

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2016070938

v.

SOLEDAD UNIFIED SCHOOL DISTRICT.

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SOLEDAD UNIFIED SCHOOL DISTRICT,

OAH Case No. 2016070115

v.

PARENT ON BEHALF OF STUDENT,

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DECISION

Soledad Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 30, 2016. Soledad named Parent on behalf of Student as the respondent. On July 18, 2016, the matter was continued for good cause.

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California on July 15, 2016. Student named Soledad Unified School District as the respondent. On August 29, 2016, the matter was continued at the parties request for good cause.

On September 12, 2016, the two cases were consolidated at the request of the parties. Student's case became the primary case and Soledad's case became

the secondary case. On October 17, 2016, OAH granted Soledad's request to amend its complaint.

Presiding Administrative Law Judge Margaret M. Broussard heard this matter in Soledad, California, on December 6, 2016. At the parties' request, the matter was continued for receipt of closing arguments and the translation of the closing arguments until December 29, 2016.

Anthony Miranda, Director of Special Education for Soledad, represented Soledad. Lori Morones, Program Coordinator, attended the hearing on behalf of Soledad.

Mother and Father represented Student. A qualified interpreter was present throughout the hearing to translate for Parents in Spanish.

#### SOLEDAD'S ISSUES

Will Soledad's individualized education program offer of September 26, 2016, provide Student with a free appropriate public education such that Soledad can implement it without parental consent?

#### STUDENT'S ISSUES

Did Soledad's IEP offer for Student made at the end of the 2015-2016 school year deny her a FAPE for the 2016-2017 school year because it did not provide for her to continue having a one-to-one aide?

#### SUMMARY OF DECISION

Soledad did not establish that the IEP of September 26, 2016 offered Student a FAPE in the least restrictive environment such that it may implement the IEP without parental consent. Soledad failed to meet its burden to show that the IEP offered Student a FAPE. In addition, the IEP itself failed to make a clear

offer of placement, failed to properly document Student's present levels of performance, did not have appropriate and measurable goals, and failed to offer Student the services of a one-to-one aide during the time she was in the general education environment.

Student established that she should have been offered one-to-one aide support in the May 24, 2016 IEP and this resulted in a denial of FAPE from the beginning of the 2016-2017 school year, until September 26, 2016.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a 13 year-old girl in seventh grade who resides with Parents and her siblings within the geographical boundaries of Soledad. According to Student's 2014 psycho-educational assessment, she was born in California and has lived in California her whole life. Student is eligible for special education under the categories of specific learning disability and speech and language impairment. Student was classified as an English Language Learner at the Beginning level overall as of October 2015.<sup>1</sup> There was no testimony to explain the relationship between Student's speech and language impairment and her English language acquisition, and the effect each has on the other.

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<sup>1</sup> In California, students who are considered English Language Learners are tested yearly using the California English Language Development Test (CELDT) assessment. The assessment rates a student's abilities in English in the following areas: listening, speaking, reading, writing and overall. The ratings are Beginning, Early Intermediate, Intermediate, Early Advanced and Advanced.

## EVIDENTIARY ISSUES

2. Although Student appears to have been eligible for special education, and she has been receiving special education services since she was three years old, little evidence was provided at the hearing regarding her previous assessments, needs, and educational progress. Soledad called three witnesses at hearing: a resource teacher who has had minimal contact with Student this school year and has not taught Student in class; a school psychologist who observed Student but has never assessed her; and the Special Education Director, who has observed Student as well, but does not know Student. Student called her sixth grade teacher and her instructional aide, as well as her parents. No testimony was elicited specifically by Soledad from any witness regarding the appropriateness of Soledad's September 26, 2016 IEP, with the exception of general endorsements of placing Student in a special day class and some opinion testimony regarding the Student's need for an instructional aide. None of Student's teachers from the 2016-2017 school year were called as witnesses and no one who has actually assessed Student was called as a witness.

3. The documentary evidence in this case was limited to a page from the Special Education Local Plan Area manual regarding instructional aides; Student's September 26, 2016 IEP; a psycho-educational assessment from 2014; a speech and language assessment from 2014; an IEP amendment from May 24, 2016; an IEP from September 28, 2015; a progress report from November 14, 2016; and a note from Student's physician.

## 2014 SPEECH AND LANGUAGE ASSESSMENT

4. The October 2014 speech and language assessment of Student was completed by Cristina M. Hutton, M.S., CCC-SLP. At the time, Student was 11

years old and was classified as an English Language Learner. Ms. Hutton was not called to testify at hearing and no explanation was offered regarding her absence. No other speech and language therapist was called to offer testimony regarding Student's current speech and language needs or the assessment report from 2014.

5. Although the school psychologist Ms. Lacy Ventress attempted to offer testimony regarding the report, she admitted that she had not read the entire report, had not given any of the assessments administered, and that she was not a speech and language therapist. Any testimony from her regarding the report was given no weight for these reasons.

6. The speech and language assessment paints a picture of Student having a very severe speech and language impairment. Although the report lists Student's dominant language as English/Spanish, the testing appears to have been done in English and there was no explanation offered as to any effect Student's limited English proficiency may have had on the results or why the assessment was not given to Student in Spanish. Further, the report lists that English is spoken in the home without further explanation. Parents asked for and received a Spanish interpreter at the hearing, Mother spoke only Spanish during the hearing, and evidence established that Soledad regularly translates IEP meetings and documents into Spanish for Mother. Further, the CEDLT assessment is only given to students when there is a language other than English spoken in the home. When taken together, this casts a serious doubt over the statement that English is the language spoken in the home.

7. The assessment report indicates that Student demonstrated articulation errors which affected her level of intelligibility and that her score in the Goldman Fristoe 2 Test of Articulation was in the seventh percentile. The

summary of the report indicates that her articulation skills are below the normal range of functioning and that Student should receive speech and language services to address her articulation errors.

8. Student was given the Clinical Evaluation of Language Fundamentals 5- English Edition. Overall, Student's Core Language Score was 53, with scores from 85-115 being in the average range. Her percentile score was 0.1 percent. Generally, this means if 1,000 children her age were put in a line and ranked according to their language ability, she would be last in line. Overall, her scores in receptive language, expressive language, language content, language structure and memory for language skills were all significantly below average.

9. The assessment report recommended 1,800 minutes of speech and language therapy yearly to address her language and articulation skills. No testimony was given regarding any changes to Student's needs in the area of speech and language. No witness was called to explain the results of this report in relation to the development of Student's September 26, 2016 IEP or to explain the effect of Student's English proficiency on the test results in the report (if any).

#### 2014 PSYCHO-EDUCATIONAL REPORT

10. Soledad completed a psycho-educational assessment of Student in October of 2014. The assessment report states that Student was examined by Jorge De Leon, psychologist; Eugene Mosqueda, RSP teacher; and Christina Hutton, speech therapist. It appears that the speech and language part of this assessment is the separate speech and language assessment referenced above. Neither Mr. De Leon nor Mr. Mosqueda was called as a witness and no explanation was given as to why they were not called. The assessment report is unsigned, although there was a space for the signature of Mr. De Leon. There was no explanation given for the lack of signature. Mr. De Leon identifies himself

throughout the assessment as “Psychologist” but it is not clear from the report what his actual credentials were at the time of the assessment (i.e. is he a licensed clinical psychologist or a credentialed school psychologist). There was no information provided regarding the experience or education of either assessor.

11. Again, importantly, Student is identified on this report as an English Language Learner. This report indicates that, as of the fall of 2013, Student’s scores on the California English Language Development test were in the Early Intermediate Range in writing, listening, and speaking and the Beginning range in the area of reading. However, Student’s September 2016 IEP lists Student scoring in the Beginning range for listening, the Intermediate range for speaking, the Beginning range for reading, the Early Intermediate range for writing, and overall in the Beginning range as of October 2015. It is unclear whether the ranges as reported in the psycho-educational assessment were correct at the time, whether the fall of 2013 scores were in error, or whether Student has decreased in her English proficiency over time.

12. The assessments in the psycho-educational report were given in English. There is a section of the report called “Economic, social and language factors affecting the student’s school functioning.” In this section, the report notes that Student indicated that she is able to understand Spanish but that it is difficult for her to speak the language. The report says that she stated she feels more comfortable communicating in English. There is no indication anywhere in the report that any reasoned decision was made by the assessor regarding the language in which Student’s abilities would best be assessed.

13. Student’s school history is listed in one very short paragraph. It lists the school year, her grade and the school she attended. It states that she received the support of a 1:1 aide in the general education classroom and that she has

struggled with the ability to independently complete work and pay attention in the classroom. It states that she has shown difficulty understanding directions and completing grade level academic work. The report also references a report from the San Andreas Regional Center dated November 15, 2009, which showed that Student has symptoms of ADHD and a mild form of an intellectual disability. The Regional Center report was not offered into evidence in this matter and no one testified regarding the report.

14. The psycho-educational report contains the reported observations of Mr. De Leon. He claims to have observed Student for 30 minutes in October 2014 during a writing activity in her fifth grade classroom. She was seen as focused and on task during the observation and responsive to help from her instructional aide who gave her gestural prompts and minimal verbal reminders. The writing activity was mostly copying and her teacher reported that Student struggles more when asked to independently produce written work. Despite earlier comments in the report that Student struggles to independently complete work and pay attention in class, no attempt was made to reconcile or explain Mr. De Leon's classroom observations with the earlier comments.

15. Student was given the Piers-Harris 2 Children's Self-Concept Scale. She rated herself in the low average range overall. There was no testimony regarding this assessment or how the results from the assessment helped form any of the conclusions or recommendations in the report.

16. Student was given the Woodcock-Johnson Tests of Achievement-IV by Mr. Mosqueda. The report only lists her standard scores in Broad Reading (65), Broad Math (79), and Broad Written Language (76). However, attached to the October 2016 IEP appears to be a breakdown of the individual scores Student received on this assessment. There was no explanation provided at hearing as to



what scores were included in the Broad Reading, Broad Math, and Broad Written Language results reported. The report states that Student's lowest subtest scores were in reading and math problem solving. Her highest subtest scores were in math calculation and reading rate. No testimony was offered regarding the administration of this assessment to Student, or how to interpret these scores in relation to the development of Student's September 26, 2016 IEP.

17. Student was also given the Brigance Comprehensive Inventory of Basic Skills – II by Mr. Mosqueda. He reported that she received a standard score of 76 in basic reading, a 64 in reading comprehension, an 88 in total math and a 79 in written expression. No testimony was offered regarding the administration of this assessment to Student, or how to interpret these scores in relation to the development of Student's September 26, 2016 IEP.

18. Student was administered the Weschler Intelligence Scale for Children – Fourth Edition. For this test, the assessment states that the average range is considered a standard score in the range of 80-120. Student received 65 on the Verbal Comprehension Index, an 84 on the Perceptual reasoning Index, a 71 on the Working Memory index and an 83 on the Processing Speed Index. There was no Full Scale Score reported. Ms. Vassar, school psychologist, testified that she has given this test before many times and that she recommends using the Perceptual Reasoning Index score of 84 to estimate Student's overall intelligence score. She did not explain why no full scale IQ score was calculated for Student, especially in light of the Regional Center report referenced, where Student was apparently diagnosed with a mild intellectual disability.

19. Finally, Student was administered the Beery-Buktenica Test of Visual Motor Integration where she received a standard score of 80, which is reported as in the low average range. Despite the references in the report regarding Student's

attention and organizational problems, no assessments were completed in these areas and no testimony was provided to explain why.

20. The report then describes Student's eligibility for special education. The report contains no analysis regarding whether or not Student may have an intellectual disability. The report states that she "appears" to qualify for special education under the category of specific learning disability and that she "also seems" to qualify under speech or language impairment. The report then cites the basis for making the determination and states "a significant discrepancy does not seem to exist between currently measured intellectual potential and academic achievement. Although a discrepancy does not exist, she seems to have limitations in the areas of auditory processing, working memory, attention, and overall cognitive abilities." The report lists no basis for making Student eligible for special education as a student with a specific learning disability but contains a statement that Student qualifies under this category. No testimony was offered to explain this inconsistency.

21. Despite Student's academics being almost uniformly years below her peers in every subject area, the report has only three instructional recommendations. First, support with academic interventions which she receives through the special education program with extra practice and re-teaching support, and that she seems to respond well to individualized support offered by her teacher and her instructional aide. Second, she requires her teachers' help to make sure she understands the material and she may benefit from being asked to explain her assignments to her teacher or her parents. Third, the report states she may benefit from increased time spent in small group work or hands-on activities.

22. Overall, this report is of very limited evidentiary value. First, it is unauthenticated and unsigned. The assessor was not called to testify regarding the report and no explanation was given for his absence. The qualifications of the assessor are unknown. There are serious questions regarding the report including the language in which Student was assessed and in what language Student should be assessed; her level of English proficiency; the interactions between her language disability and her language acquisition; whether Student was the appropriate person to determine the language in which the assessments were given; how the results of the Regional Center report informed the assessors conclusions; how the results of the Piers testing should be interpreted; the actual level of Student's intellectual ability; the basis for the Broad scores she received on the Woodcock; how all of the test results should inform the IEP team when making decisions for Student; and, how the assessor determined Student met the criteria for specific learning disability.

23. Ms. Lacy Ventress was called by Soledad to testify regarding the psycho-educational report. Ms. Ventress has never met Student or assessed Student but is a member of Student's IEP team. Ms. Ventress explained that Student's low scores in the psycho-educational report show why she needs the aide to prompt her and repeat directions. Ms. Ventress testified briefly regarding Student's overall cognitive ability as she read the report during her testimony. However, Ms. Ventress did not assess Student, did not speak to the assessor and offered little information or explanation that was not already written in the report itself. Although Ms. Ventress testified that Student has made very little, if any, growth in the last three years and that her academic test scores have not improved, she gave no basis for that opinion and no evidence was admitted to independently support her opinion. Her testimony is given very little weight in

light of her very limited contact with Student, her lack of contact with the assessor combined with the questionable reliability of the psycho-educational report as discussed above, and her failure to explain the basis for her opinion regarding Student's progress.

#### SEPTEMBER 28, 2015 IEP

24. An IEP was admitted as evidence dated September 28, 2015. No testimony was offered regarding this IEP. The IEP was Student's annual IEP. Relevant to Student's issue in this hearing, the IEP offered Student placement in general education, a 1:1 aide for 1,062 minutes per week, 360 minutes of specialized academic instruction per week, and 1,800 minutes of speech and language services per year. All of these services had an end date of September 28, 2016. This IEP was consented to by Parents and was the operative IEP for Student up through the time of the hearing.

#### MAY 24, 2016 IEP AMENDMENT

25. An IEP Supplemental Review document admitted at hearing shows that an Amendment IEP team meeting was held on May 24, 2016, to prepare for Student's transition to middle school. As with all other documents entered into evidence in the hearing, no testimony was given regarding the specific program offer for Student. The document shows that after what appeared to be a review of goals, placement for middle school was discussed. Parents; Mr. Jamie Ceja (Student's sixth grade teacher); and Student's aide Ms. Gonzalez, all gave their opinion that Student should continue in the general education environment with aide support.

26. The IEP Amendment notes indicate that the offer of placement was a special day class and makes no mention of regular education courses. However,

the services page of the IEP states that Student would be in general education 53 percent of the time and out of the general education environment 47 percent of the time. The IEP Amendment offers 1,004 minutes a week in a special day class, and 1,800 minutes a year of speech and language services. The IEP Amendment does not explain why the team determined that Student needed to move to a special day class to receive FAPE. The amendment itself does not indicate what progress Student made on her goals at that point in the year or give any information about Student's grades or any other information regarding Student's educational progress. The IEP document offers Student no one-to-one aide support either when she is in the regular education environment or the special education environment.

#### 2016-2017 SCHOOL YEAR

27. Because Parents did not consent to the IEP Amendment of May 2016, Student began middle school with aide support in general education because Soledad was required to continue implementing the September 2015 IEP that called for 360 minutes a week of resource support, aide support, and 1,800 minutes of speech and language services.

28. Ms. Alyssa Olvera is Student's case manager and the resource teacher at Main Street Middle School, where Student attends. Ms. Olvera testified that Student does not have a scheduled resource class where she receives special education instruction, but comes into the resource room 30-45 minutes a week to take tests or seek assistance. Ms. Olvera testified that she has observed Student in the general education setting this year one to two times a week, both with and without her aide present. Ms. Olvera did not explain the purpose of all of these observations or explain why Student was not receiving 360 minutes a week of resource support as called for in her operative IEP.

## ONE-TO-ONE AIDE SUPPORT

29. An area of real dispute between the parties is whether Student should participate in general education classes with the support of a one-to-one aide. Soledad's position is that students who are "RSP" students, that is students in special education who are not in special day classes, do not receive one-to-one aide support in the district. There was one exception made for a student in a wheelchair at one point, but other than that, Soledad does not provide one-to-one aide service for Students in the RSP program. More specifically for Student, Soledad sees Student as too dependent on aide support and believes that Student can be more independent in a special day class, without a one-to-one aide. Parents believe that Student can succeed in the general education environment but needs one-to-one aide support to be successful.

30. Student was in sixth grade during the 2015-2016 school year. Student's teacher was Mr. Jaime Ceja. Mr. Ceja was called to testify by Student and not by Soledad. Mr. Ceja arrived at the hearing with a union representative, who remained in the room during Mr. Ceja's testimony. Mr. Ceja testified with a clear memory of Student's time in his class and answered questions from both parties completely and without any apparent bias. He spent more time with Student than any of the other witnesses who work with Student at school, with the exception of Ms. Gonzalez, the one-to-one aide. His testimony was based on actual experience in the classroom with Student and is given great weight.

31. Mr. Ceja explained that Student was a lower performing academic student in his class last year and that she required a lot of help in the areas of English Language Arts, Math, Science and Social Studies. Student occasionally worked in small groups and spent most of the time accompanied by her aide. He strongly believes that the combination of the new IPAD technology that was

provided to all students in his class last year, his instruction, and the one-to-one aide support Student received last year resulted in a successful school year for Student where she received educational benefit.

32. Mr. Ceja supported his conclusion that Student received educational benefit in the general education environment with specific examples of Student's progress. Student started sixth grade reading at a second grade level as measured through the Accelerated Reader program. She finished the year reading at a fourth grade level. He noted specifically that Student was assisted by the aide while she was learning the material but that Student took all tests on her own. He also explained that Student knew all of her multiplication facts and that she could do almost all of the sixth grade math calculation problems. He explained that she needed help from the aide with directions and with word problems. He explained that Student started off in Science and Social Studies far below grade level and while she did not end the year at grade level, she made progress in these subjects as well.

33. Mr. Ceja credibly opined that Student needs extra support throughout her school day. She was not disruptive in class and he would often place her in small groups where other students needed more support so her aide could assist the other children, as well, and Student would not be isolated alone with the aide. Mr. Ceja never observed Student's one-to-one aide completing Student's work for her.

34. Student also called Ms. Gonzalez to testify. Ms. Gonzalez has been Student's one-to-one aide since Student was in third grade. Ms. Gonzalez testified openly and clearly. Her testimony did not waiver on cross examination. She has worked with Student in the school environment more than any other Soledad employee. Her testimony is given great weight.

35. Ms. Gonzalez established that she does not complete Student's work for her, as alleged and insinuated by Mr. Miranda and Ms. Olvera. She breaks down the work into smaller chunks for Student and does not write down the answers for her. Despite the fact that Ms. Gonzalez has never been given any specific training on how to work with Student or any ongoing consultation and support, with the exception of a few tips from other resource specialists in earlier years, she has been able to get to know Student and her learning needs to be able to provide real assistance to Student. This is despite her credible testimony that she does not know Student's "condition" and that she has not been given any information by anyone at Soledad on how Student's disabilities affect her performance in the classroom.

36. Ms. Gonzalez explained that Student has needs in the following areas: focus and making sure her attention is where it needs to be; writing; breaking down long paragraphs when she is reading; and reading vocabulary. Ms. Gonzalez established that Student sometimes needs more time than other students to complete her work but other times, like in History class, she knows the answer herself right away. Student needs to be prompted often. She has seen Student make progress in class and has helped her succeed.

37. Ms. Gonzalez explained that middle school has been more challenging for Student and that she has had a hard time adjusting to having more teachers, and more classes, each with a different environment. Ms. Gonzalez is scheduled by Soledad to work from 8:15 a.m. until 2:25 p.m.. Student's middle school schedule has her at school from 7:45 a.m. until 3:15 p.m. Ms. Gonzalez testified that she is able to work the full school day, but Soledad has restricted her schedule so that she does not work the full school day. Soledad



offered no explanation for not providing Student an aide for her entire school day.

