UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NOS. 14-55224 and 14-55256

CHANDA SMITH, ET AL,

PLAINTIFF,

V.

LOS ANGELES UNIFIED SCHOOL DISTRICT, ET AL.

DEFENDANTS.

APPEAL FROM UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 93-7044 RSWL (GHKx)
(Hon. Ronald S.W. Lew, District Judge)

BRIEF OF APPELLEE LOS ANGELES UNIFIED SCHOOL DISTRICT

Barrett K. Green (145393) **Maggy M. Athanasious (252137)** **LITTLER MENDELSON PC** **2049 Century Park East, 5th Floor** **Los Angeles, CA 90067.3107** **Telephone: 310.553.0308** **Fax: 310.553.5583** **Attorneys for Appellee LAUSD**	**Belinda D. Stith (102910), Interim Chief Education and Litigation Counsel** **D. Deneen Cox (204792)** **Associate General Counsel I** **OFFICE OF GENERAL COUNSEL** **LOS ANGELES UN. SCH. DIST.** **333 S. Beaudry Avenue, Floor 24** **Los Angeles, CA 90017** **Telephone: 213.241.6601** **Fax: 213.241.8444** **Attorneys for Appellee LAUSD**

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS
(CONTINUED)

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

I. STATEMENT OF JURISDICTION

Appellee Los Angeles Unified School District ("LAUSD" or the "District") agrees with Appellants that the district court's January 16, 2014 order denying Appellants' motions to intervene was a final and appealable order. See, e.g., *League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1302 (9th Cir. 1997) ("The denial of a motion to intervene as of right pursuant to Rule 24(a)(2) is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291.").

II. STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a district court's denial of a motion to intervene as of right pursuant to Rule 24(a)(2) except that, as to the first prong of the intervention standard – timeliness, the Court of Appeals reviews the district court's determination for abuse of discretion. *League of United Latin Am. Citizens*, 131 F.3d at 1302.

If the Court of Appeals finds that a motion to intervene was not timely, the Court of Appeals need not reach any of the remaining elements of Rule 24. *Id.*

III. INTRODUCTION

The gravamen of Appellants' claim is that they should be allowed to intervene in this action – which has been pending for 20 years and been settled for 17 years – because they believe LAUSD has been improperly reducing the number of students who attend segregated special education centers.

Appellants' claim was incorrect on the facts (LAUSD continues to operate many special education centers); incorrect on the law (Congress requires mainstreaming); incorrect on the Consent Decree (the Consent Decree encourages and requires mainstreaming, and does not prohibit it); and incorrect on the procedural requirements for intervention (Appellants did not meet the standard for intervention).

Moreover, if any Appellant disagrees with the appropriateness of the educational services offered to his/her child, the Appellant has an absolute right to file a complaint challenging the services offered, and to have the complaint adjudicated in a full-evidentiary "due process hearing" provided for under state and federal law.

Prior to the enactment of the Individuals with Disabilities Education Act ("IDEA") in 1975, many children with disabilities were excluded from the regular education public school environment. The IDEA was enacted to

remedy this exclusion. At the core of the IDEA, Congress included a requirement that, to the maximum extent appropriate, disabled children would not be excluded from their non-disabled peers, and would instead be mainstreamed in both the academic components of the school environment, as well as the social components (such as extra-curricular activities, as well as lunch, recess, and general interaction).

This Congressional principle is codified in the IDEA and state law and is known as the "least restrictive environment" mandate or "LRE." LRE is also known generally as "mainstreaming."

There are over 600,000 students in the LAUSD, including over 80,000 students receiving special education services. LAUSD offers a full range of special education services to its students, from the most basic services (accessed in a regular general education classroom) to the most intensive services (residential treatment centers). This range of services is known as a "continuum" of special education services.

LAUSD operates numerous "special education centers," which are facilities generally dedicated to serving only students with moderate to severe disabilities, and with no non-disabled students.

Appellants here are the parents of a tiny fraction of students with disabilities. Appellants oppose the Congressional requirement of LRE and

mainstreaming, and instead prefer that LAUSD continue to operate as many segregated special education centers as possible.

As more fully explained below, the district court correctly concluded that Appellants did not meet the standard for mandatory intervention[1].

IV. SUMMARY OF ARGUMENT

A. The district court correctly concluded that Appellants did not meet the standard for mandatory intervention:

1. The district court did not abuse its discretion in determining that the request for intervention was untimely, that intervention now would be prejudicial, and that the delay in seeking intervention was not excusable.

2. Appellants' interest in the revision to Outcome 7 is attenuated and they will not be negatively impacted by denial of intervention.

3. Disposition of the action will not impair or impede Appellants' interests.

4. Appellants' interests are being adequately represented.

---

[1] Neither of the Appellants' briefs contains a challenge to the district court's decision to deny permissive intervention. See, e.g., *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief . . . .").

B. The parties complied with the modification process set forth in the Modified Consent Decree ("MCD").

C. Appellants' efforts to present new evidence and arguments on appeal should be rejected.

V. STATEMENT OF FACTS

A. The IDEA And "Mainstreaming."

Prior to the enactment of the IDEA[2] in 1975, many children with disabilities were excluded from the regular education public school environment. In 1971, a class action was filed in the District of Columbia, alleging that disabled students were unlawfully excluded from public school in violation of the Fifth Amendment's Due Process Clause. *Peter Mills et al. v. Board of Educ. of the District of Columbia*, 348 F.Supp. 866, 869-870 (D.D.C. 1972).

The *Mills* court held that, "the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause." *Mills*, 348 F.Supp. at 875.

In 1971, the Pennsylvania Association for Retarded Children ("PARC") filed a similar class action, alleging that Pennsylvania was not

[2] In 1975, called the "Education for All Handicapped Children Act" or "EHA."

providing mentally retarded children access to a free public education. A June 18, 1971 stipulation and order, and an October 7, 1971 injunction, consent agreement, and order resolved the suit. See *Pennsylvania Assn. For Retarded Children v. Commonwealth of Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972).

The landmark decisions in these 1970s cases led to the enactment in 1975 of PL 94-142, the EHA, which has since been retitled as the IDEA.

Under the IDEA, disabled children have a right to a "free appropriate public education," often referred to as "FAPE." (20 U.S.C. § 1412(a)(1)(A); Cal. Ed. Code, § 56000 et seq.) A FAPE consists of special education and related services that are provided at public expense and under public supervision and direction, that meet the state's educational standards, and that conform to the student's Individualized Education Program ("IEP"). (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

"Special education" means specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Cal. Ed. Code, § 56031.) "Related services" include transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from

special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (1989).)

In developing a FAPE for a student, Congress included a requirement for mainstreaming. Federal and state laws require that special education students receive services in the "least restrictive environment" or "LRE."

Specifically, the Congressional mainstreaming requirement means that a special education student must be educated with non-disabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities 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); 34 C.F.R. § 300.114(a)(2)(i) & (ii); Cal. Ed. Code, § 56364.2.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Cal. Ed. Code, § 56031.)

The Ninth Circuit Court of Appeals has explained that the law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." *Daniel R.R.*, 874 F.2d at 1044-45; see also 20 U.S.C. § 1412 (a)(5)(A); *Board of Educ. of Hendrick Hudson*

Central Sch. Dist. v. Rowley, 458 U.S. 176, 181, n. 4 (1982); *Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995).[3]

Mainstreaming is required not only to benefit children in the academic components of their education, but in the socialization aspects as well. In *Daniel R.R.*, *supra*, at 1047-1048, the Court of Appeals explained this concept as follows:

> [T]he district court placed too much emphasis on educational benefits. . . [E]ducational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment. [Citations omitted.]

The mainstreaming requirement is contained in the IDEA itself at 20 U.S.C. § 1412(5)(B) and is implemented by the federal Department of Education's regulations at 34 C.F.R. § 300.114, which provides, in pertinent part, as follows:

> Sec. 300.114 LRE requirements.

---

[3] This strong preference is supported by educational experts and empirical research. (See Appellees' Joint Supplemental Excerpts of Record ("S-ER") 494-498, Declaration of Amy Hanreddy; S-ER 499-505, Declaration of Mary Falvey.)

> ***
>
> (2) Each public agency must ensure that--
>
> (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
>
> (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(See also Cal. Ed. Code § 56364.2(a).)

The federal regulations (34 C.F.R. § 300.117) require that mainstreaming occur in connection with nonacademic and extracurricular services and activities, including meals, recess periods, and other services, as follows:

> Sec. 300.117 Nonacademic settings.
>
> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the

> supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

B. IDEA's Requirements For A "Continuum" Of Special Education Services.

The IDEA and regulations, and California law, require that school districts maintain a "continuum" of special education services, from basic services to intensive educational interventions. (See 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115.)

The continuum requirement is explained in California Education Code section 56361, as follows:

> 56361. The continuum of program options shall include, but not necessarily be limited to, all of the following or any combination of the following:
>
> (a) Regular education programs consistent with subparagraph (A) of paragraph (5) of subsection (a) of Section 1412 of Title 20 of the United States Code and implementing regulations.
>
> (b) A resource specialist program pursuant to Section 56362.
>
> (c) Designated instruction and services pursuant to Section 56363.
>
> (d) Special classes pursuant to Section 56364.2.
>
> (e) Nonpublic, nonsectarian school services pursuant to Section 56365.
>
> (f) State special schools pursuant to Section 56367.

> (g) Instruction in settings other than classrooms where specially designed instruction may occur.
>
> (h) Itinerant instruction in classrooms, resource rooms, and settings other than classrooms where specially designed instruction may occur to the extent required by federal law or regulation.
>
> (i) Instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions to the extent required by federal law or regulation.

C. The District's Provision Of Special Education Services And Supports, Including At Special Education Centers.

To comply with the Congressional mainstreaming requirements, the District offers a free, appropriate public education in the least restrictive environment to students with disabilities, starting with the general education school unless there is a compelling reason that the supports and services cannot be provided there. (See Excerpts of Record ("ER") at p. 293[4], Declaration of Sharyn Howell ("Howell Decl."), ¶ 3.)

The District has the capacity to provide all the supports and services identified on each child's IEP at a general education site. (ER 293, Howell Decl., ¶ 4.)

According to the District's December 1, 2012 California Special Education Management Information System ("CASEMIS"), the District

[4] Unless otherwise specified, all references to the Excerpts of Record herein are to the Appellants Mina Lee and Frances Moreno's Excerpts of Record, Volumes I-III (Dckt. # 11-1 - 11-5).

served a diverse population of 82,765 students with disabilities in a variety of educational settings including general education classrooms and special day programs on general education sites; special day programs on special education centers and nonpublic school sites; private programs; independent study; home hospital settings, State special schools (such as the California School for the Deaf in Riverside and the California School for the Blind in Fremont); and, residential treatment facilities at that time. (ER 293-294, Howell Decl., ¶ 5; S-ER 513, Declaration of Sharon Jarrett ("Jarrett Decl."), ¶ 12.)

When determining a student's IEP offer of placement and services, District IEP teams are required to consider the individual needs of each student at IEP team meetings. Changes in student placement do not occur without following the IEP team process. (ER 296, Howell Decl., ¶ 15.) The IEP team utilizes a form called the "Annual Least Restrictive Environment Analysis," which requires that information be completed as part of the IEP team discussion regarding placement. Step A asks the question, "Can the supports, services, accommodations and/or modifications in the student's IEP be made available in a general education classroom/setting?" (ER 296-297, Howell Decl., ¶ 16.) This form was developed to ensure that IEP teams comply with the IDEA which requires that students with disabilities be

educated in the LRE. (ER 297, Howell Decl., ¶ 17.) Steps A through E contain placement options for the full continuum of program options the District offers. Step C requires the IEP team to discuss whether the supports, services, accommodations and/or modifications in the student's IEP can be made available in a non-general education setting, which includes special education centers as part of the District's continuum of program options. (ER 297, Howell Decl., ¶ 18.)

The term "special education center" is a term established by the District to describe a school campus where all or nearly all of the students served are disabled, and where there is limited, if any, interaction between disabled students and their non-disabled peers. (ER 294, Howell Decl., ¶ 7.) These centers centralize Special Day Classes and other services and supports that are widely available throughout the District, including at general education school sites. (ER 294, Howell Decl., ¶ 7.) Students educated at special education centers generally participate in special education for 90-100% of the instructional day. (ER 294, Howell Decl., ¶ 7.)

As of the date of the district court proceedings that are the subject of this appeal, the District was operating 15 special education centers.[5] (ER

[5] In the 2010-2011 school year, the District closed West Valley Special Education Center due to very low student enrollment. Through the IEP process, students received placements at other special education centers or

295, Howell Decl., ¶ 9.) Of the approximate 82,765 students with disabilities receiving special education services as set forth in student IEPs during the 2011-2012 school year, about 3,195 were educated at special education centers. These students made up about 3.88% of the total special education population of the District. (ER 294, Howell Decl., ¶ 6.)

D. History Of The Modified Consent Decree.

On November 19, 1993, Plaintiff Chanda Smith filed the class action lawsuit from which the MCD that is at issue arose. (S-ER 761, Dckt. 84.) Smith alleged, on behalf of herself and other disabled students, that the District was in violation of the IDEA and California special education law in various respects. (*Id.*) To resolve that case, the Parties negotiated a settlement, which the district court entered as a Consent Decree on April 25, 1996. (S-ER 755-838, Dckt. 84.) Ultimately, a Modified Consent was entered into in 2003. (S-ER 984-1043, Dckt. 265; S-ER 951-983, Dckt. 266.)

The Parties acknowledged that one of the MCD's objectives was that "each child with a disability will have access to education in the least restrictive environment." (ER 41, MCD, p. 1, ¶ 2(e).) To that end, the MCD

---

general education schools within the vicinity based upon their residence. (ER 295, Howell Decl., ¶ 9.)

included, in relevant part, Outcome 7, Placement of Students with Disabilities (ages 6-22) with all Other Eligibilities, as follows:

> By June 30, 2006, the District will demonstrate a ratio of not less than 52% of students placed in the combined categories of 0-20% and 21%-60% and not more than 48% students placed in the 61%-100% category according to federal placement reporting requirements. In determining whether the District has achieved this outcome, any fractional percentage of .51 or above shall be rounded up to its nearest whole number.

(ER 49, MCD, p. 12, ¶ 44.) The terms of the MCD required the appointment of an Independent Monitor ("IM") and also provided for a Parents' Council, which was established to provide parents a meaningful role in the implementation and monitoring of the MCD. (ER 43, 46, MCD, p. 3, § 2, Independent Monitor; p. 6, § 4, Parents' Council.) Finally, the Parties agreed that "special education centers" would be part of the continuum of program options for a full continuum of special education and related services in the LRE. (ER 50, MCD, p. 13, ¶ 47.)

E. The District's Implementation Of Outcome 7 As Set Forth In The MCD, And Further Modification Of Outcome 7 In 2008.

In compliance with the MCD, and in the course of implementing the MCD, the District regularly met (and as of the date of the district court proceedings, was continuing to meet) with the MCD Plaintiffs' Counsel,

Robert M. Myers and Catherine Blakemore ("MCD Plaintiffs' Counsel" or "Class Counsel"), as well as the-then IM, Frederick Weintraub, to discuss the District's progress toward implementing the terms and conditions of the MCD. (S-ER 178, Declaration of Deneen Cox ("Cox Decl."), ¶ 3.) Additionally, in accordance with Section 4 of the MCD, the District attended (and, as of the date of the district court proceedings, was continuing to attend) Parents' Council meetings to provide reports on the implementation of the MCD and to answer questions from the Parents' Council related to the MCD. (S-ER 178, Cox Decl., ¶ 4.)

The District's main objective regarding Outcome 7 was always to provide more inclusive opportunities for students with disabilities attending all District-operated schools and programs in compliance with the federal and state law LRE mandates. (S-ER 178-179, Cox Decl., ¶ 5.)

The District met with the IM and MCD Plaintiffs' Counsel over a several month period in 2008 regarding efforts to meet mainstreaming targets, and reviewed extensive data and engaged in in-depth discussions regarding addressing those difficulties. (S-ER 179-180, 289-341, Cox Decl., ¶¶ 7 and 8, Exs. B & C.)

The data review and discussions eventually led to the revision of Outcome 7 which was agreed to by the Parties and approved by the IM. The revised Outcome 7 was divided into two subparts:

> Outcome 7A: Placement of Students with Disabilities (Ages 6-18) with All Other Eligibilities excluding SLI, SLD and OHI. The District will demonstrate a ratio of not less than 51% of students placed in the combined categories of 0-20% and 21-60% and not more than 49% of students placed in the 61-100% category utilizing instructional minutes as the methodology. In determining whether the District has achieved this outcome, any fraction percentage of .51% or above shall be rounded up to its nearest whole number.
> Outcome 7B: Placement of Students with Disabilities (Ages 6-18) with MDO eligibility. The District will demonstrate a ratio of not less than 23% of students placed in the combined categories of 0-20% and 21-60% and not more than 77% of students placed in the 61-100% category utilizing instructional minutes as the methodology. In determining whether the District has achieved this outcome, any fraction percentage of .51 or above shall be rounded up to its nearest whole number.

(S-ER 180, 342-371, Stipulation Regarding Outcomes 5, 7, 8 and 16 of the *Chanda Smith* Modified Consent Decree; Cox Decl., ¶ 9, Exs. D & E.) The terms of the stipulated agreement, including the revisions to Outcome 7, were set forth in the IM's October 1, 2008 Annual Report Part I, which the

IM submitted to the district court. (S-ER 179-180, Cox Decl., ¶ 8; S-ER 608, IM's October 1, 2008 Annual Report Part I.)

F. The District's Implementation of Outcome 7 As Set Forth In The 2008 Stipulation, And Further Modification Of Outcome 7 In 2012.

In implementing Outcome 7A and 7B, it became apparent that Outcome 7B's focus on students with multiple orthopedic disabilities meant that almost the entire student population relevant to that outcome attended special education centers and, as a result, had limited mainstreaming opportunities. (S-ER 180-181, 372-438, Cox Decl., ¶¶ 10-11, Exs. F, G, H.) The IM noted this structural challenge in achieving Outcome 7B, as well as data abnormalities that skewed the baseline data from which targets were formulated. (*Id.*)

In October 2011, the District met with the IM and MCD Plaintiffs' Counsel to review discussion papers the IM prepared regarding the District's performance and the barriers that were impeding the District from meeting the Outcome 7 targets. (S-ER 181, Cox Decl., ¶ 12.) The discussion papers set forth the IM's summary of Outcome 7A and 7B, the progress on each to date, the challenges and limitations with the structure of the current outcomes and new areas to explore or potential alternatives to measuring progress on Outcome 7A and 7B. The IM specifically proposed that the

parties consider "an outcome that increases the number of students who transition from special education centers to general education campuses" and "an outcome that increases the number and percentage of students who attend general education campuses." (S-ER 181, 439-451, Cox Decl., ¶ 12, Exs. I & J.)

Following the October 21, 2011 meeting, the IM hired a consultant to assist the Parties, Dr. David Rostetter, a professor and expert regarding LRE. With Dr. Rostetter's assistance, the Parties developed a revised plan to meet the Outcome 7 requirements. (S-ER 181, Cox Decl., ¶ 13.)

Throughout all of these meetings and discussions with the IM, Dr. Rostetter and MCD Plaintiffs' Counsel, the District's objective and commitment was always focused on reducing the number of students with disabilities attending school at segregated sites while increasing the percentage of time students with disabilities participate in programs with their non-disabled peers in alignment with the Congressional intent of the IDEA that schools expand opportunities for educating students with disabilities in the least restrictive environment. (S-ER 181-182, Cox Decl., ¶ 14.)

In September 2012, following several months of discussions and revisions to the proposed Outcome and the District's plan to implement the

proposed Outcome, the Parties reached a stipulated agreement to change Outcome 7. (S-ER 182, 453-491, Cox Decl., ¶ 15. Exs. K & L.) The revised Outcome 7, which is its current iteration and which replaced Outcome 7A and 7B, provides for the following two mutually exclusive parts:

> Reduce the number of students with moderate to severe disabilities ages 6-18 at special education centers by a total of 33% over three years, beginning with the 2012-2013 school year. In order for students at the co-located schools 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. The number of general education students used in this calculation shall not be less than the number reflected in California Longitudinal Pupil Achievement Data System (CALPADS) during the initial year in which the co-location of the designated schools occurs; however, for students to count at a co-located school, the number of special education students shall not exceed 35% of the population.
>
> Students with moderate to severe disabilities at co-located schools shall participate with their nondisabled peers in general education classes an average of 12% of the instructional day and during lunch, breaks/recess and school-wide activities.

(S-ER 182, 492-493, Stipulation Regarding Outcomes 4, 7A and 7B Of The *Chanda Smith* Consent Decree, Cox Decl., ¶ 15, Exs. M.) The stipulated agreement and resulting Outcome 7 requirements were set forth in the IM's October 24, 2012 Annual Report. (S-ER 182, 465-491, Cox Decl., ¶ 15, Ex.

L.) The IM was instrumental throughout this process. (S-ER 182, Cox Decl., ¶ 15.)

As of the date of the district court proceedings that are the subject of this appeal, the District has accomplished 16 of the 18 Outcomes identified in the MCD. Outcome 7 remains outstanding. (S-ER 182, Cox Decl., ¶ 17.)

G. The District's Course Of Dealings Regarding Integration Of Special Education Centers.

In alignment with the congressional intent of the EHA and the IDEA, the renegotiated Outcome 7 is designed to reduce the number of students attending segregated settings and increase the percentage of time students with moderate to severe disabilities spend in integrated programs.[6] (ER 296, Howell Decl., ¶ 13.)

Since Outcome 7 was approved in September 2012 and was implemented, no special education center has closed. (ER 295, Howell Decl., ¶ 9.) Commencing with the 2013-14 school year, four special education centers were co-located with general education schools with age appropriate students. This was done to provide opportunities for integration

---

[6] Moreover, the 2011-2012 California state Key Performance Indicators require that each LEA must have less than 3.8% of students with disabilities in special schools (including centers, NPS, etc.). The District's last submitted performance as of the time of the district court proceedings was 8.4%. Thus, the District does not meet LRE benchmarks at the state or federal level, further supporting the need for the District's integration efforts. (ER 294, Howell Decl., ¶ 8.)

in alignment with LRE mandates due to the contiguous location of the special education center and general education school sites. Secondary students at certain school sites who were not age appropriate to integrate with the elementary students at the co-located sites remain at the special education centers. (ER 296, Howell Decl., ¶ 14; S-ER 518-519, Declaration of Diane Klosterman ("Klosterman Decl."), ¶ 8.)

To fulfill the mainstreaming mandate and revised Outcome 7, the District has undertaken significant efforts and expended substantial resources to ensure that the necessary resources continue to be allocated District-wide for all supports and services to be provided for students, as prescribed in their IEPs, at general education centers and special education centers. (ER 293, 296-298, Howell Decl.,¶¶ 2-4, 14-21.)

These services and supports include the provision of necessary personnel, materials and equipment, health and safety precautions, and ensuring physical accessibility of classrooms and facilities. (S-ER 512-514, Jarrett Decl., ¶¶ 5-11, 13-15.)

The District has approximately 1,100 related-service providers (such as counselors; speech and language, occupational and, physical therapists; and personnel specializing in adapted physical education, visually impaired, orientation and mobility, deaf and hard of hearing, audiology, recreational

therapy, orthopedic impairment and assistive technology services) who provide services throughout the District for all students with IEPs that require these services. (S-ER 507, Declaration of Deborah Rubenacker ("Rubenacker Decl."), ¶¶ 3-4.)

Planning for the integration of students was thoughtful and comprehensive. (S-ER 518, Klosterman Decl., ¶ 7.) The District spent the 2012-2013 school year preparing for co-location, including: researching best practices in integration; holding informational and data sharing presentations and meetings with principals, teachers, paraprofessionals, service providers and parents; and holding advisory meetings with Regional Center representatives and union representatives. (S-ER 516-517, Klosterman Decl., ¶¶ 5-6.) Additionally, each co-located site created and implemented an Integration Team of school stakeholders, who meet regularly to develop the integration plans specific to that school. (S-ER 518, Klosterman Decl., ¶ 7.)

Through the District's efforts, hundreds of students who were previously served at special education centers are now being provided with all necessary supports and services at general education sites. (ER 296, Howell Decl., ¶14.) As a practice, the District's psycho-educational assessment recommendations do not specify a placement at a special school

site, but rather describe the supports and services the student needs based on the assessment findings. (LAUSD Supplemental Excerpts of Record ("LAUSD S-ER") 01-03, Declaration of Beth Kauffman ("Kauffman Decl."), ¶ 4.)

The type of school students attend or the program students attend does not determine what services are provided or at what level services are provided. Services are provided based upon the unique needs of the student as documented in the student's IEP regardless of location or program. (S-ER 508, Rubenacker Decl., ¶ 7-9; see *Letter to Fisher*, OSEP, July 6, 1994, 21 IDELR 992, 21 LRP 2769.) The District's integration efforts, therefore, do nothing to disturb an individual student's offer of placement and services. Instead, they give students who would otherwise be segregated at a special education center the opportunity to be a part of a comprehensive educational environment.

Special education centers have experienced steadily declining enrollment over the years as the District has been able to provide the supports and services required in student IEPs for students with moderate to severe disabilities on general education campuses in compliance with LRE mandates. This decline has not been due to the renegotiation of Outcome 7. (ER 295, Howell Decl., ¶ 11.)

Nevertheless, since the implementation of the renegotiated Outcome 7 in the 2013-2014 school year, 166 student IEP teams have recommended placement in a special education center as the District's offer of a FAPE. (ER 297, Howell Decl., ¶ 19.) This shows that the centers remain available where appropriate.

The District has never stated that it plans to close all special education centers and it does not plan to do so, though there is no obligation to segregate students if they can be mainstreamed. (ER 295, Howell Decl., ¶¶ 9-10; S-ER 182, Cox Decl., ¶ 16.) The District continues to address individual student needs in the IEP process. (S-ER 182, Cox Decl., ¶ 16.)

VI. ARGUMENT

A. The District Court Correctly Concluded That Appellants Have Not Met The Standard For Mandatory Intervention.

As noted above, the Court of Appeals reviews *de novo* a district court's denial of a motion to intervene as of right pursuant to Rule 24(a)(2) except that, as to the first prong of the intervention standard – timeliness, the Court of Appeals reviews the district court's determination for abuse of discretion. *League of United Latin Am. Citizens*, 131 F.3d at 1302.

Rule 24(a)(2) provides for intervention as a matter of right if four criteria are met: (1) timeliness; (2) an interest relating to the subject of the litigation; (3) practical impairment of an interest of the party seeking

intervention if intervention is not granted; and (4) inadequate representation by the parties to the action. *United States v. State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); Fed. R. Civ. P. 24(a). Appellants fail to meet this standard.

If the Court of Appeals finds that a motion to intervene was not timely, the Court of Appeals need not reach any of the remaining elements of Rule 24. *League of United Latin Am. Citizens*, 131 F.3d at 1302.

1. The District Court Did Not Abuse Its Discretion In Determining That Appellants' Request For Intervention Was Untimely.

Whether intervention is sought as a matter of right or merely as permissive, it can be granted only "on timely motion." Fed. R. Civ. P. 24(a), (b)(1); see also *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

The Ninth Circuit considers the following factors to determine timeliness: (1) the stage of the proceedings at the time the applicant seeks to intervene; (2) prejudice to the existing parties from applicant's delay in seeking leave to intervene; and (3) the reason for and length of the delay, i.e., how long the prospective intervenors knew or reasonably should have known of their interest in the litigation. *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). "Any substantial

lapse of time weighs heavily against intervention." *League of United Latin Am. Citizens*, 131 F.3d at 1302 (where motion was filed 27 months after action commenced, applicant-intervenors fought an "uphill battle"); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 934 F.2d 1092, 1095 (9th Cir. 1991).

a. Untimeliness.

Appellants sought to intervene at the eleventh hour of the MCD. The underlying class action lawsuit was filed in 1993—more than twenty years ago. The Consent Decree was entered in 1996, was modified in 2003 and various outcomes have been revised multiple times, during which time Appellants did not seek to intervene in the proceedings. Moreover, integration has been a public focus of the Consent Decree from its inception in 1996 and beyond.

In finding that Appellants' requests to intervene were untimely, the district court explained that, "Movants seek to intervene in this action twenty years after it was initially filed, seventeen years after the original Consent Decree was entered, and ten years after the adoption of the MCD." (ER 14, Order, p. 12.)

The district court further explained that, in this case, Appellants were seeking to intervene "at an extremely advanced stage of the proceedings. As

such, the Court finds that this factor weighs heavily against a finding of timeliness." (ER 15, Order, p.13.)

With respect to the Appellants' claims that the revisions to Outcome 7 marked a new stage in the proceedings, the district court considered the argument but determined that, "Revised Outcome 7 appears to be just another modification to the MCD aimed at further integration and inclusion of students with disabilities. As such, the Court finds that this factor weighs against a finding of timeliness." (ER 15-16, Order, pp. 13-14.)

The district court did not abuse its discretion in this analysis.

Rather the court's reasoning was cogent and well-supported by existing appellate authority.

Specifically, the district court cited to *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 658-59 (9th Cir. 1978), in which the Court of Appeals found that the stage of the proceedings factor weighed heavily against proposed intervenors where they sought to intervene 17 days after a consent decree had become effective.

The district court also cited to *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986), in which the court found that the stage of proceedings factor weighed against intervention where the motion was filed after the parties had reached an agreement following five years of litigation.

Here, Appellants complained about revisions to Outcome 7 that took place in September 2012. However, the subject of integrating students at special education sites where appropriate was not new even in 2012, and had been discussed since 2002 when counsel for Appellants first stated an intention to intervene on this same issue. (S-ER 183, Cox Decl., ¶ 18.)

Moreover, the IM's October 5, 2011 Progress Report, a public document available to all stakeholders, expressly addressed planned integration of students in certain eligibility categories who attend special education centers. (S-ER 180-181, 419-438, Cox Decl., ¶¶ 10-11, Ex. H.) The IM followed his report with carefully researched "discussion papers" that he provided to the Parties. (S-ER 181, 439-451, Cox Decl., ¶ 12, Exs. I & J.) The IM's February 17, 2012 Progress Report also specifically states that the Parties were actively engaged in finding a solution to the problems with Outcome 7. (S-ER 181-182, 452-464, Cox Decl., ¶ 14, Ex. K.)

Additionally, the IM held annual hearings, at which the subject of integrating students from special education centers was discussed at least during the last two annual meetings. (S-ER 183, Cox Decl., ¶ 19; S-ER 862, MCD, p. 21, ¶ 83.) The modification of Outcome 7 was transparent and Appellants were on notice of the proposed revisions as early as October 2011.

Since Outcome 7 was approved in September 2012 and was implemented in the 2013-2014 school year, four special education centers have already been co-located with general education school sites as part of the District's ongoing efforts to provide otherwise segregated students with meaningful opportunities to interact with non-disabled peers. Additionally, hundreds of students who were previously served at special education centers are now being served at comprehensive school sites. (ER 296, Howell Decl., ¶ 14; S-ER 519, Klosterman Decl., ¶ 9.)

Moreover, both sets of Appellants admit that they had actual notice of the District's integration efforts as of Spring 2013. Mina Lee and Francis Moreno Opening Brief, pp. 14-15 (Dckt. 7); April Munoz, et al., Opening Brief, pp. 6-7 (Dckt. 16-1).

Finally, the district court cited to *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970, 974-75 (3d Cir. 1982), and found that modification of a consent decree does not, ipso facto, mean that a change in circumstances has occurred.

The district court reached a careful, reasoned conclusion in determining that Appellants' request to intervene was not timely.

The district court did not abuse its discretion.

b. Prejudice

Some courts consider prejudice "the most important factor" in determining timeliness of a motion to intervene. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir. 1981).

Factors courts consider when looking at prejudice include, whether intervention at a final stage of the action would unnecessarily prolong litigation, whether it would threaten the parties' settlement, whether it would delay implementation of a needed action, whether it would complicate issues or upset a delicate balance, and whether the parties have already expended considerable efforts investigating, negotiating and implementing the settlement. *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (citations omitted).

The district court found substantial prejudice to the parties and affected parents/students would ensue were Appellants allowed to intervene in the action at this time.

Specifically, the district court explained that Appellants were seeking to intervene when LAUSD has already begun efforts to co-locate special education centers with general education campuses to provide for integration, and had undertaken significant efforts and expended substantial resources in furtherance of this initiative to ensure that all necessary supports

and services will be provided for all students in accord with their IEPs. (ER 17, Order, p.15.)

This finding was supported by substantial evidence. (See, e.g., ER 293, 296-298, Howell Decl. at ¶¶ 2-4, 14-21; S-ER 518, Klosterman Decl. ¶ 8; S-ER 512-514, Jarrett Decl. ¶¶ 5-11, 13-15; S-ER 507, Rubenacker Decl. ¶¶ 3-4.)

The district court also found that, if Appellants were allowed to intervene and to grant their requested relief, hundreds of students now being served at comprehensive school sites may be moved back to special education centers. (ER 17, Order, p.15.)

This finding, too, was supported by substantial evidence. (See, e.g., ER 296, Howell Decl. ¶ 14; S-ER 519, Klosterman Decl. ¶ 9.)

The district court further found that intervention would "particularly prejudice the LAUSD by requiring the LAUSD to expend further resources in resetting the status quo," as follows:

> The Parties negotiated Revised Outcome 7 over a year long period. In October 2011, the LAUSD met with the Independent Monitor and Plaintiff's Counsel to discuss the possibility of revising Outcome 7 to address problems the Independent Monitor identified with Outcomes 7A and 7B.
>
> Notably, prior to the October 2011 meeting, the Office of the Independent Monitor had already prepared discussion papers regarding Outcome 7

> and problems the LAUSD faced in meeting the Outcome.
>
> Following that meeting, the Independent Monitor retained Dr. David Rostetter, an expert on LRE, to advise the Parties and the Independent Monitor on solutions to the Outcome 7 problems.
>
> Negotiations over modifications to Outcomes 7A and 7B continued from February 2012, when the LAUSD presented an initial version of the proposed Outcome, to September 2012, when the Parties reached a stipulated agreement endorsed by the Independent Monitor.
>
> The Parties and the Independent Monitor have painstakingly negotiated an agreement. They have conducted considerable research and weighed their options in reaching this agreement.
>
> In short, the Court finds that in negotiating Revised Outcome 7, the Parties' discussions achieved a delicate balance. Furthermore, the Court finds that allowing Movants to intervene at this time would endanger that balance.
>
> * * *
>
> Allowing their intervention would prolong the litigation, threaten the Parties' settlement, and upset the delicate balance reached by the Parties' negotiations. As a result, the Court finds that the Parties would be substantially prejudiced by allowing intervention. Accordingly, the Court finds that this factor weighs heavily against timeliness.
>
> [Citations omitted.]

(ER 17-19, Order pp. 15-17.)

The district court's conclusions were all supported by substantial evidence in the record, including the declarations of and exhibits of Catherine Blakemore, Robert Myers, Deneen Cox and Frederick Weintraub. (S-ER 23, Weintraub Decl. ¶ 13; S-ER 748-749, Blakemore Decl. ¶¶ 23, 25; S-ER 62-72, 94-95, Myers Decl. ¶¶ 18, 20-22, Exs. E-F; S-ER 181, 439-451, Cox Decl. ¶¶ 12-13, 15, Exs. I & J.)

With the guidance of the Monitor, and the oversight of a Consent Decree enforced by Class Counsel, the Parties have expended significant resources over the course of nearly 20 years in achieving essentially historic improvement in the District's delivery of special education services to hundreds of thousands of children.

With respect to the integration of students from special education centers, hundreds of students who were previously served at special education centers are now being served at comprehensive school sites, through the District's efforts to ensure that the necessary services and supports are widely available throughout the District. Undoing the District's progress would require the District to move students back to special education centers, in direct violation of its legal mandate to ensure that students are educated in the LRE. (See S-ER 519, Klosterman Decl., ¶ 9; ER 296, Howell Decl., ¶ 14.)

There is no doubt that, not only LAUSD, but all of the parents who are pleased with the mainstreaming of their children, would be significantly prejudiced by intervention. Moreover, if every child who is dissatisfied with the placement and services provided in his or her IEP (as Appellants apparently are) were permitted to intervene, the courts would be overwhelmed with intervention applications.

Every parent who supports the integration effort will want to retain counsel and intervene to support LAUSD's progress.

Permitting intervention would have introduced unnecessary delays, complications and would upset the balance achieved by the Parties, the IM and the Parents' Council.

It would also have impeded the LAUSD's efforts to comply with the LRE provisions of the IDEA.

The district court did not abuse its discretion in determining that intervention at this stage of the proceedings would be prejudicial.

c. No Excuse For Delay

With respect to the issue of delay, the Court of Appeals has explained that, "[e]ven more damaging...than the...delay itself...is [the] failure to explain... the reason for [the] delay." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

The standard that applies when examining the reason for the delay is whether the intervenor knew or should have known of the circumstances which would give rise to the need to intervene. *United States v. Alisal Water Corp.*, 370 F.3d 915, 923 (9th Cir. 2004); *League of United Latin Am. Citizens,* 131 F.3d at 1304; *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1231-32 (1st Cir. 1992) (potential intervenor must move to protect its interest as soon as it has actual knowledge a "measurable right exists").

Here, even assuming Appellants are being altruistic and not self-serving in their quest to intervene and perpetuate segregated placements, there is absolutely no reason that Appellants could not have intervened at an earlier stage in the life of the Consent Decree.

In concluding that Appellants' delay in intervening was not excusable, the district court made detailed findings regarding the delay, all of which were supported by evidence in the record, as cited by the district court.

Specifically:

1. With respect to the method of revising Outcome 7, Appellants sought to intervene five years after an earlier modification of Outcome 7, and one year after the Parties and IM agreed to Revised Outcome 7;

2. Inclusion of special education students into the general education program had been a primary issue from the beginning of the case;

3. Counsel for Appellants appear to have attempted to intervene in this same case in 2002 by serving, but not filing, a motion to intervene;

4. The Independent Monitor's October 5, 2011 Annual Report concluded that Outcome 7B could not be achieved without the arbitrary transfer of a significant number of students from special education centers to general education campuses; and

5. The Independent Monitor's October 5, 2011 Annual Report also discussed the LAUSD's planned integration of students in certain eligibility categories in attendance at special education centers.

(ER 20-21, Order, pp. 18-19.)

The district court also found that, even assuming arguendo that these past events did not put Appellants on notice, Appellants were certainly placed on notice by the IM's public and televised annual hearing on April 11, 2013. (ER 21, Order, p. 19.)

Substantial evidence supports this finding, including the Cox declaration (S-ER 183, Cox Decl. ¶ 19) and Ammons declaration (S-ER 537-538, Ammons Decl. ¶ 12).

The district court noted that Appellants even appeared to agree with this, explaining that Appellants were conceding that they became aware that their interests may be impaired "at the earliest, May or June, 2013." (ER 21, Order, p. 19; see S-ER, 896, Mina Lee Motion to Intervene, 14:15-16, Dckt. #301; Munoz ER 118-119, p.3-4, Munoz Decl., Dckt. # 287.)

Finally, the district court found that, even if Appellants' delay could be excused until August 5, 2013 because, according to Appellants, they tried but failed to persuade Plaintiff's counsel to agree to oppose Revised Outcome 7, the 2 1/2 month delay that ensued following August 5, 2013, was not excusable either. (ER 22-23, Order, pp. 20-21.)

The district court's conclusion was consistent with the prior district court decisions in Washington (*Key Bank of Puget Sound v. Alaskan Harvester*, 738 F.Supp. 398, 405 (W.D. Wash. 1989)) and D.C. (*Consolidated Edison Co. of New York, Inc. v. Breznay*, 683 F. Supp. 832, 836 (D.D.C. 1987)).

The district court was within its discretion in concluding that Appellants' delay was not excused.

The district court did not abuse its discretion in determining that Appellants' request for intervention was untimely.

2. Appellants' Interest In The Revision To Outcome 7 Is Attenuated And They Will Not Be Negatively Impacted By Denial Of Intervention.

Appellants claim an interest because they contend Outcome 7 will force them out of special education centers.

Appellants are mistaken - the District has never represented that it is taking steps to close all special education centers. (ER 295, Howell Decl., ¶¶ 9-10; S-ER 182, Cox Decl., ¶ 16.)

To the contrary, 15 special education centers remain in operation and continue to be part of the District's continuum of special education services. (ER 295, Howell Decl., ¶ 9.)

The fact that less students are being enrolled at the centers reflects the District's efforts to offer more comprehensive services at its general education sites. (ER 295, Howell Decl., ¶ 11.)

The District continues to address individual student need as the central focus following the IEP process, including with respect to the education of Appellants' children. (S-ER 182, Cox Decl., ¶ 16.)

3. Disposition Of The Action Does Not Impair Or Impede Appellants' Interests In Any Way.

Appellants also have failed to meet the third element of the standard for intervention: that disposition of the action impair or impede Appellants' interests.

There are two discrete reasons why disposition of the action does not impair or impede Appellants' interests. First, under the IDEA and state law, each disabled student receives an IEP designed to meet his/her unique needs. Should a parent believe that his/her child's program is inadequate, or even that the child should not be mainstreamed and should receive services in a segregated environment, the parent has an absolute right to file a due process complaint and have the matter fully adjudicated in a special education due process hearing. (20 USC § 1415; Cal. Ed. Code § 56500 et seq.; ER 297-298, Howell Decl., ¶ 20.)

Here, individual student placement recommendations and decisions are the responsibility of the IEP team, which necessarily includes the parents, teachers and service providers, and are determined at an IEP team meeting. (LAUSD S-ER 01-03, Kauffman Decl., ¶ 5.)

It is respectfully submitted that the courts are not the forum to engage in the fact-intensive analysis necessary to determine the appropriateness of an offer of placement and services with regard to a particular Appellant. To the extent that any Appellant objects to his/her child's services, the proper recourse is to file for a due process hearing, not to intervene in a consent decree.

Second, as noted above, the District has not closed all of the special education centers. If there truly is a need for any student to attend a segregated special education center, the centers exist. And, if necessary and appropriate, the District can make other resources available to provide the student a FAPE.

4. Appellants' Interests Are Adequately Represented.

Because the district court determined that Appellants had not met the first three prongs of the intervention standard, the district court did not reach the fourth prong: whether Appellants' interests are adequately represented.

In Class Counsel's brief for Plaintiff, Class Counsel may address this prong of the test.

However, in addition to any arguments made by Class Counsel regarding the adequacy of Class Counsel's representation, in this case, unlike most others, there is a court-appointed IM who is responsible to the Parties and Court for ensuring compliance with the MCD. This is an extra layer of protection.

In summary, for all of the above reasons, Appellants did not meet the standard for mandatory intervention.

B. The Parties Complied With The Modification Process Set Forth In The MCD.

Appellants argue that the Parties failed to adhere to the MCD when they modified Outcome 7. The MCD expressly provides multiple avenues for the Parties to modify its provisions, including under Paragraphs 85 and 86.

1. The Parties' Modification Of Outcome 7 Is Consistent With Paragraph 85 Of The MCD.

Under Paragraph 85, in the event that the IM is notified of the amendment or repeal of any law or regulation upon which any outcome or obligation is based, the IM should consider the extent to which any outcome or obligation should be modified. If the IM determines that modification is appropriate, the IM should notify the parties.

Nothing in Paragraph 85 requires the Parties to make written findings or to certify the basis upon which modification is based.

Here, the Parties, with the approval of the IM, have modified the MCD multiple times pursuant to Paragraph 85. In fact, both the 2008 and 2012 stipulations provide that the Parties have met and conferred over the impact of laws, regulations and case law on certain outcomes of the MCD. (S-ER 180, 182, 342-371, 492-493, Cox Decl., ¶¶ 9, 15, Exs. D, E & M.)

With regard to the latest revisions in 2012, the Parties and the IM identified, in writing, challenges associated with Outcome 7. The IM thoughtfully considered the challenges and provided the Parties with his research and proposals in the form of "discussion papers." The IM and the Parties met repeatedly and engaged in a collaborative discourse to modify Outcome 7 pursuant to Paragraph 85. The IM determined Outcome 7 should be modified and approved the Parties' proposal. (S-ER 181, 439-451, Cox Decl., ¶ 12, Exs. I & J.) The Parties complied with Paragraph 85.

Appellants have proffered no evidence establishing non-compliance with Paragraph 85.

2. The Parties' Modification Of Outcome 7 Is Consistent With Paragraph 86 Of The MCD.

Although not expressly referenced in the process of revising Outcome 7, Paragraph 86 of the MCD provides that the District may seek to modify a continuing commitment set forth in Section 12 of the MCD by notifying counsel of its desire to modify its continuing commitments and the Parties meeting and conferring to resolve the issue by mutual agreement. (S-ER 864-865, MCD, p. 23, ¶ 86.)

Section 12 of the MCD refers to the District's maintenance of effort commitments to achieve the various Outcomes described in the MCD, as set out in the document entitled "District's Maintenance of Effort Activities

Under IDEA to Implement Modified Consent Decree." This document describes the District's LRE commitments, which is directly related to the goals of Outcome 7. (S-ER 179, 202-209, 247-249, Cox Decl., ¶ 6, Ex. A [pp. 13-20, 58-60].) Accordingly, the revision was essentially a modification allowed under Section 12 of the MCD.

Since the District notified the Parties of its desire to modify its continuing LRE commitments, the Parties then negotiated a mutual agreement to resolve the issue and, although not required, the IM approved the change. The Parties' modification of Outcome 7 also complies with Paragraph 86 of the MCD.

C. Appellants' New Arguments And New Evidence Should Be Rejected.

By way of requests for judicial notice, Appellants seek to enlarge the record to add extensive new evidence not presented to or considered by the district court.

Specifically, both sets of Appellants filed requests for judicial notice on appeal, seeking to introduce numerous new documents that were not presented to the district court.

It is well-established that documents not filed with or considered by the district court are not part of the record on appeal. See, e.g., *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077 (9th Cir. 1988);

Barcamerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 594 (9th Cir. 2002).

Further, an appellant generally may not enlarge the record on appeal to include material that was not presented to the district court. See, e.g., *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003); *Morrison v. Hall*, 261 F.3d 896, 900, fn. 4 (9th Cir. 2001).

The rule prohibiting enlargement of the record is strictly construed. *Daly-Murphy v. Winston*, 837 F2d 348, 351 (9th Cir. 1987).

And the Court of Appeals will generally consider only those matters that were before the trial judge when the appealed judgment or order was entered. See, e.g., *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212, 1218 (9th Cir. 2001).

Were these new documents to be entered into the record, LAUSD would be required to obtain and submit other evidence and argument to explain the documents or refute the arguments being made by Appellants in reliance on the documents.

Appellants' requests to enlarge the record should be rejected.

In their opening briefs, Appellants make several new arguments not made in the district court.

Specifically, with respect to the Mina Lee appellate brief, the arguments contained at page 9 (fn. 1) regarding Career Technical Centers, pages 16 and 26 regarding the determination of meaningful benefit on general education campuses, pages 23-24 regarding changes in circumstances, pages 25-26 regarding the complexity of different eligibility categories, and pages 32-33 regarding due process proceedings were not made before the district court. (S-ER 73-88, 880-950, Mina Lee Motion and Reply (Dckt. # 301 & 332).)

With respect to the Munoz (V.P/A.F.) appellate brief, the arguments made at page 6 regarding the Parents' Council, pages 6-7 and 28-35 regarding the 2013-2014 Independent Monitors Report and events subsequent to the district court proceedings, pages 24-27 regarding the basis and development of Revised Outcome 7, page 37-38 regarding the distinctions between Revised Outcome 7 and Outcome 7 as approved in 2003, pages 42-43 regarding prejudice to the parties, page 54 regarding Revised Outcome 7's purported limiting effects on due process hearing outcomes, and page 56 regarding Article III's case or controversy requirement were also not made in the district court. (Munoz ER 75-117, S-ER, 1-18, V.P./A.F. Motion and Reply (Dckt. # 286, 346).)

Appellants may generally not present new arguments on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Appellants' new arguments and new evidence should not be considered on appeal.

VII. CONCLUSION

For all of the above reasons, the district court correctly concluded that Appellants did not meet the standard for compulsory intervention.

It is respectfully submitted that the district court's order should be affirmed.

Dated: April 1, 2015

Respectfully submitted,

/s/Barrett Green
Barrett K. Green
LITTLER MENDELSON PC
Attorneys for Appellee
LAUSD

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, the undersigned certifies that the type in this brief has a proportionately spaced, 14-point face and that the brief contains 9424 words.

Dated: April 1, 2015

Respectfully submitted,

/s/Barrett Green
Barrett K. Green
LITTLER MENDELSON PC
Attorneys for Appellee
LAUSD

STATEMENT OF RELATED CASES

Appellee is not aware of any related cases pending before the Court.

Dated: April 1, 2015

Respectfully submitted,

/s/Barrett Green
Barrett K. Green
LITTLER MENDELSON PC
Attorneys for Appellee
LAUSD

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015, 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.

/s/ Barrett K. Green

Firmwide:132505702.17 040530.1058