A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) John M Gaffney in Spokane, Washington, on August 17, 2010, and August 18, 2010. The Parent of the Student whose education is at issue\(^1\) 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 August 18, 2010. There were no post hearing briefs. 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 pre hearing conference.

The following is hereby entered:

**STATEMENT OF THE CASE**

**Evidence Relied Upon:**

Exhibits Admitted; Parent's exhibits P 201 – P 202 and P 206 - P 216; School District's exhibits D 2; D4 - D7; D 13 - D17; D20.

Witnesses heard: Michelle Mace (school psychologist), Eileen Nelson (special education teacher), Jennifer Long (Alternative Instruction Model (AIM) teacher), Jacqueline Johnson (School District Special Services Director), the Mother, Debbie Snyder (Parents Are Vital in Education (PAVE) advocate).

**ISSUES**

The issue for decision in this proceeding is:

Whether the program placement offered to the Student by the School District on May 21, 2010, of 1.5 hours per day in special education and 1.0 hour per day in the ECEAP is appropriate.

\(^1\) 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 was born on [redacted] 2006. The Student began receiving early intervention services in [redacted] at a young age. The family moved to Spokane Valley in [redacted] 2007. The Student began receiving early intervention services through the Infant Toddler Network.

3. The Student is a 3 year old boy who resides within the School District boundaries, in Spokane Valley, Washington, with his [redacted] year old sister and a [redacted] brother. The Student has Angelman Syndrome. Angelman Syndrome is 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 between five and ten words. The student is deaf in his left ear. The Student has also suffered from a seizure disorder. The Student does not speak. The Student uses sign language and can sign about 15 words.

4. An Individualized Family Service plan transition meeting was held on June 1, 2009. The Student was then referred for special education evaluation in the areas of cognitive, adaptive, fine motor, and gross motor skills. The Student does not have behavioral difficulties at home or at school. Both sides agreed that good behavior was a strong point for the Student.

2009/2010 School Year

5. On September 18, 2009, the Student scored at the 3rd percentile in cognitive domain based on the Developmental Profile -3 Interview form. Based on the Vineland Adaptive Behavior Scales the Student scored as follows: 4th percentile for communication; the 13th percentile for daily living skills; the 37th percentile for socialization; the 8th percentile for motor skills; and the 8th percentile for adaptive behavior. Exhibit D 2, page 2. Based on the Preschool Language scale - 4, the Student scored in the 1st percentile in auditory comprehension and in the 1st percentile in total language score. Exhibit D 2 page 4.

6. An Individualized Education Program (IEP) meeting was held on October 2, 2009. Goals and benchmarks were established for the Student in the following areas: receptive/expressive; cognitive; fine motor; and gross motor.

7. During the 2009/2010 school year the Student spent 2.0 hours per day in a special education setting, with a special education teacher, and 1/2 hour per day integrated into a child care setting, specifically recess period.
8. The School District wrote a reevaluation report on November 19, 2009. The added disability category in that report was "developmental delay". The IEP team determined that specially designed instruction was needed in the area of adaptive skills. Exhibit D7 page 1. The Student scored between the 2nd percentile and the 7th percentile on the Vineland Adaptive Behavior Scales. Exhibit D7 page 2. The Student’s IEP was amended based on this new information.

9. On May 7, 2010, the IEP was amended to add an extended school year (ESY) for the Student. Exhibit D. 13 page 1.

10. During the 2009-2010 school year, the Student began using an AC device as the Student does not speak. The Student is able to push buttons on the device that allows the Student to communicate ideas such as "more food" or "my turn".

11. Eileen Nelson was the special education teacher for the Student for 2.0 hours per day during the 2009/2010 school year. Ms. Nelson described the Student as a very happy compliant sweet boy. The Student was in the class with Ms. Nelson with the exception of 30 minutes per day when he was at recess with the early learning students to work on his gross motor skills.

AIM Program

12. Prior to May 18, 2010, the AIM program, within the School District, stood for “autism inclusion model”. Prior to May 18, 2010, only autistic students were in the AIM program.

13. On May 18, 2010, the School District changed the AIM program from “autism inclusion model” to “alternative instructional model”. As a result of the name change and other general changes, the School District now considers non-autistic students for the revamped AIM program. The School District decided that some of the same components in the older program would benefit other students with significant social/behavioral needs and that the new AIM program should be considered along with a continuum of placement options as an option for service delivery. Exhibit D. 18 page 2.

14. Jennifer Long is the AIM teacher for the School District. The primary goals of the AIM program are to increase the social skills of the students and to decrease the challenging behaviors of the students. Most of the time is devoted to decreasing the challenging behaviors. Those behaviors include tantrums, hitting heads against walls or floors, dropping to the ground, kicking, screaming, biting, rolling around on the floor, and vocalizations.

15. Although non autistic students are allowed in the AIM program, Ms. Long was not aware of any non-autistic students in the program for the 2010/2011 school year. Autistic individuals tend to have strong sensory concerns. Loud noises can easily distract students with autism. Overstimulation by lights or something hanging from the ceiling or certain smells can be extremely bothersome to autistic students.

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16. Bad behavior is the easiest behavior to model from other students. School District witnesses noted that good behavior was a strong point for the Student. The Student, who is an agreeable, compliant, low functioning student who learns from watching and modeling others would very likely model the routinely inappropriate behavior of the AIM students. The AIM program is for students with bad behavior and is not designed for a Student who exhibits very acceptable behavior.

17. The AIM program is heavily involved in building social skills for those students. Many of the AIM students have "no social skills whatsoever" and must be taught to make eye contact, to notice when a person enters the room, and to take turns. The students in the AIM program have huge social deficits and need specifically designed instruction in those areas. It is likely that in the AIM program will take 2.5 months just to get the students to sit down for circle time.

18. The Student has good social skills. Social skills are one area where the Student does not need special education. The Student is a very social boy.

**ECEAP (early childhood education and assistance program)**

19. The Parent's first choice for the Student for the 2010/2011 school year is to be placed in the AIM program. The AIM program lasts four hours per day. Students in the AIM program spend 1.5 hours per day completely segregated with other AIM students in what the School District calls "intervention". The other 2.5 hours per day, the AIM students spend in a group setting in the ECEAP program. If the Student is in the AIM program during 2010/2011, the Student will be with the AIM students during the 2.5 hours per day spent in ECEAP. ECEAP is funded by the state and is similar to what used to be called the head start program. ECEAP is designed as regular education for at risk children below a certain income level. There are generally 18 Students in each ECEAP room. The Student was not in the ECEAP program during the 2009/2010 school year in part, because he was too young.

20. The Student is far below the cognitive level of the ECEAP students and the curriculum would be too fast paced for the Student because of his low cognition levels.

21. ECEAP teachers are not certificated teachers by the state of Washington. ECEAP teachers generally have a two year degree.

22. Special education teachers are required to have a special education endorsement by the state of Washington.

23. The ECEAP program is designed for typically functioning four and five year old children one year out of kindergarten. The Student has two more years of preschool and before he will enter kindergarten. The Student is still gaining a lot of foundational skills with communication devices and gaining in his cognitive goals and adaptive goals.

24. The parents first choice is for the Student for the 2010/2011 school year is to be in the AIM program full time. The Parent's second choice is for the Student to be fully integrated into the ECEAP program 2.5 hours per day. This would mean that all his special education goals be met in the ECEAP and the Student would not have any special education classes.
25. On May 21, 2010, the School District established the proposed IEP for the 2010/2011 school year. This IEP is the subject of the appeal in this case. Although the IEP goals could be delivered in ECEAP, the School District felt strongly that the Student would have the best chance for success and that his IEP goals would best be met with 30 minutes per day in ECEAP and 2.0 hours per day in special education classes. Because the Parent is part of the IEP team and strongly advocated for more ECEAP time, the School District modified its stance and established the proposed IEP for the 2010/2011 school year at 1.5 hours of special education per day and 1.0 hours per day in ECEAP for the Student.

**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 IDEA, 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 that there has been a violation of the IDEA by a preponderance of credible evidence. Hendrick Hudson School School District Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

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 School School 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; 103 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; 103 S. Ct. at 3041-3042.

Is the AIM program the most appropriate placement for the Student

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 educational benefits. This is characterized as the 'snapshot' method. Adams v. State of Oregon, 195 F.3d 1141 (1999). The inquiry here is whether the May 21, 2010, IEP was reasonably calculated to provide this Student with meaningful educational benefit.

6. It is correct that a Student need not be autistic to be in the AIM program. The AIM program is to improve social skills and to decrease inappropriate behavior. The Student is strong in his social skills and does not need special education in that area. It would serve no purpose to have the Student in the AIM program where students need to be taught to recognize when a person enters the room, to make eye contact, and to learn the most rudimentary social skills. Likewise, the Student does not have a problem with inappropriate behavior. The Student is very likely to model and imitate behavior. Bad behavior is the most imitated behavior by students. Placing the Student in the AIM program would be doing a huge disservice to the Student. The AIM program is not the appropriate placement for the Student.

What is the appropriate mix of ECEAP time and special education time

7. The ECEAP is designed for four and five year old children who will be in kindergarten the following year. Although ECEAP is for high risk students, ECEAP is not designed for special education students. The Student is not one year away from kindergarten but rather has two years of preschool before he enters kindergarten. ECEAP is at a much faster pace than the Student is capable of learning. EACAP is taught by individuals with a two year degree. The special education classrooms are taught by certificated special education teachers. The special education program is specifically designed to meet the needs of the Student in the areas he needs improvement. Although the IEP goals could be delivered in the general education, ECEAP setting. The Student will have a much better chance of mastering the goals of the IEP in a special education setting. The May 21, 2010, IEP that provides for 1.5 hours of special education per day, and 1.0 of ECEAP per day is the most appropriate placement for the Student.
Least Restrictive Environment (LRE)

8. The inquiry then moves to whether 1.5 hours of special education per day, and 1.0 of ECEAP per day is in the LRE. School Districts are required to ensure special education students are educated to the maximum extent appropriate in the general education environment with students who are nondisabled. 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. Part 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. Part 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. Part 300.114 through .118; WAC 392-172A-02050 through -02070, including placement options that provide a reasonably high probability of assisting the Student to attain his annual goals. Placements must also be based upon a consideration of any potential harmful effects on the Student or on the quality of services which he needs. Unless the IEP of a Student requires some other arrangement, the Student must be educated in the school he would attend if nondisabled.

11. The Ninth Circuit has adopted a four-factor balancing test to determine whether a school School District has complied with the IDEA's main streaming 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 main streaming 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 factors set forth above: 1) the Student has severe limitations and would not receive meaningful educational benefit in a full time ECEAP program; 2) the non academic benefits of a full time ECEAP placement are limited at best and do not outweigh the lack of educational benefits from such a placement; 3) the ECEAP teacher would spend a great amount of time with the Student; 4) the cost was not raised as an issue.

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13. The Act recognizes that regular education is not a suitable setting for educating many handicapped children. Even when school officials can mainstream a child, they need not provide for exclusively mainstream environment; the Act requires school officials to mainstream each child only to the maximum extent appropriate. When education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and school need not place the child in regular education. Cody H. V Bryan Independent Sch. Dist., 2005 WL 1515389, No. Civ. A. H-03-5598 (S.D. Tex. June 24, 2005.) Placing the Student full time in ECEAP does not meet the handicapped child’s unique needs. The School District's proposed placement of the Student under the Rachel H. standard supports the placement at 1.5 hours of special education per day, and 1.0 of ECEAP per day.

ORDER

1. The School School District's May 21, 2010 IEP for 2010/2011 that proposed 1.5 hours of special education per day and 1.0 hours per day through ECEAP is an appropriate program for the Student.

Signed at Spokane, Washington on September 1, 2010.

[Signature]

John M Gaffney
Administrative Law Judge
Office of Administrative Hearings

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. A copy of the petition must be provided to OSPI, Administrative Resource Services. 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 School School School 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

Jacqueline Johnson
Director, Special Education
Central Valley School School School District
19307 E Cataldo Ave
Spokane Valley WA 99016

Gregory L. Stevens
Stevens ~ Clay ~ Manix, P.S.
421 W Riverside Ave, Suite 1575
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Enclosures: Blank Exhibit List
Subpoena Request Form

cc: Administrative Resource Services, OSPI (w/o Encl.)