A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) John M. Gaffney in Spokane, Washington, on August 31, 2010, and September 1, 2010. The Parent of the Student whose education is at issue¹ appeared on her own behalf. The Central Valley School District (hereinafter School District) was represented by Gregory Stevens, attorney at law.

The record closed on September 1, 2010. The decision due date was originally August 25, 2010. The decision due date was extended 20 days to September 14, 2010, due to the 20-day continuance of the first prehearing conference.

The following is hereby entered:

**STATEMENT OF THE CASE**

**Evidence Relied Upon:**

Exhibits Admitted: *Parent’s* exhibits P 201 – P 205; P 208 - P 218; P 226 - P 236. *School District’s* exhibits D 16, D 17, D 21, D 22.

Witnesses Heard: Michelle Mace (school psychologist), Shirley Brick (special education teacher), Melissa Salvetti (lead ECEAP teacher), Geraldine Hammond (special education coordinator for elementary programs), Jacqueline Johnson (School District special services director), the Mother.

**ISSUE**

The issue for decision in this proceeding is:

Whether the Student’s May 7, 2010, individualized education program (IEP) provides the Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2010-2011 school year?

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¹ To ensure confidentiality, names of parents and students are not used. The Parent in this matter is the Mother of the Student whose education is at issue.
FINDINGS OF FACT

Procedural History

1. The Parent filed a Request for Due Process Hearing (hereinafter the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on June 11, 2010. It was assigned the above cause number. A series of prehearing conferences were scheduled and held.

Educational Placement and Evaluation History

2. The Student is a [redacted] year old [redacted] who resides within the School District boundaries with her family. The Student has Angelman Syndrome, a neuro-genetic disorder. Characteristics of Angelman Syndrome include severe cognitive, speech, and motor impairments. Children with Angelman Syndrome typically have a happy, excitable demeanor with frequent smiling, laughter, and hand-flapping movements. Individuals with Angelman Syndrome rarely speak or at most develop and use between five and ten words. The Student does not speak. The Student also suffers from a seizure disorder and has frequent petit mal seizures. The Student has significant developmental delays in the following areas: cognitive; adaptive social; fine motor; gross motor; communication.

2007-2008 School Year

3. The 2007-2008 school year started in September, 2007. The Student began attending school in the School District on February 1, 2008. The Student’s first IEP was completed on February 1, 2008. The Student’s IEP’s was effective February 1, 2008, through January 31, 2009, one year later. Each IEP straddles two school years. The Student was in a self-contained classroom with other special education students during the 2007-2008 school year.

4. The February 1, 2008, IEP set goals and objectives in the following areas: gross motor; speech language pathology (SLP); occupational therapy (OT); cognitive; social. Exhibit P 230.

2008-2009 School Year

5. During the 2008-2009 school year the Student was primarily in a self-contained classroom, but spent a small amount of time with general education students in the early childhood education and assistance program (ECEAP). ECEAP is funded by the state and is similar to the federal Head Start program. ECEAP is designed as a general education preschool program for at-risk children and children in families with incomes below a specified level.

6. January 31, 2009, marked the one year ending date of the first IEP that started on February 1, 2008. As of January 31, 2009, the Student had mastered most of the goals and objectives set forth in the February 1, 2008, IEP. Exhibit D 22.

2009-2010 School Year

7. Between February 1, 2008, and January 31, 2009, the Student met 4 of 13 goals in her IEP.

8. Between February 1, 2009, and January 30, 2010, the Student met 5 of 12 goals in her IEP.

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9. Between February 1, 2010 and the end of the school year in June, 2010, the Student mastered a total of 2 goals in her IEP.

10. At age 5, the Student scored at an age equivalent of 23 months on the Battelle test for non-verbal students.

11. During the 2009-2010 school year the Student was placed with general education students in the ECEAP. The ECEAP was not the choice of the School District. The IEP team believed that the Student should have remained primarily in a self-contained classroom, and only in the ECEAP a small portion of the time. The IEP team agreed to place the Student in the ECEAP for the 2009-2010 school year at the strong request of the Mother.

12. The Student had a full time one-on-one aide during the 2009-2010 school year. While this can be very beneficial, the Student tended to ignore her peers and interacted almost exclusively with her adult aide.

13. A child outcomes summary form was completed by the School District on May 5, 2010. The form is part of a report on early childhood outcomes that the School District reports to the state. The form is the School District equivalent of the Washington Assessment of Student Learning (WASL). Students are scored between 1 and 7 in various areas. A “1” stands for “not yet”, a “3” for “emerging” a “5” for “somewhat” and a “7” for “completely”.

14. Question 1a of the form asked: To what extent does this child show age-appropriate functioning, across a variety of settings and situations, on this outcome? The Student was rated a “2” on this question. Exhibit D 16 page 2.

15. Question 1b asked: Has the child shown any new skills or behaviors related to positive social-emotional skills (including positive social relationships) since the last outcomes summary? The Student was rated a “2” on this question. Exhibit D 16 page 3.

16. Question 2a asked: To what extent does this child show age-appropriate functioning, across a variety of settings and situations, on this outcome? The Student was rated a “1” on this question. Exhibit D 16 page 3.

17. Question 2b asked: Has the child shown any new skills or behaviors related to acquiring and using knowledge and skills since the last outcome of summary? The Student was rated a “2” on this question. Exhibit D 16 page 4.

18. Question 3a asked: To what extent does this child show age-appropriate functioning, across a variety of settings and situations, on this outcome? The Student was rated a “2” on this question. Exhibit D 16 page 4.

19. Question 3b asked: Has the child shown any new skills or behaviors related to taking appropriate action to meet needs since the last outcomes summary? The Student was rated a “2” on this question. Exhibit D 16 page 5.
20. The child outcomes summary form determined that the Student rated at the lowest or nearly the lowest rating in all categories. The Student had a cognitive score of 20%, which is considered to be very low. Although the Student progressed in goals that were age-appropriate for children between birth and age 3, the Student had regressed in goals that were age-appropriate for children ages 3 to 6. As of May 5, 2010, the Student was at the beginning level for preschool benchmarks.

21. The Student will be in kindergarten during the 2010-2011 school year. Kindergarten students are taught to read. Knowledge of shapes and knowing the alphabet are precursors to reading. The Student knows approximately three letters of the alphabet and is still struggling to differentiate shapes. The Student is easily distracted. The Student’s ECEAP teacher during the 2009-2010 school year estimated the Student’s attention span at between 6 and 7 seconds.

The Parent’s Proposed Placement for the Student for the 2010-2011 School Year

22. The Parent’s first choice of placement for the Student for the 2010-2011 school year is an all-day (not half day) general education kindergarten class at the Student’s neighborhood school, Opportunity Elementary School, most likely with a one-on-one aide but no pull-out services.

23. The School District has an all-day kindergarten class at Opportunity Elementary, the school closest to the Student’s home. The morning session of the all-day class is like the other kindergarten classes in the School District. The afternoon session is funded through the Title I Improving The Academic Achievement of The Disadvantaged program. The program states “Children with disabilities may be served in Title I reading if reading is not one of their IEP goals”. Exhibit P 234 page 3.

24. As a prescrawler, the Student had a shape goal. Preschool students do not have reading goals. When the Student enters kindergarten on September 8, 2010, the shape goal will be changed to a reading goal.

25. The Parent’s second choice for the Student for the 2010-2011 school year is 2.5 hours per day, four days a week [2 hours per day on Thursdays], in a general education kindergarten class at Opportunity Elementary School, most likely with a one-on-one aide but no pull-out services.

The School District’s Proposed Placement for the Student for the 2010-2011 School Year

26. On May 7, 2010, the Student’s IEP was amended. The May 7, 2010 amendment is the Student’s proposed placement for the 2010-2011 school year. In an attempt to accommodate the wishes of the Parent and in direct disagreement with the Student’s teachers, the amendment proposed placement of the Student in an integrated kindergarten class. Only a few of the elementary schools in the School District have an integrated kindergarten class. Opportunity Elementary School does not have an integrated kindergarten class.

27. An integrated kindergarten class has 12 general education students and 10 special education students. An integrated kindergarten has one certified general education teacher and one certified special education teacher. An integrated kindergarten has one general educational assistant and two special educational assistants.
28. With the exception of the all-day kindergarten using Title I funds, kindergarten in the School District is 2.5 hours per day, four days per week. On the fifth day, Thursdays, kindergarten is only 2.0 hours. This is a total of 720 minutes of class time each week for kindergarten students. The May 7, 2010, IEP proposes that the Student spend 405 minutes (55.25%) per week in the integrated kindergarten classroom and 315 minutes (43.75%) per week in pull-out services each week. The pull-out time includes 75 minutes per week on cognitive goals, 75 minutes per week on social goals, 75 minutes per week on adaptive goals, 30 minutes per week on fine motor goals, 30 minutes per week on gross motor goals, and 30 minutes per week in receptive/expressive goals. The School District feels strongly that the Student needs pull-out services to receive a meaningful educational benefit. Pull-out services are provided in small groups with less noise and fewer distractions, where a special education teacher works directly with the special education students.

29. The School District believes that placing the Student into a full-time general education kindergarten with a one-to-one aide is not only inappropriate for the Student but substantially more restrictive than placing the Student in an integrated kindergarten. When a student has a one-to-one aide, other children often do not approach the student.

30. If the Student is placed in a general education kindergarten class full time during the 2010-2011 school year, it will require a great deal of the general education teacher's time. The Student is between two and three years delayed in her abilities and maturity when compared to her chronological age. The general education teacher would spend more time with the Student than with the other children in a general education kindergarten class.

31. Of all the students in the School District moving from preschool to the integrated kindergarten class in September 2010, the Student would be the most disabled student. The other special education students going on to integrated kindergarten in September 2010 are higher functioning and more independent than the Student.

Review of the Student's Progress During the 2009-2010 School Year, and Observations of School District Educators

32. Shirley Brick is a special education teacher for the School District. Ms. Brick has 16 years of experience as a special education teacher. Ms. Brick has provided the Student with extended school year (ESY) services and instruction during summer vacations for the past three years. During ESY summer 2010, the Student's cognitive functioning was assessed at a chronological age of between 2.5 and 3 years old. Ms. Brick further noted that the Student has an attention span of between 10 and 15 seconds, and that the Student prefers adults over peers.

33. Ms. Brick believes an integrated kindergarten program is not an appropriate placement for the Student because the Student would struggle a great deal in that environment. Ms. Brick believes the Student should be placed in a special education self-contained classroom with special education teachers who are highly trained, and where the Student would be with peers closer to her abilities.

34. Melissa Salvetti is a lead ECEAP teacher for the School District. Ms. Salvetti taught the Student during the 2009-2010 school year. The Student was the lowest functioning student in Ms. Salvetti's class. Ms. Salvetti recommends that the Student be taught in a small group special education setting and not in a general education setting for the 2010-2011 school year.
35. Geraldine Hammond is the special education coordinator for elementary programs for the School District. Ms. Hammond has 35 years of experience. Ms. Hammond noted the Student was extremely dependent on her one-on-one aide during the 2009-2010 school year and that the Student often appeared distracted and disengaged. Ms. Hammond believes the Student should be placed in a self-contained classroom during the 2010-2011 school year, and that an integrated kindergarten program was not the best fit for the Student. Ms. Hammond believes the Student would be the lowest-functioning student in an integrated kindergarten program during the 2010-2011 school year. Ms. Hammond noted that general education kindergarten is fast-paced and requires a higher level of cognitive functioning than the Student currently possesses.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. §1401 et seq. (Individuals with Disabilities Education Improvement Act IDEA, sometimes referred to as IDEIA, formerly Education for All Handicapped Children Act EHA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) §300 et seq., and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing is on the party seeking relief, which in this case is the Parent. See Schaffer v. Weast, 546 US 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). In order to meet this burden, the Parent must establish there has been a violation of the IDEA by a preponderance of credible evidence. Hendrick Hudson School District Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

Free Appropriate Public Education

3. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In Hendrick Hudson District Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 458 U.S. at 207; 102 S. Ct. at 3051.

4. A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA (formerly the EHA). The Rowley court articulated the following standard for determining the appropriateness of special education services:
According to the definitions contained in the (Education for All Handicapped Children Act) a 'free appropriate public education' consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items of the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

Id. at 458 U.S. at 188-189; 102 S. Ct. at 3041-3042.

5. In the Ninth Circuit, it is well-settled that the appropriateness of a proposed educational placement is evaluated by looking to the IEP's goals, the special education and related services that are offered, at the time the placement is proposed. That is the time to ask whether those methods were reasonably calculated to provide the Student with an educational benefit. This is characterized as the 'snapshot' method. Adams v. State of Oregon, 195 F.3d 1141 (1999). The inquiry here is whether the May 07, 2010, IEP was reasonably calculated to provide this Student with meaningful educational benefit.

6. The Parent strongly desires that the Student be placed in a general education kindergarten class with no pull-out for special education services. The Student is 5 1/2 years old but cognitively and in other areas functions at an age equivalent of three years old or less. Mainstreaming the Student during the 2009-2010 school year caused the Student to regress in her functioning. The Student would be the most severely disabled student going from preschool to an integrated kindergarten, let alone to a general education kindergarten with no other special education students. Placing the Student in a general education kindergarten class with a one-to-one aide when the Student is so delayed and easily distracted would not provide the Student with any meaningful educational benefit. The majority of the school witnesses felt that even the integrated kindergarten was not appropriate for the Student, and that the Student should be placed in a self-contained special education classroom for kindergarten. The May 7, 2010, IEP, however, places the Student in an integrated kindergarten 56.25% of the time, with pull-out services the remaining 43.75% of the time. The May 7, 2010, IEP is reasonably calculated to provide the Student with meaningful educational benefit and is an appropriate educational program for the start of the 2010-2011 school year.

7. Because placement of the Student in a general education kindergarten class is not appropriate and does not provide FAPE, the undersigned need not reach the issue of whether the Student is eligible for School District's all-day kindergarten.

Least Restrictive Environment

8. The inquiry then moves to whether the May 7, 2010, IEP places the Student in her LRE. School districts are required to ensure special education students are educated to the maximum extent appropriate in a general education curriculum and class with nondisabled students. Special
classes, separate schooling, or other removal of special education students from the general education environment may occur only if the nature or severity of the disability is such that education in general education classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. 34 U.S.C. § 300.114; WAC 392-172A-02050.

9. Each school district must ensure that a continuum of alternative placements is available to meet the special education and related services needs of students. The continuum must include alternative placements, such as instruction in general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions. Provision must be made for supplementary services such as resource room or itinerant instruction, in conjunction with general education classrooms. 34 U.S.C. § 300.116; WAC 392-172A-02055.

10. Educational placements of special education students must be based upon the least restrictive environment requirements contained in 34 U.S.C. § 300.114 through .118; WAC 392-172A-02050 through -02070, including placement options that provide a reasonably high probability of assisting a student to attain the student’s annual goals. Placements must also be based upon a consideration of any potential harmful effects on a student or on the quality of services which the student needs. Unless the IEP of a student requires some other arrangement, the student must be educated in the school the student would attend if nondisabled.

11. The Ninth Circuit has adopted a four-factor balancing test to determine whether a school district has complied with the IDEA’s mainstreaming requirement, and, more fundamentally, with the requirement that children be placed in the LRE. The factors are: (1) the educational benefits of placement full time in a general education class; (2) the non-academic benefits of such placement; (3) the effect the student had on the teacher and children in the general education class; and (4) the costs of mainstreaming the student. Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., ex rel. Holland, 14 F.3d 1398, 1404 (9th Cir. 1994) (hereinafter Rachel H.).

12. In examining the four factors set forth above: 1) the Student has severe limitations and would not receive meaningful educational benefit in a general education kindergarten class; 2) the non-academic benefits of a general education kindergarten placement are limited at best and do not outweigh the lack of educational benefit from such a placement; 3) in a general education kindergarten placement, the kindergarten teacher would spend a great amount of time with the Student to the detriment of the other students in the class; 4) the cost was not raised as an issue.

13. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. Daniel R.R. v. State Board of Ed., 874 F.2d 1036, 1050 (1989). The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home or instruction in hospitals or institutions.

14. An IEP providing for over fifty-percent of the child’s day to be spent outside of general education for academic instruction was held not to violate the child’s right to be educated in the LRE where the evidence showed that the benefits of separate academic instruction outweighed the

15. The IDEA recognizes that general education is not a suitable setting for educating many disabled children. Even when school officials can mainstream a child, they need not provide for an exclusively mainstream environment; the IDEA requires school officials to mainstream each child only to the maximum extent appropriate. When education in a regular classroom cannot meet the disabled child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in general education. *Cody H. v. Bryan Independent Sch. Dist., 44 IDELR 211, 105 LRP 59974 (S.D. Tex 2005).* The Student was in the full time ECEAP during the 2009-2010 school year and the Student regressed in functioning for children ages 3 to 6. Placing the Student in general education kindergarten with no pull-out for special education does not meet the Student's unique needs. The four factors identified in *Rachel H.* support the School District's May 7, 2010, proposed placement of the Student in an integrated kindergarten at Broadway Elementary School, with 405 minutes per week in the integrated kindergarten classroom and 315 minutes per week in pull-out services. The May 7, 2010, IEP for the 2010-2011 school year provides the Student a FAPE in her LRE.

**ORDER**

1. The Student's May 7, 2010, individualized educational program provides the Student a free appropriate public education in her least restrictive environment for the 2010-2011 school year.

Signed at Seattle, Washington on September 8, 2010.

[Signature]

John M. Gaffney
Administrative Law Judge
Office of Administrative Hearings

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Final Decision

Further Appeal Rights: Information About Your Right To Bring A Petition For Reconsideration And Your Right To Bring A Civil Action

Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

Parent

via US Mail and Electronic Mail

Jacqueline Johnson
Director, Special Education
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via US Mail

Gregory L. Stevens
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cc: Administrative Resource Services, OSPI
OAH/OSPI Caseload Coordinator

Findings of Fact, Conclusions of Law, and Order
Cause No. 2010-SE-0057
Page 10