38. Student's first period class this year is physical education. Ms. Gonzalez arrives about one half hour into the period. She established that Student has difficulty in physical education following multi-step directions and needs her assistance. Student does rely on Ms. Gonzalez in order to be able to access her education in the general education environment. Student is also very social - talks to her friends - and there was no credible testimony that the presence of the on-to-one aide is having a negative social effect on Student.

39. Ms. Olvera testified regarding Student's one-to-one aide support, as well. Ms. Olvera's position is that Student should not have one-to-one aide support and that Student should be in a special day class all or part of her school day. Ms. Olvera testified at great length about how RSP students do not have one-to-one aides in their district. Ms. Olvera did not establish that she considered Student's needs individually when making her determination. Although Ms. Olvera argued that Student would be more independent in the special day class, she did not address Student's need for aide support when she would not be in the special day class. Ms. Olvera's testimony, when taken as a whole, actually supports one-to-one aide support for Student.

40. Ms. Olvera testified that she had observed Student one to two times a week, and, as discussed above, there was no explanation given for this level of observation. Ms. Olvera was not using the information from the observations to assist and provide instruction to Ms. Gonzalez or to assist herself in providing instruction to Student, as she testified that she does not provide instruction to Student. The purpose of these observations was apparently to support her testimony in hearing for her position that Student's aide should be

removed. Ms. Olvera testified that she feels that Student is dependent on the aide and that she needs to become an independent learner, which she feels Student cannot do with an aide, but she believes could be achieved in a special day class. However, Student was not offered a special day class for her entire school day. Ms. Olvera never addressed why the IEP team determined Student could receive educational benefit in the general education courses in which Student would still be enrolled without any aide support offered.

41. Ms. Olvera explained that when she observed Student in class with her aide, the aide was sitting next to Student, repeating the teacher's instructions and helping Student to complete her assignment. When she observed Student in English class without the aide, Student could not complete her assignment and looked to see what the other students were doing. The other students were completing a snowman and Student, after looking around at the other students, still did not complete the snowman correctly. Ms. Olvera explained that Student does raise her hand and ask the teacher for help if she needs it, but if she tries to complete the work independently without the aide support, the work is not correct and Student can only complete work correctly with aide support.

42. Perhaps the most striking example Ms. Olvera gave, which she thought supported the removal of the aide, concerned Student in math class this year. Student was assigned to seventh period math, the last class of the day. The class starts at 2:20 p.m. and the aide is scheduled to leave at 2:25 p.m. Student was receiving an F in that class because, according to Ms. Olvera, there was no aide support in the class. Instead of adjusting the time that the aide worked to make sure Student had support all day, Ms. Olvera changed Student's math period to a time when the aide was at school. Student's math grade improved. However, the change resulted in Student being without aide support in her new

seventh period class. Ms. Olvera's opinion that Student's aide support should be removed was contradicted by the evidenced gathered through the very observations she conducted.

43. Ms. Ventress also testified that it was not common for a student in resource to have a one-to-one aide. Ms. Ventress observed Student twice, solely to prepare to discuss Student's services at her annual IEP team meeting in September, specifically looking at the aide and to determine whether to phase out Student's aide. She may also have observed Student last year in sixth grade in Mr. Ceja's class. No finding is being made regarding the procedural appropriateness of these observations. Ms. Ventress, who also took the position that Student should not have a one-to-one aide, gave limited testimony which supports the conclusion that Student does, indeed, need an aide.

44. Ms. Ventress testified that when she observed Student in the classroom, she did not see Student taking initiative on activities. The aide was close and one step ahead, prompting Student to focus. The aide also helped Student by facilitating group activities. The aide read aloud questions to Student and talked her through them if the vocabulary was difficult for Student.

#### STUDENT'S ACADEMICS

45. Student's grade report from November 14, 2016, was admitted as evidence. There were grades for the first progress period and then final grades for the first quarter. At the first progress period, Student received A's and B's, one C, and an F in math. For the end of the first quarter, Student received A's and B's, one C, and one D. Student's math grade had risen to a C. There is no indication on the grade report that any of Student's grades are modified.

SEPTEMBER 26, 2016 IEP

46. An IEP team meeting was held on September 26, 2016, for Student. Aside from testimony regarding changing Student's placement from general education with some aide support to a special day class, there was no testimony or reliable documentary evidence supporting the appropriateness of the elements of this IEP.

47. The IEP shows that Student is eligible for special education as a Student with a specific learning disability and also under speech and language impairment. Soledad did not put forth any evidence which can be relied upon to show that these are the appropriate eligibility categories for Student.

48. The IEP lists the following areas of need for Student: Reading – Decoding/Fluency; Reading – Comprehension; Math – Calculation; Written Language; Receptive Language; and Expressive Language. Soledad did not show with any reliable evidence that these are current areas of need for Student. Student's IEP does not list Math – Application; Articulation; Study/Organization Skills; or Attention as areas of need and Soledad did not establish that Student does not have current needs in these areas.

49. For each goal area, the IEP purports to list Student's present level of performance. Under each goal is a section titled Baseline. There was no explanation regarding the baseline or how or when it was calculated. Soledad did not put on evidence of Student's present levels of performance or baselines to support what was written in the IEP. Soledad did not put on any evidence that the goals were appropriate for Student or were measureable. As discussed below in the legal conclusions, the goals were found objectively not appropriate and unmeasurable. The IEP listed the following as Student's Present Levels of Performance (PLP), Goals, and Baselines:

### *Writing – Goal 1*

PLP: [Student] needs to describe key elements of information in the History/Social-Sciences area.

Goal: By 9/26/17, given an organizer with a writing frame, [Student] will explain how and where each empire arose (at least 2 reasons) and how the Aztec and Incan empires were defeated by the Spanish (at least 2 reasons), with 90% correct for 3 consecutive trials as measured by work samples and observation records.

Baseline: 10%, 1 trial

### *Reading – Goal 2*

PLP: [Student] needs to develop an understanding of processes relating to Earth's formation as part of the Science Standards.

Goal: By 9/26/2017, given an organizer with a writing frame, [Student] will describe how tectonic processes continually generate new ocean sea floor at ridges and destroy old sea floor at trenches. (H.S.ESS1.C GBE) (secondary to MS-ESS2-3) with 90% correct for 3 consecutive trials as measured by a simple multiple choice assessment (teacher-made with up to 10 questions) & observation records.

Baseline: 10%, 1 Trial

### *Receptive Language- Goal 3*

PLP: [Student] has met her previous receptive language goal with 80% accuracy. However, she continues to need support in the area of comprehension.

Goal: By 9/26/2017, in the speech room setting, [Student] will draw inferences after listening to a selection with 80% accuracy in 4 out of 5 trials, as measured by the Speech and Language Pathologist charting and observation.

