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

In the Matter of : STUDENT, Petitioner, vs. POMONA UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2005070523

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter between October 11, 2005 and October 13, 2005, in Pomona, California.

Petitioner Student P. (Student or Student) was represented by his attorney, Tania Whiteleather. Student's parents David P. and Anna P., as well as educational advocate Christopher Russell, were also present at the hearing on Student's behalf. [1]

Respondent Pomona Unified School District (District or PUSD) was represented by educational consultant G. Robert Roice. Trena Spurlock, Director of Special Education for PUSD, was also present on PUSD's behalf.

[1] Both parents and the educational advocate were present for the majority, but not the entirety, of the hearing.

Petitioner called the following witnesses: Trena Spurlock, Director of Special Education for PUSD, Diane LaBomme, program specialist for PUSD, Sophia Miller, special education teacher for PUSD, Maureen Santos, speech pathologist for PUSD, Viji Nagarajan, speech and language therapist for PUSD, Patti Adams, program administrator for PUSD, Christopher Russell, educational advocate for Student, Kay Schneider, Director of Student Services at Oralingua School for Hearing Impaired (Oralingua), a non-public day school for children with hearing loss, Anna Lopez, Principal, Philadelphia Elementary School in PUSD, David P., father of Student (also called as a rebuttal witness), Linda Hyde, program director at Oralingua, Traci Nolin, clinical audiologist at Oralingua, and Nina Cesena, Student's teacher at Oralingua.

Respondent called the following witnesses: Dr. Miles Peterson, clinical audiologist, and Diane LaBomme, program specialist for PUSD.

Oral and documentary evidence was received and submitted on October 13, 2005. A motion for directed verdict and a motion to admit an audiotape of the January 20, 2005 IEP meeting (District Exhibit 17), were taken under submission, with counsel and the educational consultant directed to address arguments on those issue in their closing briefs. Closing arguments were submitted by both parties on October 31, 2005, and the record was closed. Both parties waived time for a decision within 30-days of closing arguments.

On November 16, 2005, a conference call was held involving Ms. Whiteleather and Mr. Roice. Ms. Whiteleather moved to re-open the record and admit a declaration from Kristin Dunton, record clerk at Oralingua, to rebut the audiotape evidence. The declaration of Kristin Dunton was marked as Exhibit N. That motion was granted and the declaration was received. Ms. Whiteleather withdrew her objection to the audiotape subject to a transcript of the tape being prepared. Argument was heard on the issue of whether a transcript of the audiotape from the January 20, 2005 IEP meeting should be prepared PUSD was ordered to provide a transcript within two weeks. Mr. Roice filed a notice on

November 28, 2005, indicating that the transcript was not completed. PUSD filed the transcript on December 9, 2005, and it was marked as District Exhibit 17A. The record was closed upon receipt of the audiotape transcript. Both parties agreed to an additional two weeks for the decision from the date the transcript was received.

Petitioner's motion for directed verdict is denied. There was no persuasive argument made that a directed verdict was appropriate, or that OAH has authority to grant such a motion.

ISSUES

I. Did respondent hold a valid IEP meeting at any time to determine Student's needs and educational placement?

II. Was respondent's proposed placement appropriate for Student, who has a cochlear implant?

III. Did respondent fail to comply with the procedural requirements of the IDEA: to hold a valid IEP meeting; to provide prior written notice; to consider the needs of Student, including his progress at Oralingua; and, to invite Oralingua teachers to any IEP meeting?

FINDINGS OF FACT

BACKGROUND

1. Student is 8-years-old and is eligible for special education and related services as a student under the category deaf and hard of hearing. Student received a cochlear implant (CI) that went active in March 2002. Student has a "listening age" of approximately 3 years, 8 months. Listening age is the date that a child had consistent access to speech. Student's IQ was tested at 121. Student has a need for language development and verbal communication as a result of being able to hear.

2. Student began attending pre-school at Oralingua, which is located within the Rialto Unified School District (Rialto). Rialto initially agreed to place Student at Oralingua, but for the 2002-2003 school year, Rialto offered a transition from Oralingua to a deaf and hard of hearing class (DHH) in Rialto. Student's parents did not agree to the transition offer from Rialto and filed for a due process hearing.[2] The case was "off calendar" for nearly two years.

3. The due process hearing was held in August 2004. The SEHO hearing officer issued a decision dated October 22, 2004, which found that Rialto's offer at a May 21, 2004 IEP was FAPE provided that the offer include auditory-verbal therapy (AVT).

4. On December 13, 2004, Student's parents contacted the principal at Philadelphia Elementary School in PUSD to transfer Student into the PUSD. David P., Student's father, had an incomplete copy of an October 21, 2001 individualized education plan (IEP) from Rialto. Mr. P. spoke by telephone with Diane LaBomme and agreed to meet for an interim IEP meeting on December 14, 2004.

5. PUSD received a series of documents from Rialto on December 13, 2004, after Ms. LaBomme called Rialto and requested the documents. The documents contain a FAX transmittal date of December 13, 2004 and include: Individualized Education Program Addendum dated September 22, 2004; Individualized Educational Program dated May 21, 2004; Language Speech and Hearing Assessment from April 23 and 29, 2004; Psychoeducational Triennial Assessment with test date April 23, 2004;

[2] Special Education Hearing Office (SEHO) Case No. SN 04-01820. SEHO was the organization that had jurisdiction to hear special education due process matters until July 1, 2005.

Occupational Therapy Report dated July 2, 2004; IEP Report (Assessment and Progress) Language, Speech, and Oral Motor Skills, including two documents entitled LING Phonetic Level Evaluation Summary results, dated May 2004 and prepared by Kimberly Hiddleson at Oralingua; Present Levels of Performance dated May 21, 2004, prepared by Oralingua teachers Nina Risinger and Kim Ortega; and a Medical Information Report 2004-2005 dated April 29, 2004.

6. On December 14, 2004, PUSD met with Student's parents and made a 30-day Interim Placement for Transfer Students offer for Student which was rejected by the parents. In attendance at the interim IEP meeting was Trena Spurlock, Director of Special Education for PUSD, Ms. LaBomme, program specialist with PUSD, and Student's parents. Ms. LaBomme had obtained and reviewed a copy of the May 21, 2004 IEP offer and had reviewed the due process decision from October 2004. PUSD offered an interim placement for Student at Diamond Point Elementary School (Diamond Point) in a special day class for communicatively handicapped (SDC-CH), which provides an oral program for students with hearing impairments.[3] PUSD had also reviewed a psychologist's report from Rialto but was not certain of the date of the report. PUSD did not invite any Oralingua or Rialto teachers

[3] The actual interim placement offer to Student was as follows: "1) Placement at Diamond Point Elementary School Special Day Class Communicatively Handicapped (CH), Oral Program for Students with hearing impairments. This program has been in existence for over 25 years and effectively served students with hearing impairments including those with cochlear implants; 2) Auditory Verbal Therapy 1x per week 60 minute sessions as recommended by Karen Rothwell-Vivian certified AVT letter September 20, 2004; 3) LSS service 2x per week 30 minutes individual or small group; 4) Transportation will be provided by PUSD a) curb to curb to and from school, b) transportation reimbursement to the family to and from AVT services."

or staff to attend the interim IEP meeting. PUSD indicated that it attempts to parallel the current IEP when a student transfers to PUSD, then reviews the program within 30 days as required by statute.

7. At the interim IEP meeting, PUSD agreed to observe Student in his Oralingua class, and the parent's agreed to observe the Diamond Point SDC-CH class. Both the parents and PUSD agreed to meet again on January 20, 2005 to discuss the school visits and Student's educational placement. Student was given information to enroll in PUSD, but did not enroll in the district at that time.

8. On January 20, 2005, an IEP meeting was held at PUSD. In attendance were Student's parents, Christopher Russell, educational consultant for Student, Ms. LaBomme, Sophia Miller, teacher at Diamond Point SDC-CH class, "June" (no last name given), reading specialist at Diamond Point, Viji Nagarajan, speech and language therapist for PUSD, and Dr. Patti Adams, program administrator for special education in PUSD. There were no representatives from Oralingua or Rialto in attendance at the January 20 IEP meeting.

9. At the January 20, 2005 IEP, the IEP team had the same documents that were reviewed at the time of the interim IEP meeting in December (see factual finding 5), but also had a copy of the Progress Report/Speech Production and Oral Motor Skills dated November 2004 that had been provided by Oralingua.[4] The IEP team reviewed the goals and objectives

[4] PUSD provided a copy of a FAX request from PUSD sent to Oralingua dated December 13, 2004, including proof of transmission, and a FAX transmittal receipt from Oralingua dated January 3, 2005 indicating that Kristin Dunton, Administrative Clerk at Oralingua sent by FAX a copy of the Progress Report/Speech Production and Oral Motor Skills dated November 2004. PUSD marked the document received January 6, 2005. Oralingua indicated that they had never received any requests for documents from PUSD. The document provided by PUSD has a FAX transmittal receipt showing that the document

from the proposed May 2004 Rialto IEP that were proposed to be in effect until May 2005. Student's parents indicated that those were the goals that Oralingua was working on with Student, but could not state whether he had attained any of the goals without input from Oralingua. The parent's advocate indicated that an Oralingua teacher should be present to discuss current levels of performance. The IEP team recommended review of the goals within 30-days once PUSD personnel had an opportunity to work with Student. The IEP team discussed placement at Oralingua, the placement that the parents requested, and at the Diamond Point SDC-CH class. PUSD has not conducted any additional IEP meetings since the January 20, 2005 IEP meeting.

10. The IEP team also discussed the observations by the parents at Diamond Point, and the observations by PUSD of Student's classroom at Oralingua. Student's parents had concerns about the safety of the environment for CI students, that an FM Sound Field was not utilized, and the age range of the students in the Diamond Point class. PUSD did not observe CORE curriculum being followed in the Oralingua classroom.

DIAMOND POINT SDC-CH

11. Sophia Miller is the SDC-CH teacher at Diamond Point. She is extremely well qualified to teach DHH students and is an expert in DHH issues. Diamond Point has an FM sound field system installed by Dr. Peterson that Ms. Miller only uses when

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was sent in the ordinary course of business and marked as sent "ok." To the extent that there is a conflict in the testimony, the ALJ accepts the testimony and exhibits from PUSD as truthful and accurate that attempts were made to obtain current documents from Oralingua. In fact, Oralingua sent by FAX a November 2004 progress report for speech production and oral motor skills.

beneficial for a student. Ms. Miller believes that children should learn "in noise" because they live in noise. Ms. Miller has worked with CI students in the past, but did not have any current CI students in the SDC-CH class at Diamond Point. There were no goals from Oralingua that Ms. Miller could not accomplish in her class. At the time of the January IEP meeting, the Diamond Point SDC-CH class had 7 students: 3 students were age 7; 1 student was age 6; 1 student was age 8; 1 student was age 5; and 1 was age 11.[5]

12. Maureen Santos is a speech language pathologist for PUSD, and the speech language pathologist who would be working with Student. She has been in the field for nearly 31 years. She has worked with CI students in the past, but was not working with any at the time of the hearing. She maintains her skills with continual ongoing education, reading, and collaboration, but has not had any classes specifically in CI's. Ms. Santos is a doctoral candidate in speech pathology and is extremely well qualified for her position. She has not met Student, but has read the IEP and other reports and indicated that the goals seemed appropriate for someone with Student's needs and she could work with him.

13. Viji Nagarajan is also a speech language pathologist who indicated that she attended the January 20, 2005 IEP as the SL representative and that it would be either she or Maureen Santos who would be working with Student.[6] Ms. Nagarajan was

[5] Mr. P. stated that there were 8 students the day he observed the class: 2 were age 7; 3 were age 8; 1 was age 11; and 2 were age 5.

[6] According to Student's advocate, PUSD stated at the IEP meeting that Viji Nagarajan was the selected speech language pathologist. The IEP transcript does not reveal that representation by PUSD.

well educated and qualified to offer services, but she did have a fairly pronounced accent which made her difficult to understand at times. She had not worked with CI students before, but her coursework to obtain her master's degree contained a unit on CI's.

14. PUSD offered AVT one time per week for 60 minutes provided by Karen Rothwell- Vivian, the same person who was providing those services at Oralingua.

15. Dr. Miles Peterson is a clinical audiologist who provides audio-logic support to PUSD once or twice per week, including at least once per week at the Diamond Point SDC- CH. Dr. Peterson is available on call for immediate assistance when needed. Dr. Peterson is familiar with CI's, has mapped those devices in the past and teaches about CI's at a local university. Dr. Peterson designed and installed the FM sound field system that is in the Diamond Point SDC-CH classroom. Dr. Peterson has a very high opinion of Ms. Miller as a teacher of DHH, and also has a high opinion of the program and instruction offered at Oralingua. Dr. Peterson currently services four CI students in PUSD at least once or twice per month, and checks their CI devices. PUSD does not maintain a bank of spare parts for CI's.

ORALINGUA

16. Oralingua is a highly respected certified non-public school for DHH students. Oralingua has a high percentage of CI students and has trained their staff, including on site audiologists, in the use, maintenance, and service of CI devices. Oralingua provides a special learning environment for children with CI's, including small class sizes, use of an FM sound field system, regular maintenance of the education environment to prevent static issues, and close interaction between parents, staff and teachers. Oralingua maintains a bank of spare parts for CI's. Oralingua generally

mainstreams their students by the age of ten, but there is not a cut-off age where services stop. Oralingua has a premier program for children with CI's, extremely well qualified teachers and staff, and is more than highly qualified to render services to CI students, including Student.

17. Oralingua believes that Student was not ready to mainstream into a regular education classroom, but might be ready by the end of the school year. However, Student would be able to interact with non-handicapped kids.

CONCLUSIONS OF LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400, et seq.; Ed. Code §56000, et seq.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. §1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. §1401(29).) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. §1401(26).) California provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code §56363, subd. (a).)

2. Once a child is identified under the IDEA as handicapped, the local education agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (Ed. Code §§56300–56302; 20 U.S.C. §1412.)

3. The United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id*. at 201.)

4. The U.S. Supreme court recently ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v Weast* (2005) 546 U.S. .)

5. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483).) Citing *Rowley,* the Court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id*. at 1484.) Procedural violations may constitute a denial of FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process. (*Id*.)

6. In *Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1074, the Court held that failure to include the special education teacher of the child was a FAPE denial even though the child had been attending a private school in

another state and was now seeking special education services in an Arizona public school district. The 1994-1995 school year was at issue, and the Court interpreted a provision of the 1995 IDEA that was amended in 1997 and deleted the language the Court found pertinent.[7] (*Id.* at 1077.) The *Shapiro* court reasoned that the statute required "*the teacher*" of the student be present at the IEP, and even though the child was receiving services in another state, the current special education teacher of the child was required to attend. (*Id.*) The IDEA no longer states "the teacher" should be present, but requires that the IEP team consist of "not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child." (20 U.S.C. §1414(d)(1)(B)(iii).) *Shapiro* did not indicate if Arizona had an interim placement statute that was similar to California's. California law specifies that a 30-day interim placement is required when a special education student transfers into a new district. (Ed. Code §56325, subd. (a))

7. Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.).) In *M.L.*, the court decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA, and using the harmless error analysis, determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L.

[7] In 1995, Title 20 United States Code section 1401(a)(2) provided in relevant part: The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, *the teacher*, the parents or guardian of such child, and, whenever appropriate, such child (emphasis added.)

to receive educational benefits. (*Ibid.*) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. (*Id.* at 652, 658.)

8. The district is required to provide written notice to the parents of the child whenever the local educational agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.[8] (20 U.S.C. §1415(b)(3).) The notice given to the parent's of the child must meet the requirements specified in Title 20 United States Code section 1415(c)(1).[9]

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[8] Education Code section 56500.4 states: Pursuant to paragraphs (3) and (4) of subsection (b) and paragraph (1) of subsection (c) of Section 1415 of Title 20 of the United States Code, and in accordance with Section 300.503 of Title 34 of the Code of Federal Regulations, prior written notice shall be given by the public education agency to the parents or guardians of an individual with exceptional needs, or to the parents or guardians of a child upon initial referral for assessment, and when the public education agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child.

[9] Title 20 United States Code section 1415(c)(1) provides:

> (1) CONTENT OF PRIOR WRITTEN NOTICE- The notice required by subsection (b)(3) shall include--(A) a description of the action proposed or refused by the agency;(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for

9. The IEP team must include at least 1 regular education teacher of the child, if the child is or may be participating in the regular education environment, and at least 1 special education teacher of the child. (20 U.S.C. §§1414(d)(1)(B); Ed. Code §56341, subds. (b)(2) and (3).)

10. When a child with an IEP transfers school districts within the same state during the same academic year, the local educational agency (LEA) shall provide a FAPE including services *comparable* to those described in the previously held IEP, until the LEA adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with Federal and State law. (20 U.S.C. §§1414(d)(2)(C)(i)(I).) California requires that when a child transfers school districts not in the same local plan, that a local program administrator must ensure that an interim placement be provided immediately to the child for a period not to exceed 30-days that is *in conformity* with an IEP. (Ed. Code §56325,

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the proposed or refused action;(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;(D) sources for parents to contact to obtain assistance in understanding the provisions of this part;(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal.

subd. (a).)[10] The interim placement IEP may be "either the pupil's existing [IEP], implemented to the extent possible within existing resources, which may be implemented without complying with subdivision (a) of Section 56321, or a new [IEP], developed pursuant to Section 56321."[11] (Ed. Code §56325, subd. (a).) "Before the expiration of the 30-day period, the interim placement shall be reviewed by the [IEP] team and a final recommendation shall be made by the team in accordance with the requirements of this chapter. The team may utilize information, records, and reports from the school district or county program from which the pupil transferred." (Ed. Code §56325, subd. (b).) The IDEA did not include an interim placement requirement until July 1, 2005. (20 U.S.C. §§1414(d)(2)(C)(i)(I).)

11. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).)

12. The IDEA inquiry is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the developed IEP provides the student with a FAPE by meeting the following substantive

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[10] Education Code section 56325, subdivision (a) was amended on October 7, 2005, to state that the 30-day interim placement IEP must include "services comparable to those described in the previously approved [IEP]."

[11] Education Code section 56321 provides procedures when an assessment is required to develop or revise an IEP. There was no information that an assessment was requested or recommended in this case.

requirements: (1) have been designed to meet Student's unique needs; (2) have been reasonably calculated to provide Student with some educational benefit; (3) comport with his IEP; and (4) provide education in the least restrictive environment. [12]

13. As discussed below, petitioner has failed to meet his burden of proof by a preponderance of the evidence.

I. Did Respondent hold a valid IEP meeting at any time to determine Student's needs and educational placement?

III. Did Respondent fail to comply with the procedural requirements of the IDEA: to hold a valid IEP meeting; to provide prior written notice; to consider the needs of Student, including his progress at Oralingua; and, to invite Oralingua teachers to any IEP meeting?

ISSUES I AND III WILL BE ANALYZED TOGETHER SINCE THEY CONCERN THE SAME GENERAL ISSUES.

INTERIM PLACEMENT MEETING DECEMBER 14, 2004

14. As stated in factual findings 4 to 7, PUSD held an interim IEP meeting to provide Student services for a period not to exceed 30 days of Student's enrollment in PUSD. Student never enrolled in PUSD. Two district administrators and both Student's parents were present. PUSD did not invite Oralingua to be present at the interim IEP meeting. There is no statutory or case authority that requires that the new district have any

[12] The District was also required to provide Petitioner with a program which educated him in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. §1412(a)(5)(A); Code § 56031.) LRE is not an issue in this case.

specific persons present at the interim IEP placement meeting other than a local program administrator, and there is no requirement that the new district include any teacher or other member of the student's old IEP team.

15. The interim IEP placement had to be in conformity with an existing IEP, which was either the old district's IEP implemented to the extent possible within the existing resources of PUSD, or a new IEP developed pursuant to state and federal law. Rialto had made an offer at an IEP meeting May 21, 2004 which had been determined to be a FAPE by the Special Education Hearing Office (SEHO) in October 2004. The offer made by PUSD conformed to the offer made by Rialto in the May 2004 IEP. Thus, the interim placement offer made by PUSD was a FAPE offer in conformity with Student's existing IEP and was therefore an appropriate offer.

16. Thus, the ALJ finds that PUSD held a valid interim placement meeting and made a FAPE offer for the interim placement that conformed to existing law.

JANUARY 20, 2005 IEP MEETING

17. As stated in factual findings 8 and 9, PUSD convened an IEP meeting on January 20, 2005 to develop a placement offer for Student. Student's parents were present at the IEP meeting, but no teacher or other person from Oralingua or Rialto was present at the IEP meeting.

18. When a student transfers into a new district in the same state, but different local plans, during the same academic year, the new district is required to provide an interim IEP placement not to exceed 30-days. Prior to the 30-days expiring, the new district must hold an IEP meeting to make a final recommendation regarding placement and services. At the end of the 30-day IEP meeting, a special education teacher of the student must be included in the IEP meeting. It is reasonable to assume that the special education teacher required to be present is a teacher from the new district who has gained

knowledge of the student during the 30-day interim placement. Here, the parents declined the 30-day interim placement, which prevented PUSD from having a special education teacher in a position to have knowledge of Student and attend the IEP. There is no authority that requires a district to include a member of the old IEP team or a current teacher of the special education student particularly when those teachers are not part of the same local plan or district. Considering that Rialto and Oralingua are in close proximity to PUSD even though they are in different local plans, PUSD could have easily included a teacher from Oralingua, but there was no statutory requirement that PUSD do so.

19. Petitioner argued that *Shapiro*, *supra*, stands for the proposition that the current special education teacher of Student must have been in attendance at the IEP. The viability of *Shapiro's* holding is questionable in light of the interim placement language now found in the IDEA and the interim placement statute in California. Congress could have included the specific provision that a new district must include a special education teacher from the old district, but it did not do so. Further, *Shapiro* never discussed whether Arizona had the same interim placement statute as California, but *Shapiro* must be considered in light of California law and the recent changes to the IDEA. When viewed in that context, *Shapiro* is distinguishable from the facts of this case.

20. Even if it were error to not include the Oralingua teacher at the IEP meeting, the error would be harmless error. On the facts of this case, there was no loss of educational benefit to Student, and his right to a FAPE was not otherwise impeded. The proposed IEP was nearly identical to the IEP that was determined to be a FAPE in October 2004. The goals that were in place were current goals that were to expire in May 2005, and PUSD indicated that they would have reviewed and revised any goals that were not appropriate after working with Student for 30-days.

21. Further, the January 20 IEP document was the prior written notice required to be given to the Student's parents. The issue of placement at Oralingua or Diamond Point

was well discussed at both the December interim placement meeting, and again at the January 20, 2005 IEP meeting. The parents had indicated that they would only consider placement at Oralingua. The January 20 IEP document contains all the necessary information to constitute prior written notice to the parents and the PUSD was not required to provide further documentation.

22. PUSD was required to have a general education teacher present at the IEP meeting, to the extent that Student would be included in a mainstream class. Student was not ready to be mainstreamed. Thus, PUSD's failure to have a regular education teacher at the IEP was not error. Even if it were error, it would be harmless error because there was no loss of educational benefit to Student and his right to a FAPE was not impeded.

23. As stated in factual findings 8 to 10, the January 20, 2005 IEP meeting discussed and reviewed the goals and objectives found in the May 21, 2004 IEP. PUSD recommended reviewing those goals in 30-days once PUSD personnel had an opportunity to work with Student and determine his current skill level. The goals were the same goals that were currently being pursued at Oralingua, and Student would not have another IEP meeting until May 2005 if he had stayed in Rialto and remained at Oralingua.

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

25. The January 2005 IEP meeting was held according to the procedures established by the IDEA and California state law.

26. The substantive offer made by PUSD to Student was a FAPE designed to meet Student's unique needs in the least restrictive environment.

II. Was respondent's proposed placement appropriate for Student, who has a

cochlear implant?

27. As stated in factual findings 9 to 15, PUSD offered placement at Diamond Point Elementary School in a special day class for communicatively handicapped students. The proposed teacher Sophia Miller is extremely well qualified to teach the SDC-CH class and has taught CI students in the past, but did not currently have any CI students in class. CI students currently attend school within PUSD.

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

29. Thus, PUSD made an appropriate placement offer at Diamond Point that accounted for Student's unique needs as being a student with a CI, and offered some educational benefit to him.

ORDER

1. Petitioner's request for relief is denied. The District's offer of a SDC-CH class at Diamond Point Elementary School is a FAPE offer.

PREVAILING PARTY

2. Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided.

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: January 3, 2006

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RICHARD M. CLARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings