Principal of Hemet's preschool programs. Prior to obtaining her present job, Ms. Fairfield was a program development specialist for the Riverside County Office of Education where she was responsible for monitoring the Head Start and State Preschool programs. Ms. Fairfield's present position requires her to oversee the Hemet's preschool special day classes as well as the 10 State Preschool classes that operate at Hemet. She also oversees Hemet's Head Start preschool program. Head Start is another state-funded general education preschool program designed to serve children from lower-income families.

48. The income eligibility limits for Head Start are lower than the income eligibility limits of the State Preschool program. However, Head Start regulations permit IEP teams to place students with an IEP at the Head Start preschool if appropriate, regardless of the family's income. Conversely, the funding terms and conditions for operation of the State Preschools do not permit Hemet to waive income eligibility requirements. If Hemet placed a child at one of its 10 State Preschools who was not eligible, Hemet would risk losing its contract and funding for all 10 schools. Hemet's contract with the Riverside Office of Education, which is the grantee holding the funding grant from the State of California, required Hemet to adhere to the eligibility requirements.

49. Parents did not enroll Student in the 2013 extended school year special day class preschool program or in the special day class offered to Student by Hemet for the 2013-2014 school year. As of the hearing, Student still had not attended any type of school. Additionally, Parents ceased bringing Student to Hamilton for speech therapy sessions with Ms. McElligott. Parents did not believe that Student was benefitting from the services.

50. Student did participate in a library-sponsored program over the summer of 2013. The program was an hour and a half a week for six weeks. It consisted of

introducing the children to books and having them engage in art activities. Student participated fully in the program. She was attentive and would listen when books were read to her. She participated in all activities of the program. Student did not disrupt the sessions in any way.

51. Additionally, Student's family purchased instructional materials for her. Father has no education or training as an educator. In spite his lack of educational background, he began teaching Student at home. He taught Student to follow a morning routine of having breakfast, washing her hands, getting dressed, combing her hair, and brushing her teeth. Father reviewed numbers and letters with Student using teaching tools such as a magnetic board. He sang and danced with Student and painted with her. He worked on her toilet training. He took her hiking and on walks. He took her to the park and to the library so that Student could interact with other children. Father is a very loving and hands-on caregiver for Student who dedicated considerable effort to ensure that she received preschool instruction to the extent he was able to provide it. As discussed below, Father's efforts resulted in Student's significant progress in most areas in which she had demonstrated delays.

#### NOVEMBER 15, 2013 IEP TEAM MEETING

52. Hemet convened an addendum IEP team meeting for Student on November 15, 2013, in response to Parents' request for a meeting. Father attended the meeting with Ms. Smith and a regional center representative to support him. Although this IEP is not at issue in the instant case, the present levels of performance and goals developed by Student's IEP team at this meeting carried over to Student's subsequent IEP meeting, convened by Hemet on January 8, 2014, which is the subject of this case.

53. Since Student had not been attending school or going to her speech and language therapy sessions, her IEP team determined her present levels of performance based primarily on input from Father.

54. Father reviewed Student's abilities in the area of developmental, academic, and functional skills. Student was able to count to five. She could alternate her attention between objects for brief periods and request "more" by speaking the word or using a gesture. Student looked at the pictures in books and turned the pages to see the next picture. She was able to build a tower with eight blocks. Student recognized three or four colors. Student could hold a crayon and scribble, but could not yet imitate a line.

55. Student's communication skills had also increased. Student had stopped using signs for words, was imitating words said to her, had increased her vocabulary, and was using some two to three word phrases. Student was able to follow simple commands and complete familiar actions when requested. Based upon Father's input regarding Student's language abilities, the IEP team determined that Student had partially met her three language goals.

56. Although Student had not wanted to interact with Ms. McElligott during speech therapy, Student acted very differently when at home or in the community. She played with a variety of toys and imitated actions of other people. She was affectionate with her family and showed concern when she perceived someone to be hurt or sad. She was more outgoing when other children were around.

57. Student's adaptive skills had also increased. Although she still resisted toilet training, Student could identify herself in the mirror, liked to help put things away, and could attend to activities for up to five minutes. Student could drink from a cup and use a spoon to feed herself. Student was learning to dress herself. She was able to put on and take off some of her shoes and boots, and was able to remove most of her clothing independently.

58. Student's IEP team retained her three language goals since Student had not yet met them fully. The team also added five goals. Two of the goals addressed pre-academic skills in the area of math and pre-reading. The IEP team developed two

goals for Student to address her social, emotional, and behavioral needs. The IEP team also developed a fine motor goal to address Student's writing deficits. The IEP team developed and revised the goals based upon input from Father. The goals addressed the fact that Student's skills in all areas had significantly increased since Hemet had assessed her in November 2012. Father agreed to the goals.

59. Father discussed the fact that Student's doctor recommended limiting Student's travel time on the bus due to her emotional issues and because it upset her stomach. Father did not present any further letters from the doctor or any other documents addressing Student's health issues. He again neglected to elaborate on Student's reflux condition. He did not discuss how seriously the problem was affecting Student's health and her ability to travel in any type of vehicle. Hemet therefore was again unaware of the extent of Student's reflux and the fact that it was so severe that the family rarely traveled any significant distance with her. Rather, Father focused his concerns regarding transportation by school bus on safety issues caused by Student's inability to remain seated in a vehicle.

60. In response to Father's concerns, Hemet's IEP team members proposed providing Student with an aide on the bus or in the family car if Parents chose to transport Student. Hemet also proposed conducting a functional behavior assessment on the school bus to determine how to address Parents' concerns for Student's safety on the bus. The Hemet team members prepared an assessment plan and gave it to Father. Parents have never signed the assessment plan.

61. The IEP team then discussed several placement options for Student, including a general education preschool placement at the Head Start preschool. Teresa Howland was present at the meeting as the general education teacher. She felt that although the general education teacher could not provide special education instruction, Student might be successful in the Head Start program if provided with additional

supports. Given Ms. Howland's 25 years of teaching preschool children, she was fully qualified to make a determination of whether Student would be able to be able to gain benefit from a general education preschool classroom.

62. The other Hemet team members disagreed with Ms. Howland. They believed that Student needed more specialized instruction than would be available in a general education preschool. They believed that Hemet would best meet Student's needs by placing her in a special day class. Hemet's IEP offer was therefore placement in the special day class preschool program then taught by Cindy Munsey, with speech and language therapy and bus transportation as related services.

63. Father, Ms. Smith, and the regional center representative disagreed with Hemet's placement offer. They believed that Student's proper placement was in a general education preschool class at her home school. They asked Hemet to investigate whether it could obtain a waiver for Student to attend the State Preschool. Hemet agreed to do so.

64. Parents did not give their consent to Hemet's November 15, 2013 IEP offer.

65. A few days after the IEP meeting, Leah Davis, Hemet's Director of Special Education, learned that waivers were sometimes possible but that the State Preschool at Hamilton was not then eligible for a waiver.

66. On November 21, 2013, Ms. Davis wrote to Parents explaining that a waiver for the State Preschool was not available. She also reiterated that in any case, Hemet continued to believe that Student required a special day class to receive a FAPE.

67. At the hearing, Ms. Smith testified that one of her staff members also spoke with a CDE representative who had stated that a waiver was possible for Student if her IEP placed her at the State Preschool. However, Student did not present any direct evidence that Hemet could obtain the waiver.

68. Father took Student to view Ms. Munsey's classroom just before Thanksgiving in November 2013. Student explored the classroom, looked at the toys, and eventually went to join some students at one of the tables where they were playing with play dough. She was not disruptive in any way. Ms. Munsey explained to Father how her students spent their school day. Father was extremely impressed with Ms. Munsey and the learning environment she had created. He admitted during his testimony at hearing that because he had so much confidence in Ms. Munsey, if her classroom had been located at Student's home school he would have placed Student in it even though it was a special day class and not a general education classroom.

#### JANUARY 8, 2014 ANNUAL IEP TEAM MEETING

69. Student's annual IEP meeting was due by December 12, 2013. Hemet sent Parents a notice of IEP meeting on December 2, 2013, with a meeting date of December 9, 2014. Parents initially declined to attend because they felt it was not appropriate to hold IEP meetings for Student while due process proceedings were pending.<sup>8</sup> Parents later reconsidered their position and agreed to go forward with the meeting. Due to the intervening winter holiday break, the meeting did not convene until January 8, 2014.

70. Hemet convened the meeting at Hamilton. Father attended accompanied by Ms. Smith and a representative from the regional center. Sherri Miller, a Hemet program specialist, attended as Hemet's administrative representative. Ms. Howland attended as the general education teacher. Ms. Munsey was present as the special

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<sup>8</sup> In addition to Student's pending due process case, Hemet had filed a request for due process on November 18, 2013, to validate its November 15, 2013 IEP offer. Hemet subsequently withdrew that case and filed instead to validate its January 8, 2014 IEP offer, which is the subject of this Decision.

education teacher. Ms. McElligott also attended the meeting. All required IEP participants were present.

71. The team updated Student's present levels of performance based solely on input from Father since Student had not enrolled in school and had not been attending speech and language therapy sessions.

72. In the areas of developmental, academic, and functional skills, Student was able to point to pictures in books when asked about questions about the book, but could not yet answer questions about the information in the books. She was able to say some letter names but did not name or recognize written letters. Student could imitate some of the actions in the stories read to her. She could also copy a written line. Student was able to recognize and name favorite colors. In math, she had advanced from being able to count from five to being able to count to 10 in two months. Student could match shapes in a puzzle, would give Father an object when he requested it, and could separate and sort cooking pans and silverware. She was also able to use objects in pretend play such as setting the table with toy dishes. Student still could not use scissors to cut.

73. Student did not withdraw in social situations although she was generally more outgoing when other children were present. She played with her siblings and their friends, following along with what they were doing. Student interacted with other children at the park and the library and participated in activities in both environments. She participated successfully in table time and circle time at the public library. Student was able to sit through the IEP meetings. She demonstrated manners. She did chores at home such as clearing the dishes. Student was showing more interest in toileting and would undress when wet or getting ready to use the toilet. She knew how to use a tissue to wipe her face and how to wash and dry her hands. Student could use a fork and spoon, and knew how to fill her cup with water from the refrigerator dispenser.



74. The IEP team then developed goals for Student, based almost entirely on Father's report of Student's present levels of performance. Student had increased her expressive vocabulary to approximately 40 words, and was using three to four word phrases. Based on Student's increased vocabulary, the IEP team revised Student's expressive language goal from being able to express her wants and needs using one word and gestures to that of Student being able to express her wants and needs using four to five word phrases independently, with 80 percent accuracy over three consecutive sessions.

75. The team did not revise Student's articulation goal from the November 15, 2013 IEP as she was still working on being able to make the sounds indicated in the goal.

76. Father informed the team that Student was able to understand completely everything said to her. Hemet's IEP team members did not contest Father's contention that Student's receptive language skills had improved markedly. The full IEP team therefore agreed that Student demonstrated age appropriate receptive language skills, had met her receptive language goals, and thus did not require any goals for receptive language.

77. The team retained Student's previous math goal of being able to match pictures for 15 different objects and her writing/fine motor goal of copying lines from models. Student had not yet met the goals.

78. However, the team did write a new math goal for Student, which recognized her new ability to be able to count by rote up to 10. The objective of the new goal was for Student to learn to understand the concept of numbers. The goal required her to learn to relate numbers one to five to specific objects.

79. The team revised Student's pre-reading goal based upon her progress in that area. The objective of the new goal was for Student to be able to recognize her

name in print from a field of seven names with one verbal prompt in four out of five opportunities. Ms. Howland explained several strategies Father could use at home to help Student learn to recognize numbers and letters.

80. Based upon the information from Father that Student appropriately played and interacted with her siblings and other children at home and in the community, the IEP team agreed that Student had met her social, emotional, and behavioral goals and therefore did not require any new goals in those areas.

81. The team then discussed placement options for Student, including placement in the Head Start general education preschool with supports, and placement in either a mild- to-moderate or moderate-to-severe special day class.

82. Cindy Munsey taught the mild-to-moderate preschool special day class preschool at Bautista Creek Elementary School. Ms. Munsey is an extraordinary and energetic preschool teacher. She has an Associate degree and a Bachelor of Science degree in child development. She has a special education teaching credential. In 2012, Ms. Munsey received her Master of Arts degree in education, with a special education option. She worked as a preschool teacher in the private sector for 12 years. She has worked as a special education preschool teacher for Hemet for the last six years. She has a passion for teaching children and wants to see them grow and access a curriculum that best suits each child's learning style.

83. Ms. Munsey taught one preschool special day class in the morning and another in the afternoon. Each class lasted for three hours. There were eight students in each class. Like the classes taught by Ms. Van Lue, there were always at least two general education students enrolled so that the other six children, who had IEP's, were given the opportunity to continuously interact with their typically developing peers. The children all worked on the same general curriculum although the children with IEP's had

instruction tailored to their individual needs throughout the day. Ms. Munsey had two instructional aides during each class.

84. The entire class day was highly structured. The children knew that each school day would follow the same routine even if the focus of the lessons were different. The purpose of the class structure was to help the children learn the rules of going to school; how to follow directions and how to regulate their behavior; and to transition from one activity to the next.

85. The curriculum Ms. Munsey taught was the same taught in the general education preschool. However, she modified the curriculum to meet the individual needs of each of the students in her classes who had IEP's.

86. At the January 8, 2014 IEP meeting, Ms. Howland acknowledged that Student would be able to participate socially in the Head Start general education preschool. However, she had concerns about Student's ability to access the curriculum because neither Ms. Howland nor the teachers then teaching the Head Start program had training in working with special education students.

87. Ms. McElligott's opinion at the IEP meeting was that Student might make some progress in a general education setting with additional support but that Student would make the most progress toward kindergarten readiness in a special day class. Ms. Munsey agreed that Student would probably be able to participate in a general education classroom, but she was concerned that the general education staff did not have the specialized training to deliver special education instruction.

88. At hearing, Ms. Howland, Ms. McElligott, and Ms. Munsey, all acknowledged that they could not concretely state just how much progress Student would be able to make in a general education classroom because Student had never attended school. They agreed that Student would make "some" progress, but felt that "some" progress was different from "meaningful" progress. As discussed below in the

Legal Conclusions, there is no legal significance between “some” progress and “meaningful” progress.

89. All three Hemet educators agreed that Student would maximize her progress in a special day class because special education teachers are trained to differentiate instruction for each child’s learning style and individual needs.

90. Father and his representatives continued to stress that they believed a general education classroom was the least restrictive environment for Student. Although Hemet IEP team members all agreed that Student would make some progress in a general education class with additional aide support, they recommended against a general education placement because Student would not have access to special education instruction in that setting.

91. Student’s witnesses were more persuasive as to whether, at the time of the January 8, 2014 IEP meeting, she would have been able to make some progress in a general education classroom. All of Student’s present levels of performance were based on information provided by Father, who saw Student on a daily basis and was able to recount her substantial progress in communication and socialization. The evidence supports the testimony of Student’s witnesses that Student had made substantial progress in her ability to communicate and socialize with other children.

92. Hemet’s IEP team members had not had any contact with Student for over eight months and therefore could not address her capabilities at the time of the IEP meeting. Significantly, the three educators who testified on behalf of Hemet – Ms. McElligott, Ms. Munsey, and Ms. Howland – who are all highly educated and experienced professionals, all agreed that Student would have been able to make some progress in a general education classroom. They were just concerned because they all agreed that Student would be able to *maximize* her progress and acquisition of learning in a special day class. As discussed below in the Legal Conclusions, maximizing progress

is not a criterion for determining what constitutes the least restrictive educational environment for a student.

93. Given Student's successes in the community, in her library program, and in making progress in pre-academics under Father's tutelage, the more persuasive evidence supports a finding that Student's least restrictive environment at the time of the January 8, 2014 IEP meeting was in a general education classroom with supports.

94. The IEP team only briefly addressed the issue of transportation for Student from home to school. Father did not discuss how Student's reflux affected her ability to travel. Mother was not able to be at the meeting and therefore was not available to address the issue based on her medical knowledge of Student's condition.

95. Ultimately, Hemet's offer of FAPE to Student in the January 8, 2014 IEP continued to be placement in Ms. Munsey's preschool special day class for 180 minutes a day, along with group speech and language therapy sessions seven times a month for 20 minutes a session. Hemet also offered curb-to-curb bus transportation as a related service, with an aide on the bus to maintain Student's safety.

96. Parents have not consented to Hemet's January 8, 2014 IEP offer.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>9</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it.

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction and in the sections that follow are incorporated by reference into the analysis of each issue decided below.

(20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>10</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 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. 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.)

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 and "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

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<sup>10</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 (*Mercer*) [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. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 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. 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].)

#### STUDENT’S ISSUE 1: DID THE MAY 6, 2013 IEP OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

5. The primary focus of this hearing was what the least restrictive educational environment is for Student. Student contends a general education classroom is the least restrictive environment for her. Hemet contends that based on the information it had

regarding Student's unique needs and her abilities at the time of the May 6, 2013 IEP meeting, a special day class was the least restrictive environment for her.

6. One of the key policy motivations behind the enactment of special education laws was to move special needs children out of segregated programs. In *Rowley*, the Supreme Court noted the intent of the Education of the Handicapped Act (the predecessor to IDEA) was "to open the door of public education to handicapped children on appropriate term . . . ." (*Rowley, supra*, 458 U.S. at p. 192.)

7. Both federal and California special education laws emphasize the importance of keeping special education pupils with their typically developing peers. For example, California Education Code section 56000, subdivision (b), provides that:

The Legislature further finds and declares that special education is an integral part of the total public education system and provides education in a manner that promotes *maximum interaction* between children or youth with disabilities and children or youth who are not disabled, in a manner that is appropriate to the needs of both. (Italics added.)

8. For this reason, special education law mandates that disabled children remain in the general education setting *whenever appropriate*. Under Title 20 United States Code section 1412(a)(5)(A), a state must ensure that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular



educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(See also Ed. Code, § 56040.1; 34 C.F.R. § 300.114.)

9. The seminal Ninth Circuit case addressing the issue of least restrictive environment is *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 (*Rachel H.*). The *Rachel H.* court noted the preference by Congress for educating children with disabilities in regular classrooms with their peers. The court then considered four factors to examine in determining the appropriate least restrictive environment for the child: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. (*Rachel H.*, *supra*, 14 F.3d at p. 1404.)

10. However, the Ninth Circuit has also found that a general education placement is not the least restrictive environment for every special needs child. In *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830 (*Poolaw*), the Ninth Circuit considered the *Rachel H.* factors and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court stated:

In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream

environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment. This allows educators to comply with the Act's main requirement—that the child receive a free appropriate public education. Thus, “the Act’s mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom.”

(*Poolaw, supra*, 67 F.3d at p. 834, citing *Daniel R.R. v. State Bd. Of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1044.)

11. The Ninth Circuit followed the *Poolaw* line of reasoning in subsequent cases. In *County of San Diego v. SEHO* (9th Cir. 1996) 93 F.3d 1458, the court found that while school districts must make every effort to place a child in the least restrict environment, it must be the least restrictive environment that also meets the child’s IEP goals. In *A.M. v. Monrovia USD* (9th Cir. 2010) 627 F.3d 773, the Court found that the student could not receive a meaningful education in a full-inclusion general education setting. The child was non-verbal and could respond only to yes-or-no questions. The general education teacher felt the class would have overwhelmed the child, particularly since attempts to have him interact with other children were not successful. In *Ms. S. v. Vashon Island* (9th Circuit 2003) 337 F.3d 1115, the Court found the first *Rachel H.* factor weighed in favor of special education because it was not clear that the student’s academic progress would have been satisfactory in a general education classroom.

12. Although the Court determined in *Rachel H.* that the little girl at issue should have been educated in a general education setting, applying the *Rachel H.* factors to the instant situation results in a different conclusion with respect to Hemet’s offer to Student in the May 6, 2013 IEP. Here, with regard to the first *Rachel H.* factor,

whether Student could achieve academic benefit in a general education classroom, the only information available to Hemet at the time of the IEP meeting indicated that Student could not. Student's assessment scores indicated that she was functioning at a substantially lower rate than expected. The most significant aspect of Hemet's 2012 assessment of Student, as with the regional center assessment done a few months earlier, was Student's significant expressive and receptive language delays. Student scored in the third percentile in receptive language and below the first percentile in expressive language. As explained by Ms. McElligott, the scores indicated that Student would not be able to understand any of the instruction given by the teacher in a general education classroom. Student would be unable to understand any of the academic concepts being taught. She would not have been able to keep up with the pace of the classroom.

13. Ms. McElligott had also been able to observe Student over four months during her speech and language sessions. Student had not interacted at all with her and had not responded to the therapy or gained anything from it, other than briefly interacting with Ms. McElligott's assistant on a couple of occasions. Student remained mute during the sessions, curled up in Father's lap. She had not even responded to Ms. McElligott's attempts to get a response by sitting on the floor with Student and using toys during the sessions. Student's lack of participation in the speech therapy, even after four months, indicated that she would not be able to function in a classroom without the intervention of a special education teacher specifically trained to teach children with cognitive and communication delays. In order for Student to progress at all academically, Hemet would have had to provide separate instruction to Student within the general education classroom, totally defeating the purpose of placing her in the general education class. Additionally, an instructional aide, even a highly trained one, would not have the educational background and training necessary for providing the

sole education to a child with the cognitive and communication delays Student demonstrated in May 2013.

14. An IEP is evaluated in light of information available to the IEP team at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

15. Father and the regional center representative did not provide any information at the May 6, 2013 IEP meeting that would have given Student's IEP team a more expansive view of Student's abilities at the time. The only information Hemet had on May 6, 2013, on which to base its placement offer were Student's regional center records, the assessments conducted by Hemet, the present levels of performance from Student's December 2012 IEP, and the four months of observations by Ms. McElligott when she was attempting to provide speech therapy to Student. The totality of this information indicated that Student would not have made more than minimal academic progress, if any at all, in a general education classroom. Therefore, the first *Rachel H.* factor weighs heavily in favor of a special day class being the least restrictive environment for Student as of the May 6, 2013 IEP meeting.

16. With regard to the second *Rachel H.* factor, the evidence supports a conclusion that the only information available to Hemet at the time of the May 6, 2013 IEP meeting was that Student would have obtained only de minimus benefit from the non-academic benefits of placement in a general education classroom. Student demonstrated significant delays in play skills and behavior, with some of her scores falling below the first percentile. As previously discussed, Student's behavior during speech therapy sessions with Ms. McElligott was also an indication that Student would not receive non-academic benefits from placement in a general education classroom. At

the time of this IEP meeting, Student still showed a fear of strangers, refused to join in activities that involved groups, and would cling to Parents in strange surroundings. During speech therapy sessions, Student did not want to leave Father's lap; when she did, she would curl up in a ball on the floor. She did not interact at all with Ms. McElligott. She only separated from Father briefly on two occasions, both when Ms. McElligott's assistant was present. Student would not have been able to interact with the other children in a general education classroom because Student would not understand what they were saying to her. Father did not present any information to the IEP team that demonstrated Student's ability to interact with her peers in any setting, such as in the community or at home.

17. It is also significant that because of Student's cognitive and communication delays, Hemet would have had to provide separate academic instruction to her. She would not have been able to be part of the class; rather she would be isolated from her peers, in a separate area of the classroom, receiving instruction from another teacher rather than participating with the other children. Instead of including Student in the class environment, this model would have served to set Student apart from her classmates. The evidence therefore indicated that Student would not have received more than de minimus non-academic benefit from a general education placement. The second *Rachel H.* factor therefore weighs in favor of a special day class being the least restrictive environment for Student as of the May 6, 2013 IEP meeting.

18. With regard to the third *Rachel H.* factor, Hemet points to Student's reluctance to leave Father's lap, and to curl up in a ball on the floor sometimes during speech therapy as evidence that she would disrupt a general education class. That argument, however, is not persuasive. Ms. McElligott acknowledged that Student did not have tantrums, was compliant with Father, and was not aggressive. Although Student would not have been able to participate and benefit from a general education

classroom, the evidence supports a finding that she would not have been a disruption in class. The third *Rachel H.* factor therefore weighs in favor of a general education placement.

19. Student provided little evidence of her ability to receive academic and/or non-academic benefit from a general education classroom at the time of the May 6, 2013 IEP team meeting. Student instead argued that Hemet was required to start with placement in a general education classroom and only move to a more restrictive placement if Student was not able to make some progress. However, the law does not support Student's position. In *Poolaw, supra*, 67 F. 3d at p. 835, the Ninth Circuit noted that the IDEA does not require a school district to implement supplemental services before offering an alternative placement to that of general education. Likewise, in *Seattle School District v. B.S.* (9th Cir. 1996) 82 F.3d 1493, the Ninth Circuit found that the IDEA does not mean that general education, or any specific placement, has to be tried before a more restrictive placement is offered. Sometimes, as for Student in May 2013, the more restrictive placement is the least restrictive environment for the child in question.

20. Here, although Student would not have been a disruption in a general education classroom, the totality of the evidence supports a conclusion that Student would have received only minimal academic and non-academic benefit placement there. Based on all three *Rachel H.* factors,<sup>11</sup> Student has failed to meet her burden of proof that a general education preschool classroom was the least restrictive environment for

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<sup>11</sup> Neither party presented any evidence relating to the relative cost of placing Student in a general education rather than a special education classroom. Therefore, this Decision will not address the fourth *Rachel H.* factor.

her as of the date of the May 6, 2013 IEP meeting. Hemet's offer of a special day case was appropriate at the time of that IEP meeting.

STUDENT'S ISSUE 2: DID HEMET'S MAY 6, 2013 IEP OFFER FAIL TO MEET STUDENT'S UNIQUE NEEDS, THEREFORE DENYING HER A FAPE, BECAUSE IT REQUIRED STUDENT TO TRAVEL TOO GREAT A DISTANCE BY SCHOOL BUS FROM HER HOME TO SCHOOL?

21. Student contends that Hemet's May 6, 2013 IEP offer denied her a FAPE because the bus ride to either Hemet's preschool special day class or to the Head Start general education preschool, both located in the city of Hemet 40 to 45 miles from Student's home, was too great a distance for her to travel. Student contends that for health and safety reasons, Hemet was obligated to offer her a placement closer to home. Hemet contends that it offered appropriate transportation alternatives to Student based upon the information known to it as of the May 6, 2013 IEP meeting.

22. A disabled child's special education program may require "related services" which include transportation and such developmental, corrective, and other supportive services that are required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services.]) As a related service, "transportation" includes (1) travel to and from school and between schools, (2) travel in and around school buildings, and (3) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16)(i)-(iii).) Generally, the IEP team makes the decision about whether a disabled child requires transportation as a related service. (Ed. Code, § 56342, subd. (a); 71 Fed.Reg. 46576 (Aug. 14, 2006).) The team bases its decision upon the unique needs of the disabled child. (*McNair v. Oak Hills Local School District* (8th Cir. 1989) 872 F.2d 153, 156.)

23. To the extent that Student is arguing that a long bus ride per se denies her a FAPE, Student has failed to provide support for her contention. Student cites to no federal or California law that defines the maximum amount of permissible travel time on a school bus to and from school. The IDEA does not contain any provision addressing the appropriate length of bus rides for special needs students. As a result, the determination must be made on an individualized analysis of the needs and circumstances of the specific child. What is inappropriate for one child may be appropriate for the next.

24. The individualized analysis has been the basis for the majority of decisions involving the transportation of children with special needs. There are no Ninth Circuit decisions on the subject of transportation for special needs children. However, there are several decisions from the federal Office of Civil Rights, as well as decisions from other state administrative bodies, that inform the Decision here.<sup>12</sup> For example, in *Santa Rosa County School Dist.* (OCR 1991) 18 IDELR 153 (*Santa Rosa*) and *Palm Beach County School Dist.* (OCR 1998) 31 IDELR 57 (*Palm Beach*)) the length of the bus rides were determined to be too long because of factors other than the time it took for the bus to get to school. In *Santa Rosa*, the district transportation for *some* special needs students was found inappropriate and discriminatory because the bus schedule caused the special needs students to arrive late to class and forced them to leave early while general education students had a shorter bus ride. In *Palm Beach*, the district bus transportation was found to discriminate against special needs students because their ride was one-and-a-half hours long as compared to the half-hour bus ride for the general education students. None of these circumstances is present in Student's case.

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<sup>12</sup> See, Government Code section 11425.60; California Code of Regulations, title 5, section 3085.



25. In *District of Columbia Public Schools* (SEA D.C. 2004) 108 LRP 7451 (*Dist. of Columbia*), a student with a primary eligibility of visually impaired was placed through his IEP at a specialized non-public school. The bus ride to the school took two hours each way. The hearing officer found the bus ride inappropriate because the student, in addition to his visual impairment, was confined to a wheelchair and could not tolerate being in the chair for two hours at a time on the bus. The hearing officer found that the placement offered by the district was inappropriate because it was too far away from home for this particular student due to the student's physical disability.

26. Student's situation is similar to that of the child in *Dist. of Columbia, supra*. Student suffered from extreme acid reflux. Because of this condition, Student experienced great discomfort when traveling in a vehicle. She became nauseous and struggled to get out of her car seat, often succeeding. She frequently choked on the reflux or she vomited. The medication prescribed by Student's doctor had not been fully successful in controlling the condition. As a result, Student's family rarely traveled outside their small, rural community with Student. When they did, the trip was punctuated by frequent stops to make sure Student was not choking, and to make her comfortable.

27. However, the basic underlying deficiency in Student's argument that Hemet's IEP offers did not amount to a FAPE because the transportation was not appropriate, is that Parents did not bring the extent of Student's health issues to Hemet's attention at any of her IEP meetings, or at any time prior to the hearing.

28. At Student's initial IEP meeting in December 2012, the only information Hemet had was a notation in the regional center's documentation for Student that she was taking the medication famotidine. Student's parents did not mention the medication or her reflux on any of the documentation that they filled out for Hemet, and they did not discuss the issue at the IEP meeting.

29. At the May 6, 2013 IEP meeting, Father did not discuss Student's reflux at all. The only concern regarding transportation that he brought to Hemet's attention was the fact that Student often released the buckles of her car seat and would climb around the car when it was moving. This was a safety concern. Hemet addressed the concern by first discussing the possibility of providing a harness for Student on the bus or providing an aide on the school bus to make sure that Student did not move around the bus. Because Father indicated that he did not want Student to take the bus at all, Hemet eventually agreed to reimburse Parents for transportation.

30. The May 30, 2013 letter by Student's doctor, which addressed school bus transportation, merely stated that it was difficult for Student to tolerate being in a vehicle for a long length of time and that Student was able to get out of her car seat. The letter does not address Student's health issues per se or specifically address her reflux. Parents have never provided Hemet with any communication from Student's doctor addressing Student's health issues or the impact of those issues on Student's ability to tolerate safely a long bus ride.

31. Hemet had no notice that Student's disability or her health precluded a long bus ride. As stated in Legal Conclusion 14, a district's IEP offer is evaluated in light of information available to the school district at the time it developed an IEP and made the IEP offer, not based on information unknown to it at the time. (*Adams, supra*, 195 F.3d at p. 1149.) Hemet is not responsible for failing to address the impact of Student's health issues on her ability to ride a school bus because it was unaware at the time of those issues. Hemet's response to Father's stated safety concerns about the bus ride was to offer to provide Student with a harness she could not remove, to place an aide on the bus, or to reimburse Parents for transporting Student to school themselves. Given the information available to Hemet at the time of the IEP meetings, this was an appropriate response.

32. Student has therefore not met her burden of persuasion that Hemet's May 6, 2013 IEP failed to offer her a FAPE because of the length of the bus trip from her home to the preschool offered as her placement.

STUDENT'S ISSUE 3: WAS HEMET REQUIRED TO ACCEPT STUDENT INTO THE STATE PRESCHOOL (EARLY START) PROGRAM AT HAMILTON OR ALTERNATIVELY CREATE A TYPICAL PEER PRESCHOOL PROGRAM FOR STUDENT THERE?

33. Student contends that Hemet was required to offer her placement at Hamilton because it is her home school, either by placing her at the State Preschool through the IEP process, or by creating a preschool program for her. Hemet contends that it was not able to place Student at the State Preschool because Parents did not meet the income eligibility requirements for the program and that it has no ability to waive those requirements. Hemet also contends that it was not obligated to create a new preschool program at Hamilton just for Student.

34. Student witness Vickie Smith testified that one of her staff members had spoken with a representative of the CDE, who stated that Hemet could waive the income eligibility for admission to the State Preschool. However, this was double hearsay. Student did not provide any direct evidence that Hemet could waive income eligibility without jeopardizing Hemet's participation in the program.

35. Student also presented no evidence or citation to legal authority that required Hemet to create a preschool classroom for her at her home school. The IDEA does not require a student with disabilities to attend the school located closest to her home if her IEP requires a different arrangement because the program that would offer the student a FAPE is located elsewhere. Title 20 United States Code section 1412(A)(5)(a) only requires that a student be educated "to the maximum extent appropriate" with nondisabled peers in the school she would attend if not disabled, "unless the IEP of a child with a disability requires some other arrangement." The Code

of Federal Regulations also states that "where it has been determined that a disabled student cannot be appropriately educated within her neighborhood school due to her special needs, the requirement of a school district is merely to place the student in an appropriate setting as close to home as possible." (34 C.F.R. § 300.552(a)(3).)

