

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2011070262

v.

SANTA MONICA-MALIBU UNIFIED  
SCHOOL DISTRICT.

DECISION

This matter was heard before Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on October 31, 2011, November 1, 2, 3, 9, 10, and 14, 2011 in Santa Monica, California.

Eric Menyuk and Valerie Vanaman, attorneys at law, represented the Student. One or both of Student's parents (Parents) were present each day of the hearing. Student was not present.

Sundee Johnson, attorney at law, represented the Santa Monica-Malibu Unified School District (District). Law Clerk Brianna Hill was also present for portions of the hearing. Dr. Sara Woolverton, special education director (Woolverton), was present each day of the hearing.

The Request for Due Process Hearing (RDPH) was filed on July 7, 2011. A joint request for continuance was granted for good cause on July 29, 2011. Closing briefs were filed by both parties on December 12, 2011, and the matter was submitted at that time.

## ISSUES

1. Did District deny Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2009-2010 school year in the Individualized Education Programs (IEPs) dated September 23, 2008, September 23, 2009 and May 4, 2010 by failing to provide her with an appropriate program for her individual needs?

2. Did District deny Student a FAPE in the LRE for the extended school year (ESY) 2010 and 2010-2011 school year ending June 18, 2011 in IEPs dated June 8, 2010, March 8, 2011, and May 25, 2011 by:

- (A) predetermining Student's placement and services;
- (B) failing to provide adequate speech and language services;
- (C) failing to provide an appropriate program and services;
- (D) failing to provide a placement in the LRE; and
- (E) failing to offer or provide sufficient auditory verbal therapy?<sup>1</sup>

## FACTUAL FINDINGS

### BACKGROUND

1. Student is a 15-year-old young woman eligible for special education and related services under the category of hearing impairment. Student was diagnosed with a bi-lateral hearing loss in 1998, and received a right cochlear implant in January of

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<sup>1</sup> In her closing brief filed on December 12, 2011, Student purported to withdraw two sub-issues: (1) whether District denied Student a FAPE in the LRE for ESY 2010 and the 2010-2011 school year by failing to provide adequate speech and language services and (2) failing to offer or provide sufficient auditory verbal therapy (AVT). The withdrawal was ambiguous and therefore, the ALJ declined to accept it.

1999. She received the left implant in April of 2008. The left implant was remapped in 2009. Student is an oral learner and does not use sign language.

2. Student attended Oralingua, an oral school for deaf children from the time she was two years old until she entered first grade. Beginning in kindergarten, Student attended Roosevelt Elementary School (Roosevelt) within the District two days a week and Oralingua three days per week. In first grade, she began attending Roosevelt five days a week. She received resource specialist program (RSP) support in first and second grade. Student attended special day classes (SDC) in third, fourth and fifth grades. She then attended Lincoln Middle School (Lincoln) within District for the sixth, seventh and eighth grades. A variety of supports and interventions including real time captioning (CART) and a note taker/aide were used during her tenure at Lincoln.

#### 2008-2009 SCHOOL YEAR (EIGHTH GRADE)

3. Student's September 23, 2008 IEP established her educational program for the 2008-2009 school year. For the first time, this IEP added specific learning disability (SLD) as a secondary category of eligibility. The SLD eligibility was based on school psychologist Marissa Perry's (Perry) determination that there was a significant discrepancy between Student's nonverbal ability and achievement in the area of mathematical calculations and a psychological processing deficit in auditory and visual memory. The IEP team discussed Student's then present levels of performance (PLOPs) and then determined that Student had educational needs in the areas of reading comprehension, writing, social/emotional, auditory responsibility (i.e. advising others about her hearing loss and when she cannot hear something), mathematics, problem solving, social/emotional, auditory training, receptive language, verbal language-articulation and expressive language. Measurable goals were established in each identified area of need. Student's father (Father) advised the team that Parents' top priority for Student was socialization. As such, and to facilitate socialization in the

general education population, it was agreed that Student would try a general education history class with modifications and accommodations.

4. Student was offered placement at Lincoln, with specialized academic instruction (SAI) for 150 minutes per day, five times per week, in resource specialist support (RSP) English, RSP history and RSP math classes. The offer also included group speech and language service twice per week for 25 minutes per session and individual speech and language therapy twice per week for 25 minutes per session. The IEP provided that Student would be excused from speech for core activities, state testing, special class projects and minimum days. Student was also offered specialized deaf and hard of hearing (DHH) services in the form of a DHH specialist and audiologist services for 30 minutes, twice a week, as well as counseling by a school psychologist once a week for 25 minutes for 10 sessions in a group. In addition, the offer included AVT services once per week for Student's new implant she received in April 2008, and once per month for Student's old implant by a non-public agency (NPA). extended school year (ESY) was not offered.

5. Father signed and consented to the IEP. Student's Mother (Mother) did not attend the meeting or sign the IEP.

6. On February 3, 2009, an amendment IEP meeting was held to discuss CART and Student's progress in her classes. IEP team members present were Parents, DHH Specialist Lori Soroko (Soroko), general education teacher Sharon Hart-Kaehler, Administrative Designee Suzanne Weber, and special education teacher/Teacher of Record (TOR)<sup>2</sup> Linda Catanzano (Catanzano). At this meeting, the general education teacher reported that Student had adjusted well to the general education history class and participated with help from peers, teacher, and the CART services. Parents reported

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<sup>2</sup> A TOR is the case carrier and responsible for setting up IEP meetings

that Student did not want help with studying or homework. Soroko recommended that Student switch from CART to a notetaker/aide because she was having trouble following the captioning services while lip reading the teacher's instruction. The IEP team agreed to try a notetaker/aide in both history and science and to reconvene to discuss the findings.

7. On May 19, 2009, an addendum IEP meeting was held at Parents' request to discuss testing accommodations, reading level, an elective class, and an NPS placement for ninth grade. In attendance were Parents, Administrative Designee Darci Keleher (Keleher), general education teacher Michele Such, special education teacher/TOR Catanzano, and Speech and Language Pathologist Rachel Birdsall Patino (Patino). At the meeting, the IEP team agreed to decrease Student's speech and language services to three times per week for 25 minutes per session to include two individual sessions and one group session. The change was recommended because articulation was no longer a concern and it was important for Student to be in class as much as possible. The IEP team reviewed Student's testing accommodations which included smaller settings, extra time, revised test directions, adult support in reading classroom tests and explanation of directions. Parents expressed concerns about a lack of communication with the notetaker/aide. It was agreed that the notetaker/aide would maintain a communication log with Parents. It was also agreed that Student would take a reading class instead of a science class for eighth grade. Parents also agreed to explore Student having a morning class so that she could take art. Parents expressed concern about placement for ninth grade and requested an opportunity to see the special education classes at Santa Monica High School (SAMOHI). The IEP team also agreed that Student would attend ESY with a notetaker/aide.

## 2009-2010 SCHOOL YEAR (NINTH GRADE)

8. Student's annual IEP was drafted over the course of two IEP meetings held on September 23, 2009 and October 13, 2009 at Lincoln. Parents, Administrative Designee/Assistant Principal Miguel Marco, general education/physical education teacher Nate Stauffer, special education teacher/TOR Catanzano, RSP teacher Craig Holland, SDC teacher Amy Hyland and District Coordinator Francis Costanzo (Costanzo) attended the September 23, 2009 session. Parents, Special Education Director Woolverton<sup>3</sup>, general education history teacher Glen Greenfield, Speech and Language Pathologist Patino, District Coordinator Costanzo, and DHH specialist Soroko attended the October 13, 2009 session. Woolverton did not typically attend IEP meetings. She attended the October 13, 2009 session at the request of Costanzo.

9. During the September 23, 2009 IEP meeting, Hyland reported that Student had partially met her two math goals and he proposed two new math goals. Hyland reported that Student needed help and prompting to complete her work and was

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<sup>3</sup> District special education director Sara Woolverton received her bachelor of arts degrees in special education and anthropology and a teaching credential from the Western Washington University in 1983. Woolverton received her master's degree in special education from the University of Washington in 1992. She received a doctorate in educational leadership and policy studies from the University of Washington in 1996. She received an administrator's certificate from the University of Washington in 2001. Woolverton has 25 years of experience in the special education field. She served as an administrator, director of special education and teacher for both special and general education students in Washington. She has also taught college courses at the University of Washington, Western Washington University and Shoreline Community College. Woolverton became the District director of special education in 2009.

reluctant to ask for or accept help in math or history. Catanzano also reported that Student struggled with higher level reading comprehension skills. Catanzano presented a new reading goal to target appropriate pacing, intonation and rhythm. Patino reported that Student was doing well in speech and making progress. She met three of her speech goals in auditory training, articulation, and expressive/receptive language. A new listening goal was developed. The meeting was adjourned for Parents to visit SAMOHI and other schools before discussing placement.

10. During the October 13, 2009 meeting, the IEP team further discussed Student's PLOPs. Student's strengths were determined to be her average performance in visual motor integration tasks and above average performance in written expression skills. Student's weaknesses were her below grade-level academic skills in the areas of math and language arts and difficulty comprehending grade-level core curriculum. The IEP team also noted deficits in the areas of receptive and expressive language and difficulty answering high level comprehension questions.

