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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**J.S., a minor, by and with her parents,  
ALBERTO SOLORIO and ALICIA  
SOLORIO,**

**Plaintiffs,**

**v.**

**CLOVIS UNIFIED SCHOOL DISTRICT,**

**Defendant.**

**1:16-cv-01319-LJO-BAM**

**MEMORANDUM DECISION AND  
ORDER AFFIRMING THE ALJ'S  
SEPTEMBER 1, 2016, DECISION**

**(Doc. 7)**

**INTRODUCTION**

This appeal concerns an Administrative Due Process Hearing under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. Student J.S. ("Student") brought this action by and with her parents, Alberto Solorio and Alicia Solorio, seeking to reverse a decision of the California Office of Administrative Hearings ("OAH"). The decision found that Defendant Clovis Unified School District's ("the District") proposed individualized education program ("IEP"), as amended on April 18, 2016, offered Student a Free and Appropriate Public Education ("FAPE") in the least restrictive environment ("LRE") pursuant to the IDEA. (*See* Administrative Record ("AR") 616-48). Student seeks reversal of the OAH decision, as well as damages and attorney's fees and costs. (Doc. 1.)

## I. FACTUAL BACKGROUND

In March 2016, Student was a 14-year old girl attending seventh grade at Kastner Middle School within the Clovis Unified School District. Student qualifies for special education under the category of intellectual disability due to Down syndrome, and Student has been included in the general education program since Kindergarten, with resource specialist program ("RSP") support. Her educational program for seventh grade consisted of one elective, lunches, breaks, and physical education in general education, history and science in general education, and math and language arts in an RSP classroom. She has always had a one-to-one instructional aide.

### **A. IEP Team Meetings**

On March 16, 2016, Student's IEP team met to develop Student's annual IEP for eighth grade. (AR 249-324.) The IEP team began by reviewing Student's progress on previous goals, noting she had met only 40 percent of her goals (6 out of 15). (AR 249-63.) Other than Student's mother ("Mother"), all members of the IEP team were concerned that Student was not making educational progress in the general education setting, observing Student was beginning to withdraw during her academic general education and RSP classes. (AR 290-94; 687:5-688:23; 1092:15-1093:4; 1179:25-1182:6.)

Ms. Worden, Student's RSP instructor, explained Student put her head down in class when peers asked her questions, and Student would become frustrated and withdraw when she was questioned during instruction. (AR 291; 919:1-920:1.) The IEP team also considered a letter written by Ms. McLean, Student's science teacher, who observed Student had withdrawn in her science class, and her social skills had regressed. (AR 291; 581; 1177:18-1178:20.) Ms. Worden noted she had seen very "minimal growth over a two[-]year period and ha[d] seen some regression [in Student]." (AR 292; 1091:8-1093:19.) Student's grades were reviewed, which included "F" grades in both general education science and history. (AR 267.) Student received modifications of the academic requirements in both these general education classes to a kindergarten and first-grade level to meet her individual needs, but she was still unable to achieve a passing grade. (AR 285, 290-92, 915:24-916:5.)

1 The IEP team also discussed eight new proposed goals for Student. (AR 274-82, 293-94,  
2 1101:1-1119:15.) After discussing surrounding goals, inclusion, accommodations, modifications and  
3 supports for Student, and placement options, the District made its offer of a FAPE wherein Student  
4 would spend 42 percent of her time in a Special Day Class ("SDC") for academic activities with other  
5 disabled students, and 58 percent of her time in a regular classroom for extracurricular and non-  
6 academic activities. (AR 285; 293; 1111:16-1112:5.) Mother stated her concern that Student would  
7 not have movement from class to class in the SDC, and indicated she thought Student would do well in  
8 her general education classes if she were given additional supports. (AR 293.) Mother stated she  
9 would discuss the 42-percent SDC placement offer with her husband. Mother was asked whether she  
10 would consent to any portion of the IEP – i.e., the proposed goals – but Mother refused, indicating her  
11 fear that if she agreed to the goals, it would imply that the only place those goals could be worked on  
12 was in the SDC placement. (AR 294.)

13 The IEP meeting was reconvened on April 18, 2016, to address Mother's concerns and to  
14 discuss the proposed IEP and offer of placement. (AR 295-324; 1133:1-1138:23.) At the April  
15 meeting, the IEP team discussed Student's lack of academic and non-academic progress in the general  
16 education setting, followed by comportsing revisions to and additional new goals in Student's annual  
17 IEP. After the revisions, the offer of FAPE for the 2016-17 school year remained the same: Student  
18 would be placed in an SDC for her academic subjects (constituting 42 percent of her time), and in the  
19 general education setting for two elective classes and physical education (constituting 58 percent of her  
20 time). (AR 319.) Student's parents did not agree with this offer.

21 **B. The District's Request for A Due Process Hearing**

22 On May 27, 2016, the District requested a due process hearing before the OAH to determine  
23 whether the proposed IEP offered Student a FAPE and whether the District could implement it without  
24 Student's parents' consent. In defending and explaining its offer in its preconference hearing statement,  
25 the District provided the following argument, in relevant part:

1 Student's current placement is in the general education setting for 77% of the time and in  
2 the [RSP] direct instruction setting for 23% of the time. Due to Student's significant  
3 cognitive, adaptive, academic, and speech and language deficits, Student is unable to  
4 access the grade-level academic curriculum that is implemented in her general education  
5 and RSP classes.

6 In Student's academic classes, the District extensively modifies the grade-level  
7 curriculum as well as the expectations of Student's performance. Indeed, the curriculum  
8 must be modified to such an extent that it bears little or no resemblance to the work  
9 being done by the typically-developing students in Student's classes. Student requires  
10 ongoing and significant prompting and support by adult staff, including her one-on-one  
11 instructional assistant, on whom she is highly dependent. Effectively, Student is a  
12 member of the general education and RSP direct instruction classes in location only as  
13 she is working on a separate curriculum with her instructional assistant. This is not the  
14 least restrictive environment for Student, and she is receiving little educational benefit.

15 (AR 35-36.)

16 **C. Due Process Hearing Before the OAH Administrative Law Judge ("ALJ")**

17 A three-and-a-half day hearing was held before an ALJ beginning on July 12, 2016. (AR 651.)  
18 Donna Iturbe (District program specialist), Kristen Belknap (District learning director), Michele  
19 Shurtliff (Student's general education history teacher), Lisa Marie Bath (District psychologist who  
20 assessed Student in 5th grade), Gabrielle Worden (District resource specialist and teaches Student's  
21 RSP class), Regena McLean (Student's general education science teacher), Dava Parks (District special  
22 education teacher), David Weber (District lead psychologist), and Lisa Herring (District assistive  
23 technology) testified on behalf of the District. Hailee Santos (Student's friend and after-school tutor),  
24 Mother, and Patricia McVay (Student's special education expert) testified on behalf of Student.

25 Ms. Iturbe observed Student in several of her RSP classes, and noted Student would withdraw  
or shut down and disengage when the tasks were too difficult for her; she did not respond to teachers  
and required encouragement and cuing to get back on track; and she was very dependent on her  
instructional aide, requiring prompting at every step of academic assignments. This type of withdrawal  
and disengagement was not observed in Student's non-academic classes. (AR 671-847.)

Ms. Belknap observed Student primarily in her RSP language arts class, but also observed her  
in math class as well as at break and lunch times. Even in her RSP classes, Student did not actively

1 participate in the lesson; she required prompting from her instructional aide to start her work and  
2 needed redirection back to the assignment when she was off task; and Student was reserved and quiet.  
3 Ms. Belknap testified Student's engagement was different in non-academic classes, where she  
4 interacted in a causal and fun manner, appearing happy and relaxed. (AR 847-904.)

5 Ms. Shurtliff testified Student was unable to keep up with the general education history  
6 curriculum; she could not comprehend many of the vocabulary terms or text-related questions; she was  
7 unable to engage or participate with the class during instruction; she could not do any of the whole-  
8 class or group reading portions of instruction; and she was unable to start or continue her work  
9 independently. Ms. Shurtliff noted Student even struggled with her modified curriculum and would  
10 become frustrated and withdraw. Ms. Shurtliff testified the eighth grade reading criteria could not be  
11 modified to Student's instructional level. Although she had no specific training on inclusion for  
12 students with Down syndrome or with intellectual disabilities, she had support from the special  
13 education staff. (AR 904-29.)

14 Ms. Bath, a school psychologist, testified she observed Student in the RSP setting in 2014 while  
15 Student was in the 5th grade. At that time, Student was unable to initiate work independently and  
16 required her instructional aide to prompt her to start and continue working through each step of an  
17 assignment. In her music class, however, Student required less prompting and engaged with the class  
18 and her peers. Her impression was Student was struggling "quite a bit" with her general education  
19 academic material. (AR 939-1028.)

20 Ms. Worden taught Student language arts and math in the RSP setting, and observed Student in  
21 her science and history classes. In her RSP classroom, Student was unable to keep up with the  
22 modified curriculum, and Ms. Worden testified she was unable to modify her curriculum to Student's  
23 first-grade instructional level. Ms. Worden described Student as more social in her elective classes, but  
24 in her academic classes she did not initiate conversations, did not appear happy, and did not engage  
25 with peers or perform group work. In her history class, Ms. Worden observed Student would appear

1 uneasy coming to class, and despite prompting from the teacher and instructional aide, she often  
2 appeared frustrated or did not know what to do. She would demonstrate her frustration by putting her  
3 head down or shrugging her shoulders. Even in her RSP class, Ms. Worden noted Student was growing  
4 increasingly frustrated as the curriculum progressed. (AR 1029-1159.)

5 Ms. McLean is Student's general education science teacher. She testified she has experience  
6 with special needs students, including those with cognitive delays. She observed Student was unable to  
7 understand the class material; the majority of the time Student appeared overwhelmed and as though  
8 she did not want to be in the class. Student would place her head on her desk or look disengaged; she  
9 did not engage with the instruction; she was not independently motivated to initiate work; and she had  
10 very little comprehension of the text and materials, even though modified to her instructional level.  
11 Ms. McLean testified she saw Student withdrawing more and more as the year progressed; she was  
12 easily embarrassed and would withdraw from questioning; and she appeared overwhelmed with the  
13 materials. Ms. McLean explained that she was unable to modify the eighth grade curriculum to a level  
14 that Student would understand and be able to access. (AR 1161-95.)

15 Dava Parks, the special education SDC teacher for the District, testified she generally has 10 to  
16 12 students in the SDC class who function anywhere from a pre-kindergarten to a second- or third-  
17 grade level. The goals she teaches are based on state standards, and she exposes students to their grade-  
18 level standards whenever possible. Ms. Parks testified she paired Student with a peer mentor to assist  
19 her in elective classes during seventh grade, she observed Student 10 times per semester, and she  
20 completed Student's state assessment. In her view, Student was difficult to keep focused, and she was  
21 often observed to be unengaged with her head on the table. It was difficult for Student to stay on task  
22 during class. Ms. Parks testified she had reviewed Student's proposed IEP goals for eighth grade and  
23 found them appropriate and measurable. (AR 1209-79.)

24 Dr. Weber, lead psychologist for the District, testified about his observation of Student during  
25 her general education history class. During that class, Student was able to find her seat and work with

1 her instructional aide who prompted her to start her work. Student worked in a group, and another  
2 student attempted to interact with her, but she seemed to reciprocate very little. During instruction,  
3 Student was unable to keep pace with the class; for example, although the rest of the class was listening  
4 to instruction and directions given by the teacher, Student still did not have her name on the top of the  
5 assigned worksheet. When the class began working independently after the teacher had given the  
6 assignment directions, Student put her head on her desk and appeared uninterested in working on the  
7 assignment. Although the aide and the teacher attempted to engage her with the assignment, Student  
8 kept her head down on her desk. Dr. Weber's impression was Student did not understand what she was  
9 supposed to do with the assignment, despite encouragement and prompting. Upon review of Student's  
10 proposed IEP goals, Dr. Weber testified they seemed appropriate based on Student's current level of  
11 functioning. (AR 1472-1519.)

12 Ms. Herring is the District's assistive technology coordinator who testified about the technology  
13 made available to Student to access the curriculum. An i-pad was available to Student which had  
14 several applications for visual aids, typing, spelling, and calendaring. There were also applications for  
15 math, writing, and for identifying coins. Bookshare was also available, which would assist in  
16 increasing textbook font and provided some audio of texts. Student's aide was trained to access and use  
17 the i-pad applications. Student had some difficulty learning the applications, but she was making some  
18 progress on repetitive tasks through the use of the i-pad. Student had supplementary aids and services  
19 including high- and low-tech assistance, such as masking, access to the internet and software  
20 applications, manipulatives for math, and pairing of verbal directions with visual cues. (AR 1358-88)

21 Hailee Santos, a friend and Student's former after-school tutor, testified Student was making  
22 progress in her speech abilities as Student could form longer sentences, could relate stories with more  
23 detail, and had become more outspoken. Student talked to Ms. Santos about her friends, and it  
24 appeared she liked her teachers and all of her classes. Ms. Santos did not tutor Student during her  
25 seventh grade school year and had not observed her at school. (AR 1282-89.)

1 Mother testified Student enjoyed school, and could navigate her schedule and find her classes.  
2 Student enjoyed her homework; she liked her classes and talked about a movie she had seen in her  
3 science class about DNA. Mother felt that even though it may appear Student was not learning, she  
4 was listening and understanding some of the academic material. Due to vision impairment, Student  
5 requires larger font and images. During homework, Student did not require constant prompting.  
6 Student's draft IEP in 2015 for seventh grade had proposed an SDC class, but Mother did not consent.  
7 Student was placed on a "stay put" schedule for seventh grade, and remained in general education for  
8 science and history. During the IEP meeting in March 2016, an SDC classroom was again suggested as  
9 the placement for Student for academic subjects. Based on Mother's observations, however, she  
10 thought Student still benefitted from an inclusive setting. Student was motivated in her general  
11 education classes and loved science. She felt Student was making progress on her goals, but certain  
12 modifications, such as enlarged print, were not in place all academic year, and that may have been  
13 detrimental to Student. Mother felt the IEP team never addressed inclusion as a placement option for  
14 Student and that the teachers did not know how to properly work with Student or appropriately modify  
15 her work so she could access the curriculum in her general education classes. Mother objected to the  
16 SDC placement as she felt students in that classroom would not model appropriate language and skills  
17 for Student. (AR 1290-1356.)

18 Ms. McVay is a special education expert who reviewed Student's records and testified about  
19 Student's IEP and educational program. Ms. McVay opined Student did not require an alternative  
20 curriculum for inclusion. Having reviewed some of Student's modified assignments, Ms. McVay  
21 determined the work was not appropriately modified and Student's general education teachers were not  
22 properly trained in inclusive strategies for students with disabilities. She opined Student's IEP goals  
23 should be aligned to grade-level, but the proposed IEP goals were too low and were inappropriate for  
24 Student. To be successful in an inclusive class, she noted Student would need support from school  
25 personnel in the form of staff training, pre-teaching to Student, participation visuals, visual schedules



1 and checklists, daily home/school communications, and multi-modal instructions. She concluded that  
2 Student has not been appropriately or adequately supported in her general education classroom, and  
3 that there were "things that both research based and evidenced in the IEP that have actually hampered  
4 [Student] from being included." (AR 1407-68.)

5 **D. ALJ Finds IEP offered by District Constituted a FAPE**

6 The ALJ issued a decision on September 1, 2016, finding that the IEP offered by the District  
7 was a FAPE, the proposed IEP goals were valid, and the District was entitled to implement the IEP  
8 without Student's parents' consent. Student now seeks to reverse the ALJ's determination.

9 **II. LEGAL STANDARD**

10 The IDEA provides federal funds to help state and local agencies educate children with  
11 disabilities while conditioning the funds on compliance with specific goals and procedures, primarily  
12 the obligation to provide a FAPE. 20 U.S.C. § 1412; *Board of Educ. of Hendrick Hudson Cent. Sch.*  
13 *Dist. v. Rowley*, 458 U.S. 176, 179–80 (1982) (describing the genesis and primary provisions of IDEA).  
14 Among the procedures mandated by IDEA is the development of a written IEP for each child with a  
15 disability. 20 U.S.C. § 1401. The IEP is crafted to meet the unique needs of each child with a  
16 disability by a team that includes a representative of the local educational agency, the child's teacher  
17 and parents, and, when appropriate, the child. *Id.* § 1414(a)(5). The IEP must consist of various items  
18 including "a statement of the child's present levels of academic achievement and functional  
19 performance," "a statement of measurable annual goals, including academic and functional goals," and  
20 "a description of how the child's progress toward meeting the annual goals . . . will be measured." *Id.* at  
21 § 1414(d)(1)(A). Local educational agencies must review, and where appropriate revise, each student's  
22 IEP at least annually. *See id.* at § 1414(d)(4)(A).

23 The IDEA also contains extensive procedural safeguards for the benefit of disabled children and  
24 their parents, including the opportunity to review records, the right to be notified of any changes in  
25 identification, evaluation, and placement of the student, as well as the right to file a Due Process

1 Complaint regarding their child's education. 20 U.S.C. § 2015(b)-(h). Such complaints may lead to  
2 mediation or an appearance at an impartial Due Process Hearing conducted by a hearing officer. *See id.*  
3 at § 1415(e)-(f).

4 Under the IDEA, "[a]ny party aggrieved by the findings and decision made [by the hearings  
5 officer] . . . shall have the right to bring a civil action with respect to the complaint presented . . . which  
6 action may be brought . . . in a district court of the United States." 20 U.S.C. § 1415(i)(2)(A). In these  
7 actions, the court "(i) shall receive the records of the administrative proceedings; (ii) shall hear  
8 additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the  
9 evidence, shall grant such relief as the court determines is appropriate." *Id.* The burden of persuasion  
10 is on the party challenging the administrative decision. *L.M. ex rel. Sam M. v. Capistrano Unified Sch.*  
11 *Dist.*, 538 F.3d 1261, 1269 (9th Cir. 2008).

12 Judicial review in IDEA cases "differs substantially from judicial review of other agency  
13 actions, in which courts generally are confined to the administrative records and are held to a highly  
14 deferential standard of review." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993).  
15 In IDEA cases, courts give "less deference than is conventional" in the review of administrative  
16 decisions. *Id.* at 1472. This standard was articulated in *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585,  
17 587-88 (9th Cir. 1992) as follows:

18 The court, in recognition of the expertise of the administrative agency, must consider the  
19 findings carefully . . . After such consideration, the court is free to accept or reject the  
20 findings in part or in whole. Thus, . . . federal courts cannot ignore the administrative  
findings . . . Ultimately, however, the weight to be accorded administrative findings  
under the IDEA is a matter within the discretion of the federal courts.

21 Despite this lesser deferential standard, "[t]he amount of deference accorded the hearing  
22 officer's findings increases where they are 'thorough and careful.'" *Capistrano Unified Sch. Dist. v.*  
23 *Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995); *see also Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047,  
24 1053 (9th Cir. 2012) ("An administrative hearing officer's 'thorough and careful' findings receive  
25 particular deference."). After such consideration, "the court is free to accept or reject the findings in

1 whole or in part." *Gregory K v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987) (citation  
2 omitted). "When the court has before it all the evidence regarding the disputed issues, it makes a final  
3 judgment in what is not a true summary judgment procedure [but] a bench trial based on a stipulated  
4 record." *Miller v. San Mateo-Foster City Unified Sch. Dist.*, 318 F. Supp. 2d 851, 859 (N.D. Cal. 2004)  
5 (internal quotation marks omitted); see *Ojai*, 4 F.3d at 1472 (such procedure is proper when the court  
6 "had before it all of the [] evidence regarding the issues in dispute").

### 7 **III. ANALYSIS**

8 Student's general contention is that the placement offer made by the District did not constitute a  
9 FAPE because it only allowed her access to general education classrooms for 52 percent of her day, and  
10 offered her an SDC for her academic subjects comprising the other 48 percent of her day. Student  
11 maintains a FAPE should have constituted full inclusion in general education classrooms, with no time  
12 spent in an SDC classroom. In concluding the District's placement offer constituted a FAPE, Student  
13 contends the ALJ erroneously failed to (1) credit the testimony of her expert witness, Ms. McVay;  
14 (2) require the IEP be predicated on peer-reviewed research; (3) find the District's placement offer was  
15 predetermined; (4) find that SDC was not the LRE for Student; and (5) find that Student has a right to  
16 grade-level curriculum and that her IEP goals were invalid.

#### 17 **A. The ALJ's Determination is Entitled to Deference**

18 The ALJ's findings of fact and conclusions of law will be afforded substantial weight where the  
19 OAH decision shows "careful, impartial consideration of all the evidence and demonstrates [the ALJ's]  
20 sensitivity to the complexity of the issues presented." *Ojai*, 4 F.3d at 1476. Here, the OAH hearing  
21 lasted almost four days, and the ALJ was involved in actively and frequently questioning witnesses.  
22 Additionally, the ALJ's 34-page decision presents a thorough and accurate factual background and a  
23 detailed analysis supporting the ALJ's ultimate conclusions. *J.W. v. Fresno Unified Sch. Dist.*, 626  
24 F.3d 431, 440-41 (9th Cir. 2010) ("a Court treat[s] a hearing officer's findings as thorough and careful  
25 when the officer participates in the questioning of witnesses and writes a decision contain[ing] a

1 complete factual background as well as a discrete analysis supporting the ultimate conclusions"  
2 (quoting *R.B. v Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942-43 (9th Cir. 2007))). Accordingly,  
3 the Court gives "due deference" and weight to the ALJ's findings and conclusions.

4 **B. District's Placement Offer Constituted a FAPE**

5 Student's argument centers on whether her academic materials could have been modified to her  
6 instructional level so that she could remain included in the general education classroom for academic  
7 subjects and whether inclusion in the general education classroom is the least restrictive environment.  
8 Ms. McVay testified the seventh and eighth grade academic materials and services could be modified to  
9 Student's instructional level, and that inclusion was the best and least restrictive environment for  
10 Student.

11 **1. The ALJ Did Not Err in Discounting Ms. McVay's Opinions**

12 Student contends the ALJ improperly discredited the testimony of her expert witness, Ms.  
13 Patricia McVay. Ms. McVay opined Student could satisfactorily be taught academics in general  
14 education classrooms provided her materials were properly modified to her instructional level and  
15 certain supports were put into place; that she did not need an alternative curriculum; and that she had a  
16 right to grade-level, standards-based curriculum.

17 The ALJ found Ms. McVay's opinions "not persuasive" primarily because they "appeared to be  
18 based in a general philosophy of inclusion rather than any careful consideration of Student's individual  
19 capacities and needs." (AR 630.) The ALJ noted Ms. McVay knew "relatively little" about Student, as  
20 all her knowledge came from reading and reviewing Student's recent IEPs and "one or two assessments  
21 from 2014," and Ms. McVay had a poor memory of Student's IEP. (AR 630.) The ALJ found Ms.  
22 McVay assumed Student had capabilities she did not have and provided hypothetical examples that  
23 undercut how Ms. McVay envisioned Student could function in the classroom. (AR 630-31.) Finally,  
24 the ALJ found unpersuasive Ms. McVay's testimony that inclusion was possible for Student so long as  
25 properly trained personnel modified the curriculum appropriately and additional supports were put into

1 place. (AR 632.) The ALJ noted Ms. McVay could not adequately articulate how the academic  
2 materials could be modified to Student's instructional level, nor was she able to identify any ways in  
3 which Student's teachers were improperly trained to adequately modify Student's academic materials.

4 Student first argues Ms. McVay's lack of personal contact with or observations of Student  
5 should not weigh against her credibility, particularly when the District's expert, Dr. Weber – whose  
6 opinion was credited – only evaluated Student for a 30 to 35 minute period, and he had never attended  
7 any of Student's IEP meetings or assessed Student. Student also argues the ALJ used irrelevant or  
8 "specious" examples to support his reasoning that Ms. McVay's knowledge of Student's IEP and her  
9 general education instruction were insufficient.

10 The ALJ's credibility determination regarding Ms. McVay's testimony is sound and will not be  
11 disturbed: it is based on salient examples supported by a preponderance of evidence in the record. Ms.  
12 McVay's lack of personal contact with Student was a sufficient basis, among others, for the ALJ to give  
13 her testimony less weight. Ms. McVay had never met or interviewed Student, observed Student in her  
14 classes, participated in her IEP assessment or meetings, and had never talked to or interviewed any of  
15 her teachers, peers, or IEP team members. When asked to describe Student's educational program  
16 based on her review of Student's records, Ms. McVay testified Student spent most of her time in the  
17 back of the class with her instructional aide. (AR 1440.) This contradicted the testimony of Student's  
18 teachers who stated she worked in groups frequently in her general education academic classes, which  
19 highlighted Ms. McVay's limited knowledge of Student's actual classroom interactions and program,  
20 undercutting Ms. McVay's opinions. Student argues Ms. McVay's statement that Student worked with  
21 her aide at the back of the classroom was a logical extrapolation from notations in Student's IEP and  
22 assessments – it does not reflect that Ms. McVay did not have a good working knowledge of Student's  
23 IEP or educational program. However, had Ms. McVay actually spoken with Student's teachers or  
24 observed Student in her classes, she would have known Student's educational program was not largely  
25 spent working at the back of her general education classrooms with her aide. Ms. McVay's less-than

1 thorough knowledge of Student's classroom interaction and educational program eroded the persuasive  
2 value of Ms. McVay's opinions about Student's abilities and her educational program.

3 Student notes the ALJ rejected Ms. McVay's opinion because it was based on her "virtually  
4 unqualified" belief in inclusion, but Student maintains this ground is unsupported because Ms. McVay's  
5 opinion was based on extensive experience and knowledge of inclusion. Contrary to Student's  
6 argument, the ALJ thoroughly explained how Ms. McVay's opinion about inclusion was overly broad  
7 and generalized: Ms. McVay opined that no matter how cognitively challenged a student is, that  
8 student can satisfactorily learn in a general education classroom with proper modifications and  
9 supports. (AR 1464-65.) Nonetheless, the ALJ pointed out Ms. McVay did not satisfactorily explain  
10 how the eighth grade general education content could be modified to Student's cognitive level:

11 [Ms. McVay] referred to a lengthy document of official appearance but uncertain origin,  
12 describing "core content connectors," which states that it identifies the most salient  
13 grade-level academic content in Common Core state standards and identifies priorities in  
14 each content area. Ms. McVay claimed that the document showed that eighth grade  
Common Core materials could be modified with those connectors to Student's level.  
However, the document itself does not make anything remotely like that claim, and Ms.  
McVay never explained how this could be done.

15 (AR 632.) Coupled with Ms. McVay's demonstrated lack of personal knowledge about Student's  
16 individual program and classroom interactions, her overly broad opinion of inclusion contributed to a  
17 conclusion that Ms. McVay's opinions were not specific to Student or based on Student's particular  
18 abilities and needs.

19 Ms. McVay's opinion about Student's ability to join the general education classroom was also  
20 predicated on the assumption that Student's general education teachers did not have proper training, and  
21 that their opinions the general education curriculum could not be modified to Student's instructional  
22 level stemmed from their lack of training in inclusion practices. However, Ms. McVay could not  
23 identify anything in Student's IEPs to support her assertion Student's teachers lacked appropriate  
24 training. She also acknowledged on cross-examination that she had no knowledge of the District's IEP  
25 process, had never talked to any of the District's service providers or teachers, and had no idea what

1 level of training or credentials any District personnel had or what level of collaboration occurs at the  
2 school site with special education personnel. (AR 1466-67.) Student had access to a resource  
3 specialist, Ms. Worden, who worked with Student on a daily basis and provided support to general  
4 education staff on how to work with Student. (AR 911-14, 1029, 1035, 1037.) Ms. McLean testified  
5 she had a number of students in her classes every year with different types of disabilities, including  
6 cognitive disabilities. (AR 1167-68.) She received support from the special education teacher on how  
7 to assist those students, and she attended staff development trainings that included strategies to meet  
8 needs of special education students. (AR 1168-69.) Ms. Shurtliff also testified she received assistance  
9 from special education personnel on inclusion for disabled students in her general education classes.  
10 (AR 911-12.) Ms. McVay's lack of knowledge of teacher training and credentials or how special  
11 education personnel collaborated with general education instructors undercut her opinion that Student's  
12 teachers lacked the proper training to adequately modify Student's curriculum for her needs.

13 The ALJ also found Ms. McVay over-estimated Student's capabilities in light of the multiple  
14 observations of Student in her general education classrooms. Ms. McVay testified how she envisioned  
15 Student could participate in a science general education classroom, but the ALJ found this vision was  
16 unrealistic in view of the evidence. The ALJ noted there was nothing in the evidence to support that  
17 preteaching or the visual aids Ms. McVay envisioned would be any more effective than what Student  
18 already received. Moreover, Ms. McVay described Student preparing for class ahead of time by  
19 reviewing the textbook, doing her own research online, and coming to class with prepared statements.  
20 However, Student's reading level was at approximately a first-grade level, and her general education  
21 teachers testified she could not understand their textbooks and lacked the necessary vocabulary to  
22 participate. The testimony of multiple teachers, including special education professionals who  
23 personally observed student, contradicted Ms. McVay's theory on Student's ability to prepare for and  
24 focus on academic grade-level material, even the material modified to Student's instructional level. The  
25 ALJ's reasoning in this regard is well-supported by the record. The ALJ's consideration of Ms.

1 McVay's opinion was thorough and supported by a preponderance of evidence, and his conclusion to  
2 give her opinions diminished weight was not erroneous.

3 **2. The IEP is Not Deficient as Lacking of Peer-Reviewed Research Support**

4 Student argues the ALJ erred in finding the IEP provided a FAPE because it was not supported  
5 by peer-reviewed research. The District contends this argument has been waived because it was not  
6 presented to the ALJ, and it should not be considered by the Court. Even if the Court entertains this  
7 new argument, however, the District asserts it should be rejected because there is no rigid requirement  
8 that an IEP be based on peer-reviewed research.

9 Generally, when administrative proceedings such as due process hearings are available, all  
10 issues must be raised at the administrative level to be subject to judicial review. *See Portland Gen.*  
11 *Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (excusing waiver of issues  
12 not raised before administrative agency, but noting concerns of respecting "the agency's prerogative to  
13 apply its expertise, to correct its own errors, and to create a record for our review"). Here, Student  
14 maintains the issue of peer-reviewed research was discussed in her closing brief submitted to the ALJ  
15 post-hearing and thus was not waived. In this brief, Student noted that the IDEA requires that services  
16 provided to a student must be "based on peer-reviewed research to the extent practicable." 20 U.S.C.  
17 §1414(d)(I)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4). At the conclusion of Student's argument why  
18 inclusion was the most appropriate placement for her, she stated the District failed to implement  
19 Student's inclusive education based on peer-reviewed special education programming, which impeded  
20 Student's access to educational opportunities. (AR 148.) Although the words "peer-reviewed" appear  
21 in these two instances in Student's closing brief, no cogent articulation was presented to the ALJ of how  
22 the IEP is unsupported by peer-reviewed research. The ALJ had specifically cautioned Student's  
23 counsel at the hearing to include all arguments in her closing brief that needed to be addressed and to be  
24 "very specific." (AR 1530 (ALJ explaining "it would also help me if you would be very specific about  
25 your contentions. I'm not going to go digging for arguments that aren't in your brief. If you're not



1 going to put it in your brief, I'm not going to rule on it. So . . . .") From the little that can be gleaned  
2 from Student's closing brief before the ALJ, the argument has been waived.

3 Nevertheless, even if these two bare reference to peer-reviewed research were enough to  
4 preserve the argument, however, it lacks substantive merit. Student's trial brief submitted to this Court  
5 discusses peer-reviewed research, but the argument is difficult to discern as it is sprinkled throughout  
6 the brief in only a few sentences.<sup>1</sup> Student appears to argue that Ms. McVay's opinion regarding full  
7 inclusion for disabled students was supported by peer-reviewed research. Because the proposed IEP  
8 did not provide for full inclusion and none of the witnesses or the ALJ cited peer-reviewed research for  
9 a placement that included time spent in SDC, the IEP was not and could not be based on peer-reviewed  
10 research.

11 First, other than testifying to her experience with inclusion, Ms. McVay did not cite or reference  
12 any specific peer-reviewed research supporting her opinions on full inclusion for nearly every disabled  
13 student, nor was there evidence that a placement with a certain percentage of SDC was *not* a research-  
14 supported placement option. The 2004 amendment to IDEA provides that an IEP must include "a  
15 statement of the special education and related services and the supplementary aids and services, based  
16 on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child  
17 . . . ." Pub. L. No. 108-446, § 101, 118 Stat. 2708 (2004) (codified at 20 U.S.C. § 1414(d)(1)(A)(i)(IV)  
18 (2006)). Notably, however, there is no absolute requirement that an IEP be supported by peer-reviewed  
19 research, but only that it be supported to the "extent practicable."

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21  
22 <sup>1</sup> Student first notes that an IEP must be supported by peer-reviewed research to the extent practicable, and then summarily  
23 concludes the District predetermined that Student would not succeed in general education and this "perception of low  
24 expectations permeated the testimony of District's witnesses and decision of the ALJ in the hearing below." In a different  
25 section of the brief, Student again notes IEPs must be supported by peer-reviewed research to the extent practicable, and  
then states neither the ALJ nor the witnesses cited to research contrary to the opinions of Ms. McVay. Finally, Student  
argues in conclusory fashion there was no peer-reviewed research cited in rejection of the supports and services Ms. McVay  
opined were necessary for Student's full inclusion.

1 Second, even if a full-inclusion placement was the more research-supported placement option,  
2 the IEP team was not required to utilize that option if they did not find it suitable based on Student's  
3 individual needs. The U.S. Department of Education has clarified that Section 1414's peer-reviewed  
4 research preference is not absolute: "This does not mean that the service with the greatest body of  
5 research is necessarily required for a child to receive FAPE . . . the final decision about the special  
6 education and related services, and supplementary aids and services . . . must be made by the child's  
7 IEP team." 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006). The IEP team must have this flexibility to  
8 enable it to individualize a placement for a student's particular needs, as the IDEA requires. 20 U.S.C.  
9 §§ 1401(14), 1414.

10 Finally, in view of the requirement for *individualized* placement plans, Student's argument is  
11 illogical. If the law absolutely required every IEP placement to be supported by research, and full-  
12 inclusion really was the most research-supported educational model for disabled students or students  
13 with Down syndrome, such students would almost never, in Ms. McVay's view,<sup>2</sup> be eligible or  
14 permitted to participate in special education courses like the SDC placement offered here. This is  
15 simply not the law. The law requires that an IEP be specifically individualized for a student's particular  
16 needs, and courts routinely find placements with less than full inclusion constitute a FAPE. *Rowley*,  
17 458 U.S. at 179-80 (a FAPE requires instruction specially designed to meet the unique needs of the  
18 handicapped child, supported by services that are necessary for the child to benefit from the  
19 instruction); *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1136-38 (9th Cir. 2003) (approving  
20 interim placement of student with Down syndrome into self-contained special education classroom).  
21 Student's IEP was not deficient for lacking peer-reviewed research support, and the ALJ was not  
22 required to cite any peer-reviewed research to find the placement offer constitutes a FAPE, so long as it  
23 was particularized for Students' individual needs.

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24  
25 <sup>2</sup> Ms. McVay's opinion on full-inclusion was limited only to the extent a student was a danger to himself or others. Those students, she opined, may require classes separate from the general education classrooms.

### 3. The District's Placement Offer was Not Predetermined

Student argues the proposed IEP offer constituted predetermination of placement and denied her parents the right to full participation in the placement decision. Specifically, Student notes that the goals on the March 2016 IEP specify the special education teacher and the special education staff are the responsible persons, signifying an SDC had already been selected as the placement before the IEP meeting. (Doc. 16, 11:6-15.) The District contends Student's predetermination argument was not presented to the ALJ, and there is no evidence that Student's Mother was in any way prevented from participating in the IEP team meetings.

A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992). Predetermination violates the IDEA because the Act requires that placement be based on the IEP, not the vice versa. *Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 258-59 (4th Cir. 1988). "Predetermination occurs when an educational agency determines a student's placement prior to an IEP and is unwilling to consider any other placement. *K.D. v. Dep't of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011).

Student's predetermination argument has been waived. *C.L. v. Lucia Mar Unified Sch. Dist.*, No. 12-cv-9713-CAS (PJWx), 2014 WL 117339 at \*10 (C.D. Cal. Jan. 9, 2014); *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 1048 (9th Cir. 2002) ("when a plaintiff has alleged injuries that could be redressed by any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required"). The issue was not presented in Student's opening or closing briefs filed with the ALJ, and it was not presented as an issue at the hearing before the ALJ. Mother testified her objection to the proposed IEP was limited to the SDC not being an appropriate placement for Student, and that Student was making progress on her goals in the general education setting.

Notwithstanding this waiver, even on its merits, Student's substantive argument fails. Student notes the proposed IEP goals identify the special education teacher and staff as the responsible persons

1 which, according to Student, indicates the IEP team never adequately considered inclusion, but  
2 predetermined Student would be in the SDC class and her academic goals would be overseen by that  
3 special education teacher. This limited notation on Student's goals is not persuasive, let alone  
4 conclusive, evidence that the SDC placement was predetermined and that the District presented it in a  
5 take-it-or-leave-it manner. The District was entitled to give thought to the proposed IEP and placement  
6 prior to the IEP meeting, and the proposed IEP evidences this forethought – the proposal is not itself  
7 evidence of predetermination. *See, e.g., Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262  
8 (E.D. Va. 1992) (noting school officials must come to an IEP meeting with an "open mind" but may  
9 have given prior thought to placement).

10 Rather, where there is evidence that the draft IEP is a working document, that the parents are  
11 able to discuss the sections that were of concern, and that the district listened to those concerns, there is  
12 no predetermination. *A.G. v. Hawaii*, No. 14-cv-00234-DKW-RLP, 2015 WL 3822309, at \*6 (D.  
13 Hawaii June 19, 2015). As noted above, Student's mother was welcomed and included in the IEP  
14 meeting, she articulated her concerns about a 42 percent SDC placement, which were discussed by the  
15 IEP team. Although Student's mother testified at the hearing she recalled no discussion of full  
16 inclusion during the March 2016 IEP meeting, IEP team members testified they did discuss inclusion.  
17 Moreover, the District was not required to consider a "continuum" of placement options at the IEP  
18 meeting. In *Basquerizo v. Garden Grove Unified School District*, 826 F.3d 1179, 1186 (9th Cir. 2016),  
19 the court noted there is no authority indicating a parent is prevented from participating in the IEP  
20 process if the school district first prepares an offer to be discussed at the IEP meeting, "instead of  
21 conducting a free-wheeling discussion and then creating an offer." There is simply no conclusive or  
22 persuasive evidence that the draft IEP was a predetermined offer of placement by the District.

#### 23 **4. The ALJ Did Not Err in Finding the SDC was the LRE for Student**

24 Student argues the SDC placement offer is not the LRE because she was obtaining some  
25 educational benefit from her general education academic classes. Specifically, Student notes she was

1 making progress on some of her IEP goals, and thus she should have been permitted to continue in the  
2 general education classrooms for her academic subjects. Student maintains this factor, along with the  
3 lack of disruption Student poses in her general education classes, favor Student remaining in her  
4 general education classes.<sup>3</sup>

5 The IDEA favors mainstreaming disabled children in general education classes to the extent  
6 appropriate:

7 To the maximum extent appropriate, children with disabilities, including children in  
8 public or private institutions or other care facilities, are educated with children who are  
9 not disabled, and special classes, separate schooling, or other removal of children with  
10 disabilities from the regular educational environment occurs only when the nature or  
11 severity of the disability of a child is such that education in regular classes with the use  
12 of supplementary aids and services cannot be achieved satisfactorily.

13 20 U.S.C. § 1412(a)(5)(A). "In carrying out this directive, the state educational agency must develop  
14 and implement an IEP aimed at providing each disabled child with a [FAPE] in the least restrictive  
15 environment." *Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995). The decision to mainstream a  
16 disabled student or place that student in a special education environment is an individualized and fact-  
17 specific inquiry which requires balancing the tension between the IDEA's clear preference for  
18 mainstreaming and its requirements that schools provide individualized programs tailored to the  
19 specific needs of each disabled child. 20 U.S.C. §§ 1401, 1414(a)(5). In *Sacramento City Union Sch.*  
20 *Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), the court adopted a four-factor balancing test for  
21 determining compliance with the IDEA's mainstreaming requirement, which includes the follow: (1)  
22 the educational benefits of placement full-time in regular classes; (2) the non-academic benefits of such  
23 placement; (3) the effect the disabled student has on the teacher and children in the regular class; and  
24 (4) the costs of mainstreaming. These have been delineated the *Rachel H* factors.

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25 <sup>3</sup> Student does not challenge the ALJ's finding that Student derives no non-academic benefit from her general education  
classes, and the cost factor is not relevant. See *Rachel H.*, *infra*.

1 On the first factor, the ALJ determined Student was not receiving academic benefit from her  
2 general education curriculum. (AR 642-43.) Specifically, the ALJ noted Student's general education  
3 teachers testified Student could not participate in their classes, could not understand the texts, did not  
4 have the necessary vocabulary, and frequently withdrew and put her head down on her desk. Student is  
5 also 6 to 7 years behind her classmates in academic skill. Thus, while she made some minimal progress  
6 on her goals between 2014 and 2016 while in the general education setting, Student remains at  
7 kindergarten and first-grade level in terms of her cognitive abilities. The ALJ found Student was not  
8 making progress with the general education curriculum, and that any progress with her individually  
9 tailored goals (which are not at grade-level) was not the result of Student's physical presence in general  
10 education classrooms, but was tied to her constant interaction with her instructional aide, the help of  
11 two private tutors, and assistance from Mother, who is educated and involved at home. (AR 643.)

12 The preponderance of evidence supports the ALJ's conclusion as to the lack of benefit Student  
13 obtained from her academic general education classes. All of Student's academic general education  
14 teachers, including in the RSP setting, observed Student almost daily, testified she could not keep up  
15 with their classes, even working on modified curriculum. Ms. Worden testified Student could not  
16 engage in group activities (AR 1039-40); Student could not engage in the instruction in any of the  
17 classes in which Ms. Worden observed her (AR 1040-41); Student required significant support from  
18 her instructional aide, and needed continual prompts to focus on assignments (AR 1091). Student's  
19 science teacher, Ms. McLean, testified Student could not understand class materials, was overwhelmed  
20 the majority of time, and did not engage in instruction at all. (AR 1171.) Even with the assistance of  
21 an instructional aide who provided step-by-step instructions and encouragement, Student was unable to  
22 complete assignments. Ms. McLean also noted Student appeared to withdraw over the course of the  
23 year, and had a difficult time engaging with other students during group work, and was embarrassed  
24 when Ms. McLean asked her questions in a one-on-one setting. (AR 1188.) Ms. Shurtliff, Student's  
25 general education history teacher, testified Student was unable to access the curriculum because she

1 was academically working at a first-grade level. Even with her aide and a modified curriculum, she  
2 was unable to comprehend it and as a result she was regressing and beginning to withdraw. (AR 1179-  
3 82.) Ms. McVay's opinion that the teachers were untrained to properly modify the curriculum had no  
4 support in the record, and Ms. McVay could not sufficiently explain how the curriculum could be  
5 modified to Student's instructional level.

6 The testimony discussed above constitutes a preponderance of evidence supporting the ALJ's  
7 determination that Student was receiving no academic benefit in her general education classes. The  
8 only evidence of some benefit was Student's minimal progress at her first-grade and kindergarten level  
9 instructional goals, which did not appear tied to her general education classes and Student had no  
10 evidence of such a nexus. The ALJ's conclusion that Student received no academic benefit from her  
11 academic general education courses is underpinned by a well-reasoned and thorough analysis with  
12 evidentiary support, and therefore it is given deference.

13 As to the second *Rachel H* factor, the ALJ determined that Student was not deriving substantial  
14 non-academic benefit from her presence in general education, which Student does not challenge.  
15 (AR 643-44.) As to disruption to the general education classroom, the ALJ found this factor supported  
16 inclusion as Student had no behavioral issues. The final cost factor was not considered, and appears  
17 irrelevant.

18 In sum, the only factor that favors Student's inclusion in academic general education classes is  
19 the lack of disruption Student poses to her general education classes. On balance, two of three of these  
20 *Rachel H* factors (academic and non-academic benefit) weigh against a general education classroom as  
21 the least restrictive environment. The Court finds the ALJ did not err in finding the SDC placement for  
22 Student's academic classes was the LRE.

1           **5. Student's IEP Goals are Valid and Sufficiently Aligned with Grade-Level**  
2           **Standards**

3           Based on Ms. McVay's testimony, Student asserts the ALJ erred in finding her goals align to the  
4 state academic content standards, and contends she has a right to grade-level, standards-based  
5 curriculum. (AR 1418.) Ms. McVay testified the goals are written below Student's grade level, and  
6 the IEP goals should relate to the core curriculum and aligned to grade-level standards. (AR 1428.)  
7 She also testified that with the proper accommodations and modifications for inclusion, Student should  
8 be able to engage in and follow along with eighth grade level curriculum. (AR 1442-44.) In  
9 considering this testimony and Student's argument that she is entitled to grade-level goals and  
10 curriculum, the ALJ provided the following discussion:

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

24           . . .  
25           Student's argument, that the alternative curriculum Student would have under the  
proposed IEP is not based on state standards, had no evidentiary support beyond the  
testimony of Ms. McVay; who did not claim to have any familiarity with the alternative  
curriculum taught in Ms. Parks's SDC. She appeared to believe that a goal is  
insufficiently tied to state standards unless it explicitly references standards at the grade  
level of the student, no matter how far beyond the student's capabilities those standards  
may be. However, while alternative curriculum must be aligned with state standards,  
there is no requirement that annual goals in an IEP must affirmatively demonstrate that  
alignment or reference those standards.

          In addition, the references in the goals to first grade standards impliedly  
incorporate eighth grade standards because, as established by Mrs. Iturbe, the standards  
of first grade involve concepts that are prerequisite to the standards of higher grades.  
First grade level standards are aligned to eighth grade standards because they contain  
prerequisites to the performance of the eighth grade standards, and thus promote access



1 to those standards . . . .

2 (AR 646-47.)

3 Student's argument regarding the validity of her goals was thoroughly addressed by the ALJ.  
4 Student offers no authority or reasoning why the ALJ's finding in this regard was incorrect other than a  
5 bare assertion that providing an *alternative* curriculum (as opposed to a *modified* curriculum) tailored to  
6 Student's instructional level and encompassing prerequisite skills aligned to eighth-grade standards is  
7 not permitted. Pursuant to 34 C.F.R. § 200.1(d), alternative academic achievement standards may be  
8 utilized for students with the most significant cognitive disabilities who take an alternate assessment  
9 provided those standards are aligned with the state's academic content standards, promote access to the  
10 general curriculum, and reflect professional judgment of the highest achievement standards possible.  
11 Here, Student has significant cognitive disabilities and she takes an alternative assessment; thus, the  
12 District is entitled to employ alternative academic achievement standards for Student. Student has not  
13 cited any authority that such alternative academic standards must *explicitly* reference grade-level  
14 academic content standards. And, as the ALJ noted, Student's goals are all prerequisite skills to eighth  
15 grade level academic content and therefore the goals *are* aligned to the state academic content  
16 standards, as both Ms. Worden and Ms. Iturbe testified.

17 Finally, as the District notes, when goals are tied to grade-level state standards without  
18 addressing the individual abilities of the student that are far below grade-level, those goals have been  
19 found not to provide a FAPE. *Jefferson v. Cnty. Bd. of Educ.*, 581 Fed. App'x 760 (11th Cir. 2014)  
20 (unpublished) (student with first-grade reading level whose reading goals were based on ninth-grade  
21 state standards did not provide a FAPE). In other words, Student would be denied a FAPE if her goals  
22 were set at eighth-grade level curriculum standards without accounting for Student's pre-primer reading  
23 level and limited cognitive abilities. The ALJ did not err in finding Student's goals valid.

1 **IV. CONCLUSION**

2 For the reasons set forth above, IT IS HEREBY ORDERED that the ALJ's September 1, 2016,  
3 decision is AFFIRMED in full.

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5 IT IS SO ORDERED.

6 Dated: July 24, 2017

/s/ Lawrence J. O'Neill  
UNITED STATES CHIEF DISTRICT JUDGE

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