

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

FRESNO UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2006090026

NOTICE: This decision has been **UPHELD** by the United States District Court. Click [here](#) to view the USDC's decision. The USDC's decision was **AFFIRMED** by the United States Court of Appeals. Click [here](#) to view the USCA's opinion.

DECISION

Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 30-31, June 1- 2, 5, 7- 8, 11-12, and 26, 2007, in Fresno, California.

Attorney Elaine Yama, of the law firm Bennett & Sharpe, represented the Student for most of the hearing, and attorney Barry Bennett, of the law firm Bennett & Sharpe, represented the Student for a portion of the hearing. Student's mother attended the entire hearing, and Student's father was present for portions of the hearing. Law clerk Tracy Moore also attended portions of the hearing.

Attorney Sarah Daniel, of the law firm Miller Brown & Dannis, represented Fresno Unified School District (District). Beth Schroeder, Manager of Special Education Programs and Services, attended the hearing on the District's behalf.

On September 1, 2006, OAH received Student's due process hearing complaint (Complaint). On September 25, 2006, OAH granted the District's Notice of Insufficiency and dismissed the Complaint with leave to amend. On October 6, 2006, OAH received

Student's amended due process hearing complaint (Amended Complaint). On November 8, 2006, OAH granted a continuance of the hearing at the request of both parties. At the hearing, the ALJ received sworn testimony and documentary evidence. The parties requested leave to submit closing arguments in writing. Upon receipt of those arguments, the record was closed on July 13, 2007, and the matter was submitted.

ISSUES¹

1. For the 2003-2004, 2004-2005, and 2005-2006, school years, did the District fail to assess Student's unique needs in the area of audition skills (which skills affect his ability to access sounds and words, and thereby affect his ability to learn to read)?²
2. For the 2003-2004 school year, did the District deny Student a free, appropriate public education (FAPE) by failing to:
 - A. address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language;
 - B. offer or provide a program and services that were reasonably calculated to meet his auditory and oral needs, due to the District's offer of a mainstream placement for most of Student's time;
 - C. offer ESY services?
3. For the 2004-2005 school year, did the District procedurally deny Student a FAPE by:
 - A. failing to convene an individualized education plan (IEP) team meeting after the parent conference on October 6, 2004;
 - B. unilaterally implementing services to change his mode of communication (by beginning to teach Student sign language) without parents' consent?

¹ These issues are those framed in the May 17, 2007 Order Following Prehearing Conference, as modified by the May 29, 2007 Order Granting In Part and Denying In Part Student's Motion To Clarify Issues. This Decision addresses only the issues as clarified in those two orders, and does not rule on new claims raised in Student's closing brief. In addition, the ALJ has slightly reorganized the issues by consolidating the assessment claims into a single issue.

² Initially Student raised this claim for all school years at issue. However, at the hearing, Dr. Maura Martindale testified that the District's May 2006 speech-language assessment report was an excellent, comprehensive report, as was Ms. Sakaguchi's August 2006 assessment report. In light of this testimony, in his closing brief Student indicated that he no longer disputed the District's assessment of his audition skills for the 2006-2007 school year.

4. For the 2004-2005 school year, did the District substantively deny Student a FAPE by failing to:

- A. address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language;
- B. offer or provide a program and services that were reasonably calculated to meet his auditory and oral needs, due to the District's offer of a mainstream placement for most of Student's time;
- C. implement his IEP, as evidenced by Student's failure to progress on any goals and objectives;
- D. convene an IEP team meeting to discuss parents' concerns (after the parent conference on October 6, 2004) regarding grading, failing to modify classroom work, academics (vocabulary and spelling), and Student's behavior (including assessment and development of a behavior plan), and to review and/or revise Student's goals, objectives, and services (Signing Exact English (SEE) Sign interpreter);
- E. offer ESY services?

5. For the 2005-2006 school year, did the District substantively deny Student a FAPE by failing to:

- A. address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language;
- B. offer or provide a program and services that were reasonably calculated to meet his auditory and oral needs, due to the District's offer of a mainstream placement for most of Student's time;
- C. offer ESY services?

6. For the 2006-2007 school year, did the District procedurally deny Student a FAPE by failing to:

- A. include a general education teacher, a special education teacher, and a local educational agency (LEA) representative at the IEP meeting on June 21, 2006;

- B. offer a special education program prior to the start of the 2006-2007 school year;
- C. invite to the September 1, 2006 IEP meeting an individual who could interpret the results of Nancy Sakaguchi's auditory verbal (AV) assessment dated August 23, 2006, and its attached amendment dated August 29, 2006?

7. For the 2006-2007 school year, did the District substantively deny Student a FAPE by failing to address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language?

REQUESTED REMEDIES

Student seeks the following remedies: (1) reimbursement for his attendance at Clarke School For The Deaf (Clarke School) for summer 2006; (2) reimbursement and educational placement at Clarke School from September 2006, until a date when the District offers an appropriate program; (3) reimbursement for privately funded AV therapy; and (4) an order requiring the District to contract with Clarke School or with Dr. Maura Martindale to assist with Student's transition back to the District.

EVIDENTIARY MATTERS

1. On July 13, 2007, along with Student's written closing argument, he filed a request that the ALJ take "judicial notice" of the document entitled "Programs for Deaf and Hard of Hearing Students: Guidelines for Quality Standards," issued by the California Department of Education (CDE). Student attached a copy of the Guidelines, and argued that they are subject to judicial notice pursuant to California Evidence Code section 452, subdivision (h).

2. California Evidence Code section 452, subdivision (h), states that judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. For example, a court may take judicial notice that June 25, 1964, fell on a Friday and that June 28, 1964, fell on the following Monday. (*Espinoza v. Rossini* (1966) 247 Cal.App.2d 40, 46.) The Administrative Procedure Act (APA), California Government Code section 11515, provides that in an administrative hearing, official notice

may be taken of “any generally accepted technical or scientific matter within the agency’s special field, or of any fact which may be judicially noticed by the courts of this State.”³

3. The fact that CDE issued these Guidelines is not reasonably subject to dispute and is capable of immediate and accurate determination. However, the same has not been established for the contents of the Guidelines. The entire document is 200 pages long and contains extensive, technical recommendations about numerous topics related to the education of deaf and hard of hearing (DHH) students. Since the choice of methods for education of DHH students is a topic with a long history of debate and controversy, it is doubtful that the recommendations expressed in the Guidelines are not subject to dispute or are capable of immediate and accurate determination.

4. In any event, a party in a special education due process hearing must provide the opposing party with a copy of its proposed documentary exhibits at least five business days in advance of the hearing. (Ed. Code, § 56505, subd. (e)(7).) For purposes of managing the hearing, OAH also requires each party to list its proposed documents in a prehearing conference statement submitted three business days prior to a prehearing conference. Contrary to these requirements, Student did not disclose the CDE Guidelines as a proposed exhibit prior to the hearing. Student has not offered any reason why the document should be admitted despite the failure to comply with these requirements. Particularly given the lengthy, complex nature of the CDE Guidelines, admission of the document after the close of the hearing would not allow the District any opportunity to submit documents in response, or to question witnesses about the Guidelines, or raise arguments regarding the Guidelines. Had the Student wanted the CDE Guidelines to be considered as evidence in this hearing, Student should have timely identified the document as a proposed exhibit. The request for official notice is therefore denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is 13 years old. During all times at issue in this case, he was a resident within the boundaries of the District, and has been eligible for special education services due to a hearing impairment.

Factual Background

2. At age 15 months, Student was diagnosed with severe to profound hearing loss in both ears. Subsequently, the District conducted its initial assessment of Student. In determining Student’s initial program, District staff asked Student’s parents to observe both an aural/oral program for DHH preschool students and a sign language program; Students’

³ This section of the APA is applicable to special education due process hearings. (See Cal. Code Regs., tit. 5, § 3089.)

parents chose the aural/oral program. When he was two years old, Student began attending the aural/oral infant/preschool program at the District's Alice Birney Elementary School (Birney). During that time, Student wore a hearing aid in each ear.

3. When he was four and a half years old, Student received a cochlear implant in his left ear. Thereafter his implant was "mapped" at the California Ear Institute's Let Them Hear Foundation in Palo Alto, California. Student continued to wear a hearing aid in his right ear.

4. For preschool and kindergarten, Student continued to attend an aural/oral program at Birney. For first grade, Student did not enroll in the District and instead attended a private school, Fairmont Private School. Student returned to Birney for second grade, and attended an aural/oral special day class (SDC) for DHH students, taught by Rosie Ruelas Wasser. In May 2002, District staff conducted Student's triennial reassessment. For the 2002-2003 school year, Student was in third grade and again attended Birney in an aural/oral SDC taught by Ms. Wasser.

5. During the 2002-2003 school year, Student's parents entered Student in the lottery for admission to a District magnet school, Bullard Talent School (Bullard Talent), and thereafter Student was successful in the admission lottery for a space at the school. On May 20, 2003, Student's IEP team convened for his annual IEP meeting. Staff from both Birney and Bullard Talent attended the meeting. The team members reviewed the results of the triennial reassessments. They discussed whether Student's placement for the 2003-2004 school year should be in a general education fourth grade class at Bullard Talent or in the aural/oral DHH SDC at Birney. Several District staff expressed concerns about placing Student at Bullard Talent, because the students there receive academic instruction during the mornings only, with afternoons devoted to visual and performing arts activities. However, Student's parents requested a full inclusion mainstream placement at Bullard Talent, stating that Student would benefit from exposure to peer language models in a mainstream setting, and that Student had not been making sufficient progress in an SDC. After approximately three hours of discussion, the IEP team agreed to continue the meeting at a later date. In a letter dated May 27, 2003, Student's mother complained to District program specialist Diane Beauregard that the discussion at the IEP meeting should have been devoted to facilitating Student's transition to Bullard Talent, and should not have addressed the merits of the Birney SDC placement as compared to the Bullard Talent placement.

6. The IEP meeting reconvened on June 5, 2003. The IEP team agreed to the parents' request for a mainstream placement at Bullard Talent, and offered that placement along with designated instruction and services (DIS) of resource specialist program (RSP) for 65 minutes per day, DHH specialist therapy for 480 minutes per month, speech-language therapy for 8 sessions per month, and a cued speech transliterator.⁴ The IEP team also offered assistive technology, including an FM system/auditory trainer to be worn during all

⁴ The evidence refers to this position alternatively as a cued speech interpreter or a cued speech transliterator. Cued speech is a method of interpreting in which manual cues are used to enhance lip reading.

instruction to provide Student with amplification of his teacher's voice, and accommodations such as extended time on tests.

7. For the 2003-2004 school year, Student attended Bullard Talent in a general education fourth grade class taught by Janice Marshall. Student received DIS of RSP, DHH specialist services, and speech-language therapy. Student also had a full-time cued speech transliterator and use of an auditory trainer. District audiologist Cindy Yates also consulted with some of the educators who worked with Student, such as Ms. Marshall and the RSP teacher, Mary Ann Dorian. Student got along well with Ms. Marshall, made friends at school, and played on the school soccer team.

8. The IEP team convened again on October 27, 2003. The team members discussed Student's functioning, and noted that Student liked his new school. The team agreed that Student would receive a special education report card, would not be working towards grade level standards, and would not be working towards a high school diploma.

9. On May 26, 2004, the IEP team convened for its annual meeting. The team members discussed topics including Student's present levels of performance and progress on his goals and objectives. The team agreed that Student would remain at Bullard Talent for his fifth grade year, with DIS of RSP services for 60 minutes per day, DHH specialist services for 720 minutes per month, speech-language therapy for 8 sessions per month, and a full-time cued speech transliterator. The team also agreed on accommodations such as extended time on tests and copies of his fifth grade textbooks to review at home over the summer and for the following school year. The District offered Student ESY placement in a class for general education students with delays in reading.

10. For the 2004-2005 school year, Student attended a general education fifth grade class at Bullard Talent taught by Denise Stover. Student continued to receive DIS of RSP, DHH specialist services, speech-language therapy, and a cued speech transliterator. In late September 2004, Student received a "deficiency notice" indicating that he was in academic difficulty in several subjects at the fifth grade level. As a result of the deficiency notice, several members of Student's educational team met with Student's mother for a conference on October 6, 2004. Thereafter, Student's grading was modified and he did not receive further deficiency notices in fifth grade. As the school year went on, Student grew unhappy in Ms. Stover's class, and began resisting going to school.

11. In May 2005, District staff conducted Student's triennial reassessment, evaluating in areas including cognitive ability, academic achievement, attention, behavior, speech, language, auditory comprehension, auditory discrimination, listening comprehension, and lip reading. On June 3, 2005, Student's IEP team convened for the annual IEP meeting. Among the topics discussed were the triennial reassessment reports and Student's placement for the 2005-2006 school year. District staff stated their opinion that placement at Bullard Talent would not meet Student's needs, and instead recommended placement at either a DHH SDC at the District's Norseman Elementary School, or a regular education sixth grade class at the District's Del Mar Elementary School (Del Mar). Student's mother agreed to

visit the proposed schools. District staff also recommended referring Student to CDE's Central California Diagnostic Center for further assessment, but the IEP notes state that "parents wish to defer referral until after [Student] spends some time at his new school acclimating to his new school site." At a subsequent IEP meeting, Student's mother agreed to the District's offer of placement at Del Mar, and agreed to change Student's interpreter from a cued speech transliterator to a sign language interpreter.⁵ The IEP team agreed to continue Student's DIS of speech-language therapy, DHH specialist services, DHH counseling, and RSP. The team also agreed to add DIS of weekly counseling, which would be delivered by a counselor assigned specifically to the District's DHH program.

12. For the 2005-2006 school year, Student attended a general education sixth grade class at Del Mar. On October 19, 2005, District staff met with Student's mother for a conference. During this meeting, the participants agreed that Student's new DHH specialist, Erik Nyberg, would teach sign language vocabulary during his sessions with Student. On October 26, 2005, Student's IEP team convened and added this change to the IEP. The team also added goals and objectives in reading and writing, and agreed to the parent's request that Student's referral to the Central California Diagnostic Center would be put "on hold."

13. During his sixth grade year, Student received deficiency notices, which reported that he was below grade level in particular subjects. Student told his counselor and his mother that he was unhappy at Del Mar because he did not have friends there, and that he wanted to go back to be with his friends at Bullard Talent.

14. In or about March 2006, Student's mother took Student to see his former preschool/kindergarten teacher, Carol Aguirre. Ms. Aguirre conducted a Ling 6 Sound Test and determined that Student could not hear the sounds correctly. At Ms. Aguirre's recommendation, Student's mother took Student to an appointment with his audiologist at the Let Them Hear Foundation. The audiologist tested Student's cochlear implant and determined that the equipment was working correctly, but that Student was not accessing the sounds from the implant. In or about April 2006, Student began receiving AV therapy from Ms. Aguirre. Student also received consultation and some AV therapy sessions from AV therapist Nancy Sakaguchi. Student's parents privately funded the AV therapy.

15. On May 26, 2006, the IEP team convened for its annual meeting. The team reviewed results of informal testing by the DHH specialist, and discussed placement options for the 2006-2007 school year. District staff indicated that two placement options were the DHH SDC at Ahwahnee Middle School (Ahwahnee) or a mainstream placement at Student's home school, Fort Miller Middle School (Fort Miller). Student's mother agreed to observe the SDC at Ahwahnee, but was not interested in Fort Miller. Student's mother also requested that the District fund AV therapy for Student. The IEP team convened again on June 21, 2006. The District recommended placement at the DHH SDC at Ahwahnee. Student's mother did not agree to the proposed placement, and did not sign her consent to the IEP. The

⁵ Student's parents requested that the interpreter be able to do both cued speech and sign language, but District staff indicated that no such individual exists.

District also denied the parents' request that the District fund Student's AV therapy over the summer.

16. In July 2006, at his parents' expense, Student attended a two-week summer program at Clarke School for the Deaf (Clarke School), a private school in Northampton, Massachusetts. On August 19, 2006, Ms. Sakaguchi conducted an assessment of Student, funded by the District, to assess Student's auditory needs and evaluate whether he needed AV therapy. After reviewing Ms. Sakaguchi's assessment report, Beth Schroeder, Manager of Special Education Programs and Services, asked Ms. Sakaguchi to recommend the frequency and duration of AV therapy that she believed Student needed, and to make any other recommendations regarding his educational programming. Ms. Sakaguchi agreed to add her recommendations, and issued an amended report on or about August 29, 2006.

17. In late August 2006, Student's parents notified the District in writing that they intended to unilaterally place Student at Clarke School and would be seeking reimbursement from the District. On September 1, 2006, the IEP team convened to discuss Student's placement and Ms. Sakaguchi's report. The District offered placement in the DHH SDC at Ahwahnee. Student's parents did not agree to this placement. The District again proposed referring Student for assessment at the Central California Diagnostic Center, or else at the Northern California Diagnostic Center; Student's parents did not consent to the referral. Also on September 1, Student's attorneys filed a request for due process hearing with OAH.

18. For the 2006-2007 school year, Student attended Clarke School. Initially, he entered Clarke School as a seventh-grader. In October 2006, the Clarke School For The Deaf Center for Oral Education (Clarke COE) conducted a comprehensive educational evaluation of Student. The evaluation consisted of speech-language assessments, a psychological assessment, an academic assessment, and an audiological assessment by an audiologist.⁶ In or about November 2006, Clarke School staff moved Student from a seventh grade class to a fifth grade class, where he remained for the rest of the school year. In January 2007, Student's cochlear implant was upgraded to an improved model. In March 2007, Student received a cochlear implant in his right ear.

District's Assessments of Student's Audition Skills

19. Audition skills consist generally of hearing and listening skills. The District was obligated to assess Student in all areas related to any suspected disability. Because of Student's hearing impairment, audition skills were an area of suspected disability for Student. Student received regular audiological assessments at the Let Them Hear Foundation, as part of the maintenance of his cochlear implant.⁷ In the 2003-2004 school

⁶ The District received a copy of the Clarke COE report. However, Student's parents refused to consent to Clarke's disclosure of Student's additional pupil records to the District.

⁷ As noted in Legal Conclusion 3, a public agency is not responsible for post-surgical maintenance, programming, or replacement of a cochlear implant.

year, the assessment information regarding Student's audition skills consisted primarily of results from the May 2002 triennial reassessment. In that reassessment, Student's DHH SDC teacher, Ms. Wasser, administered the Test of Auditory Comprehension (TAC), and also the Listening Comprehension subtest of the Woodcock-Johnson-III. Ms. Wasser, DHH specialist Linda Schroer, and speech-language pathologist Lori Jern also used informal measures to regularly assess Student's hearing and listening skills, such as regularly administering the Ling 6 Sound Test.

20. For the 2004-2005 school year, the District did not conduct any additional formal assessment of Student's audition skills. In May 2005, the District assessed Student's audition skills as part of the triennial reassessment. DHH specialist Linda Schroer administered the TAC to measure Student's auditory comprehension, and the Wepman Auditory Discrimination Test to measure his auditory discrimination. Ms. Schroer also assessed Student in the area of listening comprehension, by testing his ability to repeat sentences and answer questions about a three-paragraph short story from the Read Naturally program. In addition, speech-language pathologist Lori Jern conducted a language assessment that included testing in expressive language and semantics.

21. In May 2006, District speech-language pathologist Jenny Slonski conducted a comprehensive language assessment of Student's receptive vocabulary, expressive vocabulary, and language processing skills. As noted above in Factual Finding 16, in August 2006, the District funded an independent educational evaluation by Ms. Sakaguchi, a certified AV therapist. Ms. Sakaguchi assessed Student in areas including auditory comprehension, auditory discrimination, listening comprehension, and comprehension of language structures.

22. Student argues generally that greater assessment of his audition skills was required prior to August 2006. However, there is little evidence regarding this claim. Student points to the testimony of Dr. Maura Martindale, an expert in oral education of DHH children, who testified that the triennial reassessments should have included a language sample to measure Student's mean length of utterance and syntactic production. However, this testimony did not establish that the absence of a language sample constituted a failure to assess in audition skills. The same applies to Dr. Martindale's testimony that she would have liked to see a measure of Student's pragmatic language. While such testimony established that additional measurement tools may have been helpful, the evidence did not prove any failure to assess. Thus, Student did not establish that the District failed to assess him in the area of audition skills for the 2003-2004, 2004-2005, or 2005-2006 school years.⁸

Student's Functioning in Educational Areas

23. Student had cognitive ability in the average to high average range, and was a strong visual learner. His academic abilities in math were at or near grade level, with above-

⁸ In addition, it is notable that, in June 2005, Student's parents declined the District's proposal to refer Student for further assessment at the Central California Diagnostic Center.

average functioning in math calculations and below-average functioning in applied math problems that involved language. However, he had significant delays in his communication skills and in all academic areas related to the use and understanding of language, including reading, writing, social studies, and science. His auditory processing and audition skills, speech, expressive language, and receptive language were all far below the levels expected for his age and grade, even when compared with other hearing impaired children who had received cochlear implants at similar ages. Despite his cochlear implant and hearing aid, he had difficulty listening to and understanding speech. He had a very limited vocabulary. Typically he did not speak in complete sentences, instead using content words only and leaving out grammatical features, such as word endings and connector words. Because of his poor sentence structure and poor speech intelligibility, listeners often had difficulty understanding what he was saying.

24. Student began the 2003-2004 school year far behind in language, communication, and all academic areas except for math, and these deficits have continued into the 2006-2007 school year. Knowledgeable, credible witnesses, such as District school psychologist Tim Conway and Clark School COE program coordinator Joyce Fitzroy, established both that Student should have been performing at a higher level and that the reasons why he is not are unclear. For example, Ms. Fitzroy and the other Clark COE evaluators theorized that the problem may have been due to possible failure of the cochlear implant, poor or inconsistent educational programming, including frequent change of schools, or a still-undetected language processing deficit. Ms. Fitzroy established that, while Student's test results did not indicate a language processing deficit, it is difficult to measure such a deficit in Student because his vocabulary scores are so low.

2003-2004 IEP Goals and Objectives in Audition Skills, Audiology, Auditory Language Development, Building Language, and Learning the English Language

25. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. The District was required to offer an IEP that was designed to meet Student's unique needs and was reasonably calculated to provide Student with some educational benefit. An IEP cannot be analyzed exclusively in hindsight, but rather must be analyzed considering what was objectively reasonable at the time the IEP was drafted. Student contends that the District failed to develop appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language and learning the English language. The District contends that the IEP goals were appropriate, that these goals allowed Student to make progress in his educational program, and that the Student's criticism of the goals is based upon a standard higher than the "meaningful benefit" standard required under the IDEA.

26. The IEP dated May 20, 2003, and June 5, 2003, contained one goal in each of the following areas: reading (phonics); reading (sight words); reading (comprehension); oral

language; listening skills; vocabulary development; attention span while using an educational interpreter; misarticulations (vowels); misarticulations (“L” consonant); and breath control. The October 27, 2003 IEP adjusted these goals slightly to add more work on vocabulary and language expansion. There is no question that these goal areas met Student’s areas of educational need related to his disability. While she did not have any disagreement with the inclusion of these goals in the IEPs, Dr. Maura Martindale testified that the May/June 2003 and October 2003 IEPs did not have enough goals in language, speech, and audition. She explained that there were too few auditory goals to allow Student to develop language at the rate he needed to catch up to his hearing peers.

27. Dr. Martindale was an extremely knowledgeable witness with extensive experience and significant expertise in the field of oral education for DHH children. Her testimony was candid and credible. However, for several reasons, her testimony did not establish that the District denied Student a FAPE for the 2003-2004 school year. Dr. Martindale reached her conclusions solely based upon her review of Student’s records, including IEPs, assessment reports, and audiological records. She had never assessed or met Student, and never observed his educational program. In contrast, other credible witnesses such as Student’s RSP teacher, Ms. Dorian, and Student’s speech-language pathologist, Ms. Jern, testified that these goals were appropriate to address all of Student’s educational needs. After working with and assessing Student, they were very familiar with Student’s needs during the time period at issue. While Ms. Dorian and Ms. Jern lacked the extensive expertise of Dr. Martindale, they were still qualified, experienced and knowledgeable professionals. Moreover, Dr. Martindale’s measurement of adequate progress was that Student needed to develop language at a level commensurate with his hearing peers. This standard is higher than the “meaningful educational benefit” standard applicable to this legal analysis.

28. Furthermore, in light of the strong evidence that Student received meaningful educational benefit that year, any shortage of goals did not have an impact. Evidence such as Student’s report cards, quarterly reports on IEP goals and objectives, and testimony of his fourth-grade teacher and service providers all confirmed gains in areas including academics and speech intelligibility. According to the Clarke COE report, Student’s mother reported that Student “experienced great gains in his academics” during fourth grade. Moreover, Student’s May 2004 scores on the Wechsler Individual Achievement Test (WIAT) show meaningful improvement as compared to Student’s May 2003 scores on the WJ-III. For example, Student’s May 2003 standard score on the W-J-III Spelling subtest was a 35, with a percentile rank of 0.1 percent; in contrast, Student’s May 2004 standard score on the WIAT Spelling subtest was an 82, with a percentile rank of 12 percent. Overall, Student’s May 2003 W-J-III scores consisted primarily of scores at or below the first percentile, with only two subtest scores above the first percentile; in contrast, the May 2004 WIAT subtest scores ranged from the second percentile to the thirty-seventh percentile. The ALJ gives these test results less weight because of the limitations on comparisons between the two different tests and because of the District’s inability to produce test protocols to verify the results. Nevertheless, the test results cannot be entirely discounted and are consistent with other evidence showing Student’s educational progress during the 2003-2004 school year.

29. Given all of the above, the evidence established that the IEP goals met Student's educational needs that resulted from his disability. This component of Student's program was designed to address Student's unique needs and was reasonably calculated to allow receipt of educational benefit.

District's Placement Offer for the 2003-2004 School Year

30. Student argues that the District denied him a FAPE by offering a mainstream placement for most of his school day. The District argues that it offered and provided an appropriate program in the LRE. An LEA must offer an educational program that is designed to meet the unique needs of the student, is reasonably calculated to provide the student with some educational benefit, and is provided in the LRE.⁹ An IEP cannot be analyzed exclusively in hindsight, but rather must be analyzed considering what was objectively reasonable at the time the IEP was drafted.

31. As stated above, the May/June 2003 IEP offered placement in a general education fifth grade class at Bullard Talent, a magnet school for the performing arts. The IEP offer included DIS of RSP for 65 minutes per day, DHH specialist therapy for 480 minutes per month, speech-language therapy for 8 sessions per month, and a cued speech transliterator. The RSP, DHH and speech-language therapy services were all designated as one-to-one services.¹⁰ The IEP also offered assistive technology, such as an FM system.

32. The offer of placement at Bullard Talent was appropriate in light of the information available to the IEP team in June 2003. Several knowledgeable, credible witnesses, including District school psychologist Tim Conway and fourth-grade teacher Janis Marshall, established that the offer was designed to meet Student's unique needs and was reasonably calculated to result in educational benefit. Although Student had difficulty hearing and understanding the instruction delivered in the general education classroom, supports and services such as an interpreter and FM system were designed to address that difficulty. Similarly, the RSP, DHH, and speech-language pull-out services were designed to support his learning in the general education classroom and address his IEP goals in an intensive, one-to-one setting. As several credible witnesses established, mainstreaming for most of the school day offered Student the opportunity to develop his language through communication with typically developing peers. Although Bullard Talent's condensed academic schedule made Student's academic learning more challenging, this was offset somewhat by the variety of instructional modalities and learning opportunities offered through the school's visual and performing arts curriculum. Given the entirety of the evidence, placement in a general education fourth grade class for the majority of the day was

⁹ The educational program must also be provided in conformity with an IEP. However, that requirement is not in dispute for this issue.

¹⁰ At one point during the 2004-2005 school year, the RSP teacher, Ms. Dorian, brought a typically developing student into Student's RSP sessions to provide Student with a language model. However, after a few sessions, Ms. Dorian determined that the addition of a peer was not particularly helpful, and she returned to providing Student's RSP sessions in a one-to-one setting.

designed to address Student's unique needs and was reasonably calculated to result in educational benefit.

33. A special education student must be educated with nondisabled peers to 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. Whether a student can be mainstreamed in a regular education class is determined by balancing four factors: (1) the educational benefits of placement in a general education class compared to that of a special education class; (2) the non-academic benefits of mainstreaming; (3) the effect the student has on the teacher and children in the regular class; and (4) costs of mainstreaming the student. In the present case, there was no evidence regarding cost, and it was not raised as a factor.

34. The general education class offered Student some academic benefits, such as language development from communication with typically developing peers, and some significant challenges, such as the fast pace of the academic instruction and Student's difficulty understanding that instruction. There was some indication that greater educational benefits might have been available in the DHH SDC, but the limited evidence on that point was too sparse to establish that conclusion. Mainstreaming offered significant non-academic benefits to Student. In fourth grade, Student made friends and played on the soccer team; Student's mother established that Student's experiences in fourth grade were very important to improving his self-esteem. Regarding the third factor, Ms. Marshall established that Student had a positive effect on his fourth grade teacher and classmates. On balance, the LRE factors are mixed, but lean slightly towards mainstreaming. The importance of the non-academic benefits of mainstreaming may have equaled any potentially significant educational benefits available in a special education setting.

35. In arguing that the mainstream placement was not appropriate, Student points to the testimony of District witnesses such as Mr. Conway and program specialist Diane Beauregard, who described their concerns that Student's needs would be better addressed in a DHH SDC, particularly in light of Bullard Talent's condensed academic schedule. Both Mr. Conway and Ms. Beauregard also established that they believed that Student's needs could still be met at Bullard Talent with the extensive support services offered in the IEP. As Mr. Conway established, given the reasonable nature of the parents' request, Student's mother's qualifications and expertise as an educational consultant and former RSP teacher, and Bullard Talent's status as open to all District students, the IEP team agreed to the parents' request for a mainstream placement at Bullard Talent, and committed to providing the necessary supports to address Student's unique needs in that setting.

36. It is particularly incongruous that Student now argues that Mr. Conway, Ms. Beauregard, and the other District members of the IEP team should have overridden the parents' request for placement at Bullard Talent, despite the law's preference for mainstreaming to the maximum extent appropriate, and the law's recognition of the importance of parental participation in the IEP process. Parents are key members of the IEP

team, and the IDEA requires that parental participation in the IEP process must be meaningful. Mr. Conway established in his testimony that the District members of the IEP team gave significant weight to input from Student's parents, in part due to Student's mother's background as an RSP teacher and her work for a publisher of school textbooks.

37. Given all of the above, the offer of a mainstream placement for the majority of Student's school day was designed to address Student's unique needs and reasonably calculated to result in educational benefit in the LRE.

Offer of ESY Services for Summer 2004

38. ESY services must be provided for each special education student who requires special education and related services in excess of the regular academic year in order to receive a FAPE. Such individuals must have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in light of the pupil's disability. Student contends that the District failed to offer ESY for the summer of 2004, while the District contends that it did offer this ESY program.¹¹ There is no dispute that Student needed ESY services; the only dispute is whether the District offered those services. The October 2003 IEP document contains a check mark next to the box indicating that ESY services were recommended for Student to avoid regression on all goals. The May 2004 IEP document likewise contains a check mark next to the box recommending ESY services, although the space for specifying which goals Student needed to avoid regression on was left blank. Student's mother testified that, at the May 2004 IEP meeting, the District offered a general education summer school program that emphasized reading interventions. In addition, Student actually enrolled in an ESY program and attended for three days. Therefore, the District did not fail to offer an ESY program for summer 2004.

Failure to Convene an IEP Meeting After October 6, 2004 Conference as a Procedural Denial of FAPE

39. Student alleges that the failure to convene an IEP meeting following the October 6, 2004 conference constituted a procedural denial of FAPE.¹² If a parent requests

¹¹ The May 17, 2007 Order Following Prehearing Conference identifies this as a substantive claim. Despite this clear statement of the issue, Student's closing brief raises this issue as a procedural claim, alleging that the District failed to make a formal written offer pursuant to *Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526. The Decision cannot grant Student relief for a claim which was not part of the hearing. In any event, a procedural claim on this point would not succeed. The IEP documents indicated that ESY was recommended. Student actually enrolled in and attended three days of the 2004 ESY program. There is no evidence or argument establishing how the IEPs' lack of details regarding the ESY program resulted in the loss of educational opportunity or seriously infringed on the parents' opportunity to participate in the IEP process.

¹² The substantive aspects of this claim are analyzed below in Factual Findings 51 and 52.

an IEP team meeting to review an IEP, the meeting shall be held within 30 calendar days from the date of receipt of the parent's request, not counting exceptions for school vacations. On October 6, 2004, in response to Student's receipt of a deficiency notice, some of the District staff involved with Student's program met with Student's mother for a conference. The conference participants discussed concerns of changing the type of interpreter Student used, from a cued speech transliterator to a sign language interpreter. The notes state that "an IEP will be scheduled after [program specialist] Frankie Fox speaks w/[program specialist] Dianne Beauregard about a [SEE] sign assistant and to rewrite some goals/obj and write a behavior plan." Thereafter, Ms. Fox learned from Ms. Beauregard that a Signing Exact English (SEE) sign assistant was not available; hence, the IEP team did not convene to discuss a change of interpreter. Student's IEP team did not reconvene until June 3, 2005.

40. The statement in the Conference Summary notes that the IEP team would convene in the future was not a request by the parent for an IEP team meeting, and thus the 30-day timeline was not applicable. It is not apparent which procedural requirement the District violated in this regard, and Student does not point to any particular legal provision. Therefore, Student failed to establish that the failure to hold an IEP meeting following the October 2004 conference constituted a procedural violation.

Use of Sign Language During 2004-2005 School Year

41. The parent of a special education student must consent to the special education placement and services in an IEP before the placement and services can be implemented. Student contends that District staff's use of sign language with Student during the 2004-2005 school year constituted a unilateral change to his mode of communication without his parents' consent. The District argues that staff used sign language only occasionally as a visual support, that Student's mother consented to this use, and that this use did not change Student's mode of communication as an oral learner. Among the factors that an IEP team must consider in developing an IEP for a DHH student is the student's and the family's preferred mode of communication. Pursuant to the May 26, 2004 IEP, Student had a cued speech interpreter to support his oral program. The IEP did not include the use of sign language, although it did specify visual supports; for example, the IEP states that "directions should be given both visually & verbally with additional cues as needed." At a parent conference on October 6, 2004, District staff discussed with the parent the possibility of switching from a cued speech interpreter to a sign language interpreter, but ultimately this change did not occur until an IEP meeting in June 2005.

42. In Student's May 2005 psychoeducational report, the school psychologist wrote that Student's cued speech interpreter, Stephanie Maxwell, reported that she had started to use the signing method SEE "to augment the cued speech she uses with [Student]." DHH specialist Linda Schroer reported on use of sign language to the May 2005 IEP team; her report states in part that "sign language has been used this year with [Student] when introducing new concepts and vocabulary." Ms. Schroer testified that, after obtaining consent from Student's mother, she occasionally used sign language as a visual tool to help Student retain vocabulary words. Student's mother acknowledged that she agreed to try sign

language because she was willing to try anything that might work. Student did not establish that this occasional use of sign language constituted a change in his mode of communication without his parents' consent. Student's primary mode of communication remained oral communication with cued speech; the occasional use of sign language was a visual support that did not change his primary mode of communication.

2004-2005 IEP Goals and Objectives in Audition Skills, Audiology, Auditory Language Development, Building Language, and Learning the English Language

43. For the 2004-2005 school year, Student continued to need to develop his language, communication, and auditory skills. Student contends that, for the 2004-2005 school year, the District failed to develop appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language and learning the English language.

44. The May 2004 IEP contained the following goals: reading (phonics)/listening skills; reading comprehension; oral language; written language; language expression, listening skills; vocabulary expansion/language development; attending to his interpreter and teacher; and two goals in misarticulations. Dr. Martindale again testified that these IEP goals were fine, but that there were not enough goals in auditory areas to allow Student to develop language commensurate to his hearing peers.

45. The analysis of the 2004-2005 IEP goals is similar to this Decision's analysis of the 2003-2004 IEP goals. While Dr. Martindale was a knowledgeable and credible witness, her testimony that the IEP should have included more auditory goals was not sufficient to establish that the IEP goals denied Student a FAPE. As discussed above, Dr. Martindale had never assessed or met Student, and never observed his educational program, unlike credible District witnesses who testified that the IEP goals addressed all of Student's educational needs. Moreover, the standard of progress against which Dr. Martindale was evaluating the IEP goals was higher than the "meaningful educational benefit" standard applicable to this legal analysis.

46. Unlike the prior school year, the evidence indicated that Student made only minimal progress during the 2004-2005 school year. For example, Student's April 2005 scores on the W-J-III reflect little progress on reading and writing subtests when compared to similar May 2004 subtest scores on the WIAT. As discussed in Factual Finding 28, the weight given to the comparison of these scores is limited. In any event, the evidence did not establish that Student's minimal progress was caused by a shortage of IEP goals. Rather, the most significant factor was that Student was less motivated and unhappy at school, which was largely related to his dislike of his general education teacher and, to a lesser extent, his dislike of his RSP teacher.

47. In light of all evidence, the IEP goals met Student's educational needs that resulted from his disability. The goals were part of a program designed to address Student's unique needs and was reasonably calculated to allow receipt of educational benefit.

District's Offer of Educational Placement for the 2004-2005 School Year

48. For the 2004-2005 school year, Student again argues that the District should not have agreed to his parents' request for a mainstream fifth-grade placement for the majority of his school day. The May 26, 2004 IEP offered placement in a general education fifth grade class at Bullard Talent, with assistive technology of an FM system and DIS of RSP for 60 minutes per day, DHH specialist therapy for 720 minutes per month, speech-language therapy for 8 sessions per month, and a cued speech transliterator. The RSP, DHH and speech-language therapy services were all offered as one-to-one, pull-out services. At the time the IEP was drafted in May 2004, Student's teacher, service providers and parents all reported that Student had made good progress at Bullard Talent during the 2003-2004 school year. As stated above, Student made progress in areas including academics and speech intelligibility during fourth grade. He continued to have the same general areas of need, such as communication, language, auditory skills, academics, and access to the grade-level curriculum. In May 2004, Student had made friends at Bullard Talent and liked going to school there. While Student's difficulty with understanding the language in a grade-level mainstream classroom was still a problem, the IEP team continued to offer DIS and assistive technology designed to address that difficulty and support Student in the general education setting.

49. Although Student was less successful in fifth grade than in fourth grade, the May 2004 IEP team could not have reasonably anticipated that outcome. The balance of factors affecting Student's fitness for a full inclusion placement as his LRE remained generally the same as it had been in fourth grade. Hence, a mainstream placement remained Student's LRE, and the analysis for the 2003-2004 school year is applicable for the 2004-2005 school year. Considering the parents' request for a general education placement and Student's progress during the prior school year, the IEP team's offer of a mainstream placement for the 2004-2005 school year was designed to address Student's unique needs and reasonably calculated to result in educational benefit in the LRE.

District's Implementation of the May 26, 2004 IEP

50. An educational program must comport with the student's IEP. Student alleges that the District failed to implement the May 26, 2004 IEP, as evidenced by his failure to progress on any goals and objectives. There was no evidence whatsoever to support this contention. Student did not identify any particular aspect of the IEP that was purportedly not implemented. Indeed, Student's closing brief specifically alleges only that his speech therapy goals were not implemented. However, that allegation mischaracterizes the testimony of the speech-language pathologist, Lori Jern. While Student argues that Ms. Jern "testified that she failed to implement some of [Student's] goals on his IEP," in fact Ms. Jern actually testified that she worked on the objectives sequentially, and thus did not work on certain objectives during the first two quarters of the school year. As confirmed by the progress reports on Student's IEP goals, Ms. Jern worked with Student on those objectives

during the third and fourth academic quarters of the 2004-2005 school year. Thus, the District did not fail to implement Student's IEP.

Failure to Convene an IEP Meeting After October 6, 2004 Conference as a Substantive Denial of FAPE

51. Student alleges that the District substantively denied him a FAPE by failing to convene an IEP team meeting following the conference on October 6, 2004, to discuss parents' concerns regarding grading, modification of classroom work, academics, development of a behavior plan, goals, objectives, and SEE sign interpreter services. The nature of and basis for Student's arguments on this point are unclear. The October 2004 Conference Summary notes state in part that "an IEP will be scheduled after [program specialist] Frankie Fox speaks w/[program specialist] Dianne Beauregard about a C sign assistant and to rewrite some goals/obj and write a behavior plan." The notes regarding goals, objectives, and a behavior plan all related to the possibility of a change in interpreters. Pursuant to Factual Findings 39 and 40, because no change in interpreter was going to occur, the IEP team had no reason to meet to discuss the change in interpreter or related changes in goals, objectives, or development of a behavior plan.¹³

52. Furthermore, the Conference Summary notes do not indicate that an IEP meeting would convene to discuss grading, modification of classwork, or academics. In any event, following the October 6, 2004 conference, the method of grading Student was modified; there is no argument or evidence that Student needed further grading modification, or that the failure to hold an additional meeting about grading denied him a FAPE.

Offer of ESY Services for Summer 2005

53. Student contends that the District failed to offer ESY services for summer 2005, while the District argues that it did offer ESY for that summer.¹⁴ On the June 3, 2005 IEP document, the box next to recommendation of ESY services is left blank. This IEP document does not otherwise offer or mention ESY services. Student's mother testified that the District never offered ESY for summer 2005, and Student did not attend a District program that summer. Her testimony is consistent with the evidence. There is no evidence to establish that the District offered ESY services for the 2005 summer. Had the District offered the ESY services, some documentation would exist. Hence, the testimony of Student's mother and the lack of evidence to the contrary established that the District failed to offer ESY for summer 2005.

¹³ In his argument on this issue, Student contends that he would not have benefited from sign language. It is not clear how this contention supports Student's claim that his IEP team should have convened to discuss switching to a SEE sign interpreter.

¹⁴ The May 17, 2007 Order Following Prehearing Conference identifies this as a substantive claim. Despite this identification of the issue, Student's closing brief argues that the District failed to make a formal written offer pursuant to *Union Sch. Dist. v. Smith, supra*, 15 F.3d at 1526. The Decision cannot grant Student relief for a claim not which was not part of the hearing. In any event, since no offer was made, this Decision could not analyze whether such offer was adequate.

54. The District's offers of ESY services for prior summers and for summer 2006 supports a finding that Student required ESY services to avoid regression. Given the nature of Student's needs and his difficulties in fifth and sixth grades, it is clear that he needed ESY services to avoid regression. Therefore, to the extent that the District failed to address this need for the 2005 ESY, the District failed to offer a program that was designed to address Student's unique needs and reasonably calculated to provide educational benefit for the 2005 ESY.

2005-2006 IEP Goals and Objectives in Audition Skills, Audiology, Auditory Language Development, Building Language, and Learning the English Language

55. As with the prior school years, Student contends that the District failed to develop appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language and learning the English language for the 2005-2006 school year. The June 2005 IEP contained goals in the following areas: reading comprehension; written language; misarticulations (speech-language goal); prosody/stress (speech-language goal); language expression (speech-language goal); listening skills; understanding of basic concepts; verb usage; attention to interpreter/transliterators; expressing feelings (counseling goal); and conversational skills (counseling goal). After working with Student for several weeks, District staff sought to modify the academic goals to better address his needs, and to add sign language goals. Thus, the October 2005 IEP reflects goals in the following areas: reading comprehension/auditory processing; decoding; written language; math problem solving; development of sign language abilities; and attention to sign language interpreter. Testimony and progress reports from speech-language pathologist Jenny Slonski established that the three speech-language goals from the June 2005 IEP remained part of Student's IEP for the 2005-2006 school year, and that Student worked on those goals. Similarly, DHH counselor Renee Nelay established that the June 2005 IEP goals of expressing feelings and developing conversation skills remained part of Student's program for the rest of the school year, and that Student worked on those goals.

56. Dr. Martindale testified that the June 2005 IEP goals were "better" and would lead to progress, but that she was not sure if it would be enough progress to allow Student to attain a language system commensurate with his hearing peers. The analysis of this issue for prior school years generally applies again here. While Dr. Martindale was a knowledgeable witness, her testimony did not establish that the IEP goals denied Student a FAPE. The standard of attaining a language system commensurate with hearing peers is greater than the legal standard of meaningful educational benefit. For the 2005-2006 school year, knowledgeable witnesses such as speech-language pathologist Jenny Slonski established that these IEP goals addressed Student's areas of educational need. Ms. Slonski was a credible witness who was familiar with what Student's needs were during the 2005-2006 school year.

57. Regarding the October 2005 IEP, Dr. Martindale testified that the IEP goals were "particularly thin" and were inadequate to address Student's need to develop language

and audition skills.¹⁵ However, Dr. Martindale gave that testimony specifically about the academic and sign language goals added at the October 2005 IEP, without knowing that the speech-language goals and counseling goals from the June 2005 IEP remained part of Student's program for the 2005-2006 school year. Given these circumstances, Dr. Martindale's testimony did not establish that the October 2005 goals were inadequate.

58. Student made only minimal educational progress during the 2005-2006 school year. For example, comparison between the April 2005 W-J-III scores and the October 2006 W-J-III scores measured in the Clark COE evaluation shows a similar pattern of little progress on reading and writing subtests. However, as with the 2004-2005 school year, there was no evidence that Student's poor progress was related to any shortage of IEP goals. Given all of the above, the evidence established that the IEP goals met Student's educational needs that resulted from his disability, the goals were designed to address Student's unique needs, and were reasonably calculated to allow receipt of educational benefit.

District's Offer of Educational Placement for the 2005-2006 School Year

59. Student contends that the District denied him a FAPE by offering him a mainstream placement for the 2005-2006 school year. Because of Student's academic difficulties in fifth grade at Bullard Talent, at the June 2005 IEP team meeting District staff recommended that placement at Bullard Talent would not meet Student's needs. After considering various options, Student's parents subsequently agreed to a mainstream sixth-grade placement at Del Mar, and the District formally offered that placement. The District continued to offer supports and services such as an FM system and DIS of RSP for 500 minutes per week, DHH specialist therapy for 720 minutes per month, speech-language therapy for 50 minutes per week, a sign language interpreter, and weekly counseling sessions by a counselor assigned specifically to the DHH program.

60. For the 2005-2006 school year, Student continued to have the same general areas of need, such as language, auditory skills, academics, and need to access the grade-level curriculum. During the 2004-2005 school year, Student had struggled academically and received little educational benefit, which led to the District's decision not to offer Bullard Talent for the 2005-2006 school year. However, the IEP team reasonably determined that, for the 2005-2006 school year, Student needed a mainstream placement that offered greater academic time, not removal from a mainstream placement. Unlike Bullard Talent, Del Mar had a traditional elementary school schedule, with academic classes spanning the entire school day. The extensive supports and services offered in the June 2005 IEP were designed to address Student's difficulty in understanding language in the sixth-grade classroom, and to allow him to work on his IEP goals in a one-to-one setting.

¹⁵ Dr. Martindale also questioned the October 2005 switch to IEP goals for developing sign language, but indicated that she did not have enough information to reach conclusions about the use of sign language in Student's program.

61. Accordingly, the offer of mainstream placement at Del Mar with extensive supports and services was designed to meet Student's unique needs and reasonably calculated to result in educational benefit. Moreover, Student's areas of need, ability to benefit from interaction with nondisabled peers, and effect on the classroom remained generally the same for the 2005-2006 school year. As before, a mainstream placement continued to be Student's LRE. The analysis of this issue for the prior two school years remains applicable for the 2005-2006 school year. It is contradictory for the parents to now argue that the District should have rejected their request for mainstreaming, particularly given the law's recognition of the importance of parental participation in the IEP process and the law's preference for mainstreaming.

Offer of ESY Services for Summer 2006

62. Student alleges that the District substantively denied him a FAPE by failing to offer ESY services for summer 2006. On the June 21, 2006 IEP document, the box next to recommendation of ESY services is left blank, and the IEP notes do not otherwise mention ESY services. However, after having her recollection refreshed by an enrollment form she had filled out, Student's mother established in her testimony that the District had offered 2006 ESY services in a general education summer school program. Thus, the District offered Student ESY services for summer 2006.

Attendance at June 21, 2006 IEP Team Meeting

63. An IEP team must include "not less than one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)." Student contends that the District procedurally denied him a FAPE by failing to include a general education teacher at the June 21, 2006 IEP meeting. The District argues that the June 21, 2006 meeting was a continuation of the May 26 meeting, that all topics related to general education has been previously addressed at the May 26 meeting, and that any procedural defect was cured by the September 1, 2006 meeting.

64. The members of the June 21, 2006 IEP team were Student's mother and father, school psychologist Tim Conway, DHH specialist Erik Nyberg, DHH counselor Renee Nelay, DIS coordinator Lindsey Jessup, AV therapist Nancy Sakaguchi, preschool SDC teacher and AV therapist Carol Aguirre, District administrator Vicki Allen Westburg, and program specialist Karen Dockery. Because Student was participating in the general education environment and may have continued to do so, the failure to have a general education teacher at the June 21, 2006 meeting constituted a procedural violation.

65. However, there is no evidence that this violation impeded Student's right to a FAPE, significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Student's sixth-grade general education teacher attended the annual IEP meeting on May 26, 2006, at which time the team discussed several topics including Student's grades, scores on W-J-III academic testing, present levels of performance, placement options, progress on past

goals and objectives, and creation of new goals and objectives. The notes from the June 2006 IEP meeting state that the meeting was “a continuation of the 5/26/06 IEP.” A general education teacher from Ahwahnee, the proposed placement, attended the IEP meeting on September 1, 2006.¹⁶ Hence, in developing Student’s IEP for the 2006-2007 school year, the IEP team had input from general education teachers knowledgeable both about Student and about the mainstream component of the District’s proposed placement. In light of all circumstances, the District’s failure to include a general education teacher at the second in a series of three IEP meetings was harmless error.

66. An IEP team must include “not less than one special education teacher, or where appropriate, at least one special education provider of such child.” Student argues that the District procedurally denied him a FAPE by failing to have a special education teacher attend the June 21, 2006 IEP meeting. The District contends that DHH specialist Erik Nyberg was Student’s special education teacher during the 2005-2006 school year and thus fulfilled the requirement. Mr. Nyberg was Student’s DHH specialist during the 2005-2006 school year, during which time he worked with Student approximately one hour per week. Mr. Nyberg thus fulfilled the requirement that a special education teacher or Student’s special education provider must be present. By June 21, 2006, both Ms. Aguirre and Ms. Sakaguchi were also special education providers of Student. Given that Mr. Nyberg, Ms. Aguirre, and Ms. Sakaguchi were all knowledgeable about Student and his educational needs related to his disability, it was appropriate for these individuals to attend and participate in Student’s IEP meeting.

67. An IEP team must also include a representative of the LEA who meets all of the following: (A) is qualified to provide or supervise specially designed instruction to meet the unique needs of individuals with exceptional needs, (B) is knowledgeable about the curriculum, and (C) is knowledgeable about the availability of resources of the LEA. Student also asserts that the LEA representative at that meeting did not meet the legal requirements because she was not knowledgeable about the resources of the LEA. The District argues that both Ms. Westburg and Ms. Jessup met the requirements for attendance of an LEA representative. Student’s sole support for his argument is that, in response to the parents’ request for AV therapy over the summer, Ms. Westburg replied that the request for outside services over the summer had to be submitted to the District’s Board of Education for approval in the spring and, according to the IEP notes, that “this methodology needs to be considered and looked at...in a more indepth fashion.” Neither of these statements, nor any other evidence, indicated that Ms. Westburg lacked knowledge about the resources of the LEA. In addition, Ms. Jessup established in her testimony that she met the requirements for an LEA representative, and Student presented no evidence or argument to the contrary. Hence, Student failed to establish that any procedural violation occurred on this basis.

¹⁶ The September 1, 2006 IEP offered an SDC placement at Ahwahnee with mainstreaming for physical education and an elective, such as art or study skills. According to the IEP notes, the Ahwahnee general education teacher who attended the meeting was an art teacher.

Program Offer Prior to Start of 2006-2007 School Year

68. At the beginning of each school year, each LEA shall have in effect an IEP for each child with a disability in the agency's jurisdiction. Student contends that the District failed to offer a program prior to the start of the 2006-2007 school year. At the May 26, 2006 IEP meeting, the District proposed placement at either Ahwahnee or Fort Miller. At the June 21, 2006 IEP meeting, the team discussed placement options, but the District recommended placement at Ahwahnee. Student's mother established in her testimony that she understood that, in summer 2006, the District was offering Ahwahnee as the placement for the 2006-2007 school year. Hence, there is no evidence to support Student's claim. The District proposed a program to put into effect, but Student's parents chose not to consent to it.

69. Student further argues that the District procedurally denied him a FAPE by failing to make a formal written offer of the Ahwahnee placement prior to the start of the school year. Any failure to make a formal written offer was cured by the formal written offer made on September 1, 2006. Because the parents actually knew what the offer was, had already decided not to accept it, and received the formal written offer a few days into the new school year, the provision of the formal written offer a few days after the start of the new school year was harmless error and did not impede Student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or cause a deprivation of educational benefit.

Absence of Member of September 1, 2006 IEP Team to Interpret Assessment Report by Ms. Sakaguchi

70. An IEP team shall include an individual who can interpret the instructional implications of the assessment results. This individual may be one of the other statutorily mandated members of the IEP team, such as the general education teacher, special education teacher, special education provider, LEA representative, or other individual who has knowledge or special expertise regarding the pupil. Student contends that the District failed to invite to the September 1, 2006 IEP meeting an individual who could interpret the results of Nancy Sakaguchi's assessment dated August 23, 2006, and its attached amendment dated August 29, 2006. The District contends that several members of the IEP team were qualified to and did interpret Ms. Sakaguchi's report.

71. Among the members of the September 1, 2006 IEP team were Mr. Conway, Mr. Nyberg, Ms. Jessup, Ms. Schroeder, Ms. Slonski, DHH SDC teacher Carolee Clayton, and audiologist Cindy Yates. There is no dispute that the District invited Ms. Sakaguchi to attend the September 1, 2006 IEP meeting, but that she did not attend; however, she had attended the previous IEP meeting on June 21, 2006. Testimony from Ms. Schroeder established that IEP team members including herself, Ms. Yates, Ms. Slonski, and Ms. Jessup were able to interpret Ms. Sakaguchi's report. By the end of the meeting, the team members did not have any unanswered questions about the report. Ms. Schroeder had spent a significant amount of time discussing the report with Ms. Sakaguchi over the telephone

prior to the September 1, 2006 IEP meeting. As a result, Ms. Schroeder was knowledgeable about the report and its recommendations, and was able to share that knowledge with the IEP team.

72. There was no persuasive evidence indicating that the members of the September 1, 2006 IEP team were unable to interpret Ms. Sakaguchi's report. Student's arguments on this point focus on differences of opinion between the parent and the District members of the IEP team regarding who was qualified to implement Ms. Sakaguchi's recommendations. The existence of different opinions about implementation of Ms. Sakaguchi's report did not establish that the IEP team members were unable to interpret the instructional implications of the report. Accordingly, the September 1, 2006 IEP team included individuals who could and did interpret the instructional implications of Ms. Sakaguchi's assessment report.

2006-2007 IEP Goals and Objectives in Audition Skills, Audiology, Auditory Language Development, Building Language, and Learning the English Language

73. As with the prior school years, Student contends that the District failed to develop appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language and learning the English language for the 2006-2007 school year. The September 2006 IEP contained goals in the following areas: expressive/receptive language (semantics/syntax); expressive/receptive language (vocabulary); expressive/receptive language (syntax/semantics); speech articulation; reading comprehension; written language; math comprehension; and peer interaction/pragmatics. Dr. Martindale testified that these goals were fine, but that there were not enough auditory goals. The analysis of this issue for prior school years again applies here. While Dr. Martindale was a knowledgeable and credible witness, her testimony alone did not establish that Student needed additional auditory goals in order to receive a FAPE.

Requested Remedies

74. This Decision has determined that the District denied Student a FAPE during the 2005 ESY, by failing to offer ESY services for that summer. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. Reimbursement may be denied or reduced if the parents do not give the school district statutorily-required notice of their intent to obtain a unilateral placement.

75. As a remedy for the denial of FAPE, Student seeks compensatory education in the form of reimbursement for his attendance at Clarke School for residential summer session he attended from July 9-21, 2006, including related travel expenses for himself and his mother. Testimony from Clarke School teacher Robert Storm established that the

summer session was designed to address Student's unique needs and reasonably calculated to result in meaningful educational benefit. Clarke School is a well-established institution specializing in the oral education of DHH children, and has successfully taught many students with cochlear implants. Every teacher at Clarke School has a master's degree and extensive training in DHH education, including training in teaching speech, language and audition to DHH children. Clarke School features small class sizes to allow individual instruction; the entire summer session had 20 to 25 students. The summer session had opportunities for development of language and social skills.

76. The District argues that Student is not entitled to reimbursement for this summer session because his parents did not notify the District of the placement until after the summer session had ended. However, because of the unique facts of the present case, denial or reduction of the reimbursement amount is not warranted. One factor here is that reimbursement is being awarded as a form of compensatory education for the 2005 ESY, not as replacement of services during the 2006 ESY, so advance notice was less important because the denial had already occurred. Furthermore, Student's parents expended effort in researching placement options, and they were cooperative with the District. Considering the above findings that the two-week Clarke School summer session was appropriate for Student in 2006, reimbursement for that session and reasonable travel expenses is warranted as compensatory education for the District's failure to offer any program for the 2005 ESY.

77. Receipts and Student's mother's testimony established reasonable travel expenses of one round-trip airline ticket for Student, two round-trip airline tickets for Student's mother to accompany him, two nights' hotel expenses, and dinner for Student and his mother on the eve of their return trip.¹⁷ However, the \$175 fee to a travel agent to book the trips was not a reasonable travel expense warranting reimbursement, given that Student's parents could have booked the trip for little or no fee over the internet or the telephone.¹⁸ Based on the documentary and testimonial evidence establishing the parents' expenses, and considering appropriate adjustments described herein, this Decision awards Student's parents reimbursement for the following: \$1,575 for Clarke School tuition, room, and board for the 2006 summer session and \$2,024.24 for reasonable travel expenses. This is a total amount of \$3,599.24.

78. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. For most special education students in California, an ESY program lasts a minimum of 20 instructional days, up to a maximum of 30 instructional days. While the 2006 summer session at Clarke School consisted of fewer than 20 instructional days, the residential nature of the program provided instruction and educational opportunities for more hours than daytime attendance in a typical ESY program would. Clarke School's program incorporated

¹⁷ Student did not submit a receipt for his mother's second airplane ticket. However, Student's mother established proof of this expense in her testimony.

¹⁸ Moreover, the travel agency booked Student and his mother on a flight to Newark, New Jersey, instead of to nearby major airports in Connecticut or Massachusetts.

language development and other instruction beyond the classroom, in non-instructional settings such as the school's dining hall. In light of all evidence, reimbursement for the 2006 summer session at Clarke School constitutes sufficient compensatory education for the District's failure to offer an ESY program for the 2005 summer.

79. Student's request for reimbursement for the Clarke School placement from September 2006, "to a date when the District offers an appropriate educational placement" is denied. Given that the District's sole denial of FAPE was a failure to offer an ESY program for one summer, Student is not entitled to reimbursement for a full year at Clarke School. As determined above, this Decision's award of reimbursement for the 2006 Clarke School summer session was a sufficient award of compensatory education to remedy the District's denial of FAPE. In light of these factors, the request for reimbursement for the 2006-2007 school year at Clarke School is denied. Furthermore, regarding the request for prospective placement, the ALJ cannot award prospective placement at private school not certified by the California Department of Education. In any event, such an award would be speculative and unsupported by the evidence.

80. Student's parents also seek reimbursement for AV therapy provided by Ms. Aguirre and Ms. Sakaguchi from March to June 2006. As determined above, this Decision's award of reimbursement for the 2006 Clarke School summer session was a sufficient award of compensatory education to remedy the District's denial of FAPE.

81. Finally, Student's request that the District be ordered to contract with Clarke School or with Dr. Martindale to assist with his transition back to the District is denied. This Decision has already awarded a sufficient remedy for the District's failure to offer 2005 ESY services. Moreover, time periods beyond the 2006-2007 school year were not at issue. There was no evidence to establish when Student may return to attend school within the District, what program the District would offer at that time, or what services Student might require to transition back to a District school.

LEGAL CONCLUSIONS

1. In an administrative hearing, the petitioner has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. California Education Code sections 56000.5, 56026.5, and 56341.1 contain legislative findings and declarations regarding children who are deaf or hard-of-hearing. Those findings include that deafness is a low-incidence disability that requires "highly specialized services, equipment, and materials." (Ed. Code, §§ 56000.5, subd. (a)(2), 56026.5.) California Education Code section 56000.5, subdivision (b)(1) further provides that:

Deafness involves the most basic human needs--the ability to communicate with other human beings. Many hard-of-hearing and deaf children use an appropriate communication mode, sign language, which may be their primary language, while others express and receive language orally and aurally, with or without visual signs or cues.... It is essential for the well-being and growth of hard of hearing and deaf children that educational programs recognize the unique nature of deafness and ensure that all hard-of-hearing and deaf children have appropriate, ongoing, and fully accessible educational opportunities.

3. Each public agency must ensure that hearing aids worn in school by children with hearing impairments are functioning properly. (34 C.F.R. § 300.113 (2006); 34 C.F.R. § 300.303 (1999).) Similarly, effective October 13, 2006, each public agency must ensure that the external components of surgically implanted medical devices are functioning properly. (34 C.F.R. § 300.113 (2006).) However, a public agency is not responsible for post-surgical maintenance, programming, or replacement of a medical device that has been surgically implanted (or of an external component of the surgically implanted medical device). (34 C.F.R. § 300.113 (2006).)

For the 2003-2004, 2004-2005, and 2005-2006 school years, did the District fail to assess Student's unique needs in the area of audition skills (which skills affect his ability to access sounds and words, and thereby affect his ability to learn to read)?

4. A pupil must be assessed in all areas related to his or her suspected disability. (Ed. Code, § 56320, subd. (f); 20 U.S.C. § 1414 (b)(3).) Prior to July 1, 2005, an LEA was required to ensure that a reevaluation was conducted if conditions warranted or if the child's parent or teacher requested a reevaluation, but at least once every three years. (20 U.S.C. § 1414(a)(2)(A)(1997).) As of July 1, 2005, a reassessment shall be conducted if the LEA determines that the educational or related services needs of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (Ed. Code, § 56381, subd. (a)(1); 20 U.S.C. § 1414(a)(2)(A)(2005).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subd.(e); 20 U.S.C. § 1414(b)(2)(B).)

5. Based on Factual Findings 19-22 and Legal Conclusions 1 and 4, the District assessed Student in all areas of suspected disability in the area of audition skills by conducting testing such as the TAC, the W-J-III Listening Comprehension subtest, the Ling 6 Sound Test, the Wepman Auditory Discrimination Test, and other assessment tools. While Dr. Martindale explained that she would have liked to see some additional assessment tools utilized, this testimony did not establish that the District failed to assess in all areas of suspected disability related to Student's audition skills.

For the 2003-2004 school year, did the District deny Student a FAPE by failing to address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language?

6. Among the information that shall be stated in an annual IEP is a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

7. Under the Individuals With Disabilities In Education Act (IDEA), children with disabilities have the right to a FAPE.¹⁹ (20 U.S.C. § 1400(d).) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(8).) There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.)

8. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley*, *supra* at p. 201.)

9. As long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley*, 458 U.S. at p. 208.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84 (citing *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 993).)

¹⁹ The IDEA was amended effective July 1, 2005. This Decision applies the statute and regulations in effect at the time of the events in question. (See *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 n. 1 (citing *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1148 n. 2).)

10. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

11. Based upon Factual Findings 23-29 and Legal Conclusions 1 and 6-10, the May/June and October 2003 IEPs contained annual goals to meet Student's unique needs related to his disability. These IEP goals were designed to address Student's unique needs and were reasonably calculated to allow educational benefit.

For the 2003-2004 school year, did the District deny Student a FAPE by failing to offer or provide a program and services that were reasonably calculated to meet his auditory and oral needs, due to the District's offer of a mainstream placement for most of Student's time?

12. A special education student must be educated with nondisabled peers to 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 (2006); 34 C.F.R. § 300.550(b) (1999); see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).) Whether a student can be mainstreamed in a regular education class is determined by balancing four factors: (1) the educational benefits of placement in a regular education class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) costs of mainstreaming the student. (*Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404; cert. denied (1994) 512 U.S. 1207.)

13. Among the information that an IEP team must consider when developing a pupil's IEP is the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).) In *W.G. v. Target Range Unif. Sch. Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

14. Based upon Factual Findings 5-8, 23-24, and 30-37, and Legal Conclusions 1, 7-10, and 12-13, the District's offer of a mainstream placement in a general education fourth grade class for most of Student's school day was designed to address his unique needs and reasonably calculated to result in educational benefit in the LRE. While mainstreaming posed challenges to Student because of his difficulty understanding language, the IEP team offered extensive supports and services to address those difficulties. The socialization and

language modeling available to Student in a mainstream environment offered significant benefits. Given the law's preference for mainstreaming, the parents' reasonable preference for mainstreaming, and the importance of parental input during the IEP formulation process, the IEP team's decision to offer a full inclusion placement for the 2003-2004 school year constituted an offer of FAPE.

For the 2003-2004 school year, did the District deny Student a FAPE by failing to offer ESY services?

15. ESY services shall be offered and provided if the IEP team determines that the services are necessary for the provision of a FAPE to the pupil. (Ed. Code, § 56345, subd. (b)(3).) Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in light of the pupil's disability. (Cal. Code Regs., tit. 5, § 3043, subd. (a).)

16. Based on Factual Findings 9 and 38, and Legal Conclusions 1 and 15, the District offered Student ESY services for the 2003-2004 school year. As a result, the District did not deny Student a FAPE on that basis.

For the 2004-2005 school year, did the District procedurally deny Student a FAPE by failing to convene an IEP team meeting after the parent conference on October 6, 2004?

17. In the *Rowley* opinion, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. The Ninth Circuit Court of Appeals held that procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (See, e.g., *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, supra*, 960 F.2d at p. 1484.)

18. If a parent requests an IEP team meeting to review an IEP, the meeting shall be held within 30 calendar days from the date of receipt of the parent's request, not counting exceptions for school vacations. (Ed. Code, § 56343.5.)

19. Based on Factual Findings 10, 39, and 40, and Legal Conclusions 1, 17, and 18, the failure to hold an IEP meeting following the October 2004 conference did not constitute a procedural violation. Therefore, the District did not procedurally deny Student a FAPE on this basis.

For the 2004-2005 school year, did the District procedurally deny Student a FAPE by unilaterally implementing services to change his mode of communication (by beginning to teach Student sign language) without parents' consent?

20. The parent of a special education student must consent to the special education and services in an IEP before the services can be implemented. (20 U.S.C. § 1414(a)(1)(D); see, Ed. Code, § 56346, subd. (e).) Among the factors that an IEP team must consider in developing an IEP for a DHH student is the student's and the family's preferred mode of communication. (Ed. Code, § 56341.1, subd. (b)(4); 20 U.S.C. § 1414(d)(3)(B)(iv).)

21. Based on Factual Findings 11, 41, and 42, and Legal Conclusions 1, 17, and 20, the District did not unilaterally change Student's mode of communication without his parents' consent. Because no procedural violation occurred, the District did not procedurally deny Student a FAPE on this basis.

For the 2004-2005 school year, did the District substantively deny Student a FAPE by failing to address Student's unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language?

22. Based upon Factual Findings 23-24 and 43-47, and Legal Conclusions 1 and 6-10, the May 2004 contained annual goals to meet Student's unique needs related to his disability. These IEP goals were designed to address Student's unique needs and were reasonably calculated to allow educational benefit.

For the 2004-2005 school year, did the District substantively deny Student a FAPE by failing to offer or provide a program and services that were reasonably calculated to meet Student's auditory and oral needs, due to the District's offer of a mainstream placement?

23. Based upon Factual Findings 9-10, 23-24, and 48-49, and Legal Conclusions 1, 7-10, and 12-13, the District's offer of a mainstream placement did not substantively deny Student a FAPE. The IEP team offered extensive supports and services to support Student in his general education fifth grade class at Bullard Talent. Student continued to be able to benefit from the socialization and language models available in the general education environment. Given the parents' request to continue the mainstream placement at Bullard Talent and Student's progress during fourth grade, the May 2004 IEP team's offer of a mainstream placement for the 2004-2005 school year was designed to address Student's unique needs and reasonably calculated to result in educational benefit in the LRE.

For the 2004-2005 school year, did the District substantively deny Student a FAPE by failing to implement his IEP, as evidenced by Student's failure to progress on any goals and objectives?

24. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have "materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP." (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 481 F.3d 770, 773.) For example, a brief gap in the delivery of services may not be a

material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 U.S.Dist. LEXIS 39025, pp. 22-23.)

25. Based upon Factual Findings 10 and 50, and Legal Conclusions 1, 7, and 24, there was no evidence to support Student's contention that the District failed to implement his IEP. Accordingly, the District did not deny Student a FAPE on this basis.

For the 2004-2005 school year, did the District substantively deny Student a FAPE by failing to convene an IEP team meeting to discuss parents' concerns (after the parent conference on October 6, 2004) regarding grading, failing to modify classroom work, academics (vocabulary and spelling), and Student's behavior (including assessment and development of a behavior plan), and to review and/or revise Student's goals, objectives, and services (SEE sign interpreter)?

26. Based upon Factual Findings 11, 39, 40, 51, and 52, and Legal Conclusions 1 and 7, there was no evidence that the IEP team's failure to convene following the parent conference on October 6, 2004, substantively denied Student a FAPE.

For the 2004-2005 school year, did the District substantively deny Student a FAPE by failing to offer ESY services?

27. Based upon Factual Findings 53-54 and Legal Conclusions 1, 7, and 15, the District substantively denied Student a FAPE by failing to offer ESY services for the summer of 2005. Student needed ESY services to receive a FAPE and avoid regression, but the District failed to offer any program for the 2005 ESY.

For the 2005-2006 school year, did the District substantively deny Student a FAPE by failing to address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language?

28. Based upon Factual Findings 23-24 and 55-58, and Legal Conclusions 1 and 6-10, June and October 2005 IEPs contained annual goals to meet Student's unique needs related to his disability. These IEP goals were designed to address Student's unique needs and were reasonably calculated to allow educational benefit.

For the 2005-2006 school year, did the District substantively deny Student a FAPE by failing to offer or provide a program and services that were reasonably calculated to meet Student's auditory and oral needs, due to the District's offer of a mainstream placement for most of Student's time?

29. Based upon Factual Findings 11-13, 23-24, and 59-61, and Legal Conclusions 1, 7-10, and 12-13, the District's offer of a mainstream placement for most of Student's time did not substantively deny Student a FAPE. The offer of a mainstream placement with greater time spent on academic classes and continued supports and services was designed to

address Student's unique needs and was reasonably calculated to result in educational benefit in the LRE.

For the 2005-2006 school year, did the District substantively deny Student a FAPE by failing to offer ESY services?

30. Based upon Factual Finding 62 and Legal Conclusions 1, 7, and 15, the District offered ESY services for the summer of 2006, and thus did not substantively deny Student a FAPE on that basis.

For the 2006-2007 school year, did the District procedurally deny Student a FAPE by failing to include a general education teacher, a special education teacher, and a local educational agency (LEA) representative at the IEP on June 21, 2006?

31. As of July 1, 2005, the IDEA specifies that a procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

32. One of the IDEA's procedural requirements is the creation of an IEP team to determine the appropriate placement for the child. Pursuant to the 1997 amendments to the IDEA, an IEP team had to include "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)" and "at least one special education teacher, or where appropriate, at least one special education provider of such child." (20 U.S.C. § 1414(d)(1)(B)(ii)-(iii)(IDEA 1997); 34 C.F.R. § 300.344(a)(2)-(3)(1999); Ed. Code § 56341, subds. (b)(2)-(3) (2001).) Effective July 1, 2005, the phrasing of the requirement changed from "at least one" teacher to "not less than one" teacher. (20 U.S.C. § 1414(d)(1)(B)(IDEA 2004); Ed. Code, § 56341, subds. (b)(2)-(3).) In addition, an IEP team must also include a representative of the LEA who meets all of the following: (A) is qualified to provide or supervise specially designed instruction to meet the unique needs of individuals with exceptional needs, (B) is knowledgeable about the general curriculum, and (C) is knowledgeable about the availability of resources of the LEA. (20 U.S.C. § 1414(d)(1)(B)(iv); Ed. Code, § 56341, subd. (b)(4).) Where a school district improperly constitutes an IEP team, "IDEA procedural error may be held harmless" (*R.B. v. Napa Valley Sch. Dist.* (9th Cir., July 16, 2007) 2007 U.S. App. LEXIS 16840 (citing *M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

33. In *Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1074, the Ninth Circuit held that failure to include the special education teacher of the child in an IEP meeting was a FAPE denial even though the child had been attending a private school in another state and was now seeking special education services in

an Arizona public school district. The *Shapiro* court reasoned that the statute required “the teacher” of the student to be present at the IEP, and even though the child was receiving services in another state, the current special education teacher of the child was required to attend. (*Id.*) However, as noted above in Legal Conclusion 31, the IDEA has since been amended and no longer states that “the teacher” must be present. (20 U.S.C. § 1414(d)(1)(B)(iii).)

34. Based on Factual Findings 15 and 63-67, and Legal Conclusions 1 and 31-33, the composition of the June 21, 2006 IEP team did not procedurally deny Student a FAPE. While no general education teacher attended the IEP meeting on June 21, 2006, this procedural violation did not impede Student’s right to a FAPE, significantly impede the parent’s opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Because a special education teacher and a qualified LEA representative attended the June 21, 2006 IEP meeting, no procedural violation occurred on those grounds.

For the 2006-2007 school year, did the District procedurally deny Student a FAPE by failing to offer a special education program prior to the start of the 2006-2007 school year?

35. At the beginning of each school year, each LEA shall have in effect an IEP for each child with a disability in the agency’s jurisdiction. (Ed. Code, § 56344, subd. (b); 20 U.S.C. § 1414(d)(2)(A).)

36. One of the procedural violations that may constitute a denial of FAPE is the failure of the District to make a formal, specific written offer of placement. (*Union Sch. Dist. v. Smith, supra*, 15 F.3d at p. 1526.)

37. Based on Factual Findings 15-17 and 68-69, and Legal Conclusions 1, 31, 35, and 36, the District did not procedurally deny Student a FAPE by failing to offer a special education program prior to the start of the 2006-2007 school year. The District actually offered the program as of the IEP meeting on June 21, 2006, prior to the start of the 2006-2007 school year. The District made a formal written offer of that placement at the IEP meeting on September 1, 2006. Given that Student’s parents knew and understood what the offer was, any lack of a formal written offer for the first few days of the school year did not impede Student’s right to a FAPE, significantly impede the parent’s opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

For the 2006-2007 school year, did the District procedurally deny Student a FAPE by failing to invite to the September 1, 2006 IEP meeting an individual who could interpret the results of Nancy Sakaguchi’s assessment dated August 23, 2006, and its attached amendment dated August 29, 2006?

38. An IEP team shall include an individual who can interpret the instructional implications of the assessment results. (Ed. Code, § 56341, subd. (b)(5); 20 U.S.C. § 1414(d)(1)(B).) This individual may be one of the other statutorily mandated members of the IEP team, such as the general education teacher, special education teacher, special education provider, LEA representative, or other individual who has knowledge or special expertise regarding the pupil. ((Ed. Code, § 56341, subd. (b)(5); 20 U.S.C. § 1414(d)(1)(B).)

39. Based on Factual Findings 16-17 and 70-72, and Legal Conclusions 1, 31, and 38, the composition of the September 1, 2006 IEP team did not procedurally deny Student a FAPE. Because members of the IEP team could interpret the instructional implications of Ms. Sakaguchi's assessment report, no procedural violation occurred on that basis.

For the 2006-2007 school year, did the District substantively deny Student a FAPE by failing to address his unique needs by developing appropriate goals and objectives in the areas of audition skills, audiology, auditory language development, building language, and learning the English language?

40. Based upon Factual Finding 73 and Legal Conclusions 1 and 6-10, the September 2006 IEP contained annual goals to meet Student's unique needs related to his disability. These IEP goals were designed to address Student's unique needs and were reasonably calculated to allow educational benefit.

Remedies

41. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when: (1) the school district failed to provide a FAPE; and (2) the private placement or services procured are (a) proper under IDEA and (b) reasonably calculated to provide educational benefit to the child. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents need not provide the exact proper placement or services required under IDEA, but rather must only provide a placement or services that address the student's needs and provide the student with educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 510 U.S. 7, 13; 114 S.Ct. 361; *Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.)

42. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Puyallup School Dist., supra*, 31 F.3d at p. 1496).) For most special education students in California, an ESY program ranges from a minimum of 20 instructional days to a maximum of 30 instructional days, except for longer programs for individuals in special classes or centers for the severely handicapped. (Cal. Code Regs., tit. 5, § 3043, subd. (d).)

43. Reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school before they do so. (20 U.S.C. §1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.403(d) (1999); 34 C.F.R. § 300.148(d) (2006); Ed. Code, § 56176.) Pursuant to these provisions, parents must provide such notice at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, or by written notice ten business days prior to the removal of the child from the public school.²⁰ (*Id.*)

44. Based on Factual Findings 74-78 and Legal Conclusions 41-43, Student is entitled to reimbursement from the District as follows: \$1,575 for Clarke School tuition, room, and board for the 2006 summer session and \$2,024.24 for reasonable travel expenses. This is a total amount of \$3,599.24.

45. In California, a hearing officer may not render a decision resulting in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school, or resulting in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2.)

46. Based on Factual Findings 77-81 and Legal Conclusions 41-45, Student is not entitled to further relief.

ORDER

1. As a remedy for the denial of FAPE determined in this Decision, the District shall reimburse Student's parents for the following: \$1,575 for Clarke School tuition, room, and board for the 2006 summer session and \$2,024.24 for reasonable travel expenses. This is a total amount of \$3,599.24.

2. All of Student's other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The Student prevailed on Issue 4(E). The District prevailed on the remaining issues.

²⁰ The IDEA also contains exceptions to this notice requirement, such as when the parents are illiterate or the child will face physical or serious emotional harm by providing notice. (20 U.S.C. § 1412(a)(10)(C)(iv).)

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: August 14, 2007



SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division