11. The IEP team discussed Student's progress and the impact of her deafness on her ability to access language and to learn at the same level as her hearing peers. Student made progress in her ability to answer concrete details and main idea questions, but continued to struggle with questions that required inference, drawing conclusions and prediction. Student made progress in her ability to use context clues to find the meaning of the unknown words in sentences, but needed prompting to do so. She continued to struggle with the use of context clauses at the paragraph level. She made progress in her use of correct expressive syntax with 80% accuracy in running speech. In the area of articulation, Student made progress on her production of "sh" and "r" sounds in running speech and was highly intelligible when she slowed her rate of speech. Student made progress in auditory discrimination using her left cochlear

implant and was able to distinguish between closed sets of three to five words with 80% accuracy.

12. Catanzano reported that Student met her social/emotional goals and had completed the ten counseling sessions. She reported that Student self-referred to the psychologist as needed and used anxiety reducing strategies at school. Student did not appear to have any residual anger management issues or problems misinterpreting peers. Parents expressed concern about Student's social/emotional status and lack of friends. District team members did not notice Student having difficulty with peers and asserted that she had several friends at school. Student spent time with friends at school and worked well in cooperative groups. Mother expressed that Student was solitary at home and did not have any friends at home. She felt that Student needed a way to engage socially and was concerned that Student spent most of her time on the computer on Facebook.

13. After discussion of PLOPs and progress, the IEP identified areas of need in reading comprehension, written language, social/emotional, reading fluency, auditory responsibility, mathematics, solving math word problems, expressive language, receptive language and auditory training. Measurable goals were written in each area of need.

14. The IEP team also developed accommodations for Student. The accommodations were preferential seating in the front of the classroom to the left side of the class, repetition and rephrasing of peer questions and comments during class discussions, visual cues and written directions for assignments, lecture notes when available, class outlines in advance, a peer tutor, permission for Student to work with partners and share/copy notes, no penalties or lower grades for spelling errors, modified or alternative assignments in general education classes, extra time to complete assignments, a quiet setting and written directions on classroom tests. Additionally, teachers were to model appropriate rate of speech and give verbal cues when needed.



Student was also to receive testing accommodations for statewide assessment programs and STAR testing consisting of extra time, smaller settings and revised written test directions. For all other statewide/district-wide assessments, Student was to receive extra time, smaller settings, revised written test instructions and to have the writing prompts read aloud to her.

15. At parent's request, the IEP team discussed placement. Parents wanted the IEP team to consider an NPS placement at the Westview School (Westview). Parents believed that the gap between Student and her general education peers was widening and that the smaller setting at Westview would be best for Student. Parents expressed their desire for Student to attend college and felt Westview was a better placement for Student in light of those aspirations. Woolverton guided the District members of the IEP team in a discussion of placement. Woolverton had the IEP team discuss whether or not Student's IEP could be implemented in the public school setting. She instructed the District members of the IEP team that if Student's IEP could be implemented at the public school, then the public school would be the least restrictive environment (LRE) for Student. Woolverton reasoned that an NPS was comprised solely of special education students with no access to general education peers and was therefore more restrictive.

16. Parents expressed that if Student was to attend SAMOHI, they would want her to have more general education classes. District team members were reluctant to add any additional general education classes because of concerns that Student required substantial support from the notetaker/aide and that she might become overwhelmed if additional classes were added. The general education history teacher opined that Student was comfortable in the class, had the aide seated next to her and was making progress in the class. District members of the IEP team offered to revisit placement and additional general education classes, as well as time with the notetaker/aide at the middle of the semester.

17. The IEP team offered placement at SAMOHI in a SDC for English, math, and reading, collaborative science, and a curriculum skills class with specialized academic instruction for 250 minutes per day, five days per week, for a total of 1250 minutes per week. The offer also included DHH services for 30 minutes once per month, speech and language services three times per week, 25 minutes per session, including one individual session of 25 minutes and two group sessions. Student was also offered a one to one notetaker/aide for 360 minutes, five periods of the school day, for a total of 1800 minutes per week, as well as AVT therapy once per week, 50 minutes per week, for Student's newest implant with a NPA. District members of the IEP team proposed elimination of the NPA for AVT therapy for Student's older implant. Parents did not agree to discontinue the AVT therapy. Parents believed the AVT therapy was necessary to help Student learn to listen and integrate both implants. District IEP team members reasoned that the District's speech and language pathologist could work on the AVT goals with Student. Parents again expressed that they felt that an NPS was the best placement for Student. Special Education Director Woolverton explained to Parents that they could unilaterally place Student at the NPS and file for due process if they believed that the District had failed to provide a FAPE.

18. On October 13, 2009, Parents partially agreed with the IEP. Specifically, Parents checked the box that stated "I agree with the IEP, with the exception of" and wrote "the ending of the AVT provided by Kim Hiddleson<sup>4</sup>, and the suggested High School placement at Santa Monica High School, and the goals that suggest that the placement is appropriate."

19. On January 14, 2010, Parents wrote to District and reiterated their disagreement with the IEP generated in the meetings of September 23, 2009 and

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<sup>4</sup> Hiddleson provided AVT therapy for Student's original implant.

October 13, 2009. Parents specifically stated that despite their disagreement with a proposal to change Student's AVT services, and despite their invoking of Stay Put with respect to Student's AVT services, District, nevertheless, unilaterally discontinued the AVT therapy for the older implant.

20. In March of 2010, Parents started the application process for admission of Student to Westview.

21. On May 4, 2010, an IEP team met to amend the September 23, 2009 IEP, and to discuss communication with the aide, assessment and tutoring. In attendance were Parents, Advocate Melinda Gillinger, special education teacher Catanzano, Audiologist Louie Interiano (Interiano), Speech and Language Pathologist Patino, Psychologist Rebecca Ruberg (Ruberg), special education Coordinator Costanzo, general education teacher Mr. Johnson, and Counselor Jose Hernandez (Hernandez). The IEP team discussed that District staff had a different impression than that of Parents concerning Student's social success and emotional state. Parents asserted that Student was keeping it together at school and then falling apart at home.

22. The IEP team discussed Student's notetaker/aide. Student had been upset about the aide and had a perception that the aide was interfering with her friendships. Student expressed her concerns to Parents, Catanzano, Ruberg, Perry, Hernandez and Soroko. The team members agreed that Student needed aide support for her general education history class both academically and socially. However, Student was embarrassed by the aide's presence and did not want the aide. In Student's math class, the aide worked with Student and others as needed. In history, the aide worked specifically with Student and sat next to her in class. In the reading class, the aide sat in the back of the class and took notes for Student. Student reported to the Audiologist Interiano, and the history teacher observed, that Student struggled in the history class even with the aide's help. Hernandez expressed that Student was not mature enough to

figure out how to benefit from the aide and did not have enough confidence to express her feelings to the aide. Hernandez and Catanzano both acknowledged that Student had trouble making friends. They opined that Student was "too clingy" and scared off potential friends. They observed that Student wanted to be with a friend all the time, which resulted in Student's hurt feelings when the friend did not want to be with her exclusively.

23. The IEP team discussed the various forms of real time CART available. District team members expressed concern that Student had tried CART in the past, but it was not successful. Student's lack of success was attributed to her low reading level making it difficult for her to keep up with the captioning. The advocate asserted that Student was older this time and her reading level was higher. Interiano, the audiologist, opined that Student should be part of the decision. Student used captions on movies at home and Parents found that it helped Student with comprehension. The IEP team agreed to explore a trial period of CART after speaking with Student. Parents requested some method of communication with the aide. Parents also requested that Student have CART for ninth grade and in-home academic support to work on academic skills, homework, post-teaching, and intensive intervention in reading and vocabulary development.

24. The IEP team agreed to discuss setting up a communication meeting with the notetaker/aide and counselor and a meeting to discuss CART with Student before Student's triennial IEP. Student's triennial assessment was due on May 29, 2010. The IEP team, including Parents, agreed to waive the timeline for holding the triennial IEP team meeting. The waiver was made to accommodate scheduling issues. All members of the IEP team meeting, including Parents, agreed to hold the Student's triennial IEP team meeting on June 8, 2010.

## TRIENNIAL ASSESSMENT

25. In April and May of 2010, District personnel conducted a triennial assessment of Student.

26. Catanzano conducted Student's academic assessment. She was Student's TOR for two years and her special education teacher for seventh grade. Catanzano received a bachelor of arts degree in history from the University of California at Los Angeles (UCLA) in 1984, an elementary teaching credential from Sonoma State University in 1985 and a master of arts degree from the University of Colorado in 1992. Catanzano is a national board certified teacher with 25 years of teaching experience. She has been employed by school districts in California and Colorado. Catzanano administered the Woodcock Johnson III Tests of Achievement (WJ-III) to Student on May 19, 2010. Overall, Student performed in the low average range in academic skills and in the low range in her ability to apply those skills. Student received a standard score of 93 within the average range in written expression, and a 77 within the low range in mathematical calculation skills. Student also received a standard score of 74 within the low range in broad math, and a 94 within the average range in broad written language. Student received a standard score of 84 within the low average range in broad reading. During the course of his career, Catanzano had administered the WJIII many times. She administered the WJIII to Student according to the manufacturer's instructions, and opined that it presented an accurate reflection of Student's level of achievement consistent with her school performance.

27. Soroko is a DHH specialist and has been employed by the Los Angeles County Office of Education (LACOE) since 1988. She is assigned to work at the District two days per week. She has also been employed by the Beverly Hills School District as a DHH specialist consultant since 2008. Soroko received a bachelor of arts degree from California State University at San Diego and a master of arts degree from California State

University at Northridge. She has communication handicapped and multiple subject K-12 credentials. She has served as a DHH teacher under the auspices of LACOE for three years, a DHH work experience coordinator for three years, and has 23 years of experience as a DHH specialist. As a DHH specialist, she assesses student functioning levels, provides auditory training, speech reading training, and monitors students with cochlear implants and FM systems. Soroko had worked with Student throughout her enrollment in District.

28. Soroko completed a DHH assessment of Student. Soroko administered the Screening Instrument for Targeting Educational Risk (SIFTER), and the Listening Inventory for Education (LIFE) to Student. The SIFTER is a rating scale designed to show if a student is educationally at risk as a result of hearing problems. The SIFTER results showed that Student was in the passing range in most areas, but was at risk or marginal in some areas for history, language arts and math. From this, Soroko opined that Student needed additional support in the areas of vocabulary development, reading comprehension and her expressive ability in relating stories or events that have happened. The LIFE is a student appraisal of listening difficulty in the classroom. Soroko opined that the LIFE inventory results indicated that Student had the most difficulty in the following school related situations and environments: 1) teacher talking during transition time, 2) teacher talking with back turned, 3) word recognition during a test or directions, 4) listening in school assemblies, 5) other students answering questions during discussions, and 6) listening in hallway noise.

29. At hearing and in her report, Soroko opined that due to Student's inability to hear well in background noise and at a distance greater than six feet from the sound source, Student missed a lot of information during lectures and class discussions. She opined that Student needed preferential seating, visual cues, and written directions. She also needed repetition and rephrasing of questions and answers during the classroom

discussions and comprehension checks. Soroko recommended that Student have a notetaker and help with developing self advocacy skills. Soroko had concerns that Student might be underreporting the difficulties she was having with understanding and hearing things. Soroko did not follow up with Student because she was on medical leave for several months. When she returned, Student had enrolled at Westview and was no longer enrolled in District.

30. Ruberg is a licensed and registered psychologist and a credentialed school psychologist. She received a bachelor of arts degree in psychology from Hunter College of the City University of New York in 2002, a master of science degree in school psychology in 2005 and a doctorate of philosophy degree in school psychology from Tulane University in 2008. She also has a professional clear pupil personnel services credential. Ruberg is fluent in American Sign Language (ASL) and was raised by two deaf parents. She has a private psychological practice specializing in DHH services and is the educational support specialist at The Buckley School, a private school in Los Angeles. Ruberg served as a psychologist at Saint John's Child and Family Development Center for Mental Health Services for two years before her brief tenure at Lincoln.

31. Ruberg conducted a psychoeducational assessment of Student and prepared a report dated June 8, 2010. Ruberg was the school psychologist during school psychologist Marissa Perry's maternity leave absence. Ruberg's report was based upon a review of records, observations of Student, Student interview, teacher reports and assessment measures. Ruberg also spoke with Perry about Student. Ruberg administered the Comprehensive Test of Nonverbal Intelligence (CTONI), the Developmental Test of Visual Perception Adolescent and Adult (DTVP-A), the Beery Buktenica Developmental Test of Visual-Motor Integration (VMI), the Behavior Assessment System for Children, Fourth Edition Self, Parent and Teacher Reports (BASC-IV), and the Learning Efficiency Test-II (LET-II). She administered the LET-II to Student to

test her auditory memory. At hearing, she acknowledged that the LET-II would not have been appropriate for a deaf child that was not oral. Ruberg also reviewed the results of Catanzano's administration of the WJ-III.

32. Ruberg believed that the tests she administered were the most appropriate available tests for Student. She opined that since the tests were normed for students with normal hearing, the scores had to be interpreted with caution because Student was deaf. Ruberg was not aware of any appropriate tests that were normed for deaf Students. She concluded that the results were an accurate representation of Student's abilities and were consistent with her performance at school. From the information she obtained, Ruberg opined that Student qualified for special education as a student who was hearing impaired and secondarily as a student with SLD. Ruberg further opined that the SLD was due to a psychological processing deficit in auditory memory. She also found that Student had a significant discrepancy between her average non-verbal ability and her academic achievement in the areas of oral language and math.

33. During classroom observations, Ruberg noticed that Student sometimes missed what was going on in the classroom. Ruberg opined that Student was dealing with typical adolescent issues concerning peer relations and parents. Student had difficulty in the general education history class and was frustrated because she could not always follow the classroom discussions. Ruberg opined that Student would be overwhelmed if placed in all general education classes. Ruberg observed that Student was more successful in smaller classroom environments.

34. Patino conducted an assessment of Student's speech and language skills. Patino is a speech and language pathologist at Lincoln. Patino received a bachelor of science degree in communication sciences and disorders from Emerson College in 2006 and a master of science degree in speech-language pathology from the MGH Institute



of Health Professions in 2008. Patino completed practicums at the Massachusetts General Hospital, Boston Public Schools and MGH Institute of Health Professions, Speech, Language and Literacy. She is also American Speech Language Hearing Association (ASHA) certified. Patino has experience working with DHH students and a few students with cochlear implants. Patino provided speech and language therapy to Student for two years in seventh and eighth grade. At hearing, Patino testified that Student was sometimes silly and needed redirection, but was never a behavior problem. Patino provided direct therapy in a small group, consultative services informally in the classroom, and consulted with Soroko, the AVT therapists and the audiologist.

35. To assess Student, Patino administered the Peabody Picture Vocabulary Test (PPVT), Expressive Vocabulary Test (EVT2), Clinical Evaluation of Fundamental Language-4 (CELF-4), and the Comprehensive Assessment of Spoken Language ("CASL"). Patino spoke with Student's teacher but did not conduct a formal classroom observation. Patino used PPVT to assess receptive single word vocabulary skills. On the PPVT, Student received a standard score of 74 within the significantly below average range when compared to same age hearing peers. Patino used the EVT2 to assess vocabulary skills. On the EVT2, Student received a standard score of 78 within the significantly below average range when compared to same age peers. At hearing, Patino explained that a deficit in receptive vocabulary could impact a student's listening and reading comprehension.

36. The CELF-4 is used to identify potential language problems in the areas of semantics, syntax, auditory memory and processing. Student performed in the significantly below average range on the expressive language index, the receptive language index, and the language memory index. Student performed in the average range in the language content index.

37. The CASL was administered to assess Student's higher language skills. Student scored within the average range on measures of non-literal language, meaning form context, inference, and pragmatic judgment. However, Student scored within the significantly below average range on the subtest pertaining to deriving meaning from ambiguous sentences.

38. Patino administered all four instruments according to their instructions. Then, Patino administered the CELF-4 a second time with visual prompts to determine if Student performed differently with the prompts. Student's performance improved significantly with visual prompts.

39. Patino spoke with Student during several testing sessions. Student often needed multiple repetitions or verbal directions or statements in order to understand the full meaning. Student did not always ask for repetition when needed. Patino noted that when asked to repeat back instruction or verbally presented information, Student often got the majority of information, but missed one or two details. Sometimes, the missing details were crucial for full understanding and other times the missed details were not essential.

40. Patino opined that Student's deafness could impact her ability to demonstrate what she knows on tests. Patino testified that Student had a delay in her listening age as compared to her chronological age. Visual information was helpful to Student. Patino opined that the assessment results were consistent with her knowledge of Student. Based upon her observations and the assessment results, Patino opined that Student qualified for speech and language services.

41. On June 2, 2010, Parents gave notice to District that they intended to place Student at Westview for the 2010-2011 school year and would be seeking reimbursement for all related costs and services.

42. On June 4, 2010, Father notified Catanzano that Parents had a conflict with the scheduled June 8, 2010 IEP meeting and needed to reschedule.

43. On June 7, 2010, Catanzano notified Father that the meeting had to proceed on June 8, 2010 because of the timeline for holding the triennial meeting, but that another meeting could be held during ESY.

44. At hearing, Costanzo, the IEP administrative designee and former principal of Lincoln, testified that District was unable to reschedule the IEP meeting because it was scheduled for the last week of school and District was required to have an offer of placement and services in place for ESY and the 2010-2011 school year.

#### TRIENNIAL IEP (ESY 2010 & 2010-2011 SCHOOL YEAR)

45. On June 8, 2010, an annual IEP meeting was held. Parents did not attend the meeting. Administrative Designee Costanzo, a general education teacher, an administrator, School Psychologist Ruberg, Intern Frances Flores Carter, Speech and Language Pathologist Patino, DHH Specialist Soroko, an educational audiologist, and special education teacher/TOR Catanzano attended the IEP meeting.

46. The IEP listed Student's eligibility as primarily deafness and secondarily specific learning disability. The IEP team determined that Student's strengths were her performance in the average range in written language and written expression, performance in the average range on measures of nonverbal intelligence and performance in the very superior range in her ability to copy drawings. The IEP notes that that Student enjoyed listening to music, using Facebook and surfing the internet.

47. PLOPs were developed based upon classroom performance and the triennial assessment. According to the PLOPs, Student's academic skills were below grade level in the areas of math and language arts and she had difficulty comprehending grade level core curriculum. In the area of communication development, Student had made great progress in her receptive and expressive

language skills over the year. Student's ability to get meaning from content was in the average range. Although she had made progress, her vocabulary was significantly below average at the 3.4 grade level. Student was able to answer questions about seventh and eighth grade level materials, but struggled to find important details in the text to support her inferences. Student continued to struggle with auditory discrimination. She was able to distinguish between a set of eight words, but struggled with a larger group of 20 words.

48. In the area of social/emotional development and behavior, Student had completed her counseling sessions and did not display any anger issues. She self-referred to counseling when needed, spent time with friends at school, worked well in cooperative groups and spent time talking to friends on Facebook at home. In the area of health, the PLOPS stated that Student wore glasses for reading, was profoundly deaf and had two cochlear implants. The PLOPS noted that the second implant was placed in 2008 and that Student favored the original implant. Student's height and weight were appropriate and there were no additional health concerns. Student's gross and fine motor skills, vocational development and adaptive skills were considered adequate for accessing the curriculum.

49. The IEP team used the PLOPS to determine that Student had educational needs in the areas of reading comprehension, auditory responsibility, writing language, algebra, social/emotional, receptive/expressive language, and auditory discrimination.

50. The IEP team drafted measurable annual goals in each area of need in: reading comprehension, written language, social/emotional, reading fluency, auditory responsibility, mathematics, solving math word problems, expressive language, receptive language and auditory training. Measurable goals were written in each area of need.

51. The IEP notes set forth a summary of interventions used with Student. Specifically, the notes indicate that Student used CART services for the first semester of

seventh grade at the request of Parents. The CART was discontinued because Student was not using the service. She read at the second grade level and was unable to follow the quick pace of the transcription and it was difficult for her to use both the captioning and follow the teacher. CART was replaced with a one to one notetaker/aide for the seventh and eighth grade. Student was also placed in a reading class. There were some difficulties with the aide. The IEP notes and Catanzano, Mother, Perry, Ruberg, and Soroko all testified that Student did not want the aide sitting next to her and was not receptive to having an adult hovering near her. Student insisted that the aide sit in the back of the class except during her general education history class. The IEP notes show that Student made progress and was more successful in class with the aide because the aide was able to assist her with vocabulary, review and notes from the classes. Student received counseling to deal with her emotions about the aide and consultation from the psychologist and from the DHH specialist. The notes indicate that the Catanzano had observed Student withdraw from social interactions and conversations when she was not able to follow a quick conversational exchange with multiple peers.

52. Ruberg advised the IEP team that Student was frustrated about the uncertainty about where she would go to high school and that Student had friends and wanted to continue to high school with her friends. The history teacher reported that Student was struggling with tests in the general education history classes, but was doing well with the assistance of the aide. He felt that the aide was key to her success and facilitated her communication with peers. He expressed that the class would be a great struggle for Student without the aide. Student received a lot of clarification from the aide and facilitation with group activities.

53. The goals, PLOPS, and progress were reviewed. The IEP team added new goals in reading comprehension, written language, algebra, auditory training, social/emotional, and speech language. The IEP team discussed a range of placement

options including general education and specialized academic instruction on a public school campus. Because the IEP team determined that Student's IEP could be implemented on a public school campus, the team did not offer an NPS placement.

54. The IEP team developed an offer of placement and services, which included specialized academic instruction for 250 minutes, five times per week totaling 1250 minutes, SDC English, collaborative science, SDC math, SDC reading, curriculum skills, DHH services 30 minutes once per month, speech and language therapy service three times per week for 25 minutes per session, a one to one aide for 250 minutes per day, five days per week, 30 minutes per week individual and group psychological services, AVT services from October 13, 2009 to June 30, 2010 once per week for 60 minutes per week by a private provider, and ESY. The IEP team also agreed to a trial of CART services during ESY.

55. On June 9, 2010, District gave parents prior written notice (PWN) that it would not fund placement at Westview or any costs related to the placement including tuition, transportation, CART, or DIS services. The PWN stated that an appropriate program was offered in a public school which was the least restrictive environment.

56. Student attended ESY 2010 at SAMOHI, and began attending Westview in September of 2010.

57. Thereafter, at Woolverton's request, Keleher and Soroko observed Student at Westview School and observed SDC classes at SAMOHI.

58. On March 8, 2011, an addendum IEP meeting was held. Parents, Advocate Melinda Gillinger, DHH Specialist Soroko, special education Coordinator Keleher, special education teacher Diane Gonsalves (Gonsalves), general education teacher Meredith Louria, SAMOHI Administrator Jason Kurtenbach, Speech and Language Pathologist Miriam Brock (Brock), and Special Education Director Woolverton attended the meeting.

59. Although District invited Westview representatives to the meeting, due to some confusion about the dates, the representatives were not available for the meeting. Westview director Jacqueline Strumwasser (Strumwasser) advised that she was scheduled to be in a different meeting, but would be available by phone for questions. The purpose of the meeting was to discuss placement and to have Soroko and Keleher report back on their observations at Westview.

60. Soroko and Keleher both observed Student in English and science classes at Westview. In English class, they reported that the class read silently for the entire class period and answered questions from a worksheet. They reported that Nina Saha (Saha), the reading teacher, told them that Student does not always know what is going on and does not ask for clarification unless she is prompted. New vocabulary was taught by use of a workbook. Soroko and Keleher reported that Student was seated to the left of the reading teacher and should have been seated to the right to make better use of her right cochlear implant which was in contrast with the IEP accommodation which called for Student to be seated to the right of the teacher to maximize the use of the right cochlear implant which was Student's preferred implant. Soroko reported that the teacher advised them that when the class read aloud, Student volunteers to read. In the science class, while Student copied a diagram from the board, she missed the teacher's instruction. They reported that the science teacher stated that he had heard that she read lips, but did not have specific information on her hearing loss. The science teacher found that Student performed poorly on new vocabulary, but did well on essay questions. The science teacher opined that Student did well socially, but had a problem with one student early in the year, which had since been resolved. Soroko and Keleher also spoke with Westview counselor Wendy Cherry (Cherry). Cherry told them that she saw Student weekly and that Student often requested individual sessions. Cherry told

them that Student worked on self-advocating about her hearing loss and appropriate social behavior.

61. Soroko also observed a ninth grade special education reading class at SAMOHI for comparison. She reported that there were seven students in the District class, and the teacher had everything on the board when the students came in. The teacher also summarized instructions, checked for understanding, and was interactive. Soroko reported that the teacher faced the students and walked around the class. The SAMOHI SDC curriculum did not meet the admissions requirements for the University of California or California State University system, but was appropriate for diploma track. The curriculum was modified and not as challenging as the curriculum required for state university admission. The Westview curriculum was slower paced and self-directed, but did meet the admissions requirements for both university systems.

62. At the suggestion of Woolverton, the IEP team discussed whether Student's needs could be met in the public school and whether or not her IEP could be implemented in the public school. Special education teacher Gonsalves expressed that she thought Student could be served in the public school.

63. Gonsalves received a bachelor of science degree in elementary and special education in 1991 from Kutztown University and a master of arts in special education from Grand Canyon University. Gonsalves has been a special education teacher at SAMOHI since January of 2009 and was Student's language arts teacher during ESY 2010. At hearing, Gonsalves testified that Student was social in class and had friends. Student's closest friend in the class was a boy. At one point, the two students had to be separated. According to Gonsalves, the ESY class was a mixed disability SDC and was appropriate for Student. There were three girls and seven boys in the class. Gonsalves made accommodations in the classroom during ESY and Student was able to meet her goals. Gonsalves reported that Student was not forthcoming about her hearing loss.



Gonsalves checked with Student to make sure she heard and understood what was said in the class. Student was accompanied to class by a CART transcriber for at least half of the classes. There were no formal tests during the ESY class. The grades were based upon class performance and assignments. Student performed well in ESY and received an A- in the class. Student attended Gonsalves' class for about forty hours during the summer (i.e., two hours per day, four days per week over six weeks). Student missed one week of the six week summer school program.

64. Speech and Language Pathologist Miriam Brock also expressed that she believed Student could be served at SAMOHI. Brock is a licensed speech and language pathologist and an assistive technology specialist. She received a bachelor of arts degree in sociology from the University of California at Los Angeles in 1975, a master of arts degree in speech-language pathology from the California State University at Northridge in 1979. Brock has an assistive technology applications certificate, Certificate of Clinical Competence in speech pathology from ASHA, a California speech language pathology license, and a California rehabilitation services credential with special class authorization. Brock served as a speech language pathologist in various settings including rehabilitative centers, hospitals, home care and schools and taught a communication handicapped SDC in the El Rancho Unified School District. She has served as a speech language pathologist and assistive technology specialist in the District since 2004. Brock provided speech and language therapy to Student during ESY 2010, where Student received two 25 minute sessions of speech and language therapy per week. One session was individual and one was small group. During ESY, Brock saw Student four times individually and eight times in total. She also opined that Student might benefit from assistive technology. She opined that Student was pleasant and cooperative. She observed Student in her seat, participating in class with a CART

transcriptionist seated nearby. Brock reported that Student was meeting her goals in ESY and seemed happy at SAMOHI.

65. The IEP notes indicate that Parents did not want to talk about their concerns about the public school placement, instead Parents wanted to talk about their request for funding of and reimbursement for AVT and speech and language therapy.

66. The IEP team reiterated the offer made in the June 8, 2010 IEP. The IEP notes that Woolverton stated that District members of the IEP team were not offering placement at Westview at that time and that if Student re-enrolled in District, the IEP team would need to reconvene within 30 days of re-enrollment to re-evaluate goals and services. Woolverton told Parents that because Student was unilaterally enrolled in a nonpublic school, District had no obligation to provide IEP services, but that she would discuss the request with the District's attorneys. The IEP notes indicate that discussion between the attorneys for the parties involved provision of certain services with conditions that Parents did not accept. Parents requested that it be noted that they disagreed with the district's observations at Westview.

67. On March 22, 2011, District provided Parents with PWN stating that District denied the request for reimbursement and funding for the costs of privately obtained AVT and speech and language therapy. The PWN stated that the action was taken because a FAPE in the LRE was offered to Student and Parents nevertheless chose to unilaterally enroll Student in Westview NPS. The District also asserted that Westview did not address Student's unique educational needs.

68. On May 5, 2011, District special education Coordinator Keleher wrote to Parents on behalf of District. In her letter, she reiterated the offer of placement and services made in the June 8, 2010 IEP meeting and invited Parents to a May 25, 2011 IEP meeting. Specifically, the District's PWN stated that the District IEP team met on June 8, 2010 and proposed the following program for Student: DHH services 30 minutes per

month, speech and language therapy three times per week for 30 minutes per session, DIS counseling eight to 10 sessions in an individual or group setting for 30 minutes per session. SAI 250 minutes per day, five days per week, and an instructional assistant for 1250 minutes per day, five days per week.

69. On May 25, 2011, Student's annual IEP meeting was held. Parents, Advocate Melinda Gillinger, general education teacher/Principal Jason Kurtenbach, special education teacher Gonsalves, Westview Counselor Cherry, Westview Director Strumwasser, Special Education Director Woolverton, Administrative Designee Keleher and Speech and Language Pathologist Ellie Johnson attended the meeting.

70. Student had been out of the District for nearly a year at the time of the IEP. Westview staff provided PLOPS and baseline data. Westview team members expressed that Student had made academic progress. Parents expressed their excitement about the changes in Student since attending Westview. Parents reported that Student had lots of friends, loves school, rides the bus independently, does her homework and discusses her learning with Parents.

71. Cherry reported to the IEP team that Student had not had a lot of opportunity for socialization in the past. Cherry opined that at Westview, Student was in an environment where people talked to her and gave her feed back and where she received counseling for social/emotional issues. Initially, Student was argumentative with peers and teachers when she came to Westview and did not acknowledge her part in conflicts. Westview staff saw Student mature in her social/emotional development over the year and observed that she was not as defensive as she was when she first came to Westview.

72. Parents had recently engaged private speech and language services and did not have a report to share with the IEP team. Parents declined District's offer of a speech and language assessment to update PLOPs. The District SLP was new to

SAMOH, but had in the past provided therapy to deaf students and students with cochlear implants. She felt that the 75 minutes of speech and language therapy offered in the June 8, 2010 IEP was appropriate for the goals in the IEP and based upon what she knew about Student from a review of records. The IEP team agreed to leave the same speech and language goals in the IEP until new information was provided. Parents requested two hours per week of individual NPA AVT therapy. The AVT therapy requested was one hour per implant.

73. Westview Director Strumwasser expressed that her two biggest areas of concern about Student were that Student needed to continue developing independent work habits and ask for help when needed. Student did not have CART, an FM system or a one to one aide at Westview. Westview team members opined that she did not need those supports because of the small classroom and superior acoustics at Westview. Sometimes, Student had trouble following the conversations, but she was able to access the curriculum with accommodations. According to the Westview staff, Student met her reading goal and made progress or partially met all other goals. Westview Staff did not address the auditory goal and were not able to provide PLOPS on that goal. The IEP team including District and Westview staff proposed new goals in behavior, transition, vocational goals, self-advocacy, written language, reading comprehension and math.

74. Parents and their advocate explained that Student's second implant had a softer volume than the first one. Therefore, the joint volume made it hard for Student to integrate the two implants. The advocate asserted that AVT therapy was needed to integrate the two implants. The IEP team discussed the level of language arts instruction, testing accommodation, special education instruction, the availability of counseling and the size of the two schools. District members of the IEP team continued to believe that Student could be served at the public school. Parents and their advocate did not agree. Strumwasser asserted that the size of the SAMOH campus could socially compromise

Student. She believed that Student might misinterpret social cues and miss parts of conversations resulting in misunderstandings or altercations with others on the large campus. She asserted that Westview provided a smaller campus and more supervision so Student was not likely to cross the wrong people.

75. At the May 25, 2011 IEP meeting, the District members of the IEP team offered Student 1345 minutes per week of SAI, 30 minutes per month of DHH services, 60 minutes per week of counseling, 60 minutes per week of AVT by an NPA and placement at SAMOHI. The District members of the IEP team offered Student ESY for six weeks, four days a week, with SAI 940 minutes per week, DHH services 30 minutes per month, speech and language service for 50 minutes per month, 25 minutes per month individual and 25 minutes per month group therapy.

76. Perry is a licensed educational psychologist. She received her license in 2006. She received a bachelor of arts degree in psychology in 1997 from the University of California at Santa Barbara. She received a master of arts degree in counseling in 2001 and a master of art degree in educational psychology in 2003 from Loyola Marymount University. Perry has eight years of experience in the District as a school psychologist. She has two years of experience as a special education teacher in the Los Angeles Unified School District and two years of experience as a behavior interventionist with an NPA. Perry assessed Student in 2008 and provided DIS counseling and support as needed to Student while at Lincoln. Perry had a genuine affection for Student. At hearing, Perry testified that she was aware that Student had been crying at home. She attributed the crying to Student's frustration with Ms. Evans, the SDC science teacher. Consequently, Student was transferred from Ms. Evans' class to the general education science class with a new teacher. Student also had issues with her aide. Student did not want the aide interfering with her socializing with peers. Additionally, she had some disagreements with her friend that she spoke to Perry about. Student's crying and

frustration decreased dramatically after she was moved to a new class. Student saw Perry, as well as counselor Hernandez on an as needed basis.

#### STUDENT'S EXPERTS

77. Cynthia Lynne Jew (Jew) is a professor of psychology and the chair of the Educational Psychology department at the California Lutheran University. She received a bachelor of arts degree in psychology from the University of Colorado at Denver in 1983. She received a master of arts degree in counseling from the University of Colorado at Boulder. She received a doctorate in school psychology/clinical psychology from the University of Denver in 1991. Jew also has a post-doctoral certificate in transpersonal psychology. Jew has served as a family therapist, counselor, school psychologist and psychologist in multiple settings including school districts, foster care, probation and parole, rehabilitation, youth crisis and assault victim assistance. She served as an assistant professor of school psychology at Tennessee State University, Kent State University, and the University of Denver. She is also the clinical supervisor and a behavioral consultant for Walden Family Services Foster Care Agency. Jew has written extensively in the areas of assessment and diagnosis of substance abuse, resiliency and elementary counseling. Jew also has a deaf child with bilateral cochlear implants.

78. In preparation for her observation of SAMOHI and Westview classes, as well as her evaluation of appropriateness of the placements, she contacted a colleague that currently runs the DHH program at California Lutheran University and a colleague that had a specialty in issues pertaining to disabled children. The colleague also had children in District schools. Then, Jew interviewed Parents, Student, Student's teacher and AVT therapist. Jew reviewed Student's medical and school records provided by Student's counsel. Jew spent approximately two hours observing classes at SAMOHI accompanied by Keleher and an equal amount of time observing classes at Westview. Jew perceived the SAMOHI classes to be larger and noisier than the Westview classes.

She also perceived the SDC students to be clustered in one area more isolated from the general population. She opined that the SAMOHI classes and the Westview classes were both special education classes and approximately the same size. The acoustics were superior at Westview. The Westview campus and student body were smaller than the SAMOHI campus. Jew was skeptical of the SLD as Student's secondary eligibility because she believed that the tests that would assist one in determining SLD eligibility were not well normed for deaf children with cochlear implants. Jew also opined that Student took cues from the other students in her environment to assist her in figuring out what she had missed.

79. After reviewing both programs, Jew opined that although District's program at SAMOHI seemed to be a good program, it was not the right program for Student due to the large population, size of the campus and the poor acoustics. She opined that Westview was an appropriate and superior program because the classroom environment and campus were quieter and offered a college preparatory curriculum. The Westview programs had carpet, wooden furniture and provided an optimal listening environment. Jew opined that the large 3000 student SAMOHI campus was more like a small city and would be overwhelming for someone like Student with bilateral cochlear implants because of the concrete, the echoes and the sheer number of people. Jew opined that proper acoustics allowed Student to use her implants as much as possible. Jew opined that even in an appropriate acoustical environment, Student would continue to need scaffolded instruction and support to maintain appropriate interactions with peers.

80. Kay Schneider (Schneider) earned an associate of arts degree in English from Stephens College in 1962, a bachelor of arts degree in English from San Diego State University in 1965 and a master of arts in special education from California State University, Los Angeles in 1969. She received a California standard elementary life

credential in 1966, a California standard teaching credential with specialization in deaf and hard of hearing in 1969, certification as an auditory verbal therapist from Auditory Verbal International in 1996 and certification as a Listening and Spoken Language Specialist in AVT in 2006. She has served as a teacher, language therapist and supervisor for the Oralingua School for the hearing impaired for 42 years. She served as an assistant professor at California State University at Los Angeles for the summer quarters during 1988, 1989 and 1990. She also taught third and fourth grades in the Los Angeles Unified School District for two years from 1966 to 1968. Schneider has written and spoken extensively about issues pertaining to the deaf, hearing loss and cochlear implants. She is a member of the Alexander Graham Association for the Deaf and Hard of Hearing and has served as board member, president and secretary of the association.

81. Schneider was familiar with Student from Student's previous attendance at Oralingua. Schneider testified that implant processors have changed over the years. She also opined that an implant does not make a deaf person a hearing person. It does not restore hearing or allow a person to hear speech. Instead, it provides access to a series of sounds and impulses which the brain must be trained to recognize and associate with speech. It is similar to white noise. AVT helps deaf people with implants learn to listen. Schneider noted that Student's scores on the Woodcock Johnson were better in 2007 than 2010, and noted a decline in her state STAR testing scores. In 2004, Student received a score of 264, in the below basic range, in language arts and a score of 245 within the below basic range in mathematics. In 2005, Student received a score of 249 in the far below basic range in English-language arts and a score of 250 in the below basic range in math. Scores for 2006 were not provided. In 2007, Student received a score of 297 within the below basic range in language arts, 192 in mathematics within the far below basic range and 259 in science within the far below basic range. In 2008, Student received a score of 259 within the far below basic range in language arts and 258 in



math within the below basic range. In 2009, Student received a score of 277 within the below basic range in language arts and 245 in mathematics within the far below basic range.

82. Schneider was not able to coordinate her schedule with SAMOHI to visit before hearing. She did observe Westview for an hour and twenty minutes. From her observation, she opined that Westview was appropriate for Student. Schneider found the wall and sound material to be adequate. There were no echoes, the rooms were small and the school was quiet. The acoustic environment was important for Student because she did not use an FM sound field. The Westview acoustics were well designed and Student was functioning well without an FM sound field. Schneider did not have any recent experience with Student. However, she had concerns about Student's secondary eligibility of SLD. According to Schneider, Student had a hearing loss which affected her development of language. Schneider explained that auditory processing pertained to auditorally received information and auditory memory pertained to remembering what was heard. The concern was that Student may not have heard the information and therefore could not remember it or process it. Schneider also expressed concern that the SLD label would affect the expectations that people had for Student. She was also concerned about the adult support that Student required to participate in the public school, and believed Student could become too dependent on the supports. Schneider opined that District's program showed an effort to serve Student, but the interventions were not effective. According to Schneider, Westview had the small environment that Student needed.

#### WESTVIEW SCHOOL

83. Westview is a small private NPS. Westview provides education to children with learning disabilities in a small supportive environment. The school is also authorized to educate children with Aspergers' syndrome. Westview primarily serves

children with academic potential that need a smaller environment. Jacqueline Strummwasser, the Westview school director, described typical Westview students as "quirky". To enroll at Westview, an application must be made, parents must provide a psychoeducational evaluation, the parents and student must meet with the staff, and the student must spend a full day at the school. Westview does not take students with severe behavior problems, very low academic functioning, or mental retardation. Westview's programs are slower paced than a general education program. The math program is self-paced and individualized. A few students have modified curriculum, but generally the students have accommodations. The students are given more repetition, more checking for understanding and more scaffolding than the general education classes. The curriculum is also supplemented when needed. Instruction is provided in small groups of five to six students. The classes are comprised of about 10 students and comparable to the size of SAMOHI SDC classes.

84. Nina Saha was Student's language arts teacher at Westview. Her class was one of those observed by Soroko and Keleher. Saha has been a teacher at Westview for four years. She received a bachelor of arts degree in biology and foreign affairs from the University of Virginia. She received one and a half hour training from a support group associated with the Alexander Graham Bell Association. The training was about working with Student and the needs of a child with dual cochlear implants. In her classroom, she has implemented accommodations to make sure that Student sees her when she is speaking, sees any speaker in a conversation, repeats and rephrases questions and material, gives visual presentations and points in the direction of the speaker when other students are speaking. Student is also provided with preferential seating in the front of the class. Saha provides an individual program for the students. The students meet in a small group with Saha providing comprehension checks. She also summarizes often and has the students help her with the summary. The class has 10 students with

students broken into groups of four or five. Student completed half of the Algebra text book in ninth grade and will continue with the algebra text book for tenth grade in the 2011-2012 school year. Student was very immature socially and withdrawn when she started classes at Westview. At the time of hearing, Saha considered Student to be very social and to have matured in her peer relationships.

85. Parents paid Westview School \$30, 555.50 for the 2010-2011 school year and \$32, 010.00 for 2011-2012 school year.

## LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student has the burden of proof.

### ISSUE ONE – FAPE IN THE 2009-2010 SCHOOL YEAR

2. In Issue one, Student contends that she was procedurally<sup>5</sup> and substantively denied a FAPE in the LRE for the 2009-2010 school year because District failed to provide her with an appropriate program for her individual needs. District contends that the offer of placement and related services in its IEPs of September 23,

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<sup>5</sup> Although Student's complaint includes a general allegation that District committed a procedural violation(s) concerning Student's educational program for the 2009-2010 school year, Student presented no evidence to support this allegation. Notwithstanding this, the ALJ addresses the procedural requirements in this Decision.

2008, September 23, 2009,<sup>6</sup> and May 4, 2010 offered Student a FAPE for 2009-2010 school year. As discussed below, Student failed to meet her burden of proof on Issue One.

3. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction 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 IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "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).)

4. 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 decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); *see also W.G. v. Board of Trustees of Target Range School District No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors that lead to a deprivation of educational benefits, such as failure to have the proper composition of the IEP team during the IEP process, are analyzed by determining whether: 1) a procedural violation occurred and 2) whether the procedural violation

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<sup>6</sup> Student's annual IEP of September 23, 2009 was developed over the course of two meetings: September 23, 2009 and October 13, 2009.

resulted in a deprivation of educational benefits to the student. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 653.)

5. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher of the pupil, (4) a representative of the local education agency (LEA), (5) an individual who can interpret the instructional implications of the assessment results, (6) at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate, and (7) the individual with exceptional needs. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subds. (b)(1-7).) A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882; *N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. In general, when developing an IEP, 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. (Ed. Code, § 56341.1, subd. (a).) If, after considering the above factors, the IEP team determines that to provide a FAPE a child needs a particular device, service, intervention, accommodation or program modification, in order to make progress on annual goals, make progress in the general

education curriculum or be educated with other students, the program modifications must be listed in the child's IEP. (Ed. Code, §§ 56341.1, subd. (b)&(c); 56345, subd. (a).)

7. The IEP must include a written statement of present levels of academic achievement and functional performance, a statement of the manner in which the disability affects involvement and progress in the general education curriculum, and a statement of measurable annual goals, related services, supplementary aids and services, program modifications or supports that will be provided to enable the pupil to advance appropriately toward attaining the annual goals. (20 U.S.C. §1414(d); Ed. Code, § 56345.) An IEP must also include a statement of the special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable, to be provided to the child. (20 U.S.C. §1414(d)(1)(A)(IV).)

8. When developing a pupil's IEP, the IEP team shall also "[c]onsider the communication needs of the pupil." (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code, § 56341.1, subd. (b)(4).) 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, subds. (a)(1) & (2); 56026.5.) "Deafness involves the most basic human needs—the ability to communicate with other human beings.... 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." (Ed. Code, § 56000.5, subd. (b)(1).) Hard of hearing and deaf children primarily use two different language modes, sign language and oral (aural). Oral learners express and receive language orally with or without visual cues. (*Ibid.*; Ed. Code, § 56026.2.) In developing an IEP for a child who is deaf, the IEP team should take into consideration the 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. (

20 U.S.C. § 1414(c) (B) (iv); Ed. Code, §§ 56000.5, subd. (b)(2) & 56341.1, subd. (b)(4); Notice of Policy Guidance, U.S. Department of Education, October 26, 1992, at 19 IDELR 463A.)

9. In *Board of Education. v. Rowley* (1982) 458 U.S. 176 [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. (*Rowley, supra*, 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 “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

10. *Rowley* established that as long as a school district provides an appropriate education, methodology is left up to the district’s discretion. (*Rowley, supra*, 458 U.S. at p. 209.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.* (1st Cir.2004), 361 F.3d 80, 84 [*citing Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992-93].)

11. A student derives benefit under *Rowley* when he or she improves in some areas even though he or she fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P.* (3rd Cir. 1995), 62 F.3d 520, 530.) He or she may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.) A showing of progress does not require that a D student become a C

student and thus rise in relation to his peers. Progress may be found even when a student's scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Educ.* (D.Del. 2001) 162 F.Supp.2d 316, 328.)

12. 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. (*Rowley, supra*, at 200, 202-204.) 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.) An IEP is "a snapshot, not a retrospective" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* [citing *Fuhrmann, supra*, at p.1041].)

13. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a)(2006); Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in



hospitals or institutions. (34 C.F.R. § 300.115 (6); Ed. Code, § 56361.) Federal and state law requires school districts to provide a program in the least restrictive environment (LRE) to each special education student. (34 C.F.R. § 300.114 (2006); Ed. Code, §56031.) 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)(2006); see *K.D. ex. Rel C.L. v. Dept. of Educ. Hawaii*, \_\_\_ F. 3d \_\_\_, 2011 WL 6760338 (Hawaii), 11 Cal. Daily Op. Serv. 15, 407.)

14. In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decisions are made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment (LRE); 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modification in the general education curriculum. (34 C.F.R. § 300.116 (2006).)

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" or 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 recognition "that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at p. 197.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (1989) 874 F.2d 1036, 1050.)

16. Here, District complied with the procedural requirements of the IDEA and California law in developing Student's September 23, 2008, September 23, 2009, and May 4, 2010 IEPs. Specifically, the evidence shows that Parents had an opportunity, and indeed, participated in the development of Student's IEPs. In particular, Parents shared concerns, participated in and assisted with the development of Student's PLOPs, goals, educational program, and related services, and participated in the discussion of the continuum of placement options. In addition, each IEP, which was developed by a team comprised of the necessary participants, including Parents, incorporated a statement of PLOPs, included appropriate, measurable goals, and included the details of Student's education program and services, including a delineation of Student's level of interaction with non-disabled peers. As such, the IEPs at issue complied with all pertinent procedural requirements.

17. Student failed to prove by a preponderance of the evidence that District failed to offer a FAPE for the 2009-2010 school year under *Rowley*. The evidence showed that the IEP team considered a number of factors when determining a placement and services for Student. Specifically, the team considered Student's weaknesses in the areas of reading comprehension, written language, reading fluency, mathematics, and

developed goals to address those weaknesses. In addition, the team considered Student's progress, particularly in the areas of auditory training, articulation, and expressive and receptive language, as well as considered the impact of Student's deafness on her ability to access language and to learn at the same level of her hearing peers. Also, the evidence showed the team considered Student's social/emotional status, as well as Parents' concerns about Student's apparent lack of friends at home. The evidence also shows that the team developed appropriate accommodations related to Student's disability, such as preferential seating in the front of the classroom, repetition and rephrasing of peer questions and comments, visual cues, written directions, lecture notes, class outlines, a peer tutor, modified assignments in general education classes, extra time to complete assignments, and accommodations for statewide testing. The IEP team also evaluated Student's needs for placement and related services, based on Student's PLOPS and goals, and offered Student a SDC at SAMOHI for English, math, and reading, collaborative science, and a curriculum skills class, and offered specialized academic instruction, DHH services, speech and language services, a one-to-one notetaker/aide, as well as AVT therapy. As discussed in more detail below, the IEPs offered an appropriate educational placement for Student, as well as pertinent related services, that were designed to meet Student's assessed and agreed upon educational needs, and which provided Student an educational benefit.

18. A determination of whether a district has placed a pupil in the least restrictive environment (i.e., a general education setting) involves the analysis of four factors: (1) the educational 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 mainstreaming the child. (See *Rachel H.*, *supra*, 14 F.3d at p. 1404.) Regarding the first factor, the evidence clearly established through the credible testimony of Soroko,

Catanzano, Patino, Keleher, Ruberg and Woolverton, that Student, in order to access the curriculum, required the specialized teaching methods and small group instruction by qualified special education teachers, particularly in a SDC setting for her core subjects. Specifically, Student required substantial assistance in addressing her English, math, and reading skills, as well as her collaborative science skills, as a result of Student's deafness and auditory memory deficits. The evidence shows that while in middle school at Lincoln, Student was placed in RSP classes and a general education history class. Even with the assistance of CART and an aide, Student struggled to keep up with the classes. As time went on, successive IEPs offered more specialized academic instruction in the form of SDC classes and additional supports including a change from CART to a full time notetaker/aide. For the 2009-2010 school year, Student needed a slower paced, modified curriculum of the SDC class and required aide support to fully participate in the academic and social aspects of school. Given Student's challenging history in general education classes and the extent of her needs, it is reasonable to conclude that Student's receipt of educational benefit solely in a general education setting would have been limited.

19. Regarding the second *Rachel H.* factor, Student could receive a non-academic benefit of interacting with her typical peers, giving Student more opportunity to practice her socialization skills. However, the third factor, specifically the effect of Student's full time presence would have on the teacher and children in the regular class, could pose limited problems for the teacher, who would be required to alter his or her presentation methods by directing all communication towards the class and not towards the blackboard. The teacher would also be required to repeatedly check with Student to ensure her understanding of the material, which could potentially take time away from other students. Finally, regarding the fourth *Rachel H.* factor, neither party introduced any evidence demonstrating the costs associated with educating Student in a general

education setting versus a special education setting. Weighing the above factors, which show that the only benefit of educating Student in a general education placement is social, shows that an exclusively general education placement for Student would not have been appropriate. Accordingly, a determination of whether Student was offered a FAPE must examine whether Student was offered an appropriate placement on the continuum of placement options. (See *Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.)

20. The evidence showed that at the time the team developed Student's IEPs on September 23, 2008, September 23, 2009, and May 4, 2010, District offered Student an appropriate placement, given the extent of Student's disabilities. Specifically, because a full-time general education placement was not appropriate for Student, the team appropriately focused on the continuum of placement options and the degree of mainstreaming that was appropriate for Student. In that regard, District offered Student SDC classes in English, math, and reading after evaluating Student's past performance in middle school general education classes with supports and accommodations. The evidence shows that the team determined that Student needed the slower pace and modifications offered in SDC classes for her core academics. For Science, however, District offered Student a collaborative science class which was taught by both a general education and special education teacher. As such, Student would have access to general education peers and the specialized instruction and supports of a special education teacher and aide. Given the combination of special and general education settings, coupled by the slower paced and small group and specialized instruction of the SDC, the placement was an appropriate one.

21. Even though resolving the question of whether Student was offered a FAPE focuses on the adequacy of District's offer (see *Gregory K. v. Longview School District*, *supra*, 811 F.2d at p. 1314), Student's argument focused on demonstrating that

Westview would provide a better education than District's offer. However, the evidence showed that Westview, which was a small NPS, was neither an appropriate placement under the IDEA, nor in the least restrictive environment for Student. The evidence showed that Westview's student body was comprised entirely of special education and disabled students, in particular students with learning disabilities and Asperger's syndrome. By design, Westview did not present any opportunities for exposure to general education or typically developing peers. California and federal law require special education Students to be given maximum exposure to typically developing peers, to the extent appropriate. The evidence shows that the IEP team analyzed Student's needs, goals and services to determine whether or not Student's IEP could be implemented on a general education campus within District, and appropriately concluded under the IDEA that it could be implemented at SAMOHI, her school of residence. Although Student's parents understandably want the best education possible for their daughter, that is not what the IDEA and *Rowley* require.

22. District's offer of related services for the 2009-2010 school year was also appropriate. Specifically, District offered specialized academic instruction for 250 minutes per day, five days a week, DHH services for 30 minutes per month, speech and language services three times per week (individual and group), and counseling to deal with Student's social/emotional issues. District also offered a one-to-one notetaker/aide for five periods of each school day, to facilitate Student's social interactions and academic participation. The IEP team replaced CART with a notetaker /aide when it became apparent that Student had difficulty following the teacher's instructions while simultaneously reading the captions. Although Student did not like the aide and did not want an aide, the aide helped Student access the curriculum and participate in social and academic conversations. Ultimately, the evidence showed that Student made progress and met many of her goals during the 2009-2010 school year, particularly in

the areas of auditory training, articulation, and expressive and receptive language, as well as met some math and reading goals. Even though Student struggled with social and emotional issues, the evidence shows that she made progress there as well, particularly in her coping and self-advocacy skills.

23. District also offered AVT therapy once a week for 60 minutes for Student's newest implant, but proposed to discontinue the AVT therapy for the original implant. District IEP team members reasoned that Student was functional in her use of the original implant and any residual auditory training or speech and language goals could be handled by the speech and language therapist. Although Parents objected to the discontinuance of AVT therapy for Student's original implant, at hearing, Student failed to meet her burden to prove that the elimination of the additional AVT for the original implant resulted in a denial of FAPE. While it would have been useful to Student to continue the AVT therapy, the evidence does not support a finding that additional AVT therapy was necessary for Student to receive an educational benefit or access the curriculum.

24. Given the above factors, Student failed to prove by a preponderance of the evidence that the District's offer of placement and services as contained in the IEPs of September 23, 2008, September 23, 2009 and May 4, 2010 failed to offer Student a FAPE in the LRE for the 2009-2010 school year. (Factual Findings 1-44; Legal Conclusions 1-24)

## ISSUE TWO – FAPE IN THE 2010-2011 SCHOOL YEAR

25. Student contends that she was denied a FAPE in the LRE in her IEPs dated June 8, 2010, March 8, 2010, and May 25, 2011 for ESY 2010 and the 2010-2011 school years because (1) District predetermined Student's placement and services (Issue 2(a)), (2) failed to provide adequate speech and language services (Issue 2(b)), (3) failed to provide an appropriate program and services (Issue 2(c)), (4) failed to provide a

placement in the LRE,<sup>7</sup> (Issue 2(d)), and (5) failed to offer or provide sufficient AVT (Issue 2(e)). District contends that it offered Student a FAPE in the LRE at her local public school, but Parents insisted that the only appropriate placement was Westview. As discussed below, Student failed to meet her burden of proof on this issue as well.

#### Issue 2(a): Predetermination

26. In Issue 2(a) Student contends that she was denied a FAPE because the offer of placement and services in the IEPs dated June 8, 2010, March 8, 2010, and May 25, 2011 was predetermined. Student failed to meet her burden of proof on this issue.

27. Legal Conclusions 1-26 are incorporated by reference.

28. An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification." (citing *Target Range*, supra, 960 F.2d at p.1484)].)

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<sup>7</sup> Student's contentions with respect to the May 25, 2011 IEP only concern the portion of the IEP which coincides with the 2010-2011 school year (May 25, 2011 to June 15, 2011). The remainder of the time period covered by the May 25, 2011 IEP and FAPE for the 2011-2012 school year are not at issue in this proceeding.



29. Before turning to the merits of the predetermination issue, the evidence shows that Student was not denied a FAPE by any other IEP procedure. Here, Parents notified District that despite prior agreement to the June 8, 2010 meeting, Parents had a conflict which precluded their attendance. Instead of rescheduling the meeting or inviting participation by telephone, District proceeded without Parents. District proceeded without Parents due to impending deadlines and the end of the school year. Catanzano offered to arrange another meeting during ESY, but Parents never agreed to a follow up meeting. District complied with the procedural requirements of the IDEA and California law in all other aspects of the preparation of the June 8, 2010 IEP. Although District may technically have committed a procedural violation of the IDEA by proceeding without parents on June 8, 2010, the violation did not rise to the level of a denial of FAPE because parents were not ultimately deprived of an opportunity to participate in the IEP, nor was Student denied an educational benefit. The evidence shows that by the time of the June 8, 2010 IEP meeting, Parents had already notified District that Student would be attending an NPS, and not a District school, which demonstrates that on June 8, 2010, Parents had no intention of sending Student to a District program. Accordingly, the violation did not rise to the level of a denial of FAPE, particularly when follow-up meetings were scheduled to get parent input. With respect to the March 8, 2011 and May 25, 2011 IEPs, District complied with the procedural requirements of the IDEA and California law. Parents were provided with notice and an opportunity to participate in the development of Student's IEPs. Parents participated in and assisted with the development of Student's PLOPs, goals, education program, related services and discussion of the continuum of placement options. The IEP team comprised of the necessary participants, developed IEPs which comported with the procedural requirements of the IDEA and California law including a statement of PLOPs,

goals, educational program, services and which delineated Student's level of interaction with non-disabled peers.

30. Student failed to prove by a preponderance of the evidence that District predetermined Student's placement for the 2010-2011 school year. Instead, the evidence shows that the IEP team considered the continuum of placement options for Student including general education, RSP, SDC classes, aides and supports and the NPS chosen by Parents at each of the meetings. In addition, District sent Keleher and Soroko to observe Westview and SAMOHI classes and report back to the IEP team. Student's assertion that Woolverton's guidance to the IEP team constituted a predetermination is simply incorrect. Woolverton instructed the IEP team to consider whether or not Student's IEP could be implemented in a District placement where Student would have access to general education peers before considering an NPS placement. The instruction that Woolverton gave to the IEP team was consistent with state and federal law to consider the continuum of program options from the least restrictive (general education) to the more restrictive (private schools without typical peers). Furthermore, the fact that Keleher and Soroko had opinions about an appropriate placement when they came to the IEP meetings did not constitute predetermination of placement because the decision was made by the entire team, of which Soroko and Keleher were members. The credible testimony of Soroko, Keleher and Woolverton established that they possessed a willingness to discuss the continuum of options at the meetings, and that they, as well as Parents, deliberated in the IEP process. As such, Student failed to prove by a preponderance of the evidence that District predetermined Student's IEP for the 2010-2011 school year. Instead, the evidence showed that the IEP team considered the assessment results and input of the IEP team, including Westview staff, to determine the appropriate services, duration and frequency. (Factual Findings 1- 84; Legal Conclusions 1-30.)

### Issues 2(b) and 2(e): Speech and Language Services and AVT Services

31. In two related contentions, Student argues that she was denied a FAPE for the 2010-2011 school year because her related services in speech and language (Issue 2(b) and AVT (Issue 2(e)) were inappropriate. Student failed to meet her burden on these contentions as well.

32. Legal Conclusions 1-31 are incorporated by reference.

33. Student's IEPs dated June 8, 2010, March 8, 2011 and May 25, 2011 all provided an offer that included speech and language and AVT services based upon input from the IEP team and the results of the triennial assessment. The June 8, 2010 and March 8, 2011 IEPs offered Student speech and language therapy three times per week for 25 minutes per session, and AVT services from October 13, 2009 to June 30, 2010 once per week for 60 minutes per week by a private provider. The May 25, 2011 IEP offered speech and language services twice a week for 25 minutes per session, and AVT services 60 minutes per week by an NPA. The level and frequency of service was based upon the PLOPs, the goals adopted by the IEP team, and the input of the IEP team. Student did not offer any evidence that she required a different level of speech and language therapy or AVT services than that offered by the IEP team for ESY 2010 and the 2010-2011 school year. Furthermore, District offered, but Parents refused, an offer of reassessment to determine whether there had been a change in Student's level of speech and language need since her triennial assessment. Given these facts, Student failed to establish by a preponderance of the evidence that District failed to provide her with sufficient speech and language and AVT services for ESY 2010 and the 2010-2011 school year. (Factual Findings 1-84; Legal Conclusions 1-33.)

### Issues 2(c) and 2(d): Other Services and Placement

34. Finally, Student contends that she was denied a FAPE in the 2010-2011 school year because District generally failed to provide an appropriate program and

services (Issue 2(c)) and failed to provide a placement in the LRE (Issue 2(d)). Student did not meet her burden of proof on these claims as well.

35. Legal Conclusions 1-34 are incorporated by reference.

36. As set forth above, a determination of whether a district has placed a pupil in the least restrictive environment (i.e., a general education setting) involves the analysis of the Rachel H. factors. Considering the first factor, the educational benefits to the child of placement full time in a regular class, the evidence clearly established through the credible testimony of Soroko, Catanzano, Patino, Keleher, Perry, Ruber, Brock and Woolverton, that Student, in order to access the curriculum, required the specialized teaching methods and small group instruction by qualified special education teachers, particularly in a SDC setting for her core subjects. As stated above, Student specifically required substantial assistance in addressing her English, math, and reading skills, as well as her collaborative science skills, as a result of Student's deafness and auditory memory deficits. The evidence showed that Student required a slower-paced modified curriculum of the SDC class and required aide support to fully participate in the academic and social aspects of school. Given Student's challenging history in general education classes and the extent of her needs, it was reasonable to conclude that Student's receipt of educational benefit solely in a general education setting would have been limited.

37. As in the prior school year, regarding the second Rachel H. factor, Student could receive a non-academic benefit of interacting with her peers, giving Student more opportunity to practice her socialization skills. However, the third factor, specifically the effect of Student's full time presence would have on the teacher and children in the regular class, could pose limited problems for the teacher, who would be required to alter his or her presentation methods by directing all communication towards the class and not towards the blackboard. The teacher would also be required to repeatedly

check with Student to ensure her understanding of the material, which could potentially take time away from other students. Finally, regarding the fourth Rachel H. factor, neither party introduced any evidence demonstrating the costs associated with educating Student in a general education setting versus a special education setting. Weighing the above factors, which show that the benefit of solely educating Student in a general education placement was social and not academic, a full-time general education placement for Student would not have been appropriate for the 2010-2011 school year.

38. The evidence further shows that at the time the team developed Student's IEPs on June 8, 2010, March 8, 2011, and May 25, 2011, District offered Student an appropriate placement that was in the LRE on the continuum of placements. Specifically, as stated above, because a full-time general education placement was not appropriate for Student, the team appropriately focused on the continuum of placement options and the degree of mainstreaming that was appropriate for Student. In that regard, District offered Student SDC classes in English, math, and reading after evaluating Student's past performance in middle school general education classes with supports and accommodations. The evidence showed that the team determined that Student needed the slower pace and modifications offered in SDC classes for her core academics. For Science, however, District offered Student a collaborative science class which was taught by both a general education and special education teacher. As such, Student would have access to general education peers and the specialized instruction and supports of a special education teacher and aide. Given the combination of special and general education settings, coupled by the slower paced and small group and specialized instruction of the SDC, the placement offered for the 2010-2011 school year was appropriate and in the LRE.

39. In contrast, the Westview placement proposed by Parents was not the least restrictive environment because it was comprised entirely of special education students, had no general education population and no opportunity for exposure to general education peers. Although Parents wanted Student to attend Westview because the curriculum met the entrance requirements for the University of California and California State University system, some people thought the acoustics were better, and the school campus was smaller, the evidence showed that District's offer was reasonably calculated to provide some educational benefit within the meaning of Rowley and Gregory K. Parents prioritized the smaller campus and the college preparatory curriculum at the expense of the exposure to general education peers. While such a choice is the right of the parents, it is not the responsibility of the school district under IDEA to fund such a placement based on parent choices. In this instance, the District was mandated to provide Student with a FAPE within the meaning of Rowley in the LRE and no more. In light of the above, Student did not meet her burden of proof.

40. Finally, District's offer of services other than speech and language therapy and AVT was also appropriate because all of Student's unique needs were addressed. Specifically, District offered specialized academic instruction, DHH services, and counseling to deal with Student's social/emotional issues. District also offered a one-to-one notetaker/aide to facilitate Student's social interactions and academic participation. District appropriately based the provision of these services on the results of Student's assessments, as well as on the input of the team members, including the expertise of Patino, Catanzano, Soroko, Keleher, Gonsalves and Brock. Student offered no credible evidence that established that the offered services were inappropriate or inadequate. Moreover, all of the goals were measurable and based on the most current information available.

41. Given the above, District's offer of placement and services in the June 8, 2010, March 8, 2011 and May 25, 2011, addressed Student's unique needs, and was reasonably calculated to provide Student an educational benefit in the LRE for ESY 2010 and the 2010-2011 school year. Student was not denied a FAPE on this ground. (Factual Findings 1-85; Legal Conclusions 1-41.)

42. Because Student failed to meet her burden of demonstrating that she was denied a FAPE, Student is not entitled to reimbursement or compensatory education of any kind, and the ALJ need not address whether reimbursement should be awarded through the date of hearing. (See 20 U.S.C. § 1412 (a)(10)(C); 34 C.F.R. § 300.148(c) (2006); see *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] [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].)

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) District 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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 20, 2012

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/s/

GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings