

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

In the Matter of:

STUDENT,

Petitioner,

v.

GLENDORA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007080893

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Glendora, California on October 24-26, 2007 and November 8, 2007.

Glendora Unified School District (Glendora) was represented by John E. Hayashida, Attorney at Law, of Parker & Covert. Ted McNevin, Director of Instructional and Student Support Services was also present each day of the hearing.

Student (Student) was represented by David M. Grey, Attorney at Law of Grey & Grey. Student's mother was present each day of the hearing. Student was present to testify on October 25, 2007.

The Student's Due Process Complaint was filed on August 29, 2007. There have been no continuances of the matter. The record remained open until November 30, 2007 for the submission of closing briefs. Briefs were submitted and the record was closed on November 30, 2007.

ISSUES

1. Did the District fail to assess Student in the area of assistive technology?
2. Did the District fail to provide Student a Free Appropriate Public Education (FAPE) in the April 2, 2007 and April 24, 2007¹IEPs by not providing Communication Access Real-Time Translation (CART)²?

CONTENTIONS

Student contends that District failed to provide him with FAPE in the April 2, 2007 and April 24, 2007 IEPs for the 2007-2008 school year by failing to offer a program with appropriate services to address Student's unique needs as a student with a low incidence disability, hearing impairment and deafness. More specifically, Student contends that he needs CART, so that he can make educational progress and to participate in classroom discussions. Student asserts that when District refused to conduct an assistive technology assessment and refused to provide CART,¹ the IEP team did not consider the communication preferences of Student and his family, his linguistic needs, the severity of his hearing loss, and Student's social and emotional needs, including opportunities for peer interaction and communications.

¹ The October 3, 2007 IEP is not addressed by this decision as it occurred after the filing of this due process complaint.

² CART is a computer-aided transcription device that converts typing from the court reporter's stenographic machine in to English language text displayed on a computer screen in "real-time." It is an assistive technology device that can be used as an aid for hearing impaired students to facilitate communication and access to classroom information. An assistive technology device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability.

District contends that its offer of services was reasonably calculate to provide Student with some educational benefit and address his unique needs. District also contends that Student is performing well in his classes with his current services and does not need CART to obtain educational benefit. District further contends that the provision of CART would constitute a more restrictive environment than necessary.

PROCEDURAL ISSUES

1. Official Notice and Reconsideration

During the hearing, Student's counsel requested that the ALJ take official notice of the OAH decision in case number N2006110090 involving District and Student's sibling. The ALJ granted the request and the Decision was lodged with OAH on November 30, 2007. District's counsel requested that the ALJ reconsider and reverse the ruling granting official notice on the basis that the decision was not relevant to the case at hand. The ALJ denied the motion based upon Government Code Section 11515.

2. Motion for Collateral Estoppel Student filed a Motion for Collateral Estoppel seeking to estop District from relitigating whether or not Education Code section 51512 barred provision of CART. The ALJ in case number N2006110090 found that the section was not a bar to provision of CART. District stipulated that Education Code section 51512 was not at issue in the instant case. Accordingly, the parties agreed and the ALJ determined that the issue was moot and that there was no issue of collateral estoppel to be determined.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 15-year- old boy in the ninth grade at Glendora High School and a resident of the District.

2. Student was diagnosed with profound bilateral hearing loss when he was three months old. Student had surgery to implant a Nucleus 22 cochlear implant in his

right ear in October 1995, at the age of three. The cochlear implant was mapped and activated in November of 1995. The Nucleus 22 is an older model implant with 22 channels. With the cochlear implant, Student is able to hear about 50 percent of speech at 30 decibels in a sound proof room. This level is a little lower than normal conversational speech. A cochlear implant gives student access to sounds and vibrations, but the sounds are not the same as what a typical non-hearing impaired person would hear. Cochlear implant recipients must be trained to interpret the signals received from the implant. Student has no hearing in his left ear and must rely upon the right ear implant for receiving verbal information. He is unable to use a hearing aide on either ear.

3. Student is an oral-deaf child which means that instead of relying on sign language, Student uses his voice to communicate and uses his residual hearing provided by the implant to receive verbal input. Although Student knows some American Sign Language, he is not fluent. Student and his family have made a conscious decision that Student would use his voice and residual hearing instead of sign language as his primary mode of communication. Student's older sister is also an oral-deaf child. Student's mother has undertaken training to obtain a special education credential to teach mild to moderately disabled children and deaf and hard of hearing children. She is also in the process of completing the clinical hours required to obtain certification as an audio-verbal therapist. Currently, she teaches hearing impaired and special education children at the preschool and kindergarten levels. She has also worked as a Resource Specialist teacher for the Monrovia school district. As such, she participated in IEP meetings and made recommendations on IEP programs for students. Student's mother provides specialized assistance to Student with his homework and academics on a daily basis. She has substantial specialized knowledge and experience in the area of education of oral-deaf children including a master's degree in Education and substantial training from the John Tracy Clinic and the Alexander Graham Bell Society.

4. Student's initial IEP was with the Los Angeles Unified School District in 1994 at the age of 18 months when he began an infant program. In July of 1994, at the age of 22 months, Student began a family program and an oral pre-school at the John Tracy Clinic. At that time, the John Tracy Clinic was housed on the University of Southern California campus and provided instruction and support to oral-deaf students and their families. Student attended Kaiser Elementary School located in the Newport-Mesa Unified School District from March of 1999 to September of 1999 and Evergreen Elementary School in the Pomona Unified School District from September 7, 1999 to October 15, 1999. At Student's request, he received an interdistrict transfer to Covina Valley Unified School District (Covina Valley) to attend Ben Lomond Elementary School from October 1999 to June 2001. Student returned to the Los Angeles Unified School District to attend Farmdale Elementary School from October 2001 to June of 2003 on an inter-district permit. Student returned to Covina Valley for the completion of elementary school at Valenica elementary and attended Sierra Vista Middle School.

5. Covina Valley and Glendora Unified School District are both members of the East San Gabriel Valley Special Education Local Plan Area (SELPA). Covina Valley has developed an expertise in programs for the Deaf and Hard of Hearing (DHH) population of students within the SELPA. DHH students from various schools and some other SELPAs attend schools in Covina Valley because of this expertise. Student attended Sierra Vista Middle School in the Covina Valley as a special education student receiving DHH services until transferring to Glendora High School in 2007 for ninth grade.

6. Student performed well at Sierra Vista Middle School. Sierra Vista has a substantial DHH population and a DHH teacher on staff. Many of the teachers hold special education credentials or have received special training in working with the DHH population. Student's situation as an oral-deaf child is complicated in that he is not fluent in sign language and lags behind in expressive language due to his hearing loss. According to Karen-Rothwell Vivian, a privately retained audio-verbal therapist that has

worked with Student for various periods of time from 1995 to present, Student's development of language is at his hearing age. In other words, his hearing and language development is at least three years behind. Student was not able to hear at all until receiving the right ear cochlear implant. He experienced significant difficulty in the first year, but showed improvement over time.

7. Student's mother wanted him to attend high school back in Glendora instead of moving on to South Hills High School in Covina for various reasons. According to Student's mother, there is significant controversy in the DHH community over the choice to educate Student as an oral-deaf child instead of using sign language. She was concerned about retaliation against Student for her choice to educate him as oral-deaf. Additionally, Glendora High School has higher test scores and is closer to Student's home.

DID THE DISTRICT FAIL TO ASSESS STUDENT IN THE AREA OF ASSISTIVE TECHNOLOGY?

8. A child must be assessed in all areas of suspected disability to determine initial eligibility for special education and related services. Thereafter, special education students must be reassessed every three years, or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment. A special education student must be assessed in all areas of suspected disability using a variety of assessment tools. While there is no express requirement that a school district perform an assistive technology evaluation, assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services.

9. On April 2, 2007, a combination annual, triennial and transition IEP meeting was held. In attendance were: Student's mother, Ted McNevin, Glendora Unified School

District Director of Instructional and Student Support Services, Dennis Treziack, Director of Special Education for Covina Valley Unified School District, general education teachers Ryan Price, Christine Flores and Sheila Edward from Sierra Vista Middle School, special education teacher Melody Briggs from Sierra Middle School, school counselor from Sierra Vista Middle School, Deborah Shin, a school psychologist, Rebecca Puplio Su, a school psychologist and her sign language interpreter. At the IEP meeting, the results of the February and March 2007 Covina Valley academic assessments were discussed. In February and March of 2007, Covina Valley had conducted academic assessments utilizing the Wechsler Intelligence Scale for Children IV, and the Woodcock-Johnson Tests of Achievement. The Beery-Buktenica Developmental Test of Visual-Motor Integration was also administered in March of 2007. A report compiling the results dated "June 2007" and labeled "Psycho-educational Study" was prepared sometime later. The report, a minimal psychoeducational evaluation, consisted of a recitation of the history of student's educational history, disability, current services, cognitive testing and achievement tests. The testing showed that Student had average to above average intelligence. Student's weaknesses were in spelling and word recognition. His strength was in a very well developed ability to process information quickly. No additional assessment had been conducted by Covina Valley or Glendora.

10. Teachers commented on Student's progress and level of performance. Student had difficulties in spelling and poor writing skills which were affecting his academics. Additionally, it was suggested that Student should repeat algebra in the ninth grade to ensure that he mastered the foundational math skills because he had not consistently completed his homework and needed to improve in that area. Science was a strength for Student. It was recommended that he take biology in ninth grade. Although Student was receiving a "B" grade in honors history, his teacher recommended that he take a regular non-honors history class in ninth grade because of his low writing skills. Teachers reported that Student did not always hear them or others in the classroom. The

IEP meeting notes indicate that a transition plan was discussed with Student. Pursuant to the transition plan, Student would take classes to obtain a high school diploma including career/vocational classes in home economics and computers and would either obtain employment or attend college. Student was also to explore opportunities for involvement in extra-curricular activities.

11. At the April 2, 2007 IEP meeting, Student's mother made a request for an assistive technology assessment to determine if real time captioning, or CART, would be beneficial for Student. Glendora was to investigate a source to conduct testing and report back to the IEP team. Student's mother also sent a follow up letter on April 6, 2007 requesting the assessment.

12. Student's mother provided articles and materials concerning the benefits of CART to Ted McNevin from Glendora for his review. McNevin was familiar with CART from observing Student's sister, also an oral-deaf child, receiving CART services. She also provided McNevin with the names of educators in other school districts that might have expertise with CART and assistive technology resources. At the hearing, McNevin expressed concerns about whether or not Student needed CART, the cost of CART, disruption of the classroom, unfairness to other students and taking away the incentive for Student to develop note taking skills of his own.

13. On April 17, 2007, Ted McNevin responded in writing to mother's request for assessment. He denied the request for assessment indicating that Student "has access to his instruction and is successful in his academic program, with support and accommodations he currently has. Therefore, he has no need for CART, so an assessment would not be warranted." According to the letter, the denial was based upon reports from Student's academic teachers. McNevin did not investigate a source to conduct testing and report back to the IEP team as agreed, but unilaterally denied the assessment and CART services.

14. The IEP meeting was reconvened on April 24, 2007. In attendance at the meeting were Student's mother, auditory-verbal therapist Karen Rothwell-Vivian, Ted McNevin, Director of Special Education for Glendora, Abby Cabrera, Special Education Administrator for Covina Valley, Special Education teacher Melody Briggs and general education algebra teacher Christine Flores. At this IEP meeting, Student's mother again requested that CART be provided for Student in the high school classroom. She indicated that with the FM trainer, Student was only able to hear the teacher and was not able to hear other students or his own voice. She also asserted that high school is more rigorous than middle school and that Glendora High School had fewer resources for DHH students. For these reasons, she believed that CART was necessary for Student to have equal access to the curriculum including participation in class discussions.

15. By letter dated May 18, 2007, McNevin denied Student's request for CART for what he called the "same reasons" that he denied the request for a CART assessment. Again, the decision was made solely by McNevin and not by the IEP team. Student's mother wrote lengthy notes to the IEP indicating her concerns. On August 29, 2007, Student filed for a Due Process Hearing on the issue. She requested that an adult notetaker be provided at the high school during the pendency of the Due Process complaint about denial of CART. District agreed to provide an adult note taker for all academic classes.

16. Here, a minimal psychoeducational evaluation was conducted by Covina Valley and no assessments by District. Student's mother made multiple requests to the IEP team and to District for an assistive technology assessment to determine if CART should be made available to Student. Here, a District administrator, acting unilaterally, outside of the IEP team, summarily denied the request for assessment. District was aware of Student's communication needs and other deficits from the IEP team meeting, but did nothing to determine whether or not assistive technology could provide additional devices, aides or services to address those needs.

DID THE DISTRICT FAIL TO PROVIDE STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) IN THE APRIL 2, 2007 AND APRIL 24, 2007 IEPs BY NOT PROVIDING COMMUNICATION ACCESS REAL-TIME TRANSLATION (CART)?

17. Once a child has been determined to be eligible for special education, he is entitled to a special education which addresses his unique needs. Student is eligible for special education and related services because of his status as a child with a low incidence disability, deafness. To provide Student with a FAPE, a school district must develop an IEP that is reasonably calculated to provide a child with more than de minimis educational benefit. Student's IEP must be designed to meet the unique educational needs of the student, be reasonably calculated to provide an educational benefit and be in the least restrictive environment. The term "unique educational needs" includes the student's academic, social, emotional, communicative, physical and vocational needs.

UNIQUE NEEDS AND EDUCATIONAL BENEFIT

18. Student testified at the hearing. Student has intelligible, but difficult speech. With his current Nucleus 22 implant, he uses a microboot amplifier which is attached to his transmitter. The teacher wears a micropohone around her neck and the device allows him to hear the teacher's voice to the exclusion of all other voices and sounds. Although FM transmitters exist that allow other sounds and voices, Student's implant is an older model and is not compatible with such technology. In order to use newer technology, he would have to undergo surgery and implantation of a new cochlear implant. Results of a new cochlear implant are not predictable and may not produce sound reception as good as that Student currently enjoys.

19. Student asked for CART to be provided to enable him to more fully participate in class, but it was denied. He was mature, credible, forthcoming and responsive to questioning to the extent that he could hear questions.³ Student explained

³ Student did not use his FM trainer in the hearing. He had substantial difficulty

that he wants to hear what is going on in the classroom and what others are saying. He does not want to be left out of classroom discussions and feels isolated in the current situation. Student has ideas and comments that he would like to contribute to class discussion. Student believes that CART will help him fill in information when he cannot hear it in class.

20. Student's teachers testified that they do not know if he hears what is said in class. Most often, they must rely on Student to tell them that he does not hear and ask for clarification. Student is highly motivated and a diligent student and has asked most of the teachers for clarification at some point during the course of the school year. Most of Student's classes have a component of class discussion and participation. For the most part, Student is not able to fully participate in those portions of the class because he cannot hear what the other students say. Student's teacher, Scott Turner, has allowed him to re-write projects in one instance up to five times. Turner also utilized overhead projections and Power Point presentations to emphasize the lesson points and to provide a visual mode of instruction. Student's history teacher does not downgrade him for grammar and low writing skills. Student writes as he hears and does not always hear word endings. Although one teacher took extraordinary efforts to pass the microphone from the FM transmitter to participants in a slow moving debate, she indicated that it would not have been possible in a quicker paced exercise and not in a lively class discussion. Some

hearing questions posed to him by the District's attorney who was seated to Student's left and away from the ear with the implant. He had some difficulty hearing the ALJs questions when seated next to her within a two foot distance. Student was attentive and focused on the questions, but nevertheless struggled to hear. He had less difficulty with questions posed to him from the right side of the room in a loud voice when he had a clear view of the speaker's mouth.

teachers felt that Student would benefit from CART. None of Student's teachers felt that use of CART would be detrimental to Student or the class.

21. Sandy Eisenberg of Total Recall, a CART provider, provided a captionist and demonstrated the use of CART. A captionist typed the words spoken in the room with attribution to each speaker. The words appeared on a computer screen in a dialogue format as a transcript. The captionist produced a rough draft as she typed and continued to edit when she had spare time. When finished, she can print a written transcript in rough format or edit and present a final product later.

22. Gary McMurtrey, a Covina Valley psychologist, thought it was important for Student to participate in class discussion. He also acknowledged that reciprocity is needed for social development, critical thinking and reflection. His concerns about CART stemmed mainly from the idea that Student might be isolated by having a CART captionist sitting next to him which might serve as a social barrier. McNevin also shared this concern.

23. As testified to by Ms. Eisenberg, however, the captionist need not sit next to a student. The captionist can sit any place in the room.⁴ The text can be delivered to a desk top monitor, a lap top computer or projected on a board or screen. There is no reason that the CART provider needs to sit next to Student.

24. McMurtrey based his criticism on his experience observing students with one- to-one aides. He opined that students become dependent on the aide and isolated. He believed that when aides are gradually faded from a student's program, a student becomes more independent and functions better. He believed that a student note taker, attention to seating arrangements, an FM system and working in small groups would be the best approaches to Student's needs. McMurtrey's only personal knowledge of Student, however, is from a half-hour meeting with Student and his mother before

⁴ In fact, captioning can be conducted from a remote location. This is often the case when meetings are captioned for television.

academic testing and an hour of academic testing. He has never observed Student in class nor does he have any specialized training or experience with oral-deaf children.

25. Eisenberg provided instructive testimony. She developed the CART program for California State University at Northridge (CSUN). She was trained as a court reporter, but has been a captionist for CSUN, school districts and other public agencies for the past 15 years. She retains captionists as independent contractors. All captionists have completed court reporting school and then undergo some training implemented by Eisenberg. CART is different from regular court reporting in that it may not always be verbatim and is intended to have contextual accuracy. Eisenberg and her staff have provided CART to deaf students and have found that it fills in the gaps of information and conversation that deaf students miss which allows them more independence. Most importantly, CART allows the deaf student to participate in the discussion at the moment that it occurs rather than merely receive notes after the fact without an opportunity to participate for fear of having gotten only partial information or incorrectly interpreting the pieces heard.

26. Ms. Rothwell-Vivian, Student's audio-verbal therapist, testified that CART addresses Student's unique needs in communication as an oral deaf child. CART functions as a visual aid and allows Student to fill in the gaps when he does not hear word endings or whole words or sentences. Student can track classroom discussion, formulate a thought and orally provide a comment or response at the appropriate time. The goal of audio-verbal therapy is to maximize hearing to produce speech with no emphasis on lip reading or sign language. Ms. Rothwell-Vivian thought Student would benefit from CART and that it would help him in his areas of deficit including speech, spelling and writing because he would be able to associate sounds with written words. Part of audio-verbal therapy entails learning to replicate and reproduce sounds that Student cannot hear. District did not provide any expert testimony to rebut the credible and informative testimony of Ms. Rothwell-Vivian or Ms. Eisenberg.

27. While, historically, Student has performed well without an adult note taker or CART, that was during the time that he attended the Sierra Vista Middle School in Covina Valley. At Covina Valley, he had teachers who had substantial experience in teaching deaf children and he was able to use a classroom amplification system which is not appropriate for a high school campus where students must change classes multiple times per day. Additionally, all of his teachers testified to his diligence and strong work ethic. Student has the added benefit of one-to-one tutoring by his mother, a credentialed special education teacher with training to teach oral deaf students. More recently, Student's standardized test scores and grades have shown a pattern of decline despite his best attempts to keep up and teacher's attempts to allow him to rewrite and rework his assignments.

28. In both IEP meetings, in discussion of Student's present levels of performance, Student's teachers noted that he had unique needs in socialization, class participation, speech, spelling and writing skills. The April 2, 2007 and April 24, 2007 IEPs, however, were completely devoid of any goals to address these needs. The only goal was in the area of pre- vocational/career education. Student was to be on time to classes during the 8th/9th grade, bring materials to class, complete class assignments, participate in career education activities and attend school regularly. Suggestions for classroom accommodations were that assignments be written, topics and key points be written on the board, teachers face the student when talking, check for understanding, make allowances for written errors, use a full voice when speaking, use auditory training system and that teacher should speak standing on the right side where Student has an implant. Student was to participate in the Standardized Testing and Reporting Program (STAR) with accommodations, but no modifications. The accommodations were that test administration directions are to be simplified or clarified and that audio amplification equipment was to be used.

29. Student has not been provided with access to the general curriculum. Instead, he has been provided with the opportunity to sit in general education classes and hear a portion of the class as presented by the teachers. He misses out on substantial portions of the curriculum including the dialogue and participation aspects because of his hearing disability. His IEP does not address this. His IEP does not contain any goals to facilitate his participation in class discussions or critical thinking, writing skills or spelling. Student was provided with a generic vocational/career education goal not tailored to his unique needs.

30. In short, Glendora did nothing to address Student's identified unique needs. Although Student is progressing in the general education curriculum, he has not been given meaningful access to the curriculum nor has he been provided with a free appropriate education designed to meet his unique educational needs as required.

LEAST RESTRICTIVE ENVIRONMENT

31. A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. Placement in a general education regular classroom is the preferred option under the IDEA to the extent possible. The IDEA acknowledges the academic and non-academic value of a general education placement to disabled students. The least restrictive environment for a particular child contemplates (1) the education benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

32. Here, Student is in the school closest school to his home and the school that he would attend if he were not disabled. Placement was in a general education classroom

with supplemental aids and services including the services of an itinerant teacher on a consultative basis once a month, an FM trainer⁵ and services of an audiologist for equipment maintenance as needed. Student's cognitive and academic abilities are such that he should be able to participate in a general education classroom and its curriculum. Historically, Student has been educated primarily in a general education classroom with supplemental aids and services. There was no evidence that Student has an adverse impact on his teachers or other students.

33. The costs of educating Student in the regular education classroom include the costs of his designated services which at this time include an FM transmitter and a note taker. The costs of these services are not in evidence. Regarding CART, the evidence showed that one contractor, Total Recall, charges \$55 per hour for a six hour day and does not bill in less than six-hour days regardless of the amount of time actually used. Ms. Eisenberg testified that her company is not the only contractor capable of providing CART services; thus, the service is readily available and evidence indicates that both District and other school districts have provided the service for students under a variety of circumstances.

34. District failed to meet its obligation to provide Student with a FAPE when it failed to consider and provide goals and services designed to meet his unique educational needs in the areas of communication, class participation, spelling, writing and socialization. Furthermore, District failed to provide Student with appropriate supplemental aids and services to meet its obligation to provide Student's education in the least restrictive environment. Instead, Student was placed in a general education classroom, but isolated

⁵ An FM system is a device that is used for amplification. In Student's case, a micro-boot is attached to his implant and a microphone is given to the teacher. In Student's case, he can hear only the teacher or person speaking into the microphone and no his own voice or that of classmates.

from his non-disabled peers, by the limits of the FM system that he had to wear in order to hear the teacher speak. Student was also denied a FAPE when assessment and provision of CART were summarily denied by a District administrator outside of the IEP process. These procedural violations impeded Student's right to a FAPE by denying him the opportunity to receive services designed to meet his unique educational needs and resulted in a loss of educational benefit to Student.

COMPENSATORY EDUCATION

35. When denied a free appropriate public education, a student is entitled to compensatory education to help overcome lost educational opportunity. The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed.

36. Here, Student has been deprived of the opportunity to access and participate in the general education curriculum and a FAPE for half of the 2007-2008 school year. Student will not be able to regain that missed opportunity. However, as demonstrated by Eisenberg and explained by both Vivian-Rothwell and Student's mother, CART will allow him to access the curriculum and to participate in the classroom discussions. Compensatory education is an equitable remedy and is often not a day for day replacement. An appropriate equitable adjustment is to provide CART for both the remainder of the 2007-2008 year and the 2008-2009 school years to ensure that Student has the opportunity to benefit from his special education. Student is entitled to compensatory education based upon the denial of a FAPE.

APPLICABLE LAW

1. Student has the burden of persuasion that District's failed to provide him with a FAPE and that District failed to assess Student's need for assistive technology.

(*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. A district is required to assess a child in all areas related to a suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (Ed. Code, § 56320, 20 U.S.C. § 1414 (a) (2), (3).)

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320, Cal. Code Regs., tit. 5, § 3030 (j).) Thereafter, special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code, § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or to develop an appropriate educational program for the student. (20 U.S.C. § 1414 (a) (2), (3); Ed. Code, § 56320, subds. (e), & (f).)

4. Under the federal Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE 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 plan (IEP). (20 U.S.C. § 1401(a) (9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

5. IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 203 [102 S. Ct. 3034, 3049].) The IEP must contain specified information

including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals. (20 U.S.C. § 1414((d)(1)(A)(i)(I), (II); Ed. Code, § 56345, subds. (a)(1) & (2).) The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4)(B)(i); Ed. Code, § 56341.1, subd. (d).)

6. A disabled child's IEP must be tailored to the unique education needs of that particular child who, by reason of disability, needs special education and related services. (*Heather v. State of Wisconsin* (1997) 125 F.3d 1045.) (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

7. "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 provide if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363(a).)

8. The Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined 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. (*Rowley v. Board of Hendrick Hudson* (1982), 458 U.S. 176, 198 [102 S.Ct. 3034, 73 L.Ed.2d 690].)

9. Under *Rowley, supra* at 179 , a challenge to an IEP requires resolution of two issues: (1) whether the school district complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits. If the school district's program was designed to address

student's unique educational needs, was reasonably calculated to provide some educational benefit, and comported with the IEP, then the District provided a FAPE, even if student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

10. The IDEA provides procedural safeguards to children and their parents. (20 U.S.C. § 1415.) Although a student is entitled to both procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) A procedural violation does not result in the denial of a FAPE unless the violation impedes the child's right to a FAPE, causes a loss of educational benefits, or significantly infringes on the parents' opportunity to participate in the IEP process. (*W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479. See also, 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, 6505, subds. (f)(2), (A), (B), (C).) A court's inquiry in suits brought under section 1415(f) is twofold. First, has the District complied with the procedures set forth in the Act? Second, is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the District has complied with the obligations imposed by Congress. (*Capistrano Unified Sch. Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 891.)

11. The Supreme Court in *Rowley*, expressly rejected an interpretation of 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 (*Rowley*, at p. 200.) Instead, the Supreme Court interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Rowley*, at pp. 200, 203-204.) De minimus benefit or trivial advancement however is *insufficient to satisfy the Rowley standard of "some" benefit.* (*Walczak v. Florida Union Free School District* (2d Cir. 1998); 142 F.3d at p.130; *Doe*

v. Smith (6th Cir. 1989) 879 F.2d 1340, 1341.) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex. Rel. N.R. V. Kingwood Twp. Bd. Of Educ.* (3d Cir. 2000) 205 F.3d 572, 577.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. V. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

12. Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish with in a twelve month period in the child's special education program. There should be a direct relationship between the annual goals and the present levels of educational performance. An IEP should describe the manner in which the progress of the pupil toward meeting the annual goals will be measured and when periodic reports on the progress will be provided. (Ed. Code, § 56345, subd. (a)(3).)

13. When developing a pupil's IEP, the IEP team shall also "[c]onsider the communication needs of the pupil. " (20 U.S.C. § 1401(1); Ed. Code, § 56341.1, subd. (b)(4).) In addition, the IEP team shall consider whether the pupil requires assistive technology services and devices. (20 U.S.C. § 1414(d)(3)(B)(v); Ed. Code, § 56020.5.) There is no express requirement that a school district perform an assistive technology evaluation. Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C. F. R. § 300.105.) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304 (b)(1)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).)

14. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149.)⁶ An IEP is "a snapshot, not a retrospective." (*Id.* At p. 1149, citing

⁶ Although Adams involved an Individual family Services Plan and not an IEP, the

Fuhrmann v. East Hanover Bd. Of Education (3d Cir. 1993) 993 F. 2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (Id.) To determine whether a District offered a student a FAPE, the focus is on the adequacy of the placement the District actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307.) In addition, federal and state law requires school districts to provide a program in the least restrictive environment (LRE) to each special education student. (See 34 C.F.R. § 300.114, et. seq. (2006).) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a) (5) (A); 34 C.F.R. § 300.114(a) (2) (i) (ii); Ed. Code, § 56040.1.)

15. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the education benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional

Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. Of Education* (9th Cir. 2004) 384 F. 3d 1205, 1212) and district Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salelm-Keizer School Dist.* No. 24J (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

recognition" that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at p.197.)

16. Unless the IEP requires otherwise, a child with a disability must be educated in the school that he or she would attend if he or she were not disabled. (34 C.F. R. § 300.552(c).) Each child with a disability must participate with children who are not disabled in nonacademic and extracurricular services and activities, such as meals, recess and clubs, to the maximum extent appropriate to the needs of the child. (34 C.F. R. § 300.553.) The child's placement must be in the least restrictive environment (LRE), based on the child's IEP, and as close as possible to the child's home (34 C.F.R. § 300.522(a)(2), (b)(2), (3).)

17. Deafness is a low-incidence disability that requires "highly specialized services, equipment, and materials." Low incidence disabilities make up less than one percent of a statewide enrollment in special education. (Ed. Code, §§ 56000.5, subd. (a)(1) & (2), 56026.5.) "Deafness involves the most basic human needs the ability to communicate with other human beings.... It is essential for well-being and growth of hard of hearing and deaf children that educational programs recognize the unique nature of deafness." (Ed. Code, § 56000.5, subd. (b) (1).) Hard of hearing and deaf children primarily receive language orally with or without visual cues. (Ed. Code, § 56026.2.) In Student's communication needs; the student's and the family's preferred mode of communication; linguistic needs; severity of the hearing loss; social and emotional needs; and the opportunities for peer interaction and communication. (Ed. Code, §§ 56000.5, subd. (b)(2), § 563431.1, subd. (b)(4).)

18. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Department of Education* (1996) 471 U.S. 359, 374 [85 L.Ed.2d 385, 105 S.Ct. 1996]; 20 U.S.C. § 1415 (i)(C)(iii).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help

overcome lost educational opportunity. (*Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

19. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F. 3d 516, 524.) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid.*) The award must be special education services the school district should have supplied in the first place. (*Ibid.*)

DETERMINATION OF ISSUES

Did the District fail to assess Student in the area of Assistive Technology?

The District refused to provide Student with an assistive technology assessment. The decision was made by an administrator outside of the IEP process and not by the IEP team. Student's mother made a request for assessment. Upon his mother's request, the IEP team should have considered and undertaken an assistive technology assessment of Student.

Based upon Factual Findings 1 through 14 and Legal Conclusions 1 through 4, District failed to assess Student in the area of assistive technology.

Did the District's offer contained in the April 2, 2007 and April 24, 2007, IEPs constitute a FAPE?

The District failed to develop an IEP that met Student's unique educational needs and thereby denied him a FAPE. The IEPs did not have measurable goals designed to meet his unique needs and were not reasonably calculation to provide Student with educational benefit. Student has unique communication needs due to the type and age of his cochlear implant, needs in classroom participation, writing, socialization and spelling which were not addressed by the IEP team. Additionally, District's procedural violations denied Student an educational benefit and a FAPE.

Based upon Factual Findings 1 through 36 and Legal Conclusions 1 through 19, District did not offer Student is therefore entitled to compensatory education.

ORDER

District is ordered to immediately provide CART services for Student immediately for the remainder of the 2007-2008 school years and the 2008-2009 school years as compensatory education as for its failure to provide Student with a free appropriate public education for the 2007-2008 school year.

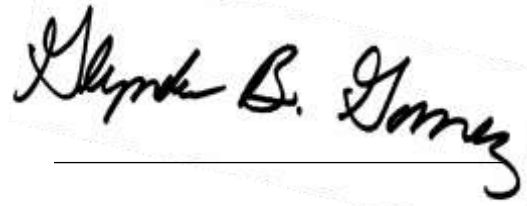
PREVAILING PARTY

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. Student has prevailed on all issues.

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).)

December 17, 2007

A handwritten signature in black ink, reading "Glynda B. Gomez", is written over a horizontal line. The signature is enclosed within a faint, rectangular border.

GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings

Special Education Division