Baseline: 70% accuracy when being provided with semantic cues.

### *Communication – Goal 4*

PLP: [Student] is able to produce grammatically correct sentences when describing pictures or sequencing story events. Based on file review, [Student] made good progress on her speech goal.

Goal: By 9/26/17, in the speech room setting, [Student] will increase her vocabulary by 45 new curriculum based words and demonstrate understanding by providing definitions across 3 consecutive sessions with 80% accuracy as measured by Speech Language Pathologist notes and observation.

Baseline: 60% accuracy when provided with cues.

#### Reading – Goal 5

PLP: WWJIV 10/09/2014 Standard Scores Broad Reading 65, Reading Comprehension 65, Reading Comprehension Ext 62, Letter word ID 62, Passage Comprehension 51, Reading Vocabulary 61, Reading 56. Standard Scores are in the very low average range. Average Range is 90-110.

Goal: By 9/26/2017, given core curriculum materials, [Student] will verbalize meaning of self-corrected words,, using context clues with guidance (e.g. meddling, visual clues, verbal prompts) with 75% correct for 3 consecutive trials as measured by work samples and observation record.

Baseline: Currently [Student] can verbalize meaning of self-corrected words, using context clues with guidance (e.g. modeling, visual clues, verbal prompts) with 40% correct as measured by work samples.

#### *Math – Goal 6*

PLP: WWJIV Mathematics 67 Standard Score

Goal: By 9/26/2017, given core curriculum materials, [Student] will solve multi-step real-life and

mathematical problems posed with positive and negative rational numbers in any form including money (whole numbers, fractions, and decimals) using tools strategically with 75% correct for 3 consecutive trials as measured by work samples and observation record.

50. For statewide assessments, the IEP listed the following supports and accommodations for the English Language Arts/Literacy Assessment: read aloud (listening and writing), separate setting, read aloud (passages only), text-to-speech (reading passages only). The following supports and accommodations were listed for the mathematics Assessment: read aloud, separate setting, calculator (for designated items only) multiplication table from publisher (gr. 4 and up). There were no supports and accommodations listed for District assessments. No evidence was presented that these supports and accommodations were appropriate or that Student did not need any additional supports or accommodations.

51. The IEP states that Student will be in the general education environment for 53 percent of the time and out of the general education environment (and in the special education environment) for 47 percent of the time. The description of the activities in which Student will not participate in general education are listed as SDC Class and Speech and Language. There is no specificity as to the actual courses Student would receive in the special day class and no evidence supported that there was any actual specific determination made for Student in this area. The IEP also lists the reason Student will not participate in the listed activities as "needs modified and/or intensive instruction



not feasible in Gen. Ed.” There was no evidence offered as to what this statement means specifically in regards to Student. Further, there was no evidence that the IEP team ever had any substantive discussions regarding any specific needs of Student which would require removal from the general education environment. The IEP offered Student no assistive or augmentative devices or tools and Soledad offered no evidence that this determination was appropriate for Student.

52. The IEP offered Student the instructional accommodations of seating near teacher, testing over more than one day, extended time to complete assignments, testing in the Resource Room, directions given in a variety of ways, and a visual schedule. Student was offered no modifications. Soledad offered no evidence that the instructional accommodations were appropriate for Student and that Student did not need modifications. Ms. Olvera testified that Student would have a modified curriculum in the special day class, contrary to the IEP document.

53. Student’s IEP details her English Proficiency Assessment results from October 2015. It lists her listening level as Beginning, speaking as Intermediate, reading as Beginning, writing as Early Intermediate with an overall level of Beginning. The IEP then states that Student requires primary language support and instruction strategies for comprehensible input in English. These instructional strategies are: “provide slow, clear oral(sic), stress high-frequency vocabulary words, bridge new learning to previous knowledge and conducting frequent comprehension checks.” The IEP recommends a general education instructional setting of mainstream English. It states that Student’s English language development be provided in general education, not special education, and that Student requires instruction in special education using the English language. There was no explanation in the IEP document itself or in testimony explaining

this. This would also seem to exclude Student from participating in her English class in the special day class environment. No evidence was provided by Soledad that any of these determinations was appropriate for Student and these determinations seem to contradict the offer of a special day class for English Language Arts, if that was part of the offer.

54. The service page indicates that the IEP offered Student 717 minutes per week in a special day class. Student's school day is from 7:45 a.m. until 3:15 p.m., which is a total of 7.5 hours or 450 minutes a day. This is equivalent to 2,250 minutes per week. No evidence was presented as to how Soledad could mathematically comply with the offer of placement in a special day class 47 percent of the time, 1,1057 minutes per week, while at the same time only offering Student 717 minutes per week in a special day class and 30 minutes a week of speech and language services.

55. The special day class offer of 717 minutes per week works out to be 143.4 instructional minutes per school day, which does not appear consistent with either two or four periods a day of special day class. However, the notes page indicates that three placement offers were discussed at the IEP team meeting: RSP support with an aide that would end at the end of the school year; RSP support with two SDC classes and no aide; and, SDC classes in four subject areas and electives with no aide. The notes state Mom turned down all three offers. The notes indicate that Ms. Olvera and Ms. Ventross deemed either placement with SDC classes as the best option for Student to gain independence and receive academic support in core academics. There is no indication as to which specific courses Student would receive instruction in the SDC class and as to which courses Student would receive instruction in the general education environment.

56. The offer page also indicates that Student is to receive 900 minutes of speech and language instruction per year. This is a reduction of 900 minutes a year from the previous IEP offer. Soledad offered no evidence to explain this reduction or to show the appropriateness of 900 minutes per year of speech and language services. The IEP offered no extended school year services and no transportation. No evidence was offered by Soledad to support its determination to not offer extended school year services and transportation.

57. Very little evidence was offered regarding the SDC placement being offered to Student. Ms. Olvera claimed that Student's work would be modified in the special day class, although Student's IEP clearly stated that her work would not be modified. Ms. Olvera also testified that the special day class has one teacher and four aides assigned to the class, but did not testify as to the number of students in the class or what times any or all of the aides were either assigned exclusively to other students or whether they leave the special day class to accompany other students to their general education classes.

58. According to Ms. Olvera, student would have an opportunity to work at her own level in academics, although it is unclear what courses were offered to Student in the special day class; the structure of the class; the curriculum offered and used in the class; the level of other Students in the class; any behavioral issues from other students; the credential of the teacher who teaches the class; and the grade levels of curriculum taught for the specific courses Student would receive in the SDC.

59. There is no indication which classes Soledad offered to Student in the regular education environment and whether those classes were appropriate for Student. The IEP does not reflect a reasoned determination by the IEP team regarding which courses required a more restrictive environment for Student, if

any. A reading of the IEP and the testimony provided by Ms. Olvera, Mr. Miranda and Ms. Ventross showed that the special day class offer was meant to replace Soledad's obligation to provide Student aide support, rather than a reasoned determination that the special day class was the least restrictive environment for Student for specific academic subjects and supports.

## LEGAL CONCLUSIONS

### INTRODUCTION - LEGAL FRAMEWORK <sup>2</sup>

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>3</sup> Ed. Code, § 56000, et seq.; and 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 to 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); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34

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<sup>2</sup> Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit", or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied

to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.)

SOLEDAD'S ISSUE - WILL SOLEDAD'S IEP OFFER OF SEPTEMBER 26, 2016, PROVIDE STUDENT WITH A FAPE SO THAT SOLEDAD CAN IMPLEMENT IT WITHOUT PARENTAL CONSENT?

5. Soledad contends that the IEP of September 26, 2016, offered Student a FAPE such that Soledad should be allowed to implement the IEP without parental consent. Parents disagree and believe that Student should be placed in a regular education environment with one-to-one aide support. The September 26, 2016 IEP will be analyzed first procedurally and then substantively.

#### Burden of Proof

6. At the hearing, the party filing the complaint, for this issue, Soledad, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

7. For this issue, Soledad had the burden to show that the developed IEP offered FAPE in the least restrictive environment. Soledad offered little reliable evidence to show that the components of the IEP were an offer of FAPE.

The IEP itself does not prove that the IEP is reasonably calculated to provide FAPE. Soledad did not put on the evidence necessary to meet its burden that the IEP provided Student FAPE, as discussed more fully below.

8. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, not that preferred by the parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.)

9. Under *Rowley*, an IEP provides a FAPE if it offers a child access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) Educational benefit includes the student's mental health needs, social and emotional needs that affect academic progress, school behavior, and socialization. (*San Diego, supra*, 93 F.3d 1458, 1467.)

#### Procedural Compliance

10. Under the IDEA, in matters alleging a procedural violation, an ALJ may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to parents' child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii).)

11. California has enacted a similar statute that requires, in a hearing conducted pursuant to this section, that the ALJ shall not base a decision solely on non-substantive procedural errors, unless the ALJ finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of parent or guardian of the pupil to participate in the formulation process of the IEP. (Ed. Code, § 56505 subd. (j).)

12. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on parent's opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (*Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) A procedural error results in the denial of educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2003) 394 F.3d 634, 657 (Gould, J. concurring in part and concurring in the judgment).) Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error. (*Ibid.*)

13. The IEP is the "modus operandi" of the IDEA; it is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

14. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct.



1994].) Protection of parental participation is “[a]mong the most important procedural safeguards” in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

#### Clarity of Placement Offer

15. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in “present[ing] complaints with respect to any matter relating to the ... educational placement of the child.” 20 U.S.C. § 1415(b)(1)(E).

(*Union*, *supra*, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

16 One district court described the requirement of a clear offer succinctly: *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi*, *supra*, 122 F.Supp.2d at p. 1108.)

17. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions invalidate IEP's that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ.* (D. Hawai'i, May 9, 2011, No. 10-00381) 2011 WL 1833207, pp. 1, 7-8.)

18. The IDEA requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7) ; Ed. Code, § 56345, subd. (a)(7).) The purpose of this is to require a district to make clear its proposed commitment to particular aspects of a student's special education and related services. As explained by the United States Department of Education:

What is required is that the IEP include information about the amount of services that will be provided to the child, so that the level of the agency's commitment of resources will be clear to parents and

other IEP Team members. The amount of time to be committed to each of the various services to be provided must be . . . clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP.

(Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46667 (Aug. 14, 2006).)

19. The Ninth Circuit has observed that the length of time that an offered service will be delivered must be "stated [in an IEP] in a manner that is clear to all who are involved." (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 953 [citation omitted].) The requirement ensures that 'the level of the agency's commitment of resources' is clear to all members of the IEP team, including parents. (*Bend LaPine School Dist. v. K.H., supra*, 2005 WL 1587241 at p. 9 [citation omitted].) Accordingly, a district that omits from an IEP a statement of the duration of an offered service or accommodation commits a procedural violation of the IDEA. (*See, e.g., Student v. Roseville Joint Union High School Dist., et al.* (2011) Cal.Off.Admin.Hrgs. Case No. 2011061341.)

20. The September 2016 IEP did not make a clear offer of placement to Student. First, the IEP is unclear on the amount of time of special education instruction offered to Student. The IEP services page says that Student is offered 717 minutes per week in a special day class. The evidence showed that Student is in school for about 2,250 minutes per week total. Student was also offered 900 minutes per year of speech and language services. This breaks down to be 30 minutes per week for 30 weeks. Assuming 30 minutes of speech and language and 717 minutes of special day class for a total of 747 minutes of specialized instruction a week, this would mean that Student was offered placement in the

special education environment 33 percent of the time and that she would be in the regular education environment for 67 percent of the time. However, the IEP states that Student would be in the special education environment for 47 percent of the day and the general education environment for 53 percent. Further, testimony and the IEP notes indicate that Student was offered either two or four periods of SDC classes and that the Parents did not choose either choice. It is unclear how much resource time was offered to Student, if any. This shows that Soledad made no evaluative decision as to what truly constitutes FAPE for Student, and instead made alternate offers in order to bargain with Parents for the removal of aide support. The IEP is unclear on its face the amount of time it offered to have Student in the special day class.

21. The IEP is also unclear about what courses were being offered in the special day class and the regular education environment for Student. The notes page discusses two options with a special day class component. The first option is two special day classes and the second is the special day class for four subject areas and electives. It is entirely unclear what courses are being offered in each environment. Further, nowhere in the IEP or in testimony does it show that the members of the IEP team pushing for placement in the special day class ever made a determination on a class by class basis which environment would be appropriate for Student.

22. The IEP offer regarding time in the special day class and time in the general education class was not clear. It is impossible to determine what Soledad's proposed commitment to special education was for Student. The amount of time to be committed to special education and regular education, and which courses would be taught in special education, are not clearly stated in the IEP in a manner that can be understood by all involved in the development and

implementation of the IEP. The IEP discusses three offers made to Parents with dramatically different amounts of time in the special education and regular education environments: there is one section of the IEP with a discrete offer of 717 minutes and another section that offers 47 percent of the school day in special education.

23. This procedural violation deprived the Parents of the right to meaningfully participate in the IEP development process. The three offers, and the conflict in the amount of time in special education offered, did not allow Parents to meaningfully consider the offer, because it is unclear what the offer really was. This results in an offer that is so unclear it results in a denial of FAPE. Therefore, on this basis alone, the IEP does not offer Student a FAPE.

24. However, there are several other areas in which the IEP also fails to offer Student a FAPE, such that even if the offer of services were considered clear, the IEP still fails. These failures are analyzed below.

### Substantive Compliance

#### COMPONENTS OF THE IEP

25. 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.) An IEP is a written statement that includes a statement of the present level of performance of the student, a statement of measurable annual goals designed to meet the student’s needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular

education 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).) The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, be involved and make progress in the general education curriculum, and 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).)

26. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999)195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Ibid.*, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

#### NEEDS, PRESENT LEVELS OF PERFORMANCE, AND GOALS

27. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d) (3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

28. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to

enable the child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child’s disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).)

29. There was limited evidence at hearing regarding Student’s needs. The speech and language report from 2014 and the psycho-educational report from 2014 offer limited information regarding Student’s needs in 2016 simply due to the passage of time. Further, as discussed thoroughly in the factual findings, neither report is given much weight in this Decision from an evidentiary standpoint.

30. Testimony from Mr. Ceja and Ms. Gonzalez did establish generally that Student has needs in the areas of reading, writing, and math. However, Soledad did not meet its burden to show that Student had needs in September 2016, specifically in the areas it noted on the IEP: reading- decoding/fluency, reading comprehension, math – calculation, receptive language, and expressive language. Soledad failed to recognize Student’s needs in other areas such as study/organization skills and attention, which were established at hearing. Soledad also failed to meet its burden to show that Student did not have needs in the area of adaptive skills, which is a component of intellectual disability, as found by the Regional Center report.

31. Even if the 2014 reports were given great weight to establish Student’s needs and the information was taken at face value, the reports themselves do not support the information in the IEP. For example: (1) the speech and language report shows that Student has an area of need in articulation and this is not listed as an area of need on the IEP; (2) the psycho-educational report

shows that Student is in the average range in math calculation but has a need in the area of math applications, yet the IEP shows the opposite; and (3) the psycho-educational report also raised concerns in the area of social emotional functioning, which were not addressed in the IEP.

32. Finally, no testimony was presented from any of Student's current teachers regarding Student's areas of need as of September 26, 2016, when the IEP was developed. Soledad failed to meet its burden to show that it properly identified all of Student's needs on the September 26, 2016 IEP. This failure alone results in a failure to offer an IEP which provides FAPE.

33. Soledad failed to put on any evidence regarding Student's present levels of performance. Not one witness addressed the present levels of performance offered as a part of the IEP. Therefore, Soledad did not meet its burden to show that the present levels of performance were appropriate and therefore did not show that the September 26, 2016 IEP offered Student a FAPE.

34. Further, a simple reading of the IEP shows that the September 26, 2016 IEP failed to adequately describe Student's present level of academic and functional performance. There are two sections in the IEP which had information regarding Student's present levels of performance: the section titled Present Level and the section titled Baseline. Generally, Student's IEP contains some Present Levels and Baselines that are either devoid of information about the specific area, have outdated information, discusses progress on previous goals without explaining what the goal was, or seems unrelated to the area of need it is supposed to address. Examples of the inadequate present levels of performance follow below.

35. In the area of writing, the present level of performance says that "[Student] needs to describe key elements of information in the History/Social



Science area.” This does not describe Student’s current writing ability. The baseline scores her current ability to answer a history question correctly, but not her ability to write. It is unknown whether she can write a complete sentence, whether she can construct a paragraph or whether she can construct a four paragraph essay. It is unknown whether she uses punctuation correctly, how she uses grammar or whether she is able to convey complex thoughts in writing. There is simply no information about Student’s current ability in the area of written language.

36. In the area of reading, the present level of performance for goal number two similarly sets out what Student needs to be able to do, not what she can. The baseline simply measures whether she can answer a science question correctly. The other reading goal recites her scores from the Woodcock in the area of reading from 2014 with no context or explanation. The baseline discusses how well she can currently do on the goal, which discussion is unintelligible as discussed below. The IEP does not indicate what level Student was reading at in September 2016, what her reading fluency was, what her reading comprehension level was or any other information regarding her ability to read.

37. Soledad failed to put on any evidence regarding Student’s goals. Not one witness addressed the goals offered as a part of the IEP. Therefore, Soledad did not meet its burden to show that the goals were appropriate and measureable and, therefore, did not show that the September 26, 2016 IEP offered Student a FAPE. There were also no goals offered in the areas of attention and organizational skills, two areas of need which Soledad failed to recognize. This failure, when taken in isolation, also results in an IEP which fails to offer FAPE.

38. A reading of the IEP shows that several of the goals were not appropriate or measureable on their face and, therefore, the IEP failed to offer Student a FAPE for this reason as well. Examples of this follow below.

39. Student's Goal 1 was in the area of writing and is neither appropriate nor measureable in a meaningful way. First, Student could meet the goal without any actual improvement in her writing. The goal calls for Student to explain how and where each empire arose and how the Aztecs and Incan empires were defeated by the Spanish. It is unclear to which empires the requirement to explain how and where each arose applies. The goal calls for Student to get 90% correct in three consecutive trials. This goal appears to be part of a very discrete unit in History class. Once this section was covered in class, how would Student's progress in writing be measured? Most importantly, if Student can answer these questions and score 90% on the question, why would the Student be required to repeat the same assignment two more times with the exact same information? Also, the goal does not explain to which the 90 % correct refers -is it the answers to the questions, a score on some essay rubric, or does the 90% apply to each section (the rise and the defeat). This goal is inappropriate, unclear, and unmeasurable in a meaningful way.

40. Student's Goal 2 is in the area of reading. The Goal does not require any reading by Student or measure her ability to read, as the goal discusses that Student will be given an organizer with a writing frame. There is no mention of reading anywhere in the goal. The format is similar to Goal 1 except that Student must get 90% correct for 3 consecutive trials as measured by a simple multiple choice assessment (teacher made with up to 10 questions). Again, if Student learns the material and achieves 90% or better on the test, Student must retake the same test two additional times with no explanation given for how this helps

Student become a better reader. Also, this also appears to be testing a very discrete unit in Science class. Even if this somehow measured Student's reading, Student would be unable to be tested on this until the unit is covered in science and then would not be tested again if she passed the test.

41. Another example is Goal 5. The goal states that Student will verbalize the meaning of self-corrected words with guidance (e.g. modeling, visual cues, and verbal prompts). What are "self-corrected words" and how will verbalizing the meaning improve Student's reading ability? Again, there is no requirement that Student actually read anything for this goal and there is no way to measure whether her ability to read has improved over the year. These goals are not appropriate or measurable and the failure to have appropriate and measurable goals established that the IEP does not offer Student a FAPE.

#### PLACEMENT AND SERVICES

42. The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

43. Soledad did not meet its burden to show that placement in the special day class is appropriate for Student. As discussed above, the offer is not clear. Soledad also did not put on evidence regarding the specifics of the placement or show how Student's present levels of performance and goals would be appropriately served in the special day class placement. As discussed above, there was no determination made regarding what classes Student would take in the special day class and what courses were appropriate for Student to take in general education. As all of the options were meant to remove aide support, there was no individualized determination made regarding aide support for Student.

44. The term “related services” (designated instruction and services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they are required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

45. Soledad also failed to show that the offer of 900 minutes of speech and language services per year was appropriate for Student. Not only was the amount of minutes changed from 1,800 to 900 with no documentation on the IEP as to why, no speech and language therapist was called as a witness to explain why 900 minutes was appropriate for Student. Further, to the extent that Soledad offered the 2014 Speech and Language assessment to support its IEP, it fails completely, as it recommends 1,800 minutes per year.

46. Finally, the evidence established that Student needs a one-to-one aide in all regular education classes in order to benefit from special education. Soledad’s offer of placement for Student clearly included some level of instruction in a regular education classroom, although how much is unclear. The evidence established that without the presence of a one-to-one aide Student does not receive educational benefit in the general education classroom. The IEP failed to offer any one-to-one aide services to Student, even in the general education setting.

47. Soledad’s repeated claim that Student’s aide should be removed because Student is dependent on the aide defies logic. With an aide, Student has

been able to achieve better than passing grades in all subjects, without modifications. Soledad's evidence established that Student needs aide support to be successful; yet, Soledad puts forth the contradictory assertion that this evidence is exactly why Student should not be provided aide support. Student needs the aide; Student uses the aide; Student is successful with the assistance of the aide; and, without the aide, Student fails. This is the exact reason Student should have an aide. The evidence established that the aide was supporting Student, not completing her work for her. If Soledad is concerned that Student is becoming more dependent on the aide than her disability requires she be, the answer would be to provide training to the aide, so that a specific plan could be developed to continue to provide Student the assistance she needs while letting her be as independent as possible.

48. A district is required to provide extended school year services to a student with an IEP if an extended school year program is necessary to provide the student a FAPE. (34 C.F.R. § 300.106(a).) However, the standards for determining whether a student is entitled to an extended school year placement to receive a FAPE are different from the standards pertaining to FAPE in the regular school year. The purpose of special education during the extended school year is to prevent serious regression over the summer months. (*Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.) The mere fact of likely regression is not enough to require an extended school year placement, because all students "may regress to some extent during lengthy breaks from school." (*MM v. School Dist. of Greenville County* (4th Cir 2002) 303 F.3d 523, 538.)

49. Extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and

related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs. Tit.5, § 3043, first par.) If an IEP team decides that a student requires an extended school year to receive a FAPE, an extended school year placement must be offered in the IEP: "An extended year program, when needed, as determined by the [IEP] team, shall be included in the pupil's individualized education program." (Cal. Code Regs. Tit.5, § 3043, subd. (f).)

50. California's standards for extended school year eligibility are consistent with longstanding interpretations of federal law. (*Hoeft v. Tucson Unified School Dist.*, *supra*, 967 F.2d at p. 1301; *Cordrey v. Euckert* (6th Cir. 1990) 917 F.2d 1460, 1470; *Alamo Heights Independent School Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1158; *Battle v. Pennsylvania* (3d Cir. 1980) 629 F.2d 269, 275; Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46582-46583 (Aug. 14, 2006).)

51. Soledad did not meet its burden to show that its determination not to offer Student extended school year services was appropriate for Student. There was no evidence in the IEP document or in testimony that extended school year was ever discussed in the IEP team meeting or meaningfully considered by the IEP team.

## LEAST RESTRICTIVE ENVIRONMENT

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

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

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

*(D.f. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571.)

54. In *Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404. In *Rachel H.* the Ninth Circuit held that an intellectually disabled student with an IQ of 44 should be placed full-time in a general education second grade class.

55. Soledad did not meet its burden to show that placement in a special day class for any part of the day was the least restrictive environment for Student. Soledad put on no credible evidence that any of the *Rachel H.* factors were ever weighed or balanced for Student or that the special day class was the least restrictive environment for Student. Soledad never determined which courses were offered in the special day class even though it made three alternative offers consisting of no special day class, two periods in the special day class, or four periods in the special day class. These disparate offers show that there was no consideration of what was *the* least restrictive environment when making the placement offer in the September 2016 IEP.

STUDENT'S ISSUE- DID SOLEDAD'S IEP OFFER FOR STUDENT MADE AT THE END OF THE 2015-2016 SCHOOL YEAR DENY HER A FAPE FOR THE 2016-2017 SCHOOL YEAR BECAUSE IT DID NOT PROVIDE FOR HER TO CONTINUE HAVING A ONE-TO-ONE AIDE?

56. Student challenges the failure to offer a one-to-one aide in the May 2016 IEP. As discussed above, the evidence at hearing showed that, as of September 26, 2016, Student needed an aide in all general education classes. The



evidence also showed, through Mr. Ceja's testimony, Student's need for an aide in the 2015-2016 school year. The testimony of Ms. Gonzalez established Student needed an aide in the 2015-2016 school year as well as the 2016-2017 school year. The testimony of Ms. Olvera and Ms. Ventress, from their observations of Student in class prior to the September 26, 2016 IEP team meeting, established that Student needed the services of a full time one-to-one aide prior to the September 2016 IEP team meeting.

57. The need for an aide was clear at the time of the May 24, 2016 IEP team meeting and continued all the way through to the September 26, 2016 IEP team meeting. Student needed an aide to help her organize and focus, understand directions, read directions, explain things, break down tasks to smaller tasks and for other classroom tasks as well.

58. Student showed that she needed an aide during every regular education class from the beginning of the 2016-2017 school year until Soledad made another placement offer on September 26, 2016. Although the May 2016 IEP special day class and regular education environment offer is unclear, as well, the IEP does call for 53 percent of Student's day in the regular education environment. Although Parents did not generally agree that Student should be placed in a special day class, that was not challenged directly by Parents for the May 2016 IEP in this case. Parents' contention is limited to her needing aide support in her regular education classes. Parents did show that Student needed aide support in all of her regular education classes in order to benefit from her education.

## REMEDIES

1. Student has asked that Soledad continue to provide Student with one-to-one aide support. However, because another IEP team meeting was held

for Student on September 26, 2016, and Student only challenged the May 24, 2016 IEP, her remedy will be for the denial of FAPE from the beginning of the 2016-2017 school year through September 26, 2016.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia, supra*, 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

3. In this case, Student was still in all regular education classes, pursuant to her stay put placement. Student had the services of her one-to-one aide except for portions of her first period and almost all of her last period per day. Student suffered an educational loss in math, getting an F for the first progress period. As a remedy, Soledad is ordered to provide Student with tutoring in the area of math in the amount of 25 hours by a credentialed teacher who is not a current employee of Soledad. This tutoring will concentrate on both assisting Student with her current math work, as well as remediating her in the area of math.

## ORDER

1. Soledad may not implement the September 26, 2016 IEP over parental objection.
2. Soledad will contract with a credentialed teacher, who does not work for Soledad, to provide Student with 25 hours of compensatory math tutoring. Soledad must identify and contract with a teacher within 30 days of this decision.
3. Student's math tutoring will take place outside Student's school day and the dates and times of the tutoring will be arranged between Student, Parents and the teacher.
4. If requested, Soledad will provide a safe, quiet place for the tutoring to occur.
5. All other requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Parents on behalf of Student, prevailed on both issues.

## RIGHT TO APPEAL

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

Dated: January 3, 2017

/s/

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MARGARET BROUSSARD

Presiding Administrative Law Judge

Office of Administrative Hearings