No. 14 - 55256

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHANDA SMITH, et al.,
Plaintiffs,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.
Defendants,

Appeal from United States District Court for the Central District of California Civil Case No. 93-CV-7044 RSWL (GHKx) (Honorable Ronald S.W. Lew)

PROPOSED INTERVENORS-APPELLANTS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

CHANDA SMITH

Plaintiff,

V.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant and Appellee.

CASE NO. 14-55256

D.C. No. CV-93-7044
RSWL {GHKx}
Central District of California, Los Angeles

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE RONALD S.W. LEW, SENIOR, U.S. DISTRICT COURT JUDGE

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Beginning in August 2013, and continuing to the present, the Los Angeles Unified School District (LAUSD) has removed hundreds of students with moderate-to-severe disabilities from their placements at special schools and forced them to attend general education campuses. These forced transfers, which have been executed without the consent of parents (many of whom do not speak English or are limited English proficient), are contrary to students' Individualized Education Programs (IEPs) and, therefore, in clear violation of the Individuals with Disabilities Education Act (IDEA).

The LAUSD has been dismantling its programs in specialized schools based on the erroneous belief that *all* of the needs of special education students can be met on a general education campus. Historically, the LAUSD has struggled to properly identify and educate special education students within its district boundaries in a manner consistent with state and federal special education laws and civil rights laws. A case in point is the *Chanda Smith Consent Decree*, a class action lawsuit which was filed on behalf of special education students and their parents. The plaintiffs in *Chanda Smith* were represented by the American Civil Liberties Union of Southern California, Protection and Advocacy (now known as Disability Rights of California), and the private law firm

of Newman, Aaronson, and Vanaman. Robert M. Myers, from Newman, Aaronson, and Vanaman and Catherine Blakemore from Disability Rights California were appointed as "Class Counsel" to represent all special education students (at *all* levels of disability) attending LAUSD schools [D. #333 Exhibits 1-3].

In 2003, a Modified Consent Decree ("The MCD") was approved by the District Court. In order to ensure the LAUSD's compliance with all applicable laws pertaining to students with disabilities protected under the IDEA, the MCD required the LAUSD to meet 18 outcomes involving students with disabilities and their education. Outcome 8 specifically stated that "[t]he parties agree that special education centers are part of the continuum of program options for a full continuum of special education and related services in the least restrictive environment" (Pg.13, ¶47 of the MCD, [D. ##265-266]).

In September of 2012, the LAUSD and Class Counsel, Robert M. Myers entered into a stipulation to revise the LRE outcomes. The stipulation improperly enlarged the scope of the MCD to force students identified as having moderate-to-severe disabilities placed at specialized schools to attend general education campuses even if parents objected to the change in placement. The Independent Monitor at the time, Frederick Weintraub, approved the stipulation on September 18, 2012. Parents of children with moderate-to-severe disabilities, whose IEPs required placement at specialized schools, were not provided notice of the change in the LRE outcome or given the opportunity

to be heard. The stipulation which modified and revised the LRE outcome of the MCD was never approved by a court, despite the MCD requirement of court approval. The LAUSD immediately began dismantling specialized schools and converting them into "Career Transition Centers (CTCs)[1]." This effectively closed all special school placement options for students with moderate-to-severe disabilities. The CTCs are not appropriate placement options for moderately-to-severely disabled students, because the CTCs are for students aged 18-22 and provide employment-based training for students.[2]

In March 2013, the LAUSD began holding IEPs for moderately-to-severely disabled students. At those IEPs, the LAUSD informed parents that their child's IEPs would be revised to require that their child attend a general education campus due to the fact that the child's program at the specialized school was being closed. LAUSD moved these students onto general education campuses even if parents objected, and for many of those parents who were limited English proficient or non-English speaking, the IEPs were not translated into their primary language.

In August of 2013, representatives of parents of severely disabled students who were being forced to attend general education campuses sought assistance from the

[1] Movants/Parent respectfully request that this Court take Judicial Notice of correspondence sent to parents of moderately-to-severely disabled students on March 21, 2014, stating that for the 2014-2015 school year several of the special education centers were converting to career transition centers.

[2] According to LAUSD website on CTCs students are taught entry level employment skills, including staying on task, working with minimal supervision, and collaborating and sharing materials with co-workers (see http://dots.lausd.net/what-dots/career-and-transition-centers)

Office of the Independent Monitor and the LAUSD to enforce the severely disabled children's rights under IDEA. Instead of assisting the parents, LAUSD and the Independent Monitor told parents that placements in special schools were "unnecessary."[3]

Mina Lee and Frances Moreno filed a Motion to Intervene in this Class Action suit alleging that as parents of severely disabled special education students whose LAUSD placements were illegally and unilaterally changed as a result of the stipulation entered into in September 2012, they had a right to intervene under *Federal Rules of Civil Procedure* Section 24(a). Ms. Lee and Ms. Moreno filed their motion as soon as they became aware that the Class Counsel appointed to represent all special education students were no longer advocating for their children's rights and had stipulated to a change in the Modified Consent Decree ("Revised Outcome 7") which violated their children's rights. Their motion was improperly denied by the district court.

The district court Order cannot stand. Hundreds of students who are moderately-to-severely disabled and whose placements should be a specialized school based on their IEPs are being harmed because of the view of a few individuals who have control over the administration of the MCD.

I. STATEMENT OF JURISDICTION

[3] See Declaration of Maseda Docket #301-2 ¶¶4,13] wherein the Executive Director of Special Education for LAUSD (Sharyn Howell), the Independent Monitor (Frederick Weintraub) and Class Counsel (Robert M. Myers) stated that they all held the fundamental belief that all special schools were unnecessary because the needs of *every* special education student could be met on a general education campus.

This is an appeal from a final order denying Appellants' motion to intervene on behalf of members of a subclass in this class action. That Appellants are members of the class (which consists of all special education students in LAUSD and their parents) was and is not in dispute.

Appellants' motion sought to intervene as a matter of right under FRCP Rule 24(a) in the action on the basis that the interests of the members of the subclass they represented (all special education students with moderate-to-severe disabilities whose proper placement is in a special education school, and their parents), were not being adequately represented by Class Counsel, who had refused to protect their interest under the Revised Outcome 7 (approved by the Independent Monitor on September 18th 2012). Movant/Parents asserted that Revised Outcome 7 violated their rights under IDEA, by requiring a change in their placement from special school campuses to general education campuses beginning with the 2013/2014 school year [D. #300].

The district court denied the motion and the denial was a final order as it disposed of Appellants' claims, and as such is appealable under 28 USC Sec 1291 [D. #359]. This Appeal was timely filed. The district court's order was entered on January 16, 2014 [D. #359] Appellants filed their notice of appeal on February 14, 2014 [D. #362].

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE IT BASED ITS DECISION ON ERRONEOUS FINDINGS OF FACT.

1. Whether the district court abused its discretion when it found that based upon the "Stage of the Proceedings" Movant's Motion for Intervention as of Right was Untimely and Revised Outcome 7 was not a change in circumstance.

2. Whether the district court abused its discretion in its analysis of "Prejudice to the Parties."

    a. [Because] Revised Outcome 7 deprives moderately-to-severely disabled students of special schools as a placement.

    b. [Because] Revised Outcome 7 violates the IEP assessment process.

3. Whether the district court abused its discretion by finding that Movants had "other means" to protect them from the effects of Revised Outcome 7.

4. Whether the district court abused its discretion by basing the reason for the length of the delay on erroneous findings of facts.

B. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE IT BASED ITS DECISION ON ERRONEOUS LEGAL STANDARDS.

1. Whether the district court abused its discretion by basing the reason for the length of the delay on erroneous legal standards.

III. STATEMENT OF FACTS

This case originated in 1992 and asserted that the Los Angeles Unified School District ("LAUSD") failed to identify and educate special education students in a manner consistent with state and federal special education laws and civil rights laws.

In 2003 a Modified Consent Decree ("The MCD") [D. #266] was approved by the district court requiring the LAUSD to place its special education students on

campuses as designated by their Individualized Education Programs ("IEP"). The MCD further provided that the LAUSD was obligated to include special schools in the "full continuum" of options for the special education students enrolled therein.[4]

The Court adopted the MCD on May 15, 2003. (CPC Stipulation and Order Regarding Modified Consent Decree, pg 4, lines 7-8, [D. #265]) The MCD recognized the District's obligations under Federal and State law to provide each disabled child with "a free and appropriate public education in the least restrictive environment;" parents were to be provided timely information concerning services so that "they can be full participants in the educational decisions affecting their children" and that "a full continuum of special education programs," including special schools, were to be provided by the LAUSD (CPC, MCD, ¶2, pg 1, lines 15-28; ¶47, pg 13, lines 6-7).

The MCD expressly prohibited the District from adopting "any policy or procedure" that violated Federal or State Special Education laws (CPC, MCD par. 68, pg 18, lines 8-9). Further, the MCD established an Office of the Independent Monitor, who was appointed to ensure that the parties were complying with the MCD. Outcome 7 in the MCD provides that the LAUSD shall demonstrate a ratio of "52% of students placed in combined categories of [spending] 0-20% [of their school day in

[4] Under the IDEA, Special schools are specifically provided for as part of the continuum under Federal law. See 34 *C.F.R.* 300.115 b (b) "The continuum required in paragraph (a) of this section must— (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, *special schools*, home instruction, and instruction in hospitals and institutions" [emphasis added]).

special education settings] and 21-60% and not more than 49% students placed in the 61-100% category according to federal placement reporting requirements.[5]" As the number of children in special education schools was 6% or less (well below the 49% threshold) of the LAUSD's disabled students, this outcome did not have any effect on special school placement.

The MCD provided in pertinent part that:

> "The 61-100% category shall include the combined totals of the following categories as used in federal placement reporting requirements: (a) outside regular class more than 60%; (b) placed in a public separate facility; (c) placed in a private separate facility; (d) placed in a public residential facility; (e) placed in a private residential facility; and (f) placed in a home or hospital environment.
>
> *The parties agree that special education centers are part of the continuum of program options for a full continuum of special education and related services in the least restrictive environment* [emphasis added]." Pages 12 and 13 of the M*CD*

The 2003 Modified Consent Decree was the last comprehensive Order approved by the Court which defined the obligations of the LAUSD in complying with IDEA.

Commencing in the spring of 2013, the Appellants/Parents attended their children's IEPs and discovered, for the first time, that the LAUSD intended to force their children who were severely disabled onto general education campuses without

[5] There were at the time the MCD was adopted approximately 80,000 disabled students receiving special education instruction in the District. Approximately 5,000 of these were in special schools, or 6% of the total. The number in special schools has fallen to less than 2,200, while the total number remains at approximately 80,000, so less than 3% are now in special schools. As of August 2013 the number enrolled in special schools has fallen to 1,643 (See Decs. Maseda and Efron).

parental consent. The Appellants were told that they did not have a choice because their children's programs at special schools were being closed. [See Decs. M. Lee [D. #301-3, ¶3], C. Chamu [D.# 301-5¶4]

Movants/Parents contacted Counsel for Appellants in July of 2013. Counsel discovered that a "Stipulation Regarding Outcomes 4, 7A and 7B of the Chanda Smith Consent Decree," herein referred to as "Renegotiated Outcome 7," (Maseda Dec. [D. #301-2 ¶¶4,13] was entered into by Robert M. Myers on behalf of "Plaintiffs" and D. Deneen Cox, on behalf of LAUSD.

Parents were not provided any notice of changes regarding MCD Outcomes 4, 7A, and 7B. They were not given the opportunity to be heard on the matter either.

Renegotiated Outcome 7

The "Renegotiated Outcome 7" Stipulation provides in pertinent part that the LAUSD must:

1. Reduce the number of students *with moderate to severe disabilities ages 6-18* at special education centers [i.e. special schools] by a total of 33% over three years, beginning with the 2012-2013 school year"; that "[i]n order for the students at co-located [special] schools [Frances Blend, McBride, Banneker and Miller] to count toward achieving this reduction, the percentage of students with disabilities at the co-located school shall not exceed 28% of the school population."

2. *Students with moderate to severe disabilities* at co-located schools shall participate with their non-disabled peers in general education classes an average of 12% of the instructional day and during lunch, breaks/recess and school-wide activities." [Emphasis added] (Maseda Declaration Exhibit A, "Stipulation Regarding Outcomes 4, 7A and 7B of the *Chanda*

Smith Consent Decree [D #301-2])

Consistent with the seminal case governing LRE (*Sacramento City School Dist. V. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994[6])), the original Consent Decree and the Modified Consent Decree never required students with moderate-to-severe disabilities to be placed at general education campuses wherein there was no determination of whether the moderately-to-severely disabled student would receive a meaningful benefit from the general education campus placement. However, Renegotiated Outcome 7, and ignores completely *Rachel H* by mandating placement that does not address whether the general education campus will confer a meaningful benefit to the moderately-to-severely disabled student.

Neither Mr. Myers nor Ms. Cox sought approval from the Court as required by the MCD (¶97, pg 27). Instead, the Independent Monitor "determine[d] that the outcomes shall be modified as set forth above" (Maseda Dec. D.# 301-2 ¶¶2-14, Ex. A] The parties based their authority to revise the MCD under Paragraph 85 of the MCD. However, Paragraph 85 of the MCD specifically permits modification without court approval only if there has been an "amendment or repeal of any law or regulation upon

[6] In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, this Court held that the determination of whether a particular placement is the "least restrictive environment" for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

which any outcome or obligation set forth in this Modified Consent Decree is based" (MCD ¶, 85 pg. 23), in other words, *when there has been a change in the law*. There has been no change in the law.

LAUSD implementation of Revised Outcome 7

Since the fall of 2013, under the authority of Renegotiated Outcome 7, the LAUSD has systematically violated IDEA and the MCD for moderately-to-severely disabled students whose placements were at special schools:

1. Hundreds of students[7] with moderate-to-severe disabilities have been forced from specialized schools to general education campuses, with fewer services (see Dec. of Gliona [D. #301-15¶¶ 9,], Dec. of Fazzi [D. #301-19¶3], Dec. of Fields [D. #301-16¶3] and Dec. of Valenzuela [D. #301-12¶¶2-6], Dec. of Efron Supp [D. #332-3, Exhibits 1-3, D. #349-2]).

2. The LAUSD dismantled several of the programs at specialized schools including Frances Blend SEC for the Blind and Visually Impaired and Widney SEC. The LAUSD removed 100% of the students from Blend SEC and converted Widney to a CTC. This effectively closed all special school options for students who are blind or

[7] From June 2013 to August 2013, 478 students have been moved from specialized schools according to the Office of the Independent Monitor, Los Angeles Unified School District, Outcome 7 dated September 22, 2013. This process continues, with more classes being moved *en mass*. The court is requested to take judicial notice of the letters from LAUSD Special Education Division issued during the 2014 Spring semester advising parents of moderate to severely disabled students that their child's "program" are being moved to general education campuses for the 2014/2015 school year, and that the teachers and other personnel, classroom materials, equipment, supports and services will move "with the classes."

visually impaired and who are also moderately-to-severely disabled (see Decs. Valenzuela [D. #301-12¶¶2-6], Bell [D. #301-17¶¶2-4], Fazzi [D. #301-19¶¶2-6], Fields [D. #301-16¶¶4-6], Efron, Ed.D [D. #301-#14 ¶¶32-41 and #332 Ex. 2¶¶27-41).

3. To comply with the 28% quota on co-located campuses, the LAUSD unilaterally changed IEPs, obtained parents' signatures on new IEPs by misrepresenting the reasons for the request, thereby disregarding the requirements of the MCD and IDEA that placement decisions are to be made by the IEP team and that parents[8] are participants as members of the IEP team. Moreover, in California, a school district must ensure that the student's parent "is a member of any group that makes decisions on the educational placement" of the child (Calif. Ed. Code, § 56342.5). As a result of Revised Outcome 7, the LAUSD moved two entire classes of severely disabled blind or visually impaired students from Blend SEC to Irving Middle School, a general education campus with hills, stairs, and uneven cement which is difficult for them to navigate. LAUSD also forced students from Banneker SEC to attend general education campuses despite their IEPs (See Decs of J. Flores [D. #301-7¶¶4-16], A. Flores [D. #301-9¶4], C. Chamu [D. #301-5¶¶4-10], Mina Lee [D. #301-3¶¶4-6], V. Fazzi [D. #301-19¶¶4-6], R. Goldberg [D. #301-18¶¶3-4], M. Gliona D.#301-15 ¶¶3-9], Gliona Supp. [Dec. D. #332-6 ¶12].

[8] The United States Supreme Court has recognized that parental participation in the development of an IEP is the very cornerstone of the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards" (see *Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877,882).

4. The LAUSD has usurped the responsibility of the IEP Team by forcing moderately-to-severely disabled students' placement at general education campuses contrary to the students' IEPs, which provide for special school placement (see Decs of J. Flores [D. #301-7¶11], A. Flores [D. #301-9¶4], Boxt [D. #301-15¶¶3-9], Buschini [D. #301-10¶¶3-9], Moreno [D. #301-4], Lee [D. #301-3¶¶3-4], Fazzi [D. #301-19], Goldberg [D. #301-18¶4], and Maseda [D. #301-2 ¶¶2-14, Ex. C].

5. The LAUSD unilaterally made changes to moderately-to-severely disabled students' placements prior to the IEP meetings without providing parents with prior written notice or other information required by 20 USC §1415(b)(3) and the MCD Par 2.a, pg 1 and Section 68, pg 18 (see Decs of J. Flores [D. #301-7¶4-13], C. Chamu [D. #301-6¶4], A. Flores [D. #301-9¶4], M. Lee [D. #301-3¶¶3-4], and Gliona [D. #301-15¶9].

6. The LAUSD has also violated IDEA by changing placement in violation of the students' IEPs by having parents sign "trip slips" (permission to take students on field trips) and by using these slips to justify indefinite and recurring movement onto general education campuses despite the students' IEPs which required that the moderately-to-severely disabled student be on a special education campus for the entire instructional day (Decs. of E. Jacobson D.#301-1¶¶8-9] and , S. Aguilar (D.# 301-11 ¶¶4-6).

7. To meet the goals under Revised Outcome 7, the LAUSD has threatened to terminate the positions of special education teachers and providers if they express an

opinion about placement at their student's IEP meetings contrary to a general education placement (see Decs. M. Gliona [D.#301-15¶¶8,Supp D. CC 7-15], R. Goldberg [D. #301-18¶¶2-8], and V. Fazzi [D. #301-19¶9]).

8. Furthermore, under Revised Outcome 7, the LAUSD is manipulating the attendance of entering students at special schools with the intent of phasing out special schools by attrition. Once special schools have been completely eliminated through this policy of attrition, LAUSD will be able to claim that special schools are no longer necessary (which, perversely, will become the justification of the policy after the fact), despite the IDEA and MCD mandates that special schools be part of the continuum of placements (see Decs. S. Aguilar [D. #301-11¶7], Efron [¶36, Efron Supp. ¶27-29], and Berrios [D. #334¶4]).

On August 2, 2013, Stephen Maseda and Joy Efron met with the Independent Monitor at the time, Frederick Weintraub, and Executive Director of Special Education for the LAUSD, Sharyn Howell. Ms. Howell stated that the needs of "*every*" special education student could be met on a general education campus. The Mr. Weintraub agreed with Ms. Howell and added that special schools were no longer a "choice" in placement as he believed that special schools were "unnecessary" (see Maseda Dec. [D. #301-2¶¶4-13, 332-4]).

On August 5, 2013, Attorney Maseda, and families of students with moderate-to-severe disabilities whose children were being forced out of special schools, met with

Class Counsel Robert Myers and Catherine Blakemore and, for the first time, were informed by them that they, too, considered special schools to be not only "unnecessary" but might be in fact "illegal." Mr. Myers and Ms. Blakemore stated that they would not advocate for special schools nor enforce the IEPs of moderately-to-severely disabled students where the placement was special schools. Mr. Myers added that he wanted all of the LAUSD special schools closed (Dec. of Maseda [D. #301-2¶¶4-13, 332-4]).

Mina Lee and Frances Moreno are parents of two young severely disabled children who attend different campuses of the LAUSD as special education students. As such, the LAUSD is required to place them on the campuses which offer them a "free appropriate public education" in their "least restrictive environment" ("LRE") as provided for in 20 *USC* §1412(a)(5)(A) ("IDEA") Ms. Lee and Ms. Moreno's children have been determined by their IEPs to be so disabled that they cannot benefit from general education courses of instruction, and require placement on one of the LAUSD "special education centers" or "special schools" (Dec. Lee [D. #301-3 ¶2]; Moreno Dec. [D. #301-4 ¶¶2-4]).

Having been informed on August 5, 2013, that "Class Counsel" believed that special schools as part of the continuum as defined by IDEA were "unnecessary" and possibly "illegal" as well as that students with moderate-to-severe disabilities should all be placed on general education campuses, Movants/Parents Ms. Lee and Ms. Moreno filed a Motion to Intervene seeking the right to have an advocate for their children.

Their Motion was filed October 23, 2013, approximately 79 days after their Class Counsel refused to protect their rights [D. #300]. Ms. Lee's and Ms. Moreno's Motion for Intervention was denied by the district court on January 16, 2014 [D. #359].

IV. STANDARD OF REVIEW

The appellate court reviews *de novo* a district court's denial of a motion to intervene as of right under F.R.C.P. 24(a)(2)[9] *LULAC*, 131 F.3d at 1302. The four-factor test for intervention (timeliness, interest, practical impairment, and inadequate representation) developed by the Courts "essentially mirrors the language" of the Rule itself and requires that the courts address a motion for intervention with *practical* consequences in mind. See *United States ex rel . McGough v. Covington Tech. Co.,* 967 F. 2d 1391 , 1394 (9th Cir. 1992).

The threshold issue for a Motion for Intervention of Right is whether the motion was timely. In determining whether a motion to intervene is timely, the Ninth Circuit considers three 3 factors: (1) the stage of the proceeding at which applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *League of Latin Am . Citizens v. Wilson,* 131 F . 3d 12 9 7 , 13 0 2 (9th Cir . 1997); *McGough, supra,* 967 F.2d at 1394.

[9] Under Federal Rule of Civil Procedure, Rule 24. Intervention (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FRCP 24 (a) is to be construed liberally in favor of potential intervenors. *In re Benny,* 791 F.2d 712, 721 (9th Cir. 1986); *see also McGough supra,* 967 F.2d at 1394. The reasoning behind the broadening of the rule is that serious harm is more likely with an Intervention as of Right (see *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 [9th Cir. 1978]). Further, although intervention of right after entry of a consent decree is generally disfavored by the courts, it will be permitted for exceptional cases. *U.S. v. Blue Chip Stamp Co.,* 272 F.Supp. 432,435-38 (C.D.Cal.1967), and *Tesseyman v. Fisher,* 231 F.2d 583 (9th Cir. 1955). Moreover, when a change in circumstances exists, the Court looks to see the extent to which the moving parties are being prejudiced by the change in circumstance. See *United States v. State of Oregon,* 745 F . 2d 550 , 552 (9th Cir . 1984).

V. ARGUMENT

A. THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE IT BASED ITS DECISION ON ERRONEOUS FINDINGS OF FACT

The question of timeliness will be overturned only when an abuse of discretion is shown. *N.A.A.C.P. v. New York*, 413 U.S. 345, 366, (1973). "An abuse of discretion occurs if the district court bases its decision on an erroneous legal standards or on clearly erroneous findings of fact" *Smith v. Marsh,* 194 F.3d 1045, 1049 (9th Cir. 1999). aff'd. 389 U.S. 580, (1968).

1. The Court Erroneously Found that Based Upon the "Stage of the Proceedings" Movant's Motion for Intervention was Untimely

The district court in this matter abused its discretion and improperly denied

Movants the right to intervene under FRCP 24 (a) by finding that the "stage of the proceeding" weighed against intervention. As mandated by principles of fundamental fairness, the court is charged with not only addressing a motion for Intervention as of Right keeping in mind the "practical consequences" (*McGough,* 967 F.2d at 1394) but also assessing timeliness based upon "all the circumstances " *NAACP v. New York, 413 U. S . at 366.*

The evidence presented to the district court by Movants was replete with documentation that Revised Outcome 7 "changed [the] circumstances" for placements of moderately-to-severely disabled student which were concealed until August 5, 2013 when the Class Counsel declared that they would not represent the interests of the entire class. The district court did not "keep in mind the practical consequences" of Revised Outcome 7 and did not consider the "importance of all of the circumstances," but instead, focused on the age of the original consent decree, and when the MCD was signed and approved by the Court (Order Pg 12 lines 9-15).

The crucial date for assessing the timeliness of a motion to intervene is "when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties." *Smith v. Marsh,* 194 F. 3d 1045, 1052 (9th Cir. 1999) (citing *League of Latin Am. Citizens,* 131 F. 3d at 1304). In other words, a party seeking to intervene must act "as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." *California*

Dept of Toxic Substances Control v. Commercial Realty Projects , 309 F. 3d 1113, 1120 (9th Cir . 2002).

The district court correctly noted that "a change in circumstances may give rise to a new stage, which may favor allowing intervention" *[Order page 13 line 12-15]* but then erroneously concluded that the Revised Outcome 7 "appears to be just another modification to the MCD aimed at further integration and inclusion of students with disabilities." [Order page 14 lines 1-4]

The district court's reasoning was clearly erroneous, because Revised Outcome 7 was not "just another modification." Unlike "another" modification, this one affected an entirely different class of students with disabilities and their placements, and, worse, directly violated IDEA by forcing students with moderate-to-severe disabilities whose IEPs required specialized schools onto general education campuses even when parents objected to the placement "offer".

The district court abused its discretion by failing to recognize the complexity of the different eligibility categories of students under the IDEA, especially students with severe disabilities[10] which includes students who are medically fragile who require intensive related services and specialized facilities not available on general education campuses. Furthermore, to group all students with disabilities together, i.e., to treat *all*

[10] Further, all students with disabilities are a protected class under federal and state law; therefore, any modification to the consent decree that affects this protected class should be strictly scrutinized.

students with disabilities the same, violates the fundamental purpose of *Individuals* with Disabilities Education Act. By denying the motion to intervene on behalf of students with moderate to severe disabilities, the district court has allowed Class Counsel and LAUSD to trump the IEP process and usurp the rights of parents of the moderately-to-severely disabled, in violation of federal and state laws.

The IDEA requires that a local education agency must "develop and implement an IEP aimed at providing each disabled child with a free appropriate public education in the least restrictive environment" 20 U.S.C. § 1412(a)(5)(A). The IDEA further mandates that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily 20 U.S.C. § 1412(a)(5)(A). Thus, although inclusion is preferred, *it is not mandatory*, and must be based on individual needs.

Under IDEA and case law, if a child's placement does not confer a "meaningful benefit" to the student and a more restrictive program is likely to provide such benefit, the child is entitled to be placed in that more restrictive program. *P. v. Newington Bd. of Educ.*, 51 IDELR 2 (2d Cir. 2008).

This court has observed:

> [The mainstreaming] requirement creates natural tension within the

> IDEA as state educators try to establish appropriate educational programs for handicapped children to meet their unique needs while attempting to comply with the IDEA's clear preference for mainstreaming. In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. . . . Thus, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom *see Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 2005).

To accomplish the goal of conferring a meaningful educational benefit to a particular student and meeting his or her unique needs in an educational placement, the IDEA has mandated that a continuum of alternative placements must be available to meet the needs of children with disabilities for special education and related services and must include special schools. 34 CFR § 300.115

Revised Outcome 7 violates the IDEA mandates requiring a continuum of placement options because it necessitates that the LAUSD meet a quota of reducing 33% of all moderately-to-severely disabled students from specialized schools.

The district court abused its discretion by failing to find that Revised Outcome 7 substantially enlarged the scope of the MCD to include a whole different class of students with disabilities which was not part of the original CD or MCD thereby creating a change in circumstance. The district court ignored the practical circumstances wherein students with moderate-to-severe disabilities were forced from their placements at special education centers onto general education campuses beginning fall of 2013 to meet the quotas outlined in Revised Outcome 7. As a result,

students with moderate to severe disabilities, such as Mina Lee's son and Frances Moreno's daughter, have suffered harm. The district court should have recognized that this constituted a change in circumstance and should have weighed in favor of a finding of timeliness as to the Intervention of Right.

2. The District Court Abused Its Discretion in its Analysis of "Prejudice to the Parties"

The district court abused its discretion by finding that the "prejudice to the parties" weighed against intervention. Again, as outlined above, a court must keep in mind the "practical consequences" [*McGough,* 967 F.2d at 1394] of all affected parties when considering a Motion for Intervention as of Right. The controlling cases emphasized that "(t)he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'maybe' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. UMW*, 404 U.S. 528, 538-39; 92 S. Ct. 630, 636, n.10, 30 L. Ed. 2d 686 (1972); *Johnson v. San Francisco Unified School District*, 500 F.2d 349, 352-54 (9th Cir. 1974) (per curiam). In the present case, Class Counsel's refusal to represent the interest of families with children who are moderately-to-severely disabled whose IEPs specify special school placement as their LRE clearly meets this test.

In *Forest Conservation Council v. United States Forest Serv.,* 66 F.3d 1489, 1493 (9th Cir. 1995) intervention was permitted years after the filing of an action….because this

court found that without intervention, the disposition of the remedy in place would, as a "practical matter," impede or prevent the intervenors from protecting their rights, holding that without intervention "they will have no legal means to challenge that injunction while it remains in effect." *Forest Conservation Council v. United States Forest Serv., supra,* 66 F.3d at 1498.

In the case at hand, the district court held that "allowing movants to intervene would prolong the litigation [and] jeopardize an already long and exhaustive process"(see Order page 14 lines 27, 28). The district court added that: "Furthermore it would particularly prejudice the LAUSD by requiring the LAUSD to expand further resources and resetting the status quo" [Order page 15 lines 20-23]. This is not an appropriate justification for the violation of students with moderate-to-severe disabilities and their families rights under the law, where the "status quo" was compliance with the IDEA and concomitant state laws and the "resetting" is made necessary by the violation of it.

(a) Revised Outcome 7 Deprives Moderately-to-Severely Disabled Students of Special Education Centers as a Placement.

The district court erred by finding that students with moderate-to-severe disabilities were not prejudiced because Revised Outcome 7 did not deprive Movants of special education centers as placement options. This is not factually correct. Ms. Sharyn Howell, Executive Director of Special Education of the LAUSD, declared under

penalty of perjury that "no special education centers have closed" (see page 4, paragraph 9 of Declaration of Sharyn Howell in Support of Defendant LAUSD Opposition to Motion to Intervene, [D #327-8]. In actuality, LAUSD "reduced" all of its population at Blend SEC from 51 students, who were blind or visually impaired, at the end of the 2012-2013 school year to *zero* as of August 2013 which indicates the school is closed. Thus, the district court erred by relying on the statement that "no special education centers have closed" without scrutiny when in fact LAUSD acknowledged that Blend SEC ceased to exist as a specialized school (see Efron Dec. [D. #301- ¶¶32-33]).

Further, Movants also provided the Court with information establishing that several of the LAUSD special schools (Leichman SEC, Salvin SEC, Willenberg SEC, Marlton SEC, Miller SEC, Perez SEC, Widney SEC, and Banneker SEC) were ceasing to function as specialized schools and were being converted to CTCs for students aged 18-22 with mild-to-moderate disabilities, thereby no longer being placement options for students with moderate-to-severe disabilities.

(b) Revised Outcome 7 Violates the IEP Assessment Process.

The court also erroneously found that Revised Outcome 7 did not "violate the IEP assessment process." However, as previously discussed, LAUSD has utilized the Revised Outcome 7 to justify bypassing the IEP process, and is making placement decisions that violate the findings of IEP teams. LAUSD has used intimidation tactics

to prevent members of the IEP Teams from advocating for the needs of the students, ignored placement decisions of IEP teams, not provided translated IEP to parents who are non-English speaking or limited English proficient, and has unilaterally moved student with moderate-to-severe disabilities out of their special education classrooms and placed them in general education classes regardless of whether the individual student would derive an educational benefit from said placement.

Parents and students affected by the mass movements from specialized schools are not being protected. Respondent LAUSD is simply closing the specialized schools and converting them to CTCs. Parents who do not agree to a general education campus are not provided with a choice for another specialized school. The district court ignored this evidence.

A party to a class action should be able to "air its objections" and present its extensive factual analysis. This meets the standard required of the district court. *See Local 93*, 478 U.S. at 529. In the case at hand, the students with moderate to severe disabilities and their families had no such opportunity and Class Counsel actively participated in blocking their remedy. Thus, the district court abused its discretion when it erroneously held that "the adoption of Revised Outcome 7 does not deprive Movants of special education centers as a placement option or violate the IEP assessment process."

3. The District Court Abused its Discretion by Finding that Movants had "other means" to Protect Them from the Effects of Revised Outcome 7.

The district court abused its discretion in finding that "the filing and adjudication of a due process complaint for parents who disagree with their child's IEP" was an adequate remedy and that the due process system was "best suited" to determine these disputes [Order at pp. 25-27].

The district court abused its discretion because again it did not consider the "practical consequences" of the intervenors' interest or that of the due process system. The filing and adjudication of a due process complaint is a system for parents who disagree with their child's IEP. Here, the Movants/Parents did not disagree with the IEPs because their students' IEPs called for a specialized school. LAUSD moved hundreds of students with moderate to severe disabilities onto general education campuses, then closed the special school (as in Blend SEC) or converted the SEC into a CTC (as with Banneker, Salvin, Willenberg, Marlton, Leichman, Widney, Miller, and Perez), thereby effectively removing specialized schools as an option for parents and students with moderate-to-severe disabilities.

The Office of Administrative Hearings does not have the jurisdiction to require the LAUSD to reopen an entire school for the hundreds of students who are being illegally deprived of its services. That can only be accomplished by a decision holding that Mina Lee and Frances Moreno have the right to intervene and that Revised

Outcome 7, which in effect dismantled the special school programs, violated the MCD and the IDEA. Such a decision cannot be made in a due process hearing.

4. The District Court Abused Its Discretion by Basing The Reason for the Length of the Delay on Erroneous Findings of Facts.

The district court in the instant case abused its discretion and improperly denied Movants the right to intervene under FRCP 24 (a) by finding that the "reason for the length of the delays" of 79 days (or two months and three weeks) after the revelation that Class Counsel refused to advocate on behalf of the entire class weighed against intervention.

In considering a motion for intervention, a court must bear in mind that any *substantial* lapse of time weighs heavily against intervention. Courts have held that if the parties made it "more difficult for the [intervenors] to acquire information about the suit early on 'they may not' now be heard to complain that the [intervenors] should have known about it or appreciated its significance sooner." *Stallworth*, 558 F.2d at 267; *cf. Alaniz*, 572 F.2d at 659. Here, LAUSD and Class Counsel should not be able to enter into a stipulation to change the placements of hundreds of moderately-to-severely disabled students without notice to the affected families and an opportunity to be heard on the issue and then complain that Intervenor/Movant parents "delayed."

Moving Parties and their counsel acted diligently in filing their detailed Motion for Intervention. Movants contend that 79 days was how long it reasonably took to obtain detailed evidence and to organize it into presentable form for a civil motion in a

class action law suit before the federal court.[11] The district court clearly abused its discretion by this finding of fact.

B. THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE IT BASED ITS DECISION ON ERRONEOUS LEGAL STANDARDS

As reiterated above, an abuse of discretion occurs if the district court bases its decision on an erroneous legal standards or on clearly erroneous findings of fact" *Smith v. Marsh,* 194 F.3d 1045, 1049 (9th Cir. 1999). aff'd. 389 U.S. 580, (1968).

1. The District Court Abused Its Discretion by Basing The Reason for the Length of the Delay on Erroneous Legal Standards for Untimeliness.

The district court in the instant case abused its discretion and improperly denied Movants the right to intervene under FRCP 24 (a) by finding that 79 days from the time Movants found out that their interest would not be adequately protected by the existing parties to the time they filed their motion was untimely. As indicated above, the crucial date for assessing the timeliness of a motion to intervene is "when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties." *Smith v. Marsh,* 194 F. 3d 1045, 1052 (9th Cir. 1999) (citing *League of Latin Am. Citizens,* 131 F. 3d at 1304).

To support a finding of untimeliness the Court erroneously relies on *Key Bank of Puget Sound v. Alaskan Harvester*, 738 F. Supp. 398, 405 (W.D. Wash. 1989) and by doing

[11] Movants maintain that 79 days or only two months and three weeks was not an undue delay as evidenced by the fact that a companion Motion to Intervene was filed by a second group of similarly situated parents and students only one week earlier.

so abused its discretion. First, *Key Bank* was an *In Rem* action, which had specific timeliness rules. FRCP 24 C(6) required that the claim had to be filed "within 10 days after process has been executed, *or within such additional time as may be allowed by the court*…." [emphasis added]. Second and more importantly, the court in *Key Bank*, **granted** an otherwise untimely motion to intervene.[12] The Court in *Key Bank* held that

> Gunnarsson acted with apparent diligence in seeking redress from his employers and, subsequently, in applying to intervene in this action. Moreover, this Court is cognizant of the special treatment historically accorded to liens for seamen wages. . . .*Key Bank of Puget Sound v. Alaskan Harvester supra,* 738 F . Supp. at 405.

Therefore, *Key Bank* should have helped Movants establish that, given the nature of their interest and the fact that they represent a protect class under federal and state laws, the Motion for Intervention as of Right was timely.

The district court also cites *Consolidated Edison Co. of New York Inc. v. Breznay*, 683 F. Supp. 832 (D.D.C.1987) in which a motion to be permitted to participate in a decision was denied as being untimely. In *Breznay,* a utility waited five months before attempting to intervene after another utility with the same interests withdrew from participation in an underlying administrative hearing. The court criticized the moving party because it allowed a different party to protect its interests, and then waited 5 months to seek intervention [*Id*, at 836]. Moreover, the court in *Breznay* held that the proposed intervening

[12] The motion of a second appellant who failed to file any explanation for his four month delay was denied. 738 F. Supp. at 405.

utility company was at the very least attempting to reopen an issue that an administrative judge in the underlying case had previously determined. As such, the Court found that intervening utility company arguments in the final phase of the proceedings were untimely.

In the present case, there has not been anyone protecting the interests of student with moderate-to-severe disabilities whose placements were special schools and there is no underlying administrative procedure. Instead, the rights of the class of moderate-to severely disabled students have been negatively affected without *any* judicial oversight. Therefore, the *Breznay* case should not have been relied upon by the district court.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's Order Denying Intervention as of Right under FRCP 24(a) to Mina Lee and Frances Moreno and direct that court to allow Intervention as of Right under FRCP 24(a) to Mina Lee and Frances Moreno.

DATED: August 27, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Other than the companion appeal filed by the April Munoz group , App. Case No. 14-55224 who are parents and children attending special education centers of the LAUSD, and whose Motion to Intervene was also denied in the same Order, there are no related cases.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 7,831 words, excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.