

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Parents, on behalf of STUDENT,

v.

BALDWIN PARK UNIFIED SCHOOL

DISTRICT AND COVINA-VALLEY UNIFIED

SCHOOL DISTRICT.

OAH CASE NO. 2008040542

DECISION

Student filed a first amended request for due process on May 21, 2008. A continuance was granted on June 6, 2008. Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Covina, California, on August 11, 12, 14 and 15, 2008, and September 9, 23 and 29, 2008.

David Grey, Attorney at Law, represented Student. Student's mother (Mother) and (Father) attended all hearing days.

Meredith Reynolds, Attorney at Law, represented Baldwin Park Unified School District (Baldwin Park). Baldwin Park Special Education Coordinator Carol Lew attended all hearing days. Courtney Cooke, Attorney at Law, represented Covina-Valley Unified School District (Covina-Valley). Covina-Valley Senior Director of Student Services Dennis Trzeciak (Trzeciak) attend all hearing days and on some days was accompanied by Special Education Administrator Abigail Cabrera (Cabrera).

At hearing, the parties were granted permission to file written closing arguments by October 10, 2008. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

ISSUES

1. Was Student denied a free and appropriate public education (FAPE) because she was not offered an auditory/oral program and auditory verbal therapy (AVT) at the September 27, 2006 and October 26, 2006 individualized education plan (IEP) team meetings.

2. Was Student denied a FAPE because the placement offered to Student as of February 9, 2007, was represented as an auditory/oral program, but was not, and did not include AVT.

3. Was Student denied a FAPE after January of 2008 because the District failed to provide Student with an appropriate placement and related services after Student was inappropriately kissed and touched by another special education student.

FACTUAL FINDINGS

1. Student is a 10-year-old female, who at all relevant times was a resident of Baldwin Park and eligible for special education under the category of deaf or hard of hearing (DHH). Although enrolled in Baldwin Park, because of her unique needs, at all times Student attended schools operated by Covina-Valley under a special education local plan area agreement.

2. Student had profound hearing loss in both ears. It was unknown whether this condition existed from birth or early infancy. Student lived outside the United States prior to the age of four. Student was not fitted for hearing aids until April of 2003, when she was almost five years old. Prior to the age of five, Student had not been enrolled in any school.

3. In June of 2006, approximately three months before her eighth birthday, Student had surgery at UCLA to install a cochlear implant in her right ear. Student began using the cochlear implant in approximately August of 2006. Student continued to wear

a hearing aid in her left ear. An August 30, 2006 assessment summary by the UCLA audiology clinic noted, without reference to specific services or methodologies, that they encouraged parents to “advocate for increased services particularly with regard to development of oral communication skills in view of the new implant.”

4. Spanish was the primary language spoken in Student’s home. Prior to receiving her cochlear implant, Student communicated using a total communication method of sign language and spoken English. Student’s family communicated with her in this way as well.

5. Covina-Valley Student Support Specialist Patti Shawn (Shawn) visited Student over the summer of 2006 to check on her progress. Shawn’s job duties included supporting students, interacting with parents, acting as the administrator at IEP team meetings and she consults with teachers regarding teaching strategies for DHH students. Shawn had an M.A. in special education with emphasis on DHH and had extensive classroom teaching experience. Shawn had been involved in starting the aural rehabilitation program in Covina-Valley. Shawn was deaf herself. She received a cochlear implant in 2001 as an adult, and had participated in aural rehabilitation herself. Accordingly, Shawn had both a personal and professional interest in making sure that Student could make the most of her cochlear implant. Shawn communicated using audition, visual cues, sign language and speaking. Shawn was proficient in sign language but also had sufficient auditory/oral abilities that she could converse without signing. Shawn explained that some people, including Mother, signed to her because they thought she needed it. At hearing, the ALJ was able to communicate with Shawn without the use of a sign language interpreter. Because Shawn had extensive experience and education regarding teaching DHH children, was deaf herself, and had personal experience with receiving a cochlear implant, her testimony and opinions at hearing were given great weight.

6. Shawn had met Student when Student first enrolled in the Covina-Valley program and had attended all of Student's IEP's as the administrative designee from that time until Student left school. Shawn described that when Student first enrolled in Covina-Valley at the age of five, Student had no prior experience with amplification and that it was a struggle to get Student to use her hearing aids.

7. At the beginning of the 2006-2007 school year, Student returned to the "total communication" special day class (SDC) program for DHH students at Covina-Valley's Mesa Elementary School (Mesa). There were four students in the class. The total communication SDC at Mesa used both spoken language and sign language when delivering instruction, depending on the individual needs of the children. In essence, a total communication program used all communication modes needed to help the child understand. Auditory trainers, i.e., devices that broadcast the teacher's speech directly to a student's hearing aid, were used. A portion of the school day was devoted to auditory only instruction in order to assist students in increasing their auditory understanding and vocabulary.

8. On September 13, 2006, Student's operative IEP was amended to provide a total of 50 minutes per week of individual aural rehabilitation therapy (ART) per week until a triennial IEP could be held on September 27, 2006. The additional therapy was suggested by Shawn, who wanted to make sure that Student received the services she needed to make the most of her new implant. Shawn also spoke to Student's teacher and explained that Student should be given more opportunities for auditory/oral learning in small groups of children with similar needs.

9. On September 20 and 22, 2006, Covina-Valley Speech Language Pathologist Sylvia Kaparos (Kaparos) performed an auditory skills assessment in preparation for Student's annual IEP. Kaparos had an M.S. in Communicative Disorders from California State University Northridge, an M.S. in Education from the University of

Southern California and a bachelor's degree in psychology. Kaparos had a deaf and hard of hearing credential, which she received following an internship working, in part, with cochlear implant recipients at the John Tracy Clinic. Between 2002 and 2008, Kaparos had attended one or two professional trainings per year on the subject of auditory verbal training. In addition to being a speech-language pathologist, Kaparos had six years experience teaching in an auditory/oral K-1 classroom. Kaparos was recognized by the A.G. Bell Academy for Listening and Spoken Language (A.G. Bell) as a Listening and Spoken Language Specialist. While Student was enrolled in Covina-Valley, Kaparos was in the process of becoming certified by A.G. Bell as a provider of Auditory Verbal Therapy (AVT) and at the time of hearing was scheduled to take the certification exam in October of 2008. As part of the certification process, Kaparos was being mentored by certified AVT therapist Sylvia Rothfleisch. AVT certification is not required by any government licensing body. Based on her credentials and her demeanor of answering questions directly and without hesitation, Kaparos's testimony was found credible in all respects.

10. Kaparos found that as of September of 2006, Student could carry on a simple conversation using sign language and would use her voice when encouraged. However, Student did not have the ability to produce most speech sounds at a conversational level. Student was assessed for auditory comprehension using the Test of Auditory Comprehension, 3rd edition (TACL-3) without the use of visual aides, lip-reading or sign language. Student was in the "very poor" range as demonstrated by her ability to comprehend only basic sentences and inability to comprehend more complex sentences or morphemes (plurals and tense markers).

11. Kaparos provided ART and speech therapy to Covina-Valley students and began providing ART to Student in September of 2006. Kaparos knew some sign language but was not fluent. Therapy always began with Kaparos verifying that

Student's implant was functioning. During therapy, Kaparos would sit to Student's right side (where the implant was located), so that Student could not see Kaparos's lips or face. Kaparos sometimes used "acoustic highlighting," i.e., emphasizing a particular consonant in a word to promote understanding by the student. Kaparos did not use lip reading or sign language as part of the therapy except for clarification. Specifically, Kaparos would only use sign language if Student had been given three opportunities to respond to aural stimulus but did not understand. Then, Kaparos might use sign language to clarify, followed by a repeat of the aural stimulus. Kaparos described this as "auditory sandwiching," i.e., using a visual cue in between audition to help the child obtain auditory understanding. During ART sessions with Kaparos, Kaparos provided Mother with lists of vocabulary words that Student was working on, and also provided homework to improve Student's listening ability. At hearing, Mother testified that she had seen Kaparos use sign language during the ART sessions with Student. Mother's observation was plausibly explained by Kaparos as being a last resort followed by "auditory sandwiching" to keep the focus on auditory learning.

12. Shawn attended Student's ART sessions from time to time in order to check on her progress. During times that Shawn observed, sometimes Shawn would provide the clarification in sign language after three auditory attempts. Shawn was knowledgeable about ART even though she could not be a therapist herself. Shawn understood that ART did not involve the use of sign language because the point of the therapy was to work on listening and that sign language was only used as a last resort for clarification. At hearing, Mother testified that Specialist Shawn used sign language during her visits to the ART sessions. This was plausibly explained by Shawn using sign language as part of her mode of communication and by Kaparos's testimony that Shawn would sometimes sign an explanation as part of the "auditory sandwiching" technique.

13. Kaparos also provided speech therapy to Student and sometimes during ART would work on speech therapy goals. To work on articulation and reduction of nasality, a mirror was used to provide a visual indicator of outgoing breath. Similarly, Student was sometimes asked to touch Kaparos's throat to show Student proper sound production. Neither of these techniques was related to teaching lip-reading.

14. Student always tried to engage Kaparos with sign at the beginning of the ART sessions, and after one or two exchanges would use auditory/oral communication. As Student made progress, there was less need for sign language clarification. When Student did sign to her, Kaparos would encourage Student to speak. Kaparos reminded Student to speak not only because it was the goal of therapy, but also because Kaparos did not understand sign language very well. Based on her behavior, it appeared to Kaparos that Student preferred to use sign language.

15. Covina-Valley's ART was designed to provide students with cochlear implants the opportunity to develop listening and speaking abilities. ART was focused on coaching parents to help children use hearing as a primary method of learning to use spoken language, without the use of sign language or lip reading. AVT techniques were used in ART. Kaparos did not think that Student could be provided AVT in strict conformance with the ten major principles of AVT as articulated by A.G. Bell because Student was relatively old for AVT (having received her implant at age eight), Student had not had the benefit of amplification prior to age five, and Student's primary language at the time she received the implant was sign language.

16. A.G. Bell is the only organization that certifies therapist who provide AVT. According to A.G. Bell, AVT requires adherence to the following ten principles: 1) promote early diagnosis in newborns, infants, toddlers and young children, followed by immediate audiological services and AVT; 2) recommend immediate assessment and use of state of the art technology; 3) guide and coach parents to help children use hearing

and speech rather than lip reading and signing; 4) guide and coach parents to becoming the primary facilitators of the child's listening and spoken language skills through consistent participation in AVT; 5) guide and coach parents to help parents to create environments that support listening for the acquisition of spoken language; 6) guide and coach parents to their children integrate listening and speaking into all aspects of the child's life; 7) guide and coach parents to use natural developmental patterns of audition, speech, language, cognition and communication; 8) guide and coach parents to help their child self-monitor spoken language through listening; 9) administering ongoing assessments to develop treatment plans and evaluate their effectiveness; and 10) promote education in regular schools with peers who have typical hearing. Support Specialist Shawn persuasively explained that Student's program in Covina-Valley provided her with all of the above, with the significant exception of early intervention, which Student had not had access to.

17. At hearing, Student presented expert testimony regarding AVT from Karen Rothwell-Vivian (Rothwell-Vivian). Rothwell-Vivian had an M.A. in special education, with an emphasis on the deaf and hard of hearing and had also obtained an M.A. in audiology. She possessed a lifetime teaching credential, a certificate of clinical competence as an audiologist and certified by A.G. Bell as an AVT therapist. Rothwell-Vivian had not reviewed Student's records, had not assessed her, and had no knowledge of the Ben Lomond auditory oral program or Covina-Valley's ART. The only time Rothwell-Vivian saw Student was when Rothwell-Vivian was observing an AVT certification candidate providing therapy to Student at Oralingua. In light of her experience and credentials, Rothwell-Vivian's limited testimony about AVT and the education of DHH children was found credible in its entirety.

18. Rothwell-Vivian described AVT as an approach to promote listening skills without emphasis on lipreading (i.e. pointing to exaggerated mouth movements) that is

done in collaboration with the child, therapist and the child's caregiver. AVT is intended to train the student's brain to make sense of the stimulation being provided by the cochlear implant. Sign language is not used in AVT because sign language does not support the development of listening and speaking. AVT therapy should be administered in a room that is as quiet as possible, particular during the early sessions, because the focus is on acquisition of language. Later on, as the child develops listening skills, the focus of therapy includes discriminating voices from background noise. It is acceptable for others, such as audiologists or therapists, to observe and participate in, AVT sessions. Rothwell-Vivian acknowledged that natural lip reading, that results from a child looking at the speaker, is acceptable. Rothwell-Vivian stated unequivocally that the education of deaf children is not known for cohesiveness of methodology and there are many possibilities and many choices. Although implantation at age eight is not a bar to successful AVT therapy, it is a much slower process. If a child was signing prior to receiving a cochlear implant, there should be a transition period in which the child is allowed to sign. If the child needs to sign, they should be allowed to. Some use of signs to clarify during teaching or to prevent danger is acceptable, so long as sign language is not emphasized. During AVT therapy, aural sandwiching in conjunction with gestures or a visual aid may be used. Rothwell-Vivian understood that in "aural rehabilitation" as compared to AVT, some visual cues could be used at the discretion of the therapist, based on the child's needs. A person who was not certified by A.G. Bell could administer AVT. Based on Covina-Valley's description of its ART program, Rothwell-Vivian interpreted it as an aural rehabilitation program that incorporated AVT techniques.

19. Student's ART sessions while she was enrolled at Mesa were held in an empty classroom that Kaparos shared with school psychologist Rebecca Su (Su). When Su was present, she was not a distraction because she was sitting at a desk working. Mother missed five ART sessions during the fall of 2006.

20. Student was given a psychoeducational assessment by Covina-Valley credentialed school psychologist Su prior to the September 27, 2006 triennial IEP team meeting. Su had known Student from the time Student was five years old. Su specialized in working with deaf and hard of hearing children. Su was deaf herself, and as an adult had received a cochlear implant. She communicated using both sign language and speech. Su had an M.A. in developmental psychology from Gallaudet University and a B.A. in psychology from California State University, Northridge. Su had 16 years experience as a school psychologist, which included extensive experience in assessing DHH children and collaborating with teaching staff on strategies and interventions. Su's testimony carried great weight in light of her credentials and the insights she possessed as a deaf person who had received a cochlear implant.

21. Student was in the second grade at Mesa Elementary at the time of the assessment. Student was using speech to communicate approximately half the time in addition to, or instead of, sign language. Su's September of 2006 psychoeducational assessment used a variety of standardized assessments as well as teacher interview and record review. Student was given the Wechsler Intelligence Scales for Children, Fourth Edition (WISC-IV), which yielded the following standardized subtests scores: perceptual reasoning (solving visual, non-verbal problems) – 84 (low average); working memory (using newly learned information to complete a task) – 68 (extremely low); and, processing speed (quickly scanning symbols and making judgments) – 78 (borderline). Because of Student's hearing loss, she was not given the full range of WISC-IV verbal comprehension subtests. Instead, she was given selected subtests in sign language to obtain an informal measure of language functioning. Even with sign language, Student's verbal comprehension was in the "extremely low" range for her age. The Beery-Buktenica test of Visual-Motor Integration, Fifth Edition (VMI) showed that Student had

average skills in this area with some weaknesses in visual perception and motor coordination.

22. As part of the psychoeducational assessments, Student's teacher reported that in reading, Student had a limited vocabulary and could only answer passage comprehension questions at a "K.4" (four months into kindergarten) level. In math, Student struggled to solve addition problems that used numbers beyond six, had not mastered addition facts and struggled with addition or subtraction word problems. In writing, Student could produce the alphabet and her name, but could not spell basic pronouns, number words, color words and the "to be" verbs. The Woodcock-Johnson Tests of Academic Achievement, Third Edition (WJ-III), was also given to Student by Specialist Shaw. Shaw used a combination of sign language and voice during the testing. Consistent with the teacher observations, the WJ-III showed that Student's academic abilities were generally in the kindergarten to first grade range when compared to typical peers. Her academic skills were in the "low" range, whereas her ability to apply her academic skills was "very low."

23. At hearing, Student did not produce evidence demonstrating that the District's assessments prior to the September 27, 2006 IEP were invalid or inappropriate in any way.

24. A triennial IEP team meeting was held on September 27, 2006. All recent District assessments were provided to parents and discussed. Measurable annual goals were developed to address the academic deficits identified by the recent assessments as well as improving auditory skills and receptive and expressive language. Modifications and accommodations were also developed based on Student's disability. It was reported that Student was not consistently using her cochlear implant, and a goal was developed for Student to have her implant on 100 percent of the time when she entered class. Student was offered placement in an SDC at Mesa, which, at the time of the IEP, was a

class of four students who received instruction using both spoken language and sign language. Student was also offered one period a day of mainstreaming with a sign language interpreter. The following related services were offered: 50 minutes per week of individual therapy to work on auditory skills goals; 10 minutes per day of individual classroom instruction to work on listening and speaking; 30 minutes per week of individual speech therapy; 30 minutes per week of group speech therapy not to exceed three students; and 60 minutes per year of audiological services and as needed.

25. Parents expressed to the IEP team that they would like to see Student learn to listen and speak. Mother explained at hearing that Student had told her that she wanted to learn to interact better with typical peers. Parents requested that Student be placed in the auditory/oral program at Covina-Valley's Ben Lomond Elementary School (Ben Lomond). The IEP team meeting notes reflect that parents wanted this placement so that Student would be motivated to speak after seeing other DHH children talking. Parents requested that Student be provided with a sign language interpreter if Student was placed at Ben Lomond. It was explained to parents that sign language interpreters were not provided in an auditory/oral program like Ben Lomond because all instruction was verbal. Parents did not agree with the offer of continued placement in the total communication program at Mesa. It was agreed that the IEP team meeting would be continued to allow parents an opportunity to visit the Ben Lomond program.

26. Ben Lomond had two DHH classes, one for kindergarten through second grade and one for students in third grade through fifth grade. Approximately 400 students attended Ben Lomond. The Ben Lomond DHH program was an "auditory" program, meaning that instruction was delivered using the instructor's voice only, without sign language, so that DHH children, particular those with cochlear implants, could learn to listen. The classroom did not use signs, labels or pictures other than those that would be used in a class of typical children. The classroom teachers collaborated

with the speech and language therapists on strategies to assist the children in areas like articulation.

27. The triennial IEP team meeting continued on October 26, 2006. At parents' request, Baldwin Park Special Education Coordinator Carol Lew (Lew) attended. Mother expressed that she wanted Student to learn to speak and was concerned that she would not in her current placement. The team discussed with Mother that at the time Student did not have the grammar, language, vocabulary and auditory processing skills to take in what was being taught in the Ben Lomond oral program. Student's teacher related that at the time, Student's first response was always in sign language and Student responded more enthusiastically with sign language. The teacher generally needed to sign first and then model speech for Student. Shawn and Su understood that parents wanted Student to learn to listen and speak, but explained that because Student had only recently received a cochlear implant, Student needed a transition period to develop more listening skills and vocabulary before moving to Ben Lomond.

28. The IEP team explained that at Ben Lomond the children were totally oral, some were even bilingual, and that all were able to process auditorily. District audiologist Blaze Kistler (Kistler) explained his opinion that he thought the total communication program was more appropriate based on Student's history of delayed intervention and education, combined with the relatively late acquisition of a cochlear implant. Aural Rehabilitation therapist Kaparos explained that Student needed to acquire additional skills before the team should consider transiting Student to an oral program. Mother provided the team with an October 4, 2006 letter from the UCLA audiology clinic that was addressed "To Whom It May Concern." The letter recommended that: "In order for maximum benefit from the cochlear implant to accrue, it is critically important that [Student] be given intensive speech and language therapy, in a one-on-one session, using spoken language without Sign." The letter recommended

four hours a week of “speech therapy,” but made no reference to AVT or any other specific type of therapy. The IEP team discussed that the recommendation contained in the letter did not take into account the need for Student to make academic progress. The IEP team proposed that another meeting could be held in January of 2007 to discuss Student’s progress and whether the oral program at Ben Lomond would be appropriate at that time. Parents did not consent to the IEP that day and took it home to consider. A signed IEP was not introduced as evidence at hearing, however, Student received the services offered by the IEP.

29. Kistler provided audiology services to Student while she was enrolled in Covina-Valley. Kistler had a M.A. in speech pathology and audiology from California State University – Los Angeles. Kistler was a state-licensed audiologist and audiometrist and possessed a certificate of clinical competence from the American Speech-Language Hearing association. Kistler remained current in the area of cochlear implants through numerous trainings. Kistler performed audiometric testing of Student on December 12, 2006, which showed that at 50 decibels, the level of everyday speech, Student’s ability to understand speech was poor. When given auditory stimulus while seeing a face, Student understood less than 36 percent of the words. When given auditory input only, Student was only able to understand about 12 percent of the words.

30. Kistler persuasively testified that at all times during her enrollment, Student was provided with appropriate audiological supports, whether through FM systems that sent teacher’s voices directly to her implant or through FM systems that sent teacher’s voices to an individual speaker on Student’s desk.

31. In December of 2006, Mother had Student informally assessed by Oralingua School for the Hearing Impaired (Oralingua) to determine if Student was a candidate for enrollment. Oralingua’s report was provided to both Covina-Valley and Baldwin Park. Oralingua’s report does not support a finding that in the fall of 2006,

Student should have been placed in an auditory/oral program or that Student could obtain educational benefit only through the provision of AVT. The report noted that Student's difficulty with using spoken language was understandable in light of her history of delayed intervention for her hearing problem, delayed enrollment in education, recent acquisition of a cochlear implant, and that multiple languages were spoken at home. Oralingua recommended "intensive": 1) "aural habilitation to aid [Student] in learning to use the information available from the implant"; and 2) "speech therapy to assist [Student] in applying these skills to speech in words, sounds and language." The report noted that at the time, Oralingua could not accept Student because it could not place Student with a group of children with similar needs. The report concluded by emphasizing that Student needed a "consistent communication system" and that "it is questionable whether introduction of spoken language alone will be sufficient for [Student's] communicative needs at this time."

32. Kaparos performed an auditory skills assessment of Student on February 5, 2007. Kaparos administered selected subtests of the Test of Auditory comprehension using Student's cochlear implant only. Kaparos also did informal observation of Student. Student was able to discriminate between a voice and an environmental sound and could discriminate between common phrases. Student was 50 percent accurate when asked to identify a picture of an orally presented noun. In informal observation, Student was seen to prefer sign language to speaking. Student was not observed to understand directions containing more than one element, nor did she demonstrate incidental aural learning or understanding of connected speech.

33. An IEP team meeting was held on February 9, 2007. Mother told the IEP team that she was interested in both the oral program at Ben Lomond and the program at Oralingua. Kaparos presented her recent assessment. Student's SDC teacher reported that when instructing Student she had increased her use of oral/auditory

communication and decreased her use of signing when possible. Mother continued to request an oral program. The other IEP team members expressed their concern that they did not think Student had acquired sufficient skills to make progress in an oral/auditory program. Shawn and Su now believed that Student was ready to go to Ben Lomond. The IEP team ultimately offered Student placement in the aural program at Ben Lomond beginning February 20, 2007, using the same goals set forth in the September 27, 2006 IEP, until a 30-day review could be conducted. The following related services were offered: 30 minutes per week of individual speech and language therapy; 30 minutes per week of group speech and language therapy; 50 minutes per week of auditory rehabilitation; and 60 minutes per year of audiological services and as needed. Mother and Father consented to the IEP. The IEP noted that auditory trainers would be provided in addition to general audiological services for Student's hearing aid and implant.

34. An IEP team meeting was held on March 23, 2007, which was designated as Student's annual IEP. Measurable annual goals were developed to meet Student's needs in academics, aural rehabilitation and speech based on Student's present levels of performance. Modifications and accommodations were also developed based on Student's disability. Student's placement remained the SDC oral program at Ben Lomond with the following related services: 30 minutes per week of individual speech and language therapy; 30 minutes per week of group speech and language therapy; 50 minutes per week of auditory rehabilitation; and 60 minutes per year of audiological services and as needed. Mother and Father consented to the IEP. The IEP noted that auditory trainers would be provided in addition to the general audiological services for Student's hearing aid and implant. Mother and Father consented to the IEP.

35. Student's ART sessions at Ben Lomond between March of 2007 and June of 2007 were held in an empty classroom. The only additional noise would have come from outside the building. During the summer of 2007 and through February of 2008,

ART was conducted in a partitioned area of the library at Ben Lomond. At hearing, Mother expressed that she did not think the ART room at Ben Lomond was appropriate because at times she would hear students in the library on the other side of the divider. However, if there was an unacceptable noise level, Kaparos would ask the children on the other side to be quiet. Kaparos did not recall any time when outside noise interfered with the therapy other than a few occasions when she quieted children who were in the library. For approximately two months during the fall and winter of 2007-2008, Mother did not attend Student's ART sessions with Kaparos because she was tending to her sick mother. Mother also missed ART sessions during this time period to care for Student's brother.

36. Student's DHH class at Ben Lomond during the 2007-2008 school year was taught by Vicki Barkley (Barkley). Barkley was a credentialed teacher with a communicatively handicapped credential. Barkley was very well qualified, possessing approximately 24 years of teaching experience, the majority of it in DHH classes. Barkley served as a master teacher for USC/John Tracy Clinic graduate students who were specializing in education the deaf and hard of hearing. Barkley's class consisted of seven deaf or hard of hearing students, all of whom had hearing aids and/or cochlear implants and some auditory and verbal ability. The students ranged in age from nine to eleven and were in grades three, four and five. Student and the other third grade students were mainstreamed for physical education, lunch and recess periods. On some Fridays, typical students from an English language learners class participate in the classroom.

37. Barkley's class was an auditory/oral classroom that was acoustically appropriate for DHH students. All instruction was delivered orally, generally with the use of FM transmitters that brought the voices of Barkley or an aide directly to the various student's cochlear implants or hearing aides. Although Barkley was fluent in conceptually accurate signed English, sign language was not used for instruction. Lip

reading was not taught to students. Occasionally Barkley would use gestures or sign to clarify something to an individual student after attempting to obtain understanding through auditory means. Barkley occasionally used sign language to communicate with Shawn or Su, both of whom used sign language as well as speech to communicate. Occasionally an aide used sign language or a gesture on the playground to tell a student to stop in emergency situations. Barkley's students sometimes used sign language amongst themselves, particularly during lunch or recess. Kaparos had seen Student sign to her friends on the playground, who then responded with speech. Barkley did not use visual cues or visual schedules any more than they would have been used to teach in a general education classroom. Principal Cheri Howell (Principal Howell) only saw one aide, Reynolds, use sign language to stop kids on the playground. Reynolds clarified at hearing that she had been specifically instructed to use sign language only as a last resort.

38. Consistent with the testimony of school personnel about children at Ben Lomond using sign language, Student's AVT expert, Rothwell-Vivian, acknowledged that some deaf or hard of hearing children use sign language with friends who do not speak well. Also consistent with the testimony of school personnel about Student's abilities to use audition in the fall of 2006, Rothwell-Vivian testified that it can take up to six months after an implant surgery for a cochlear implant to be properly "mapped" in order to provide maximum benefit.

39. At hearing, Mother testified that when she saw Student's classroom at Ben Lomond, generally when she was picking up Student to attend ART with Kaparos, she saw the teacher or students using sign language. However, Mother's testimony does not demonstrate that sign language was improperly used for instruction, but at most corroborates the testimony of Barkley, Howell, Reynolds, and Student's expert Rothwell-

Vivian that sign language could acceptably be used in limited circumstances, so long as not emphasized, and may have been used by students amongst themselves.

40. Barkley's class had double-sized desks for each of the seven children, a four foot by four foot square table for group work, a six foot long kidney shaped table for group work and a row of computers along a wall. The children were arranged at the kidney shaped table by grade, so Student was far away from fifth grade students. Generally within the classroom students were seated with children from their own grade and children from different grade levels did not use the computers at the same time.

41. Between the beginning of the 2007-2008 school year, and Student's departure from Ben Lomond in March of 2008, Teacher Barkley saw that Student made improvements in speaking and auditory processing. In particular, Barkley noted that Student developed a better understanding of class expectations, became more talkative and her communication skills were improving. Student's report cards also demonstrated that she made educational progress at Ben Lomond. Her report card for the first two trimesters of the 2007-2008 school year showed that Student had no behavior problems and made satisfactory progress in all subjects. The only "unsatisfactory" areas noted were in listening, contributing to class discussion and seeking help.

42. During recess on the Ben Lomond campus, third graders like Student were assigned to play on one area of the playground, whereas fifth graders played on another side of the campus. Third graders and fifth graders only overlapped for lunch and recess during a very short period of time. Third graders were released from Barkley's class to go to lunch at 12:00 noon, after which they go to the playground. Fourth and Fifth graders were released from Barkley's class at 12:15 p.m. and sat at tables vacated by children in the younger grades. Third graders returned to class at 12:40 p.m., whereas fifth graders returned from lunch at 12:55 p.m. Third grade students were released from school at 2:22 p.m., and fifth grade students were released five minutes later.

43. Sheryl Reynolds (Reynolds) was an aide in Barkley's DHH class at Ben Lomond since 1992. Reynolds had been a DHH since 1988. Her job duties included assisting with small group instruction at Barkley's direction and working with the school audiologist to make sure that student amplification equipment was maintained. Reynolds worked with Student from the 2007 ESY until Student left Ben Lomond in March of 2008. Reynolds had been instructed not to use sign language with Student and to only use sign language in groups as a last resort. Kathryn Ennis (Ennis) also worked as an aide in Barkley's classroom between 10:00 a.m. and 1:45 p.m. Ennis only knew two things in sign language, "stop" and "no," which she used sometimes on the playground.

44. On the morning of February 19, 2008, Mother attended one of Student's AVT sessions with Kaparos. Kaparos spoke Spanish, so Mother could communicate with her. Mother told Kaparos that she had recently overheard Student telling a cousin that she had two boyfriends at Ben Lomond. Mother questioned Student about the boyfriends and learned that on more than one occasion, the boyfriends, fifth grade students A and B, along with two female third grade students, C and D, would meet in a girls bathroom on the Ben Lomond campus.¹ The bathroom where the meetings took place was designated as a first and second grade bathroom. There, student A would kiss the girls and hold their hands. Student B would kiss the girls on the lips and touch their bodies. Student B had also put his hand in Student's pants. All of the students involved

¹ For purposes of anonymity, the other special education students involved in the incident were given letter designations. The two boys involved in the incident were referred to as students A and B, and the two other female students involved were referred to as C and D. All documents presented as evidence at hearing were redacted to use these designations rather than the student's names.

in the incident were enrolled in the deaf and hard of hearing SDC taught by Barkley.² Kaparos immediately took Mother to meet with Principal Howell, who had 20 years experience in education.

45. Kaparos translated for Mother at the February 19, 2008 meeting with Principal Howell. Principal Howell listened to Mother, assured Mother that she would investigate, and immediately instituted the following precautions: Howell determined that Student was not on the bus with A or B and did not have speech therapy with either one; Teacher Barkley was instructed to make sure that the involved male students would not have immediate contact with the female students, in particular, that none of the students were to be released from the classroom at the same time without supervision; and, during lunch and recess, an adult aide was assigned to maintain visual contact with the third grade female students, while another adult aide was assigned to maintain visual contact with the male fifth grade students. Teacher Barkley implemented the plan and in addition, rearranged the classroom seating so that the children could not touch each other under the desks.

46. Principal Howell immediately reported Mother's allegations to Covina-Valley Senior Director of Student Services Dennis Trzeciak (Trzeciak). Trzeciak told Howell to perform a preliminary investigation by contacting the students that were allegedly involved and to inform Mother about the investigation. This procedure was consistent with how Covina-Valley would handle similar allegations. If the allegations

² The Factual Findings do not, and cannot, in light of the lack of direct evidence from Student or any other alleged eyewitness, make any findings regarding the truth or untruth of Mother's allegations. Instead, the Factual Findings are limited to a determination of what was known by Covina-Valley and Baldwin Park during the relevant time period.

had been substantiated, then the appropriate authorities would have been contacted. Trzeciak contacted Covina-Valley Special Education Administrator Abigail Cabrera (Cabrera), whose responsibilities included oversight of DHH programs, to tell her about the allegations.

47. On the afternoon of February 19, 2008, female third grade students C and D were separately brought out of class and interviewed by Howell. Both C and D had good auditory skills and did not need assistance with communication. Howell explained to both that she just needed their help and needed them to be honest. Howell said something to the effect of wanting "to make sure that there was not a problem and that everyone was comfortable." Both C and D denied being in a girls bathroom with boys and denied being kissed by boys at school.

48. Male fifth grade student A was also retrieved from class and interviewed by Howell in the afternoon on February 19, 2008. Howell told student A words to the effect of, "there might be a problem," that they "had to make sure that students were safe," and that it was important to tell the truth. Shawn was present to provide sign language interpretation if needed. Student A denied being in a bathroom with girls, appeared confused when asked if it was acceptable to kiss girls at school and stated that he did not like girls.

49. Student was also interviewed on the afternoon of February 19, 2008. Principal Howell retrieved Student from class. Student made eye contact and smiled, but did not say anything initially. Shawn was present to assist with sign language translation as needed because Student's auditory skills were not as well developed as those of female students C and D. Principal Howell explained that Mother had visited and expressed a concern. Howell explained that Student needed to tell the truth so that Howell could help if she could. Student was asked about whether any boys at school made her feel uncomfortable and whether any boys had kissed her. Student appeared

confused by the questions and denied both. Howell expressed to Student that she wanted to make sure that Student was happy and comfortable at school. Shawn made sure that Student understood what was being asked of her. Shawn watched Student for signs of anxiety but did not observe any. To the contrary, Shawn described Student as appearing comfortable during the interview.

50. After learning of the allegations on February 19, 2008, Teacher Barkley watched her students for any sign that something was going on. Barkley did not see anything, even when individual students had been sent to Principal Howell's office. At the end of the day, Barkley reported to Principal Howell that she had not seen anything unusual.

51. Principal Howell interviewed fifth grade male student B in the afternoon on February 20, 2008. Principal Howell stated that she had heard that they may be a problem and that she needed student B's help. Student B denied being in the girl's restroom, denied kissing girls at school, denied touching anyone inappropriately and denied having a girlfriend at school.

52. Principal Howell was unaware of any other similar incidents involving students A and B. Based on the investigation, in which everyone allegedly involved, including Student, had denied the incident, Principal Howell believed at the time that the allegations were not true. However, Principal Howell ordered that the safeguards of ensuring that the involved students were prohibited from being together out of sight of an adult were kept in place.

53. Principal Howell explained at hearing that the alleged incident occurred in a restroom reserved for first and second graders. Student, as well as female students C and D, were supposed to use a restroom for second and third graders that was located immediately down the hall from Barkley's classroom. Male students A and B were supposed to use a restroom for fourth and fifth graders that was located in a separate

building, farther away from Barkley's classroom. None of the school staff who testified at hearing had seen these students using the wrong restroom.

54. School psychologist Su was told about the allegations. Su contacted Student B's psychologist to see if there was any information that they could get about the allegations. Su was not able to obtain any useful information.

55. Following Mother's February 19, 2008 allegations, Aid Reynolds was instructed to watch the students more closely to make sure that they were never alone and to make sure that only one student at a time left the classroom. At recess, fifth grade students A and B were monitored to make sure that they played in their designated area and lined up separately from the lower grade children. Reynolds did not observe any change in Student's demeanor before or after the allegations. After the February 19, 2008 allegations, Aid Ennis was instructed to monitor the children so that they did not leave the classroom together and accurately signed the bathroom log. Students were required to report accurate times in order to reinforce the academic goal of telling time. Ennis also generally kept her eyes on students A and B. At recess, Ennis watched A and B to make sure that they went back to class at the end of recess. Ennis did not see any change in Student's demeanor after the allegations and at no time did Student appear fearful of school or other children. Teacher Barkley had no memory of Student, or students A, B, C or D, ever returning late to class after recess and saying that there had been a long line.

56. On February 22, 2008, Mother thanked Principal Howell for investigating and expressed satisfaction with the plan to keep the involved students apart. Principal Howell reasonably interpreted this interaction as an indication that Mother was satisfied and no further information needed to be conveyed to Mother. Principal Howell informed Trzeciak about this meeting.

57. As part of her duties, Principal Howell would tour the Ben Lomond campus during lunch and recess. After learning of Mother's allegations, Principal Howell paid more attention to observing Student. Principal Howell did not see any change in demeanor in Student and saw her with her same friends, female students C and D.

58. Restroom sign-out logs from Student's classroom show that on February 21, 2008, student B left the class room at 1:37 p.m., but no return time was reported. Student A left the classroom at 1:42 p.m. and returned at 1:49 p.m. Student left the classroom for three minutes between 1:49 p.m. and 1:52 p.m. The restroom sign out logs only show one other time when Student B and Student were possibly out of the room at the same, time. On September 6, 2007, student B was out of the classroom from 9:50 a.m. to 9:57 a.m. and Student was out of the classroom from 9:52 a.m. to 9:57 a.m., a period of five minutes. The restroom logs do not show that male student A, or female student C and D were out of classroom at those times. The restroom logs were not complete.

59. Male student B was picked up from Ben Lomond by his Mother at 10:38 a.m. on February 28, 2008, because he was sick. Student B did not attend school on Friday, February 29, 2008, and was not released from a doctor's care until a week later.

60. Student did not return to Ben Lomond after Monday, March 3, 2008. On March 4, 2008, Mother called Ben Lomond and spoke to a Spanish-speaking support staff person. Mother related that she did not believe that Student was safe at school and for that reason, Student had not attended for the past two days. Mother related the following: that on February 29, 2008, a day that Teacher Barkley and one of the regular instructional aides was absent, male Student B touched and kissed Student and the other girls in the bathroom; that on the same day, male student B touched one of the female students on the buttocks in the classroom; and that male student B had told Student that the touching was normal between a boyfriend and girlfriend. Mother stated

that Student had not told Principal Howell the truth when interviewed because Student was afraid of getting in trouble. Mother was also upset because no one from school had called regarding Student's absence, but someone from the school had called about whether Student had sold candy for a fundraiser.

61. On March 5, 2008, Mother handwrote a letter in Spanish that was delivered to Covina-Valley and Baldwin Park. The letter described Mother's prior conversation with Principal Howell on February 19, 2008. Mother added that Student had reported that the children had been going into the restroom for approximately one and a half months, that student B provided gum before the children kissed and that student B told the children that if they were late returning from recess they should tell the teacher that there was a line in the restroom. The letter also contained an allegation different from what Mother had related in her March 4, 2008 phone call to Ben Lomond. Now, according to Student, on February 29, 2008, a day when Teacher Barkley was absent, student B kissed Student near the classroom door and asked her to go into the bathroom with him. Student refused. Student B was returning from using the restroom and Student was leaving for the restroom when the incident occurred. Student had also told Mother that in class, male student B touched female student C on private parts in front of two teachers who did not even notice. Mother's letter ended by stating that Student would not be attending Ben Lomond and that she desired a response.

62. Covina-Valley had responded to Mother's March 4, 2008 phone call by setting up a meeting with Mother on March 6, 2008. On March 5, 2008, Mother confirmed with Principal Howell that she was available to meet at 3:30 p.m. on March 6, 2008.

63. When Baldwin Park received Mother's March 5, 2008 letter, it was their first notice of the allegations. Assistant Superintendent of Student Achievement Christine Dennis reported the allegations to Baldwin Park's Superintendent. Special Education

Coordinator Lew was assigned to coordinate with Covina-Valley about the allegations and immediately contacted Principal Howell at Ben Lomond. Principal Howell told Lew about the allegations, the remedial efforts Covina-Valley had taken, and the results of the investigation.

64. Prior to the scheduled March 6, 2008 meeting, Covina-Valley researched Mother's claim and discovered that male student B had been absent from school on February 29, 2008, the date Mother alleged that student B asked Student to go into the bathroom with him. This information was not provided to Mother prior to the meeting.

65. On March 6, 2008 at approximately 11:46 a.m., Mother sent a facsimile to Covina-Valley stating that she would not be attending the scheduled meeting and that Mother would follow up with a letter explaining why and what Mother expected from Covina-Valley.

66. On the night of March 6, 2008, Mother sent a letter to both Baldwin Park and Covina-Valley in which she stated that she had consulted an attorney. The second paragraph of the letter contained the following statement:

. . . I want to make clear to everybody in both districts no one has the right nor has my permission to speak to my daughter regarding this situation without having me present. In more clear words, I do not want anybody including the teacher, aide, or anybody else talking to my daughter about anything relate[d] to this incident.

The letter went on to state that Student understood from talking to "the support specialist and the teacher" that the police could be called and Student could be taken away. Mother acknowledged that this was Student's understanding and may not have been what Covina-Valley intended to convey. The letter went on to state that Mother

had expected the school to report to her on the result of its investigation after February 19, 2008, but Principal Howell had not. Mother wanted Covina-Valley to ensure that Student would be in a "safe" learning environment. Mother demanded that the meeting with Covina-Valley representatives be rescheduled within a week.

67. A meeting was held on March 12, 2008. Mother and Father attended with a friend. Covina-Valley was represented at the meeting by Director of Student Services Trzeciak, Special Education Administrator Cabrera, Principal Howell and Teacher Barkley. Baldwin Park Special Education Coordinator Lew also attended. A translator was present for parents. Mother explained her concern that Student was not "safe" at school but no information was provided about whether Student was afraid of school or needed counseling. For the first time, Mother alleged that student B was using his foot to touch Student during class, to which Barkley explained that there is a large amount of space between B and Student during class. Mother and the family friend wanted to talk about why child protective services had not been called. Mother was also upset that Howell had spoken to Student and stated that Student had been frightened. Mother did not think that Principal Howell should have spoken to any students without parents being present. Howell explained that Student did not appear frightened during the interview. Covina-Valley explained that they needed to speak to Student about the allegations that had been conveyed by Mother, that Mother or anyone else could be present when they did so, and that they were willing to conduct the interview off-campus. Covina-Valley expressed that they needed to talk to Student because otherwise they could not verify what had happened, particularly where Student had denied to Howell that the earlier incident occurred. Covina-Valley explained that to the extent Student believed that she could get in trouble with the police, this had not been stated to her and at most, Student may have been told that if something had been done to her, then the police might be involved with the perpetrator. Mother was told at this meeting that student B

had not been in school on February 29, 2008, and Mother conceded that she may have had the wrong date. The discrepancy in dates led Covina-Valley to want more information from Student. Covina-Valley wanted to confirm whether the incident had happened so that they could help Student. Mother and Father said that they would think about making Student available and would contact Covina-Valley with a decision. Mother never called back to set up the interview.

68. Kaparos authored a speech and language progress report in anticipation of Student's annual IEP team meeting. As part of the regular assessments given to Student, Kaparos administered the TACL-3, which showed that Student's subtest raw scores had increased as follows: Vocabulary – 19; Grammatical Morphemes – 8; and Elaborated Phrases and Sentences – 7. When Student was first assessed by Kaparos in September of 2006 her TACL-3 subtest raw scores were: Vocabulary – 13; Grammatical Morphemes – 3; and Elaborated Phrases and sentences – 4. Kaparos plausibly explained that although Student had made progress, her progress had been slow because of the delay in Student receiving an implant and Student's prior reliance on sign language.

69. Student's annual IEP team meeting was held on March 17, 2008. Mother and Father attended with the same family friend that had accompanied Mother to the March 12, 2008 meeting. All necessary personnel attended the meeting, including Director of Student Services Trzeciak, Principal Howell, Teacher Barkley, Special Education Administrator Cabrera, Speech-Language Pathologist Kaparos, School Psychologist Su, DHH Support Specialist Shawn, and Audiologist Kistler. Spanish and sign language interpreters also attended.

70. The IEP team meeting notes reflect that the team discussed parent concerns regarding homework, reading and their perception that Student was not safe at school. Parents were told that the safety issue had already been extensively discussed, that the primary purpose of the meeting was to discuss goals and placement, and that

another meeting like the one held on March 12, 2008 could be arranged to further discuss Mother's allegations regarding Student's safety. Mother and Father did not offer any new information about Student in regard to the allegations of inappropriate touching and did not state any willingness to have Student meet with school personnel under the circumstances offered at the March 12, 2008 meeting. Student's present levels of performance were discussed, including the fact that she had met all of the goals from her prior IEP. The IEP noted that Student had good attendance at school and was well-behaved. Measurable annual goals were developed to meet Student's areas of need based on her present levels of performance. Student was offered continued placement in the oral SDC at Ben Lomond with 20 percent of her school day spent in the general education environment. In addition, Student was offered 50 minutes per week of individual ART and two, 30-minute group speech therapy sessions per week. Appropriate accommodations and modifications, including audiology services, were also offered. ESY services were offered as well.

71. At the end of the March 17, 2008 IEP team meeting, Mother and Father did not agree to the IEP. Mother stated that Student would be attending Oralingua beginning the next day, and that the family had retained an attorney. Mother and Father did not ask for any specific related service for Student such as counseling. Although Mother testified at hearing that she had requested that the IEP team discuss providing counseling Student, this was not corroborated by the IEP team notes, nor any school personnel who attended the meeting. Accordingly, Mother was not credible on this point. Moreover, even if Mother had asked for counseling for Student, the District would have needed to talk to Student to determine if such counseling was necessary and what kind. Because Mother would not allow District personnel to speak to Student, the District did not have sufficient information to determine as of the date of the IEP whether counseling was needed, let alone whether the incidents had actually occurred.

72. In reasonable reliance on parent's statements that Student would not be returning to school and would be enrolling at Oralingua, Teacher Barkley cleaned out Student's desk on March 18, 2008. Student B and other students in Teacher Barkley's class noticed that Student's desk had been cleaned out. Student B asked why Student left and was told Student had gone to a new school. Student A said to student B, "It's all your fault." When asked why it was student B's fault, student A told Barkley that student B had made Student cry. Teacher Barkley e-mailed Principal Howell with this information and suggested that student A be interviewed again.

73. Barkley and Howell interviewed student A on March 20, 2008. Student explained what he meant by saying that it was B's fault that Student had left. According to Student A, sometimes before or after lunch student B would sometimes say things to Student such as, "shut up" (a negative phrase among deaf students), "fuck you" and had called her "stupid" and "bitch." Student B had also been "mean" to Student by telling her not to stare at him. Student A denied that B had a girlfriend in their class and stated instead that Student B had a girlfriend in another classroom. Student A denied seeing student B ever touch or hit Student, denied ever seeing B in a girls restroom, and denied ever seeing B kiss Student.

74. At hearing, Barkley and Reynolds confirmed, consistent with Student A's statements to Principal Howell, that Student would stare at student B and watch him instead of paying attention to the instruction. Reynolds and Barkley interpreted this behavior as Student having a crush on student B. This behavior started in the fall of 2007 and became more apparent in January and February of 2008. In November of 2007, male student B had complained to teacher Barkley that Student was staring at him, and asked that Student be told to stop. Barkley asked Student to pay attention in class and ignore male student B. Student's behavior of staring at student B would not have put Covina-Valley on notice that any inappropriate contact had occurred between student B

and Student, particularly when student B had sought Barkley's help in having Student stop the behavior.

75. At no time did Reynolds see behavior that she thought was connected to Mother's allegations. Similarly, Barkley described Student as a happy girl who generally seemed relaxed. Barkley saw no sign that Student was afraid of the boys in the class. At no time did Barkley see any change in Student's demeanor or social interactions with other students, even after Mother's allegations came to light. Kaparos also did not see any marked changes in Student's behavior before or after the allegations. Despite having seen Student three times a week while she was enrolled at Ben Lomond, Kaparos never saw any marked changes in Student's behavior, nor did she ever see Student appear fearful, withdrawn, or wary of boys.

76. On March 25, 2008, Principal Howell contacted the Department of Child Protective Services (DCPS) in an attempt to make a report of suspected child abuse. DCPS advised that they were not sure about what could be done because Student had denied the allegations. DCPS took the names and birthdates of student B and Student and said they would call back with a referral number if they were going to take any action. Howell never heard from DCPS.

77. On April 7, 2008, Mother and Father showed up at the Baldwin Park office without an appointment. Special Education Coordinator Lew and Assistant Superintendent Dennis met with parents. This was not an IEP team meeting, but an informal meeting. Parents were asked if they had been happy with the services at Ben Lomond and they said yes. Parents expressed that they were concerned about the student conduct at Ben Lomond. Parents related that Student had been assessed by Oralingua, but did not provide any assessment information. Lew and Dennis offered to immediately provide a one-to-one aide for Student to address parents' safety concerns.

78. Oralingua had assessed Student for admission from March 16, 2008 through March 21, 2008, and from March 31, 2008 through April 11, 2008. Oralingua produced a written report dated "April 2008." The written report was not provided to Baldwin Park or Covina-Valley until after Student filed for due process in June of 2008, such that any information contained in it could not have been considered by the districts during the relevant time period. In a letter to Mother and Father dated April 7, 2008, Oralingua accepted Student for enrollment.

79. In a letter dated April 10, 2008, Student, through an attorney, stated that she was providing the required ten days notice prior to unilaterally enrolling Student at Oralingua and also stating Student's intention to seek tuition reimbursement from Covina-Valley and Baldwin Park.

80. In a letter dated April 11, 2008, Lew and Dennis memorialized the offer that Baldwin Park would provide Student with a one-to-one aide at Ben Lomond to further address Mother's safety concerns. The letter noted that Baldwin Park had left messages on Mother's answering machine on April 8, 9, and 10, but had not received a response.

81. After Student filed for due process in June of 2008, Covina-Valley and Baldwin Park learned for the first time that Mother was alleging that student B had digitally penetrated Student's vagina.

82. Kay Schneider (Schneider) testified for Student about Oralingua. Schneider had an M.A. in special education, was a certified AVT therapist, and possessed a deaf and hard of hearing teaching credential. Schneider had worked at Oralingua from its founding and accordingly, was knowledgeable about it. Oralingua Program Director Linda Hyde (Hyde) also testified for Student. Hyde had also been at Oralingua when it was founded, was credentialed to teach special education, and had extensive training in the DHH education, AVT, and cochlear implants.

83. Oralingua worked with Students from birth to around the age of 10, with the goal of moving all students to general education settings. Oralingua provided auditory/oral instruction in the classroom and AVT therapy and speech therapy outside of class. Students were expected to orally respond to auditory instruction. Oralingua's philosophy was not to use sign language, and if their students used it, they were orally prompted to use listening and speaking. As noted by Hyde, although lip reading was not taught, deaf and hard of hearing children learn it by themselves and naturally use it. Student progress is monitored at staff meetings. Audiology services are provided.

84. Student was accepted at Oralingua in April of 2008 because unlike in December of 2006, there was now a group of Students at Oralingua who were closer to Student's ability and Student's auditory/oral abilities had improved while her reliance on sign language had not increased. Oralingua implemented the goals developed in Student's March 17, 2008 IEP. Although some Oralingua students have mainstreaming opportunities, Student did not. Student was provided with reading tutoring and language arts was taught in a group that was at Student's level. At Oralingua, Student made had some progress in academics and auditory/oral skills.

85. The AVT services provided at Oralingua were remarkably similar to the ART services offered by Kaparos at Covina-Valley in that: AVT used "acoustic highlighting"; the therapist sat to Student's right side and spoke toward her cochlear implant; speech goals were sometimes worked on in therapy sessions; and visual cues such as picture cards were used for "auditory sandwiching" if Student needed help understanding. Unlike the individual ART at Covina-Valley, the AVT sessions at Oralingua were combined with speech therapy and were not delivered one-to-one.

86. The cost of Student's attendance at Oralingua between April of 2008 and September 2008 was \$10,324. As of the last day of hearing, this amount had not been paid.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUES ONE AND TWO

2. Student contends in Issue One that she was denied a FAPE at the September 27, 2006 and October 26, 2006 IEP team meetings because the offer of continued placement in the total communication program and the provision of ART did not respect her preferred language mode, which, according to Student was auditory/oral after the June of 2006 cochlear implant surgery. In particular, Student contends that because the total communication program and ART used sign language and visual cues, they did not respect Student's preferred language mode. In Issue Two, Student contends that she was denied a FAPE after February 9, 2007, when her IEP was amended to place her in the auditory/oral program at Ben Lomond. Specifically, Student contends that the placement was inappropriate because some sign language was used. As to both Issue One and Issue Two, Student contends that the ART provided to Student was inappropriate for Student because it did not strictly adhere to the guidelines for AVT as developed by A.G. Bell. Both Districts disagree and contend that Student was provided a FAPE during this time period. Specifically, the District's contend that Student was provided with an appropriate education because: the placement and services provided to Student met her unique needs; the IDEA does not mandate that schools implement a particular methodology of instruction such as AVT; and because the Ben Lomond placement was an appropriate auditory/oral program. Because determination of Issues One and Two requires analysis of the same legal issues and many overlapping facts, they will be considered together. As discussed below, Student did not meet her

burden of demonstrating by a preponderance of the evidence that she was denied a FAPE on these issues.

3. FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) Designated instruction and services for the deaf and hard of hearing may include: speech, speech reading and auditory training; instruction in oral, sign, and written language development; monitoring amplification equipment; adapting curricula, methods, media and the environment; and consultation to pupils, parents, teachers and other school personnel to maximize the pupil's experiences in the regular education program. (Cal. Code Regs., tit. 5, § 3051.18, subd. (a).)

4. In general, when developing an Individualized Education Plan for an eligible child, the IEP team must consider: the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child. (34 C.F.R. § 300.324(a)(1).) If a child is deaf or hard of hearing, the IEP team must also consider: the child's language and communication needs; opportunities for direct communications with peers and professional personnel in the child's language and communication mode; academic level; and full range of needs including

opportunities for direct instruction in the child's language and communication mode. (34 C.F.R. § 300.324(a)(2)(iv); Ed. Code, § 56341.1, subd. (b)(4).)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.) *Rowley* expressly states that as long as a child is offered a FAPE as defined above, questions of educational methodology are left to the discretion of the state and local educational agencies. (*Rowley* at p. 208.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to

what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

7. When formulating an IEP for deaf and hard-of-hearing students, the IEP team shall consider the related services and program options that provide the student with an equal opportunity for communication access, which includes, in relevant part: (1) The pupil's primary language mode and language, which may include the use of spoken language with or without visual cues, or the use of sign language, or a combination of both; (2) The availability of a sufficient number of age, cognitive, and language peers of similar abilities; (3) Appropriate, direct, and ongoing language access to special education teachers and other specialists who are proficient in the pupil's primary language mode and language; (4) Services necessary to ensure communication-accessible academic instructions, school services, and extracurricular activities; (5) That the public agency shall ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly; and, (6) That external components of surgically implanted medical devices are functioning properly. (Ed. Code, § 56345, subd. (d).)

8. The California Legislature made the following findings and declarations regarding education for the deaf and hard of hearing:

(1) Deafness involves the most basic of 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. Still others, typically young hard-of-hearing and deaf children, lack any significant language skills. 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.
- (2) It is essential that hard-of-hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of proficiency.
 - (3) It is essential that hard-of-hearing and deaf children have an education in which special education teachers, psychologists, speech therapists, assessors, administrators, and other special education personnel understand the unique nature of deafness and are specifically trained to work with hard-of-hearing and deaf pupils. It is essential that hard-of-hearing and deaf children have an education in which their special education teachers are proficient in the primary language mode of those children.
 - (4) It is essential that hard-of-hearing and deaf children, like all children, have an education with a sufficient number of language mode peers with whom they can communicate directly and who are of the same, or approximately the same, age and ability level.
 - (5) It is essential that hard-of-hearing and deaf children have an education in which their parents and, where appropriate, hard-of-hearing and deaf people are involved in determining the extent, content, and purpose of programs.
 - (6) Hard-of-hearing and deaf children would benefit from an education in which they are exposed to hard-of-hearing and deaf role models.
 - (7) It is essential that hard-of-hearing and deaf children, like all children, have programs in which they have direct and appropriate access to all components of the educational process, including, but not limited to, recess, lunch, and extracurricular social and athletic activities.

- (8) It is essential that hard-of-hearing and deaf children, like all children, have programs in which their unique vocational needs are provided for, including appropriate research, curricula, programs, staff, and outreach.
- (9) Each hard-of-hearing and deaf child should have a determination of the least restrictive educational environment that takes into consideration these legislative findings and declarations.
- (10) Given their unique communication needs, hard-of-hearing and deaf children would benefit from the development and implementation of regional programs for children with low-incidence disabilities.

(Ed. Code, § 56000.5, subd. (b).) For deaf and hard of hearing students, the legislature intended that the child's program promote maximum interaction with the general school population, taking into consideration the individual's need for a sufficient number of age and language mode peers. (Ed. Code, § 56001, subd. (g).) "Language mode" is defined as "the method of communication used by hard-of-hearing and deaf children that may include the use of sign language . . . or the use of spoken language, with or without visual cues." (Ed. Code, § 56026.2.)

9. One court found that a school district had offered a FAPE to a deaf child by offering placement in a "total communication" class (that instructed the children using oral, aural and sign language communication) despite parents' desire that the child be educated using only an oral/aural methodology. (*Dreher v. Amphitheater Unified School Dist.* (D. Ariz. 1992) 797 F.Supp. 753, 757-758.) In *Dreher*, the court applied *Rowley* and declined to determine whether a particular educational methodology was more appropriate where the evidence at the due process hearing established that the child would have received educational benefit in the proposed total communication program. (*Ibid.*)

10. In *M.M. ex rel. C.M. v. School Board of Miami-Dade County Florida* (11th Cir. 2006) 437 F.3d 1085, parents of a deaf student made a similar claim to that made by Student in the instant case, i.e., that a school district had denied the child a FAPE by offering verbotonal (VT) therapy, rather than AVT, in order to teach the child to speak. Specifically, parents argued that their deaf child had been denied a FAPE because VT was different than AVT in that it was administered in groups and the VT therapists were not trained in AVT. The parents did not present evidence establishing that VT was not a recognized methodology for teaching deaf students. The court applied the principles of *Rowley* and cases relying upon it to conclude that although AVT may have been the “best” program or the program preferred by parents, all that the IDEA required was that the child be offered an appropriate program within the meaning of *Rowley*. Accordingly, the parent’s claim regarding AVT failed. (*Id.* at pp. 1101-1103.) Similarly, in *Lachman v. Illinois State Board of Educ.* (7th Cir. 1988) 852 F.2d 290, 296-297, parents contended that a hearing impaired student had been denied a FAPE because he had not been provided with cued speech instruction, and instead had been offered instruction using the total communication method. The court in *Lachman* determined that the student had not been denied a FAPE because the total communication method was an accepted method for instructing deaf students that provided the student with an “appropriate” education within the meaning of *Rowley* and that parents do not have a right under the IDEA to compel the use of a particularly methodology. (*Ibid.*)

11. When a student alleges a denial of FAPE based on the failure to implement an IEP, in order to prevail the student must prove that any failure to implement the IEP was “material,” meaning that “the services a school provides to a disabled child fall significantly short of the services required by the child's IEP.” (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, 780.) “Minor discrepancies between the services

provided and the services called for by the IEP do not give rise to an IDEA violation.”
(*Ibid.*)

12. As an initial matter, Student contends in both Issue One and Issue Two that she was denied a FAPE because Covina-Valley provided her with ART rather than AVT as developed by A.G. Bell. This contention fails. The evidence at hearing showed that the ART provided to Student was based almost entirely on the principles of AVT and was provided by Kaparos, an AVT certification candidate. AVT certification was not required by any government body, and was not even required prior to providing AVT, as demonstrated by A.G. Bell’s practice of having certification candidates provide AVT services under a mentorship prior to receiving certification. Further, the evidence showed that Student made progress in learning how to use listen and speak with the provision of ART services. In addition, the evidence showed that sign language was not used, unless, as a last resort, Student could not understand the auditory information. Even then, sign language was used in an “auditory sandwich” that emphasized the auditory learning component to Student. As to lip-reading, it was not taught to Student, and as acknowledged by Student’s own expert, Rothwell-Vivian, it was acceptable for pupils like Student to use their incidental, self-taught lip-reading when a speaker was facing them. However, Kaparos sat to Student’s side during ART to prohibit lip reading and focus Student on responding to the auditory input. Mother’s belief that lip-reading was occurring was a misunderstanding of Kaparos occasionally working on pronunciation goals during ART sessions.

13. More importantly, Student’s contention regarding AVT fails because it is premised on an interpretation of the IDEA that would require Baldwin Park and Covina-Valley to provide Student with a particular therapeutic methodology that was preferred by parents without regard to whether the methodology offered by Covina-Valley was appropriate. As acknowledged by Student’s AVT expert, Rothwell-Vivian, there is no

single, dominant cohesive methodology for the education of deaf children and there are many choices. Student was provided with an appropriate therapeutic methodology that was nearly identical to AVT and as discussed in the paragraph above, the ART provided to Student by Kaparos resulted in educational benefit. Because the overwhelming weight of authority demonstrates that disagreements over methodology do not equate to a denial of FAPE if a student is otherwise provided with an appropriate program, Student's contentions regarding AVT fail. (Factual Findings 1-19, 28, 31, 33, 34, 37, 38, 41, 68, 70, 84, 85; Legal Conclusions 1, 3-10.)

14. Student also failed to demonstrate by a preponderance of the evidence that she was denied a FAPE from the September 27, 2006 and October 26, 2006 IEP team meetings through the February 9, 2007 IEP team meeting. The evidence at hearing showed that the Districts not only respected Student's language mode, but provided a FAPE to develop it. Significantly, Specialist Shawn had visited Student over the summer of 2006 to check on her post-implant progress and it was Shawn who had suggested increasing Student's ART services prior to the time of the annual IEP on September 27, 2006. These facts demonstrate that the District was actively seeking to rehabilitate Student from communicating with sign language to becoming an auditory/oral communicator. No evidence was presented that as of September and October of 2006 Student's cochlear implant had been properly mapped, a process that could take up to six months from the time of surgery. Further, the evidence showed that Student was simply not ready to be thrust into an auditory/oral classroom. In the fall of 2006, despite Mother's sincere and understandable desire that Student learn to use her implant to listen and speak, Student was still relying primarily on the use of sign language to express herself. Student's expert, Rothwell-Vivian, corroborated the testimony of District personnel that recent cochlear implant recipients like Student, who were older, would have a slower time developing auditory skills and would need a transition period in

which they should be allowed to sign to communicate. With that in mind, the Districts provided a program for Student that respected her language mode, i.e., as a recent cochlear implant recipient who desired to transition from sign language to auditory/oral expression. The program provided supports to encourage Student's development of auditory skills, while also ensuring that Student would have a placement in which she could make educational progress. In sum, Student misinterprets Education Code section 56000.5, subdivision (b)(2) as being the equivalent of a mandate that a school district provide a program preferred by a deaf student or a parent. However, the Legislature's findings expressed in the statute do not mandate any such outcome, but require only that a DHH student's "unique communication mode is respected, utilized, and developed to an appropriate level of proficiency." The evidence showed that not only was this done, Student was provided with a placement and related services that met her unique needs in the least restrictive environment. Accordingly no denial of FAPE occurred. (Factual Findings 1-32; Legal Conclusions 1, 3-10.)

15. As to whether Student was denied a FAPE by the Ben Lomond placement after February 9, 2007, her contention also fails. Student contends that she was denied a FAPE because the auditory/oral program at Ben Lomond involved the use of some sign language, which Student interprets as not respecting her chosen mode of communication. As discussed above, there is a difference between "respecting" a DHH student's mode of communication, and a mandate that a school district provide all instruction and services to a child in a way that a parent deems appropriate. To the extent Student argues that the Ben Lomond program was deficient because it did not meet A.G. Bell standards, her argument fails because it is a methodology argument unrelated to whether the placement was generally appropriate and provided Student the opportunity to progress in the general curriculum. The evidence at hearing showed that although Mother had a sincere and understandable desire that Student learn to

speak, Student herself continued to use sign language to try to engage Kaparos and to communicate with her friends at school during this time period. Student's insistence that her preferred mode of communication were not respected was undermined by this evidence. Moreover, the auditory/oral SDC at Ben Lomond did not use sign language for instruction unless, as a last resort a student could not access the material and needed further explanation. Instruction was auditory, using FM transmitters to make sure that Student got the auditory information from school personnel delivered directly to her implant without interference. More importantly, Student's claim fails because she made progress in the Ben Lomond program as demonstrated by Barkley's observations, Student's report card, and the fact that Student was admitted to Oralingua in part based on her improved auditory abilities and decreased reliance on sign language. (Factual Findings 1-5, 12, 13-18, 26, 30, 31, 33-42, 68, 70, 78, 84; Legal Conclusions 1, 3-11.)

ISSUE THREE

16. In her Complaint and Prehearing Conference Statement, Student described this issue as "Sexual Harassment Is a Denial of FAPE" and alleged that FAPE was substantively denied both because the incidents occurred and because the Districts failed to provide an appropriate placement and services at an IEP team meeting held on March 17, 2008. The Complaint and Prehearing Conference Statement did not allege that Student was denied a FAPE because Mother and Father were denied their right to participate in the March 17, 2008 IEP team meeting. At the prehearing conference, the ALJ confirmed with Student's counsel that Student was alleging this issue as a substantive denial of FAPE, and specifically asked the parties if the following accurately summarized this issue: "Whether Student was denied a FAPE after January of 2008 because the District failed to provide Student with an appropriate placement and related services after Student was inappropriately kissed and touched by another student." Student's counsel affirmed that the issue was accurately described by the ALJ.

However, in Student's closing brief, filed simultaneously with the closing arguments of Covina-Valley and Baldwin Park, Student for the first time argued this issue as a procedural claim, i.e., that Student was denied a FAPE because Mother's allegations and Student's needs arising from the allegations were not adequately discussed at the March 17, 2008 IEP team meeting. Notably, consistent with the notice provided by Student's Complaint, Student's Prehearing Conference Statement, and the Prehearing Conference Order, both Covina-Valley and Baldwin Park addressed this issue in their closing briefs as a substantive issue, not as a procedural issue regarding Mother's participation in the IEP team meeting.

17. Student's post-hearing revision of the issue is governed by the rule that "the party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [Complaint], unless the other party agrees otherwise." (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At no time did Student seek to amend the complaint to add a procedural argument. Accordingly, consistent with the IDEA's notice requirements, the ALJ determines that the procedural arguments made by Student in her closing brief are outside the scope of the hearing, and on that basis are denied.

18. Alternatively, the ALJ will address the merits of Student's procedural claim only in the event that a reviewing court determines that it was error not to do so. Student's contention that the Districts impeded parents' right to participate in the March 17, 2008 IEP team meeting is meritless. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a) (2006); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP

team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

19. In the instant case, the IEP team meeting was held at a time when the parties had exchanged correspondence and discussed Mother's allegations prior to the March 17, 2008 IEP team meeting. Specifically, Mother had talked to Howell, sent letters to both Districts, and met with all relevant school representatives on March 12, 2008. At the March 17, 2008 IEP team meeting, Mother and Father's concerns were noted by the IEP team, yet Mother and Father gave no indication that they had any new information to share with the Districts and did not indicate that they would now agree to school personnel meeting with Student. Without indication from the parents that there was any change in their willingness to make Student available, the Districts were in the same position as on March 12, 2008, i.e., they could not verify whether the incidents occurred, and had no way of knowing what Student's needs were. Mother's testimony that she requested counseling for Student at this IEP was not credible, and even if she had requested counseling, this does not indicate that Mother was denied her right to participate. To the contrary, if true, it would demonstrate that Mother participated and made her desires known. All necessary IEP team members were present, as were Mother's friend and all interpreters needed for communication. Under these

circumstances, it cannot be said that parents were deprived of their right to participate in the decisionmaking process. Student's procedural claim also fails on the merits. (Factual Findings 44-67, 69-71; Legal Conclusions 1, 18.)

20. To the extent Student's Complaint alleged that Student was substantively denied a FAPE, she contended that she was denied a FAPE because the incidents occurred, because the Districts did not respond adequately to the allegations, because Student's education suffered as a result of the incidents, and because Student should have been offered additional related services such as counseling and a change of placement following the allegations. Both Baldwin Park and Covina-Valley dispute these contentions and contend that they were not deliberately indifferent to Mother's allegations, that the evidence at hearing showed that Student made educational progress regardless of the allegations, and that the District did not have sufficient information on which to provide assessments and/or related services such as counseling when they were prevented from interviewing Student. As discussed below, Student failed to meet her burden of proof that she was denied a FAPE.

21. As an initial matter, Student did not demonstrate a denial of FAPE based on the incidents occurring or because the Districts' response was inadequate. The United States Court of Appeals for the Ninth Circuit has recognized that it might be possible to demonstrate a denial of FAPE based on students teasing a student with a disability. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 650 (*Federal Way*)). Specifically, *Federal Way* involved an allegation that a disabled child was denied a FAPE by teasing from non-disabled students during recess. The Ninth Circuit applied the rule that: "If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE." (*Id.* at pp. 650-651, citing *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 633 [119 S.Ct. 1661, 143

L.Ed.2d 839] [holding that a private cause of action for damages may be brought against a school district under Title IX based on allegations of a student sexually harassing another student if the school was deliberately indifferent to known acts of harassment and the “harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit“].) To show “deliberate indifference,” the response or lack of response by school administrators must be “clearly unreasonable in light of the known circumstances” and must cause the student to be subject to harassment or make the student liable or vulnerable to it. (*Davis v. Monroe County Bd. of Educ.*, *supra*, 526 U.S. at pp. 645, 648; *Stanley v. Trustees of California State University* (9th Cir. 2006) 433 F.3d 1129, 1137.) In *Federal Way*, the Ninth Circuit found no violation of FAPE where the evidence did not support a finding that teasing during recess affected the disabled child or interfered with her education, particular when parents had removed the child from school without giving the school district a “reasonable opportunity” to prevent the teasing. (*Federal Way*, *supra*, 394 F.3d at p. 651.) The United States Court of Appeals for the Eighth Circuit applied *Federal Way* to hold that parents in pro se had failed to state a claim on which relief could be granted where they alleged that sexual harassment of a disabled student by faculty resulted in a denial of FAPE without alleging facts linking the harassment allegations to a deprivation of educational benefit. (*Stringer v. St. James R-1 School Dist.* (8th Cir. 2006) 446 F.3d 799, 802-803.)

22. In the instant case, the evidence showed that prior to February 19, 2008, Covina-Valley and Baldwin Park were unaware of any facts that would cause them to suspect any inappropriate contact was occurring between DHH students in Barkley's class. Although Student had stared at student B during the fall semester of 2007, this behavior had apparently lessened after student B complained to Teacher Barkley. Student B's complaint was inconsistent with the allegation that he was inappropriately

touching Student. Student made educational progress at all times and did not exhibit any outward sign of having problems with other students from Barkley's class. The evidence showed that when Mother made her allegations on February 19, 2008, Covina-Valley and Baldwin Park in no way could be considered to have been "deliberately indifferent" to the allegations. To the contrary, Covina-Valley immediately attempted to verify the allegations by talking to the students who were allegedly involved, including Student. Any hesitancy by Student to discuss the incident cannot be attribute to translation problems because Covina-Valley made sure to have Shawn, a deaf staff person who was fluent in sign language, attend the meeting between Student and Principal Howell. Even though the allegations were not verified at the time, Covina-Valley took preventative steps to ensure that Barkley's DHH students were monitored at recess, could not leave the classroom together, and that classroom desks were arranged so that male and female students were not in contact. When Mother made allegations on March 5, 2008, that student B had approached Student on February 29, 2008, Covina-Valley wanted to immediately meet with Mother; however, Mother delayed the meeting. Mother also foreclosed any further investigation by prohibiting school personnel from talking to Student. Covina-Valley made efforts to verify the allegations by checking attendance records, only to discover that student B had not been in school on February 29, 2008.

23. Both Districts met with Mother about the incident on March 12, 2008. Rather than cease investigating, Covina-Valley and Baldwin Park tried to address Mother's concerns by offering to interview Student off-campus with any person of Mother's choosing present. At no time did Mother respond to Covina-Valley's offer. Further, both Districts continued their involvement even after Mother and Father announced at the March 17, 2008 IEP team meeting that Student would be unilaterally enrolled at Oralingua. Covina-Valley continued to try to investigate by interviewing

student A after he made comments in class about Student's departure. Principal Howell even contacted DCPS, who not surprisingly, declined to act given that Student had not verified the allegations. Baldwin Park continued to try to assure Mother's as yet uncorroborated safety concerns by offering to provide a one-to-one aide in April of 2007. Rather than demonstrate deliberate indifference, the above facts show that both Districts responded reasonably and appropriately in light of the known facts.

Accordingly, because Student failed to demonstrate by a preponderance of the evidence that the Districts acted with deliberate indifference, Student failed to prove that she was denied a FAPE on this ground. (Factual Findings 44-67, 70-78, 80, 81; Legal Conclusions 1, 21.)

24. Finally, Student failed to prove by a preponderance of the evidence that she was denied a FAPE after the allegations because she was deprived of educational benefit and should have been offered assessments or additional related services such as counseling after Mother's allegations were related to the District.

25. As discussed in Legal Conclusions 3, 4, 5, 6, 7, 8 and 11, above, the Districts had a responsibility to provide Student with a free and appropriate public education, consisting of specialized instruction and related services, based on information about what Student's unique needs were at the time. Similarly, whether further assessments were required is determined based on what was known at the time. (See 20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f); *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

26. To the extent Student is alleging a denial of FAPE for failure to assess Student or provide counseling or related services after Mother's allegations, Student's claim fails. Mother's allegations first claim to light on February 19, 2008. When given an opportunity to discuss the allegations with Principal Howell, Student denied that anything had happened. It cannot be said that communication issues prevented Student's understanding when Specialist Shawn, a deaf person with a cochlear implant who was fluent in sign language, was present to translate for Student during the meeting with Howell. Regardless, Student, and all other students who were allegedly involved, denied any knowledge, and school personnel saw no behavior changes in Student or others that would indicate a problem. In addition, Mother's subsequent allegation about an incident with student B on February 29, 2008 was physically impossible because student B was not in school on that day. Accordingly, there was no information supporting the need for an assessment or any counseling. More importantly, by March 3, 2008, Mother was no longer sending Student to school and by March 5, 2008, Mother made Student inaccessible to school staff by expressly prohibiting them from talking to Student about the incident. In order to determine whether an assessment for counseling was appropriate or whether counseling or some other related service should have been provided, the Districts would have had to verify with Student what, if anything, occurred, and what impact it had on Student's access to her education. To the extent Student is contending that she should have been offered counseling because Principal Howell scared her, the same reasoning applies: if Mother would not let the Districts talk to Student, then the Districts could not determine whether counseling or other related services were needed, and if so, what kind. In sum, in light of the information known at the time, the Districts were not aware of information that would cause them to conduct an assessment or provide counseling as a related service. Similarly, without any proof that the allegations had occurred, the Districts were

not aware of facts that would justify a change of placement as of the March 17, 2008 IEP. Accordingly, Student was not denied a FAPE on this ground. (Factual Findings 44-67, 69-77, 79, 80; Legal Conclusions 1, 3-8, 11, 25.)

27. Because the ALJ has concluded that no denial of FAPE occurred, this Decision does not address Student's reimbursement claims.

ORDER

All of Student's requests 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. Here, Baldwin Park and Covina-Valley were the prevailing parties on all issues presented.

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: November 14, 2008

/s/

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings