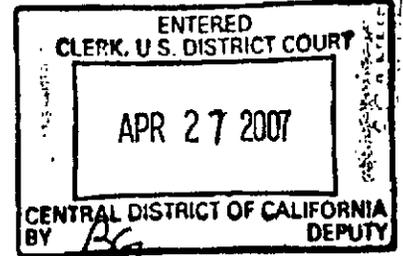


UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL



Dated: April 18, 2007

Case No. **CV 05-2747-VBF(CTx)**

Title: J.P., by and through his Guardian Ad Litem David [REDACTED] -v- Pomona Unified School District, a Local Education Agency

**PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE**

Rita Sanchez  
Courtroom Deputy

None Present  
Court Reporter

**ATTORNEYS PRESENT FOR PLAINTIFFS:**

**ATTORNEYS PRESENT FOR DEFENDANTS:**

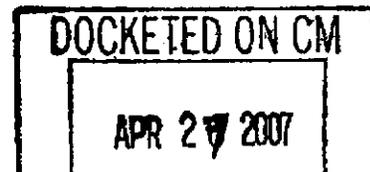
None Present

None Present

**PROCEEDINGS (IN CHAMBERS): RULING ON SUBMITTED MATTER AFTER TRIAL**

After further review of the Court's record, including the Plaintiff's Opening Brief, Defendant's Opposing Brief, the Plaintiff's Reply Brief and the administrative record, and after further consideration of counsel's oral arguments at the hearing on March 27, 2006, this Court finds in favor of the Plaintiff on each claim set forth in the Plaintiff's Second Amended Complaint, with the exception of the first claim "for order for stay-put at Oralingua." As set forth in this Ruling, the Court rejects Plaintiff's contention that the Defendant Pomona Unified School District (PUSD) violated the "stay put" statutory provisions.

The Court will grant the Plaintiff the monetary damages which were requested in his counsel's argument at the hearing. The monetary damages consist of the amounts which the Plaintiff's parents paid to have their child attend the Oralingua school. (See reporter's notes of the hearing).



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*[Handwritten number 92]*

As to the specific amount of the monetary damages and the issue of attorneys fees and costs, the Court sets a hearing on May 29, 2007 at 3:00 pm. Written evidence in support of the monetary damages shall be filed and served by May 14, 2007. If the Plaintiff seeks attorneys fees and costs, Plaintiff shall also file and serve a Motion by May 14, 2007 with supporting legal authority and evidence to document the amount of attorneys fees and costs sought. Any opposition papers shall be filed and served by the Defendant no later than May 21, 2007. Conformed courtesy copies of all filings shall be promptly delivered outside the Judge's chambers.

As set forth below, this Court rules on the evidentiary issues as follows: (1) the Court grants the Plaintiff's request to supplement the record with the declaration of David [REDACTED]; and (2) the Court sustains the objections to and strikes paragraphs 3 through 7 of the declaration of Trena Spurlock.

For reasons set forth herein, this Ruling in favor of the Plaintiff is based on the following findings:

1. As the Plaintiff asserts, a special education teacher of the Plaintiff was required to be present at the Individualized Education Program (IEP) meeting.
2. The failure to include a current teacher was not "harmless error." The Pomona Unified School District (PUSD) proposed a substantial change in Plaintiff's placement, despite having neither current information, nor input from the Plaintiff's teacher.
3. Using the appropriate standard of review of the Administrative Law Judge's (ALJ's) determinations and giving due deference and weight to the ALJ's findings, the Court finds that the ALJ's findings and determinations were not thorough, careful and reasoned. ALJ Clark's findings proceed from the premise that the January 2005 Pomona IEP was similar to the May 2004 Rialto IEP that was approved by a prior administrative officer. This is an incorrect premise, however, which undermines his conclusion. Moreover, ALJ Clark failed to make factual findings on critical issues.
4. In light of the foregoing, the PUSD's offer did not constitute "free and appropriate education" (FAPE) to the Plaintiff, a qualifying child.
5. Under the circumstances presented in the papers and at the hearing, the Plaintiff proved that the appropriate relief is reimbursement for Oralingua expenditures.

Contrary to the Defendant's arguments, the parents' decision to keep J.P. at Oralingua does not bar recovery.

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### Background

Congress enacted the Individuals with Disabilities Education Act, or IDEA, "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). Under the IDEA, the federal government provides funds to states that provide specialized educational services to disabled children. *Id.* States receiving funds are to provide a "Free [and] Appropriate Public Education", or FAPE, to qualifying children. 20 U.S.C. § 1412(a)(1)(A) (2004). For an educational offer to constitute FAPE, it must be "reasonably calculated" to allow the child to receive educational benefits. *See Park v. Anaheim Union High School Dist.*, 464 F.3d 1025 (9th Cir. 2006).

School districts are to implement the duty to provide FAPE through the development of an Individualized Educational Program, or "IEP". The IEP is developed, typically annually, at a meeting of the "IEP team". *See* 20 U.S.C. §1414(d) (2004). At the IEP meeting, the IEP team is to assess the student's needs and progress, to determine goals, and to decide appropriate educational placement and related services. *See* 20 U.S.C. § 1414 (2004).

The IEP and the IEP meeting have been called the centerpiece of the child's educational program and the statute. *See Schaffer v. Weast*, 546 U.S. 49 (2005). As the IEP forms the blueprint for the child's education, "The IEP is more than a mere exercise in public relations. It forms the basis for the [disabled] child's entitlement to an individualized and appropriate education." *Doe v. Ala. State Dep't Educ.*, 915 F.2d 651, 654 (11th Cir. 1990). Moreover, given the importance of the IEP, it is subject to detailed federal statutes and regulations, regarding, *inter alia*, what persons are to be present at the IEP meeting and the content of an IEP. 20 U.S.C. § 1414 (2005).

### J.P.'s Educational Placements

The Plaintiff, J.P., is a nine year-old boy who qualifies for special educational services under the IDEA. J.P. has severe hearing loss. He has a cochlear implant, a device which allows him to hear, albeit at a loss of approximately 20 to 30 decibels. The device contains a portion that is surgically implanted and an external portion. (*See* Decision of Officer My T. Huynh, Special Education Hearing Office Case No. SN 04-1820, p.5 at fn. 7 (hereinafter "Huynh Decision")). The device was implanted in February 2002 and activated in March 2002. J.P. has a listening age of

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approximately 4 years. Listening age is determined from the date that a child has consistent access to hearing and speech. Thus, J.P.'s skills in understanding sound, speech, and related skills lag behind other children of his age.

J.P. is an intelligent child, with an IQ of 121. (See Decision of Administrative Law Judge Richard M. Clark, OAH Case No. N2005070523, January 3, 2006, p.3 at ¶1 (hereinafter "Clark Decision")).

1. *Rialto Unified School District Placements*

J.P. lived within the boundaries of the Rialto Unified School District (hereinafter "Rialto") until December 2004. Rialto funded J.P.'s attendance at a private school for hearing impaired children, the Oralingua School. The Oralingua School specializes in teaching students with hearing impairments, including students with cochlear implants. (Clarke Decision, p. 3, ¶1; Decl. of D. Padilla).

In May 2002, Rialto sought to transition J.P. from Oralingua into a public school. Rialto proposed continued placement at Oralingua through August 31, 2002. Beginning in September 2002, Rialto proposed to place J.P. in a district-run class for students with cochlear implants. J.P.'s parents opposed this placement. They filed for a due process hearing. (Case Number SN-02-01221). The matter remained off-calendar for approximately two years, as the parties attempted to resolve their dispute through mediation and settlement negotiations. (See Huynh Decision, p.5 at fn.8).

Rialto renewed its attempt to transfer J.P. to the district-run cochlear implant class in May 2004. Rialto made a revised placement offer in a May 21, 2004 IEP. In this revised IEP, Rialto again proposed placing J.P. in the district-run cochlear implant class, providing speech and language therapy, and providing audiology services. (See Huynh Decision, p.6).

In summer 2004, the Special Education Hearing Office ("SEHO") issued an Order to Show Cause why the previous due process matter, i.e. Case Number SN-02-01221, should not be dismissed for lack of prosecution.<sup>1</sup> The SEHO dismissed the action and J.P. filed a new action alleging substantially the same claims regarding the May 21, 2004 IEP. (Case No. SN 04-1820; see

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<sup>1</sup>In 2005, special education dispute resolution in California was transitioned from the SEHO to the Office of Administrative Hearings, or OAH.

Huynh Decision, p.5 at fn.8).

The SEHO, in a decision by Officer My T. Huynh, found that the May 21, 2004 IEP offered a FAPE, with the exception that Rialto was required to provide Audio Visual Therapy ("AVT") to compensate for the loss of those services when J.P. would transfer out of Oralingua. J.P.'s parents sought review of this decision in the U.S. District Court.

J.P.'s father represents that the case against Rialto was settled and that Rialto agreed to continue funding placement at Oralingua. There is no document, however, such as a settlement agreement or IEP, memorializing the agreement. (Declaration of D. [REDACTED]; Plaintiff's Opening Brief, 2:14-19.)

## 2. *Relocation to Pomona*

In December 2004, J.P.'s family relocated to Pomona, California, within the Pomona Unified School District ("PUSD"). The Pomona District is located in a different Special Education Local Plan Area ("SELPA") than Rialto.

J.P.'s father sought to enroll J.P. in PUSD. He presented a copy of the 2001 IEP (placing J.P. at Oralingua) at a PUSD elementary school on December 13, 2005. The elementary school called district officials. PUSD scheduled an "interim" IEP meeting for the next day, December 14, 2005. Prior to this interim IEP meeting, a PUSD representative researched J.P.'s background and located the October 2004 administrative decision in which the SEHO (Officer Huynh) found that placement in Rialto's cochlear implant class, with the addition of AVT, would constitute FAPE.

The Plaintiff states that Mr. [REDACTED] presented the most "current" IEP because it reflected J.P.'s placement at Oralingua.<sup>2</sup> The Defendant characterizes the presentation of the 2001 IEP as misleading. They state that the "then-current" IEP was the May 2004 IEP offering placement in Rialto's class for students with cochlear implants.

In any event, at the December 2004 meeting, PUSD offered J.P. placement in a class run by the Pomona District at Diamond Point Elementary. The class was a day class for communicatively-handicapped students (a "CH class"). This was to be 30-day interim placement, to be reassessed at

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<sup>2</sup>In other words, Plaintiff argues that because Rialto agreed to continue funding placement at Oralingua, the most accurate IEP was the 2001 Oralingua placement.

a subsequent IEP meeting. None of J.P.'s teachers from Oralingua were invited to attend, and none of J.P.'s teachers were present.

J.P.'s parents refused PUSD's offer of placement at Diamond Point Elementary and requested that J.P. be permitted to stay at Oralingua. PUSD refused this request. PUSD officials agreed, however, to observe J.P. at Oralingua, and J.P.'s parents agreed to observe the Diamond Point CH class. Both parties subsequently visited the respective classes as agreed.<sup>3</sup>

A second IEP meeting was held on January 20, 2005. The purpose of this meeting was to conduct a review of the 30-day placement and to develop a new IEP. Again, none of J.P.'s teachers from Oralingua were asked to attend the meeting and none were present. The IEP team discussed J.P.'s placement and IEP goals. They discussed their respective classroom observations. PUSD again offered placement at its Diamond Point Elementary class and AVT sessions. This meeting was recorded, and later transcribed.

J.P.'s parents refused PUSD's offer, expressing several concerns about the Diamond Point class. J.P.'s parents raised the following issues:

- J.P. would be the only student in the Diamond Point class with a cochlear implant (all the other students had hearing aids).
- The class had a large age range of students, from six- to twelve-years old, or from first- through sixth-grade levels.
- There were potential safety hazards unique to J.P. and his cochlear implant, including the presence of static-creating carpet and plastic furniture.
- There was no audiologist on staff, nor spare parts for a cochlear implant, to assist J.P. should his cochlear implant malfunction or become damaged.
- The teacher and aides lacked experience with cochlear implant students.
- The proposed audio-verbal therapist was inappropriate, as she possessed a heavy accent and had never worked with a cochlear implant student.
- The teacher did not utilize a "sound field" system, even though one was

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<sup>3</sup>Although the District disputed the quality of education at Oralingua on the basis of this visit, the District has now abandoned that argument and now concedes that Oralingua was an appropriate placement for J.P. (See Reporter's Notes of Hearing and Defendant's Opposition Brief).

installed.

There was a noisy air conditioning unit in the Diamond Point classroom.

J.P.'s parents filed the present action in February 2004. (See Complaint, ¶ 19).

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### Issues

#### 1. *Stay Put*

The parties dispute whether PUSD's offer violated "stay put." PUSD submits that it was required to implement an educational program consistent with the current IEP, and that the current IEP was the May 2004 IEP offering placement in Rialto's district-run cochlear implant class. Defendant argues that it was not required to offer an identical placement, only an interim placement *consistent* with J.P.'s IEP. Plaintiff argues that this interim placement offer was improper, because the current IEP was the 2001 placement at Oralingua, and J.P. was entitled to "stay put" placement at Oralingua.

#### 2. *The IEP Meetings*

The Plaintiff contends that the IEP meetings were not proper because there was no teacher from Oralingua present, and the IEP was otherwise improper because the persons present had no actual knowledge of J.P. and therefore could not assess his needs. The Defendant responds that only a "special education teacher" needed to be present, not necessarily J.P.'s current teacher.

#### 3. *Substantive Appropriateness of PUSD's Offer and Harmless Error*

Plaintiff argues that PUSD's offer was not FAPE. Defendant submits that the offer was FAPE, and that, if this Court finds a procedural violation, any error was harmless.

### Motions Regarding Evidentiary Matters

#### 1. *Background*

Plaintiff has brought a Motion to Supplement the Record with a Declaration of David [REDACTED]. (Plaintiff's Motion to Supplement the Record, filed 01/29/2007). The grounds for Plaintiff's motion are that the transcript of the administrative hearing omits of the bulk of Mr. [REDACTED]'s testimony. (See *Id.*, p.1:23-27; see also Declaration of Tania L. Whiteleather, filed concurrently with Plaintiff's Motion to Supplement the Record, p.2:11-28). Plaintiff argues that the [REDACTED]

declaration is necessary because it describes the settlement of the due process action between Rialto and the [REDACTED]. Defendant opposes this request, submitting a declaration from Ms. Trena Spurlock. Ms. Spurlock states that she did not recall Mr. [REDACTED] testifying regarding the [REDACTED] Rialto settlement. (Defendant's Opposition to Motion to Supplement the Record, Filed 02/13/2007; Declaration of Trena Spurlock, filed concurrently with Defendant's Opposition to Motion to Supplement the Record).

The Defendant has also sought to supplement the record with another Declaration of Trena Spurlock, which was submitted with their Opposition Brief. The Plaintiff has brought a Motion to Strike this declaration, on the basis that Defendant has failed to bring a proper motion to supplement the record and that the evidence is irrelevant.

## 2. Analysis

While a *trial de novo* is to be avoided, a district court may supplement the record in an IDEA case. The IDEA states:

In any action brought under this paragraph, the court--

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(B) (2004).

Also, in *Ojai Unified School District v. Jackson*, 4 F.3d 1467 (9th Cir. 1993), the Ninth Circuit stated that, under this provision of the IDEA, while a district court may supplement an administrative record: [T]his clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony... ". *Id.* at 1473. The court continues to explain that supplementation of the record may be proper in certain circumstances, "The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure...and evidence concerning relevant events occurring subsequent to the administrative hearing..." *Id.*

### A. [REDACTED] Declaration

Plaintiff has shown good cause to supplement the record with the declaration of David

[REDACTED] A review of the transcript of the hearing demonstrates that it is clearly incomplete. As

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indicated in *Ojai*, it is proper to supplement the record where, as here, there are gaps in the transcript. *Id* at 1472-73.

At hearing, Defendant narrowed its argument to a request that, should the [REDACTED] declaration be considered, the Spurlock declaration also be admitted to rebut his testimony. The Court will consider the Spurlock declaration submitted with Defendant's Opposition to Motion to Supplement the Record and those portions of the Spurlock Declaration submitted with Defendant's Opposition Brief that relate to Mr. [REDACTED]'s declaration.

B. Spurlock Declaration (Submitted with Defendant's Opposition Brief)

Plaintiff submits that portions of the Spurlock Declaration (submitted with Defendant's Opposition Brief), which exceed the scope of the [REDACTED] declaration, should be stricken. The [REDACTED] declaration concerns J.P.'s "stay put" placement at Oralingua during due process proceedings. The Spurlock declaration goes beyond this issue and offers testimony regarding J.P.'s current educational placement. According to the Defendant, J.P.'s current placement and progress is relevant to show that the District's 2005 placement offer was proper. (See Defendant's Opposition to Plaintiff's Motion to Strike, filed 03/16/07, p.2:14-17).

The paragraphs of the Spurlock declaration concerning J.P.'s current placement are of little relevance and their admission would substantially change the scope of this Court's review. First, the evidence offered in the Spurlock declaration in this regard is sketchy and conclusory at best. Ms Spurlock is not currently, nor has she ever been, a teacher of J.P. Thus, she is not in the best position to assess J.P.'s current progress. Second, the fact that J.P. may now be placed in a District-run class does not indicate any basis for his parents agreement to it. At hearing, counsel for the Plaintiff represented that the reason for this changed placement was financial, and did not constitute an agreement on the part of J.P.'s family that the placement was appropriate. (See Reporter's Notes of Hearing).

Most importantly, however, the viewpoint of this Court should be the viewpoint of the time of the IEP. Defendant posits that the Court may consider events after the IEP and administrative hearing. In support of this argument, they cite to *Krista P. v. Manhattan School District*, 255 F. Supp. 2d 873 (N.D. Ill. 2003). (See also Defendant's Opposing Brief, p. 6 at fn 10). *Krista P.*, however, is of limited help to the Defendant. There, the district court there admitted some limited evidence, such as test scores after the hearing officer's decision, but denied admission to most other supplementary evidence.

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Defendant also cites to *Konkel v. Elmbrook School Dist.*, 348 F.Supp.2d 1018, 1021 (E.D.Wis. 2004). *Konkel* stated that:

[T]he administrative record should be the main source of evidence with limited supplementation..there are important policy reasons why, in the absence of persuasive justification, courts should not receive additional evidence at the judicial review stage... First, taking additional evidence delays the resolution of the dispute and undercuts IDEA's goal of finality... Second, a relaxed approach to admitting additional evidence undercuts one of the purposes of the due process hearing-developing a complete factual record.

*Id.* at 1021-22 (citations omitted); see also *Springer by Springer v. Fairfax County School Board*, 134 F.3d 659, 667 (4th Cir.1998); *Town of Burlington v. Department of Educ. for Com. of Mass.*, 763 F.2d 773 (1st Cir. 1984). *Konkel* is not helpful to Defendant, as it recognizes that there must be a good justification for inclusion of additional evidence. While there is good justification to admit the declaration of Mr. [REDACTED] i.e. an obvious error in the transcript, there is not a good justification to admit the testimony of Trena Spurlock regarding J.P.'s current progress.

If Defendant's argument were accepted, moreover, this Court's review would quickly turn into a trial *trial de novo*. The *Ojai* court warned: "The determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*..." 4 F.3d at 1473; citing *Town of Burlington*, 736 F.2d at 790-91. That is, were this Court to expand its review to J.P.'s progress in his current placement, this Court would be required to hear substantial additional evidence.

This evidence would be, in any event, irrelevant to the issues here regarding whether the IEP meeting was procedurally appropriate and whether PUSD's offer, as of January 2005, was FAPE. The Court must focus on the offer that was presented to J.P.'s parents at that time.

Accordingly, this Court will strike the following paragraphs of the Declaration of Trena Spurlock (submitted with Defendant's Opposing Brief): ¶¶ 3; 4; 5; 6; 7.

**Stay Put**

Plaintiff argues that PUSD failed to comply with the "stay put" requirements of state and federal law, because J.P. was entitled to stay at Oralingua during the appeal of the January 2005 IEP placement. Defendant argues that it complied with the "stay put" requirement because, as a

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new school district, it was required only to implement a program consistent with, not identical to, the student's prior placement.

20 U.S.C. § 1415(j) (effective July 1998 through June 2005) states:

(j) Maintenance of current educational placement

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1414(d) (2004) states:

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency *shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.*

(emphasis added).

The Defendant appears correct. The Defendant was not required to provide the same placement as the Rialto, only a program comparable to the prior program.

In *Ms. S. ex rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1133 (9th Cir. 2003) (overruled on other grounds) the Ninth Circuit explained that, where a student transfers districts, maintenance of the status quo does not require an identical placement:

to keep a student in the then current educational placement, a district typically has the obligation to provide the placement described in the child's most recently implemented IEP. This obligation, however, is not absolute. We have held that when a student falls under the responsibility of a different educational agency... the new agency need not provide a

placement identical to that provided by the old agency. Although the stay-put provision is meant to preserve the status quo, we recognize that when a student transfers educational jurisdictions, the status quo no longer exists.

(citations omitted).

Here, after J.P. transferred districts, no "status quo" existed. Plaintiff argues that it would have been *possible* to maintain J.P. at Oralingua given that school's geographic proximity to Pomona. The geographic proximity of Oralingua is not relevant, however, where PUSD had only an obligation to implement a *comparable* educational program. The statutes recognize that the initial placement is temporary, as a new IEP is to be held within 30 days.

This conclusion is also consistent with the provisions of the California Education Code, which state:

In the case of an individual with exceptional needs who has an individualized education program and transfers into a district from a district not operating programs under the same local plan in which he or she was last enrolled in a special education program within the same academic year, *the local educational agency shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved individualized education program*, in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved individualized education program or shall develop, adopt, and implement a new individualized education program that is consistent with federal and state law.

Cal.Educ.Code § 56325 (emphasis added) (2004).

PUSD did not violate the "stay put" provisions of California or Federal law because it was not required to adopt an identical educational placement. Instead, it was required to adopt a program consistent with the previous "approved" or "held" IEP. Cal.Educ.Code § 56325; 20 U.S.C. § 1414(d). The May 2004 IEP had been found to be FAPE (with the addition of AVT). The PUSD was entitled to rely on that IEP. Moreover, as this was merely an interim placement subject to reevaluation within 30 days, a District cannot practicably be held to the same requirements as a fully-implemented IEP.

Although the interim placement was comparable to the previous IEP, that finding is not determinative of whether the final placement offer was FAPE.

## The Presence of a Teacher at IEP Meetings

Plaintiff argues that the IEPs were improper because no current teacher was included. Instead, the teachers that were present had never met J.P., had never worked with him, and had never assessed him. The teachers and persons present at the IEP (save J.P.'s parents and advocate), relied entirely on assessments and documents in developing the IEP. Plaintiff argues that the failure to include a current teacher of J.P.'s was prevented the IEP team from developing a proper IEP. Plaintiff cites to *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1076 (9th Cir. 2003), which stated that "a school district's failure to include a representative from a private school that a child is currently attending violates the procedural mandates of the IDEA...".

The Defendant replies that they were not required to include J.P.'s current teacher, only a special education teacher at the IEP team meeting. PUSD argues that *Shapiro* is irrelevant because it was decided under the pre-1997 version of the IDEA.

Defendant also argues that no current teacher was present because J.P.'s parents refused the interim placement at Diamond Point. Under Defendant's argument, had J.P.'s parents accepted the interim placement at Diamond Point, the teacher present at the January 2005 IEP meeting *would have been* a current special education teacher.

ALJ Clark determined that a current special education teacher need not be present. ALJ Clark stated:

When a student transfers into a new district in the same state, but different local plans, during the same academic year, the new district is required to provide an interim IEP placement not to exceed 30-days. Prior to the 30-days expiring, the new district must hold an IEP meeting to make a final recommendation regarding placement and services. At the end of the 30-day IEP meeting, a special education teacher of the student must be included in the IEP meeting. It is reasonable to assume that the special education teacher required to be present is a teacher from the new district who has gained knowledge of the student during the 30-day interim placement. Here, the parents declined the 30-day interim placement, which prevented PUSD from having a special education teacher in a position to have knowledge of Jacob and attend the IEP. There is no authority that required a district to include a member of the old IEP team or a current teacher of the special education student particularly when those teachers are not part of the same local plan or district.

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(ALJ Clark Decision, ¶ 18). As is evident from the language cited, ALJ Clark considered the interim placement critical here.

As this is a purely legal determination, this conclusion is not entitled to deference. For the reasons discussed below, ALJ Clark's conclusion is not supported by the language of the California Education Code and Federal Regulations.

1. *Statutory Language*

The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;***
- (iv) a representative of the local educational agency who--
  - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (II) is knowledgeable about the general education curriculum; and
  - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);***
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

20 U.S.C. §1414(d) (2004) (emphasis added).

The federal regulations regarding the IEP team were amended effective October 12, 2006. Although the Plaintiff cites to 34 C.F.R. § 300.321, "IEP Team," the prior version, 34 C.F.R. § 300.344, effective up until October 12, 2006, would govern:

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(a) General. The public agency shall ensure that the IEP team for each child with a disability includes--

- (1) The parents of the child;
- (2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) *At least one special education teacher of the child, or if appropriate, at least one special education provider of the child;*
- (4) A representative of the public agency who--
  - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (ii) Is knowledgeable about the general curriculum; and
  - (iii) Is knowledgeable about the availability of resources of the public agency;
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) If appropriate, the child.

(emphasis added).

The California Education Code, Section 56341, states:

(a) Each meeting to develop, review, or revise the individualized education program of an individual with exceptional needs shall be conducted by an individualized education program team.

(b) The individualized education program team shall include all of the following:

- (1) One or both of the pupil's parents...
- (2) At least one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment....
- (3) *At least one special education teacher of the pupil, or if appropriate, at least one special education provider of the pupil.*

...

Cal.Educ.Code § 56341 (2005) (emphasis added).

The federal statute seems to require only the presence of a special education teacher, and not the current special education teacher, of the child: "*not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child*". The phrase "of the child" would appear to modify only "special education provider" and not "special education teacher." This is somewhat ambiguous, however, when viewed in light of the purpose of this section and surrounding provisions.

The statute requires that, if a special education provider is going to be present, it must be a special education provider with current knowledge of the child. With regard to the presence of a regular education teacher, the statute states, "At least one regular education teacher *of the child*" shall be present. Given that the *present* special education provider and *present* regular education teacher of the child are required to be present, it does not make sense that *any* special education teacher could be present. The statute clearly expresses a preference that individuals with actual knowledge of the child be present at the IEP meeting. *M.L. v. Federal Way School Dist.*, 341 F.3d 1052, 1065 (9th Cir. 2003) ("The requirement that one with knowledge of the child be included on the IEP team is aimed at enabling meaningful parent involvement in the IEP development process.").

The federal regulations and California Education Code contain no ambiguity and require the presence of a child's current teacher. The federal implementing regulations require that a current teacher of the child should be present at the IEP meeting, as they state that "At least one special education teacher of the child" should be present. California law also unambiguously requires that a special education teacher "of the pupil" be present.

In conclusion, the language of the regulations and California law is not inconsistent with the language of the IDEA. Instead, the IDEA implies only a floor that a special education teacher need be present, and does not exclude the additional protection of California law. State standards that impose a greater duty to educate handicapped children, if they are not inconsistent with federal standards, are enforceable in federal court under IDEA. See *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994); *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1483 (9th Cir. 1992). The IEP as conducted in January 2005 thus violated the requirements of California law, at a minimum, and most likely federal law as well.

## 2. Case Law

In addition to the statutory language, Plaintiff cites to the *Shapiro* case to support the contention that a current teacher of the child must be present at the IEP meeting. *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1076 (9th Cir. 2003). Although this issue can be decided as a matter of statutory interpretation, the parties have disagreed about the continuing relevance of this case after changes in the language of the IDEA. Specifically, Defendant posits that the case of *M.L. v. Federal Way School District*, 341 F.3d 1052, demonstrates that *Shapiro* lacks relevance here.

In *Shapiro*, the Ninth Circuit found that a school district's failure to include a child's current teacher in the IEP meeting violated the IDEA. There, the child was hearing impaired and had a cochlear implant. She had attended a private, out-of-state school for free as part of a study on children with cochlear implants. At the end of the study, her parents sought funding for the placement from the local school district. The district, however, sought to place the child in a new class for students with hearing impairments. The district convened an IEP without the child's parents present and without a current teacher. Instead, the district relied on information gathered in prior meetings with the child's parents. The Ninth Circuit found procedural error, stating: "We have held that a school district's failure to include a representative from a private school that a child is currently attending violates the procedural mandates of the IDEA... IDEA requires the persons most knowledgeable about the child to attend the IEP meeting." *Id.* at 1077 (citing *W.G.*, 960 F.2d at 1484 (holding that the formation of the child's IEP was procedurally flawed because the district "was required to ensure participation by the private school [in which the child was enrolled] in the formulation of the IEP"))).

The statutory language relevant in *Shapiro* - i.e. prior to the enactment of the 1997 IDEA amendments - stated:

(20) The term 'individualized education program' means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, *the teacher*, the parents or guardian of such child, and, whenever appropriate, such child..."

20 U.S.C. § 1401 (1997).<sup>4</sup> This language is found in the "Definitions" section of the predecessor statute.

While the language of the IDEA has changed since *Shapiro* was decided, the legislative history of Section 1414 does not indicate an intent to abrogate the requirement that a current special education teacher be present. The House Report states that the purpose of Section 1414 is, in large part, to consolidate dispersed statutory sections regarding the IEP into one consolidated provision: "Most of these provisions are current law, as it is expressed in statute, regulations, and other regulatory guidance and policies from the U.S. Department of Education. The Committee anticipates that the consolidation of these provisions in one section, and the clarification of procedural and administrative requirements associated with them, will reduce the burdens imposed by the interpretations of current law and make the requirements more understandable." H.R. REP. 105-95 at 97 (1997). The Senate report is in accord. S. REP. 105-17 at 2 (1997); *Id.* at 17-18 ("The committee also makes it easier to understand and use IDEA by simplifying its structure and the organization of provisions...groups evaluation and reevaluation, individualized education program, and placement provisions in section 614...").

The primary substantive change to the IEP team affected by the 1997 IDEA amendments concerned the requirement of the presence of a *regular* education teacher. (See H.R. REP. 105-95 at p.102-03 ("Very often, regular education teachers play a central role in the education of children with disabilities. In that regard the bill provides that a regular education teacher participate on the IEP Team..."); S. REP. 105-17 at 23).

The decision in *M.L. v. Federal Way School District*, 341 F.3d 1052 does not require a different result. (Cf. Defendant's Opposing Brief). In *M.L.*, the child was in a special education environment and did not have a current regular education teacher. The statute required the participation of a regular education teacher if a child "may be" participating in a regular education classroom. Thus, the issue in *M.L.* was not whether a special education teacher was required to be present, but whether a general education teacher was required to be present. As noted above, the primary purpose of the 1997 amendments, which created Section 1414, was to collect all provisions regarding the IEP into one section and to require the presence of a general education teacher.

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<sup>4</sup>ALJ Clark determined that *Shapiro* was inapplicable because "the viability of *Shapiro's* holding is questionable in light of the interim placement language now found in the IDEA and the interim placement statute in California." (Clark

Decision, ¶ 19).

Congress did not express a similar intent to modify the requirement of the attendance of a special education teacher.<sup>5</sup>

3. *Effect of Interim Placement Statutes*

Defendant has argued that the interim IEP statutes require a finding that no current teacher needed to be present at the January 2005 IEP meeting. Instead, Defendant posits, had J.P.'s parents accepted the interim placement at the Diamond Point class, a current teacher would have been present at the January 2005 IEP. Thus, on Defendant's argument, the parents' failure to accept the interim placement relieves PUSD from its statutory obligation to have a current teacher present. As noted above, ALJ Clark accepted this argument, finding that, if the parents had accepted the interim placement, a present teacher *would have* been present at the IEP.

This argument is problematic. It shifts the onus to J.P.'s parents, where federal and state law make a District is responsible for holding an appropriate IEP meeting. It is not the parents' burden to guarantee that a proper IEP team meeting is convened with the correct participants.

Defendant's argument, moreover, would inappropriately burden the rights of a parent to refuse a placement. There is no law supporting the contention that a parent forfeits his or her right to a procedurally proper IEP meeting by refusing an interim placement. To the contrary, the law states that a parent may seek reimbursement for the cost of private educational services if the state fails to offer a FAPE. *Union School District*, 15 F.3d at 1524, stated: "If a parent believes that a school district has failed to offer a free appropriate public education, parents may place an eligible child in an appropriate private program." *See also W.G.*, 960 F.2d at 1485 ("Parents have an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education]."); *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 369 (1985).

Nor does state and federal law exempt IEP meetings from compliance where a student has transferred districts. If the drafters of the IDEA and California Education Code wished to exempt IEP meeting conducted after an interim IEP from procedural requirements, they could have done so. Indeed, the IDEA and California Education Code exempt the interim IEP meeting from compliance with many of the requirements of an annual IEP meeting. An IEP conducted after an

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<sup>5</sup>Finally, it should be noted that the opinion cited by Defendant was withdrawn. *M.L. v. Federal Way School. Dist.*, 351 F.3d 957 (9th Cir. 2003); *M.L. v. Federal Way School Dist.*, 394 F.3d 634 (9th Cir. 2005).

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interim IEP is subject to the same procedural requirements as other IEP meetings. While often this may be a teacher who has gained knowledge of a student during an interim placement, this is not necessarily the case.

**"Take it or Leave it Offer"**

Plaintiff argues that Oralingua was not actually considered by the District. Instead, J.P. was offered only the Diamond Point placement and Oralingua was not actually considered. As such, they argue that this case is similar to *W.G.*, 960 F.2d 1479, which held that an IEP must be a discussion, and that a district cannot take a "take it or leave it" position.

This is a concern. Reviewing the transcript of the January 2005 IEP demonstrates that the Defendant denied the parents meaningful participation in the educational decisions being made. It is apparent that a placement at Oralingua was not actually considered, and the meeting seemed directed at gaining the parents' agreement to the Diamond Point class. (See Spurlock Testimony, 10/11/05, p. 38-12-39-6; 43:8-22; Russell Testimony, 10/12/05, p. 94:10-15). As such, PUSD did not comply with its duty to consider a continuum of educational placements.

**Harmless Error Analysis**

1. *Harmless Error Analysis Required*

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court stated that a state must comply both procedurally and substantively with the IDEA. *Id.* at 206-07. "A court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* (footnotes omitted).

Procedural violations of the IDEA are treated seriously, especially those relating to participation of the correct individuals in the development of an IEP. The Supreme Court continued in *Rowley* to state:

[i]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the

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IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

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*Rowley*, 458 U.S. at 205-06.

The Ninth Circuit requires a harmless error analysis, but has found that certain procedural violations are substantial and likely to result in the denial of FAPE in and of themselves. When a school district fails to develop an IEP in the manner specified in the statute, "the purposes of the Act are not served, and the district may have failed to provide a FAPE." *W.G.*, 960 F.2d at 1485. "The Act's procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision making." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1041 (5th Cir.1989); quoting *Jackson v. Sch. Bd.*, 806 F.2d 623, 630 (5th Cir.1986).

For example, in *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 877, 895 (9th Cir. 2001), the Ninth Circuit held that a failure to disclose to parents records indicating that the child had autism was so severe as to result in a denial of FAPE. *Id.* ("Because we hold that the District failed to develop the IEP in accordance with the procedures mandated by the IDEA and that this failure in and of itself denied Amanda a FAPE, we do not address the question of whether the proposed IEPs were reasonably calculated to enable Amanda to receive educational benefits."). Similarly, in *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1076 (9th Cir. 2003) (discussed *supra*), the Ninth Circuit found that the school district's failure to include a current teacher denied her educational benefits, without engaging in harmless error analysis.

Nevertheless, not every procedural violation, such as a technical violation, will result in the loss of FAPE. *Amanda J.*, 267 F.3d at 892 ("Not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, will not render an IEP invalid.") (citing *Burilovich v. Bd. of Educ.*, 208 F.3d 560, 566 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000)). Procedural violations that result in "the loss of educational opportunity," *W.G.*, 960 F.2d at 1484, or that "caused a deprivation of educational benefits," *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990), result in the denial of a FAPE. *Indep. Sch. Dist. Number 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir.1996) (quoting *Roland* with approval); *Doe v. Ala. State Dep't. of Educ.*, 915 F.2d 651, 662 (11th Cir.1990).

## 2. Standard of Review of the ALJ's Fact Determinations

The Court applies a modified *de novo* standard of review. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 206-07 (1982) ("Rowley"); *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1310 (9th Cir.1987). The Court must make an independent determination in light of the full record, but give due weight to the Administrative Law Judge's findings of fact. "[I]n reviewing state administrative decisions in IDEA cases, courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings." *Doyle v. Arlington County School Bd.*, 953 F.2d 100, 103 (4th Cir. 1991) (citing *Rowley*, 458 U.S. at 206; *Town of Burlington v. Massachusetts Dep't of Educ.*, 736 F.2d 773, 791 (1st Cir.1984)).

In addition, the Court must be mindful not to substitute its own judgment for that of a local educational agency:

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

*Rowley* at 207; *Ojai Unified School District v. Jackson*, 4 F.3d 1467 (9th Cir. 1993).

The deference ultimately due to ALJ Clark's findings and the recommendations of PUSD are a matter for this Court to decide. "How much deference to give state educational agencies, however, is a matter for the discretion of the court." *Gregory K.*, 811 F.2d at 1311. If his findings are careful and thorough, they are entitled to more deference. See, e.g. *Park, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1031 (9th Cir. 2006) ("We accord the Hearing Officer's determinations due weight because they were thorough and careful: the hearing lasted over eight days, the Hearing Officer was engaged in the hearing and questioned the witnesses to ensure the record contained complete information and that he understood the testimony. The decision entered by the Hearing Officer contains a complete factual background as well as a discrete analysis supporting the ultimate conclusions."). See also *Union School Dist.*, 15 F.3d at 1525; *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir.1996).

3. ALJ Clark's Harmless Error Analysis

ALJ Clark concluded that even if it were error not to include the Oralingua teacher, the error was harmless. (ALJ Clark Decision, Conclusions of Law ¶ 20). ALJ Clark determined that "The proposed IEP was nearly identical to the IEP that was determined to be a FAPE in October 2004." (*Id.*). It is important to note that ALJ Clarke's findings concerning the PUSD offer are extremely limited, and almost wholly rely on the conclusions of the prior due process hearing. He stated:

The offer of FAPE made by PUSD conformed to the prior offer that had been determined to be FAPE by a SEHO hearing officer in October 2004. The services were appropriate and were designed to meet Jacob's unique educational needs. The personnel chosen by PUSD to offer services to Jacob were all well qualified to provide the necessary service and instruction to Jacob and provide educational benefit to him.

(ALJ Clark Decision, Conclusions of Law ¶ 24).

Regarding the concerns raised by J.P.'s parents, Clark stated:

The Diamond Point SDC-CH class has an extremely well qualified teacher, an FM Sound Field system and qualified professional support to assist Jacob in the event of a problem with his CI. Oralingua has an impressive program and is extremely well qualified to provide service to Jacob as well. The law does not require the best possible placement for Jacob, but rather a placement that provides some educational benefit to him.

(ALJ Clark Decision, Conclusions of Law ¶ 28).

ALJ Clark's conclusions are of limited value for two key reasons. First, ALJ Clark relied almost entirely on the *prior* administrative determination, i.e. the administrative determination by SEHO Officer Huynh in October 2004 that Rialto's offer of placement in a district-run class for cochlear implant students was FAPE. Clark does not examine, however, whether the PUSD class was similar to the Rialto class. In fact, they appear rather different. The Rialto class was designed *solely* for children with a cochlear implant and had only three other children. The PUSD class had a larger group, with a wide age range, and *no other* cochlear implant students. ALJ Clark consider, moreover, whether the Huynh decision was correct.

Second, ALJ Clark made factual findings at odds with his ultimate conclusion regarding the use of the FM sound field system and the qualifications of the assistants who would have been

assigned to J.P. ALJ Clark also makes findings expressly at odds with the record, regarding support for the repair of J.P.'s cochlear implant. Finally, ALJ Clark fails to address most of the concerns voiced by J.P.'s family regarding the safety of the PUSD classroom.

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A. Failure to Compare the Rialto and PUSD Classes

ALJ Clark relies on the prior administrative decision to demonstrate that PUSD's proposed placement was FAPE. The reason being, apparently, that if Rialto's offer of placement in a district-run class was FAPE, then PUSD's class would similarly be FAPE. ALJ Clark did not consider whether these classes were, in fact, similar. (ALJ Clark Decision, Conclusions of Law ¶ 24, "The offer of FAPE made by PUSD conformed to the prior offer that had been determined to be FAPE by a SEHO hearing officer in October 2004."; see also *id.* ¶ 20).

A review of the October 22, 2004 SEHO decision, by Officer Huynh, demonstrates that the two classes were not equivalent. Officer Huynh found that J.P. "requires an SDC setting with a low teacher-to-student ratio..." (Huynh Decision, p.22). The class offered by Rialto, at the Henry school, had only three children. (*Id.*). The addition of J.P. would bring the total number of students in the class to four. Importantly, "The witnesses agreed that all of the children at the proposed placement were DHH students with a cochlear implant." (*Id.*). A primary concern of J.P.'s parents with the Diamond Point class was that J.P. would be the *only* student in the class with a cochlear implant. ALJ Clark does not clearly set forth a reason to believe that the two placements are in fact similar and makes no factual findings regarding the similarity of the two classes. Instead, it appears that the Rialto class met the critical requirement of a small student-to-teacher ratio in an environment tailored to cochlear implant students, and the PUSD Diamond Point class did not.

B. ALJ Clark's Opinion is Not Carefully Reasoned

ALJ Clark's opinion is not carefully reasoned. Instead, it relies on the findings of Officer Huynh, which, for the reasons discussed, are not apposite to the placement offered by PUSD. Independently, moreover, ALJ Clark fails to make findings on several of the key arguments made by J.P.'s parents and makes very few findings relating to the appropriateness of the PUSD placement offer. ALJ Clark's findings on critical issues are conclusory and fail to reference any evidence offered at hearing.

Other findings by ALJ Clark are expressly at odds with the evidence. For example, ALJ Clark makes the factual finding that "Diamond Point has an FM sound field system installed by Dr. Peterson that Ms. Miller only uses when beneficial for a student. Ms. Miller believes that

children should learn 'in noise' because they live in noise." (Clark Decision, Findings of Fact ¶ 11). He later reiterates that the Diamond Point class has an FM sound field system. (ALJ Clark Decision, Conclusions of Law ¶ 28). This does not resolve the critical issue, however, of whether the system *would be used* and whether J.P.'s parents were given assurances that it would be used. As set forth more fully below, at the time of the January 2005 IEP, J.P.'s parents were informed that the system *would not* be used by Ms. Miller. Ms. Miller stated at the January 2005 IEP meeting that she had a "philosophical disagreement" with the use of the system. Although she modified her testimony at hearing, at the time of the IEP Ms. Miller had indicated a clear disinclination to use the system.

In addition, ALJ Clark concludes that Diamond Point has "professional support to assist [J.P.] in the event of a problem with his CI." (ALJ Clark Decision, Conclusions of Law ¶ 28). This finding is contrary to the District's own contention, that such services were largely unnecessary.

#### 4. *Present Levels of Performance Determination*

The IEP must determine present levels of performance. 20 U.S.C. Section 1414 (d)(1)(A)(i) states: "The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes- (I) a statement of the child's present levels of academic achievement and functional performance..."

In addition, 20 USC 1414 § (d)(3);, "Development of IEP" states:

##### (A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider--

- (i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and
- (ii) the results of the initial evaluation or most recent evaluation of the child.

##### (B) Consideration of special factors

The IEP Team shall--

- ...
- (iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct

instruction in the child's language and communication mode; and  
(v) consider whether the child requires assistive technology devices and services.

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At the January 2005 IEP, the Defendant adopted the previous IEP and decided to continue working on the goals from Oralingua school. Plaintiff argues that the IEP should have updated to reflect his progress since the IEP was written, approximately 8 months prior.

Defendant replies that, given that these goals were less than a year old, it made sense to adopt an IEP that would incorporate these goals. And, Defendant argues, there was no reason to write new goals for the Plaintiff because "His parents had rejected his services. Had plaintiff accepted the 30-day interim placement, new goals would have been created for plaintiff after his teachers had an opportunity to assess his current performance levels." (Defendant's Opposing Brief, p.13:5-8).

As noted above, PUSD did not have any current teacher of J.P. present, nor any new evaluation data that would permit them to make a determination of J.P.'s present levels of performance. In particular, from the transcript of the IEP it appears as though PUSD was operating with very few documents from Oralingua. (1/20/05 IEP Tr., p.23:21-25; 24:8-14). PUSD could not make a determination that these goals were appropriate without adequate information concerning J.P.'s "present levels of performance." Defendant again asserts that this procedural failure results from the parents' refusal of the interim placement offer. As discussed earlier, Defendant's argument that their procedural failings were the fault of the parents cannot be accepted.

The lack of information and failure to determine present levels of performance compounds the error created by the absence of a current teacher: "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed." *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877, 892 (9th Cir. 2001). (See Spurlock Testimony, 10/11/05, 44:17-45:2; 46:6-8; 50:5-25).

An IEP must be "reasonably calculated" provide the child with educational benefits, "The Individuals with Disabilities Education Act is satisfied if the State complies with the Act's procedures and an 'individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits.'" *Park*, 464 F.3d at 1031; *Amanda J.*, 267 F.3d at 890; *Rowley*, 458 U.S. at 207 (1982). This determination must be made

in reference to the child's capacity, *Id.*, and, as noted above, J.P. was a child with an IQ of over 120. PUSD's IEP, formulated without the input of a current teacher and without an assessment of J.P.'s present levels of performance, was not "reasonably calculated" to provide J.P. with educational benefits.

5. *Other Violations of FAPE*

*Capistrano Unified School Dist. v. Wartenberg By and Through Wartenberg*, 59 F.3d 884, 893 (9th Cir.1995) stated that a child receives a free appropriate public education if the program "(1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the individualized education program." (Citing *Rowley*, 458 U.S. at 188-89).

The placement proposed by PUSD fails to address J.P.'s unique needs and to provide adequate support services for several reasons. First, there was no guarantee that the classroom would be made safe for his cochlear implant device. Second, the placement failed to provide for the use of an FM sound field system. Third, the proposed aides and therapists lacked experience with cochlear implant students. Fourth, the level of audiology services was substantially less than those offered at Oralingua.

A. *Use of Sound Field*

Plaintiff submits that Sophia Miller expressed a "philosophical" disagreement with the use of a sound field system, because she believed that CH students need to learn in "noise." (Padilla Testimony, 10/12/05, p.60:14, 65:9-14). Accordingly, J.P.'s parents believed that the sound field system would not be used.

Sophia Miller testified before the ALJ that she would use the FM sound field system if she believed that a student required it, but that she did not know whether J.P. needed the system. (Miller Testimony, 10/11/05, p. 192:12-19; 193:6-17). Ms. Miller also testified that she did not have any philosophical objection to the use of the system. (*Id.*).

The transcript of the January 2005 IEP meeting reflects that the parents are correct: Sophia Miller said that she did not like to use the system, and that there was a "philosophical" debate about the use of these systems. (Miller Testimony, 10/11/05, p.191, 194; Nagarajan Testimony, 10/12/05, p.33:22-25, 34:1-8; 1/20/05 IEP Tr., p.10-11, 16:3-16, 17:4-9). The parents concern that their son needed the system, but the system would not be used, was well-founded. (Schneider

Testimony, 10/12/05:85:14-22; Hyde Testimony, 10/13/05, p.17:13-25; Peterson Testimony, 10/13/05, MINUTES FORM 90 Initials of Deputy Clerk rs  
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p. 121:17-23).

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There was ample testimony from experts presented by Plaintiff that J.P. still required the FM system in order to learn. ALJ Clark did not reference any of the evidence presented by Plaintiff's experts. ALJ Clark also concluded that Miller would utilize the system, without discussing the conflicts between Ms. Miller's testimony and the IEP transcript.

The evidence demonstrates that the system would not be used, but that J.P. required its use, at least for some period of time, to learn.

### B. Audiology Services

J.P.'s parents expressed concern that, should a malfunction occur with his cochlear implant, there would be an undue delay in getting a replacement part or repair. Plaintiff offered testimony about the requirements of a cochlear implant and how it is substantially different than a hearing aid. J.P. would have been the only student with a cochlear implant at Diamond Point. (Nolin Testimony, 10/13/05, p.84:18-25; 93; 94:7-25). Plaintiff's parents expressed concern that infrequent audiology services would not be adequate for J.P. at the time of the IEP because he was still very young and inexperienced with his implant. Plaintiff offered expert evidence that J.P. required audiology support for some time, until he was old enough to repair the cochlear implant on his own.

ALJ Clark concluded that PUSD offered audiology services, without making any findings regarding whether these services were adequate and without resolving conflicts in PUSD's evidence. Dr. Peterson, PUSD's audiologist, offered conflicting testimony. Dr. Peterson stated at the administrative hearing that he visited Diamond Point Elementary School weekly. (Peterson Testimony, 10/13/05, p.105:22-25, 107). In his deposition, however, Dr. Peterson stated that he visited the CH class every two weeks. (1/20/05 IEP Tr., p.18:24). This was the parents' understanding. (See Plaintiff's Opening Brief, p. 7-8). At the time of the January 2005 IEP team meeting, J.P.'s parents did not have assurances that adequate audiology services would be offered to J.P.

### C. Audio-Visual Therapy (AVT)

According to the October, 2004 administrative decision, Rialto was required to provide AVT in order for their proposed placement to constitute FAPE. PUSD offered AVT to J.P. with Viji Nagarajan in the January 2005 IEP offer.

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J.P.'s parents had concerns about this offer of AVT. Ms. Nagarajan had *no* experience with a cochlear implant student. In addition, there is no dispute that she has a very heavy accent, which might be difficult for J.P. to understand. Thus, J.P.'s parents had a good basis to be concerned about the adequacy of this therapy offer. (Padilla Testimony, 10/12/05, p.60:10-13).

It appears that PUSD amended its offer at some point; or, PUSD at least represented to the ALJ that J.P. would receive AVT with a different individual, Ms. Maureen Santos. Ms. Santos also does not have special training in CI's, however. (Miller Testimony, 10/11/05, p.222; Santos Testimony, 10/11/05, p. 246; Nagarajan Testimony, 10/12/05, p.19:7-10, 20:5-12, 32:15-19; 47:13-18).

PUSD offered AVT with Ms. Nagarajan at the IEP. These AVT services were inadequate. It would be unfair, moreover, to find that this offer constituted FAPE on the basis of a subsequent offer - in the form of testimony or representation before the ALJ - that AVT would have occurred with Ms. Santos instead.

D. Age and Grade Range of Students in the Diamond Point class

J.P.'s parents expressed concern that there was a large age range of students in the Diamond Point class, from ages six to twelve. (Miller Testimony, 10/11/05, p.209-10; Miller Testimony, 10/13/05, 138:12-25; 1/20/05 IEP Tr., p.8). Plaintiff's experts testified that this could be a problem educationally. (Hyde Testimony, 10/13/05, p.24:17-24; 25:15-20).

ALJ Clark did not make any findings regarding either the student-to-teacher ratio or the age range of students at the Diamond Point class. The Huynh decision, upon which ALJ Clark relies, found that a small student-to-teacher ratio was required for J.P. to receive educational benefits. PUSD failed to offer this, instead seeking to place J.P. in a class with a large number of students of vastly varying age

range. ALJ Clark made no findings regarding this element, despite the testimony of the Plaintiff's experts and the findings of the Huynh decision.

E. Static creating furniture and carpets.

J.P. would be the only student in the Diamond Point class with a cochlear implant. Plastic furniture and carpet that creates static pose a danger to cochlear implants. PUSD represents that they would have made modifications to the classroom to accommodate J.P., such as replacing all plastic furniture and treating the carpets with anti-static spray.

During the IP meeting, however, it appears that PUSD offered to provide J.P. alone with a wooden chair, and did not offer to make larger modifications in the classroom. (Miller Testimony, 10/11/05, p.209-10; 1/20/05 IEP Tr., p.9, 31:1). There was also a concern for a loud air conditioning unit. (Peterson Testimony, 10/13/05, p. 112:22-24).

These concerns were not addressed at the IEP team meeting. The IEP was not FAPE for failing to address these safety and noise concerns.

F. Experience of Diamond Point Staff with CI's.

The experience of Diamond Point staff was with cochlear implant students was somewhat lacking. The teacher, Sophia Miller, had attended one conference regarding cochlear implants. (Miller Testimony, 10/11/05, p. 170:16) The aides had no experience with cochlear implant students. There were no other cochlear implant students in the class.

In summary, PUSD sought to place J.P. in a class with a large grade range of students, with few assurances of safety, with inadequate therapy and services, and with inadequate attention to his hearing needs, which required the use of an FM sound field system and the repair of an air conditioner. PUSD made its recommendation despite having no current teacher present. PUSD made this placement offer, moreover, with little information regarding the student, and without any assessment of his present levels of performance. This offer cannot be said to be "reasonably calculated" to provide J.P. with educational benefits.

**Entitlement to Reimbursement for Oralingua Expenditures**

A. *Compensation and Compensatory Education Services*

J.P.'s parents are entitled to reimbursement if they show (1) that the public placement violated the IDEA; and that (2) placement at Oralingua was proper. *Florence County Sch. Dist. No. 4 v. Carter*, 510 U.S. 7 (1993). The Ninth Circuit has stated that:

If a parent believes that a school district has failed to offer a free appropriate public education, parents may place an eligible child in an appropriate private program. Parents have an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education].

*Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir.1994) (citing *W.G.*, 960 F.2d at 1485;

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*Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 369(1985)).

Parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate. *Frank G. v. Board of Educ. of Hyde Park* 459 F.3d 356, 363 -365 (2d Cir. 2006) *M.S. ex rel S.S. v. Bd. of Educ. Of Yonkers*, 231 F.3d 96, 104 (2d Cir. 2000). Parents need only demonstrate that the placement provides "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *Rowley*, 458 U.S. at 188-89.

There is no dispute that Oralingua was an appropriate placement. Thus, if J.P.'s parents are correct that the proposed placement at Diamond Point was improper, they are entitled to reimbursement for the Oralingua placement.

*B. Whether Unilateral Change by Parents Bars Recovery*

Defendant argues that because J.P.'s parents unilaterally changed their child's placement during the pendency of review proceedings, they cannot recover for the costs of Oralingua. See *Florence County Sch. Dist. No. 4 v. Carter*, 510 U.S. 7 (1993). See also *Scokin v. Texas*, 723 F.2d 432, 438 (5th Cir. 1984); *Newport-Mesa Unified Sch. Dist. v. Hubert*, 132 Cal. App. 3d 724. (Defendant's Opposing Brief, 15:20-et seq.). The Supreme Court noted in *School Committee of Burlington v. Department of Education* that parents who "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." 471 U.S. 359, (1985).

The "risk" however, is that the parents fail to meet the two-pronged test described above. *Florence County Sch. Dist. Four*, 510 U.S. at 15. A court may "grant such relief as the court determines is appropriate, which includes equitable solutions such as reimbursing parents for the costs of a private placement. *Shapiro*, 317 F.3d at 1079 -1080 (citing *Burlington*, 471 U.S. at 369; *Union Sch. Dist.*, 15 F.3d at 1527; *W.G.*, 960 F.2d at 1486).

The Defendant's argument in this regard is unavailing. J.P.'s parents are entitled to reimbursement for their Oralingua expenses.