36. The case law has consistently supported the concept that a school district is not required to place a child at her neighborhood school if there is no program available to meet her needs. (See, e.g. *McLaughlin v. Holt Public Sch. Bd. of Educ.* (6th Cir.2003) 320 F.3d 663, 672 [Least restrictive requirement provisions and regulations do not mandate placement in neighborhood school]; *Hudson v. Bloomfield Hills Public Sch.* (6th Cir.1997) 108 F.3d 112 [IDEA does not require placement in neighborhood school]; *Urban v. Jefferson Cnty. Sch. Dist.* (10th Cir.1996) 89 F.3d 720, 727 [IDEA does not give student a right to placement at a neighborhood school]; *Schuldt ex rel. Schuldt v. Mankato Indep. Sch. Dist. No. 77* (8th Cir.1991) 937 F.2d 1357, 1361-63 [school may place student in non-neighborhood school rather than require physical modification of the neighborhood school to accommodate the child's disability]; *Wilson v. Marana Unified Sch. Dist. No. 6 of Pima Cnty.* (9th Cir.1984) 735 F.2d 1178 [school district may assign the child to a school 30 minutes away because the teacher certified in the child's disability was assigned there, rather than move the service to the neighborhood school].)

37. Student has therefore failed to meet her burden of proof in her assertion that Hemet was required to offer her placement at the State Preschool or to create a program for her at her home school.

#### HEMET'S ISSUE – ISSUE 4: DID HEMET'S IEP OFFER OF JANUARY 8, 2014, CONSTITUTE A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

38. Hemet contends its January 8, 2014 IEP offer was procedurally and substantively appropriate. Student primarily contends that Hemet's offer denied her a

FAPE because it did not offer her placement in a general education preschool class, which Student contends was the least restrictive environment for her at the time.

### IEP Requirements

39. The IEP is the “centerpiece of the IDEA’s education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA. The IEP must include an assortment of information, including a statement of the child’s present levels of academic achievement and functional performance. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child’s present levels of academic achievement and functional performance, and designed to meet the pupil’s needs that result from the disability. It must include a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the pupil can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) It must also include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow him or her to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

40. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-207.) Second, there must be a determination of whether the IEP developed through those procedures meets the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) As state above, an IEP is judged in light of the information available at the time it was implemented. The Ninth Circuit has endorsed the "snapshot" rule, explaining that " . . . an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.2d at p. 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

41. To determine whether Hemet offered Student a FAPE, the analysis must focus on the adequacy of its proposed program. If a school district's program addressed a student's unique educational needs, was reasonably calculated to provide her some educational benefit, comported with her IEP, and is in the least restrictive environment, then that district provided a FAPE, even if the student's parent preferred another program that would result in greater educational benefit to her. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

#### Procedural Requirements

42. In this case, Hemet has demonstrated that it complied with all mandated procedural requirements in developing Student's January 8, 2014 IEP. All required IEP team members were present. The IEP documents indicate that Hemet informed Father, Student's only parent present at the meeting, of his procedural rights. Student had advocates present who also participated in the meeting. Hemet reviewed a variety of potential placements for Student, focusing on the relative benefits of a special day class

as opposed to a general education class. There was significant and emotional discussion with regard to what constituted the appropriate placement for Student.

43. The evidence is also overwhelming that Father was intimately involved in the creation of Student's IEP. Hemet developed all of Student's present levels of performance based upon Father's input because Hemet had not had any contact with Student for about eight months. Hemet did not dispute any of the information Father provided as to Student's present levels or lack of need for certain goals. Hemet and Father jointly developed Student's goals. Hemet agreed to re-write goals based upon Father's input. Hemet deleted Student's receptive language goal solely based upon Father's statement that Student was able to understand everything said to her and therefore no longer needed a goal in that area. Hemet also deleted Student's social and behavioral goal based solely on Father's input. Father was a full and active member of Student's IEP team on January 8, 2014.

44. Hemet complied with all procedural requirements concerning the development of the IEP. The IEP offered by Hemet as a result of the IEP team meeting contained all requisite elements, including a description of Student's unique needs, her present levels of performance, proposed annual goals and educational placement, related services, and modifications and accommodations necessary to provide Student a FAPE. Hemet has therefore met its burden of proof that the IEP of January 8, 2014, met all necessary procedural requirements.

#### Substantive Requirements

45. Hemet offered Student placement in a preschool special day class for 180 minutes a day, four times a week. It also offered Student 140 minutes a month of speech and language therapy. There is no evidence that the amount of classroom instruction or the amount and frequency of the offered speech and language therapy are inadequate, or that Hemet should have offered her related services in other areas. At hearing,

Student only raised two disputes with the January 8, 2014 IEP offer. The first dispute is whether a general education classroom was Student's least restrictive environment. Second, whether the transportation services offered provided Student with a FAPE.

46. As stated in Legal Conclusions 7 through 12, Federal and state law require a school district to provide special education in the least restrictive environment.

47. The portrait of Student that emerges from the January 8, 2014 IEP meeting is quite different from that of Student in May 2013. The information available to the IEP team on May 6, 2013, portrayed a child who had little or no expressive and receptive communication skills, had significant social delays, and who could not separate from her father during speech therapy even after months of attendance. There was no indication in May 2013 that Student would receive more than minimal benefit from a general education placement.

48. However, in the eight months between May 2013 and January 8, 2014, Student had blossomed. Parents had purchased instructional materials to use at home and Father began a program to teach Student academic and adaptive skills and to provide her more access to community events and contacts with other children. Father had introduced pre-academic lessons into Student's day and had worked on her social, behavioral, and adaptive learning skills.

49. The result of Father's interventions with Student were apparent even by the time of Student's November 15, 2013 IEP meeting. Student's expressive and receptive communications had improved. Her socialization skills had improved and her adaptive living skills had increased. Student had become significantly more outgoing. She was no longer afraid of interacting with people, and was especially outgoing with other children.

50. By the time of the January 8, 2014 IEP meeting, Student's skills had increased further. Her pre-reading and pre-math skills had increased. Student's



receptive communication skills had increased to the extent that Hemet readily agreed that she no longer required a receptive language goal. Based upon the information from Father that Student played and interacted with her siblings and other children at home and in the community, the IEP team also agreed that Student no longer required a social, emotional, or behavioral goal.

51. From the information available to the IEP team at the January 8, 2014 meeting, it was apparent that Student was capable of making progress even when being taught by her Father, who has no instruction or training in educating special needs children. Therefore, the first *Rachel H.* factor, whether Student would gain academic benefit from a general education placement, weighs heavily in favor of a general education placement for Student as of the time of the January 8, 2014 IEP team meeting.

52. In social settings, Student had generally stopped withdrawing. She had become outgoing when other children were present. She played with her siblings and their friends, following along with what they were doing. Student interacted with other children at the park and the library and participated in activities in both environments. She participated successfully in table time and circle time at the public library. Student was able to sit through the IEP meetings. She demonstrated manners. She did chores at home such as clearing the dishes. Student was showing more interest in toileting and would undress when wet or getting ready to use the toilet. She knew how to use a tissue to wipe her face and how to wash and dry her hands. Student could use a fork and spoon, and knew how to fill her cup with water from the refrigerator dispenser.

53. It was apparent that exposing Student to typically developing peers helped her to model their behaviors. It was also apparent that Student was readily interacting with other children and learned from them.

54. The evidence therefore supports a finding that the second *Rachel H.* factor, whether Student would gain non-academic benefit from a general education placement, weighs heavily in favor of a general education placement being the least restrictive environment for Student as of the January 8, 2014 IEP team meeting.

55. Hemet presented no evidence that Student would have been a disruption in a general education classroom at the time of this IEP meeting, or that cost was a factor in its decision not to offer her a general education placement.

56. General education teacher Teresa Howland, special education teacher Cindy Munsey, and speech language pathologist Maureen McElligott all acknowledged that Student could make some progress in a general education classroom. They just believed that she would make maximum progress in a special day class, and they wanted her to be able to make the most of her educational opportunities.

57. While it is admirable that Hemet educators wish to provide an optimal education for Student, such is neither required under the law nor contemplated in determining the least restrictive environment for a child. The only focus of an inquiry as to what constitutes the least restrictive environment is whether the child will be able to make some progress in a general education classroom, even if supports are required to achieve that progress, and not on whether another placement would maximize the child's progress.

58. In applying the four factor analysis of the *Rachel H.* case, Hemet has not met its burden of proof that Student's least restrictive environment was a special day classroom as of the time of her January 8, 2014 IEP meeting. Because the placement did not comport with Student's least restrictive environment, the IEP Hemet developed on January 8, 2014, did not offer Student a FAPE, and thus cannot be implemented over the objections of Student's parents.

59. Another element of the IEP in dispute is whether the offered transportation meets Student's needs and provides a FAPE. As previously stated, a long bus ride in and of itself does not violate the IDEA or state special education law. The inquiry must focus on whether there are reasons specific to the child in question that support a finding that a long bus ride is inappropriate. In this case, Hemet has demonstrated by a preponderance of the evidence that Parents failed to inform it of the extent of Student's health issues and that her health issues precluded the contemplated bus ride. Rather, the evidence indicates that the only information Parents provided to Hemet was that Student had a habit of releasing the straps of her car seat and would move around the vehicle while it was in motion. This is a safety concern, not a health concern. Hemet appropriately responded to the safety issue by proposing that Student use a harness while riding the school bus. When Father rejected that suggestion, Hemet offered to have an aide accompany Student on the bus. When Father rejected the offer of an aide, Hemet proposed reimbursing Parents for the cost of transporting Student to school in the family car. All three proposals were appropriate and adequate responses to Parent's concerns about Student's safety. The transportation proposed by Hemet was appropriate based upon the information known to it at the time of the January 8, 2014 IEP meeting.<sup>13</sup>

## REMEDIES

60. ALJ's have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) Appropriate equitable relief,

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<sup>13</sup> However, Hemet is now aware of Student's health problems and may need to consider them when developing Student's future IEP's.

including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496).)

61. In this case, Student has failed to prevail in whole or in part on the three issues she presented for hearing. Student failed to prove by a preponderance of the evidence that Hemet's May 6, 2013 IEP offer did not provide her with a FAPE. Specifically, Student failed to prove that Hemet should have offered her placement in a general education preschool class rather than in a special day class. Student also failed to show by a preponderance of the evidence that Hemet did not appropriately address issues related to transporting her to school by bus. Since Student has not met her burden of proving that Hemet denied her a FAPE as to these issues, Student is not entitled to any remedy.

62. While Hemet proved that its January 8, 2014 IEP met all procedural requirements, it failed to meet its burden of proof that the IEP substantively offered Student a FAPE. By the time of the January 8, 2014 IEP meeting, Student had progressed to the point that she would have been able to make at least some progress in a general education classroom. The special day class Hemet offered therefore did not constitute the least restrictive environment for Student, and therefore failed to offer her a FAPE. Hemet is therefore not entitled to implement the January 8, 2014 IEP without Parent's consent.

63. Since neither of the parties prevailed on the issues each presented for hearing, neither party is entitled to any of the remedies they requested.

## ORDER

1. Hemet's May 6, 2013 IEP offered Student a FAPE in the least restrictive environment.

2. Hemet's January 8, 2014 IEP failed to offer Student a FAPE in the least restrictive environment. Hemet may not implement the IEP without the consent of Student's parents.

## 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, Hemet prevailed on Issues 1, 2 and 3, which were the issues brought by Student. Student prevailed on Issue 4, which was the issue brought by Hemet.

## RIGHT TO APPEAL

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).)

DATED: March 28, 2014

/s/

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DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings