

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012031078

v.

BALDWIN PARK UNIFIED SCHOOL DISTRICT
& COVINA VALLEY UNIFIED SCHOOL
DISTRICT,

BALDWIN PARK UNIFIED SCHOOL DISTRICT
& COVINA VALLEY UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2012070228

v.

PARENT ON BEHALF OF STUDENT.

DECISION

Administrative Law Judge (ALJ) Adrienne L. Krikorian, from the Office of Administrative Hearings (OAH), State of California, heard this matter on March 12, 13, 14, 18, 19 and 20, 2013 in Covina, California.

Attorney David Grey represented Student. Student's mother (Mother) attended five of the six hearing days and testified. Student's father (Father) attended one day of

hearing.¹ Student attended the last day of hearing and testified with the assistance of an American Sign Language (ASL) Interpreter.

Attorney Geneva Engelbrecht represented Covina Valley Unified School District (CVUSD). Special Education Administrator, Alma Guerrero (Ms. Guerrero) and Director of Student Services, Jennifer Root (Ms. Root), testified and attended all hearing days on CVUSD's behalf. Attorney Meredith Reynolds represented Baldwin Park Unified School District (BPUSD).² Coordinator of Special Education, Mary Beltran (Ms. Beltran), also testified and attended all hearing days on BPUSD's behalf.

Student filed his original complaint on March 27, 2012. On April 16, 2012, OAH granted Student leave to file a First Amended Complaint. On April 27, 2013, OAH granted Student leave to file a Second Amended Complaint. On July 9, 2012, the Districts jointly filed a request for due process hearing. OAH consolidated Student's and Districts' cases on July 25, 2012. On September 28, 2012, OAH granted Student leave to file a Third Amended Complaint. OAH granted a continuance of the consolidated cases on October 31, 2013. On March 20, 2013, at the request of the parties, the ALJ further continued the hearing to April 5, 2013, to allow the parties time to file closing briefs. The parties timely submitted their briefs and the record closed on April 5, 2013.

¹ Mother and Father are sometimes collectively referred to as "Parents."

² CVUSD and BPUSD are referred to collectively as "the Districts."

ISSUES

STUDENT'S CASE ³

- 1) Did Districts deny Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) in his May 12, 2011 individualized education program (IEP) by failing to:
 - a) consider, in determining their offer, the related services and program options available to Student in his primary mode of communication, ASL, that provided Student with an equal opportunity for communication access; and
 - b) offer an appropriate placement.
- 2) Did Districts deny Student a FAPE in the LRE in his May 11, 2012 IEP by failing to:

³ On the first day of hearing, Student withdrew from consideration an issue identified and stated in the pre-hearing conference (PHC) order dated March 6, 2013, which alleged that the Districts failed to assess Student in the areas of communication and language related to his hearing loss. Student also acknowledged that Student's Problem 3 in the Third Amended Complaint, which alleges violations Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et. seq. and the American with Disabilities Act, was dismissed by OAH in connection with Student's original complaint in this matter on the grounds that OAH has no jurisdiction over those issues. Student withdrew the issue from consideration at the PHC based on OAH's lack of jurisdiction. In Student's Closing Brief, Student withdrew issues regarding the goals in the May 12, 2011 IEP and the May 11, 2012 IEP. Accordingly, the ALJ will not make findings on the issues withdrawn by Student, and the remaining issues have been renumbered for purposes of clarity of the Decision.

- a) consider, in determining their offer, the related services and program options available to Student in his primary mode of communication, ASL, that provided Student with an equal opportunity for communication access; and
- b) offer an appropriate placement.

Student's proposed resolutions include an order by OAH compelling the Districts to refer Student to the California School for the Deaf in Riverside (CSDR).

DISTRICT'S CASE

3) Did Districts offer Student a FAPE in Student's May 11, 2012 IEP such that they may implement IEP in its totality without Parents' written consent?

FACTUAL FINDINGS

1. Student was 14 years old and in the eighth grade at the time of the hearing. He lived with Parents within the boundaries of BPUSD. He was eligible for special education as hearing impaired with a language/speech disorder. Student's primary language was ASL and his secondary language was English. The Districts are members of the East San Gabriel Valley Special Education Local Plan Area (SELPA). CVUSD services the deaf and hard of hearing (DHH) students within the SELPA in its DHH Total Communication Program (TCP).⁴

BACKGROUND

2. Student was diagnosed as profoundly deaf when he was approximately 18 months old. He received hearing aids at two years old and for approximately two years he received auditory intervention services at Pasadena Hear Center. When Student was three and one half years old, at Mother's request, BPUSD assessed Student, found him

⁴ All future references to the TCP refer to CVUSD's TCP.

eligible for special education and placed him, pursuant to his initial IEP, in the TCP at CVUSD's Vincent Children's Center. Student began learning ASL at approximately four years old. Student received a cochlear implant (CI) in one ear at the age of 10.

3. Student enrolled in the TCP at Mesa Elementary School (Mesa) at the age of six years. Christy Neria, Ph.D. (Dr. Neria) was Student's special education teacher at Mesa. She testified at the hearing. Dr. Neria has a Ph.D. in education and disability studies. She has worked as a credentialed special education teacher at CVUSD for 20 years. She is a certified ASL interpreter and teaches special day classes (SDC) in the TCP for DHH learners. Dr. Neria is familiar with the DHH teachers in the TCP throughout the District. All teachers are required to pass an ASL proficiency test in order to receive certification to teach DHH students. Dr. Neria demonstrated that she was qualified to testify regarding Student's educational needs and progress during elementary school, and to offer opinions on the subject of educating DHH students.

4. The TCP supports DHH students by providing information in a variety of modes of communication, including ASL, cued speech by ASL, verbalization, and lip reading. The program is designed to help non-hearing children learn the skills needed to communicate with persons who can hear. The children interact with hearing students and staff members throughout the day.

5. Dr. Neria worked with Student at Mesa to help him develop communication skills, including addressing his delayed introduction to communication skills because of his late diagnosis of hearing loss. She also encouraged Parents to learn ASL, and provided Parents with educational materials incorporating ASL to use at home with Student during summer breaks. Student participated in his educational program with hearing peers using ASL and an interpreter, and he made progress academically and in communication skills during elementary school. Dr. Neria participated in Student's 2010 IEP, which addressed his needs associated with transition to Sierra Vista

Middle School (Sierra Vista). In her opinion, the TCP at Sierra Vista was an appropriate program for Student and could address all of his unique needs as a DHH student, including exposing him to hearing peers to increase his ability to communicate in a hearing world.

6. Patricia Shawn (Ms. Shawn) has worked as a support services specialist for DHH students at CVUSD since 1999. She has a master's degree in special communication handicapped/DHH, multiple credentials including a California special education credential in communication handicapped/DHH and is a certified sign language interpreter. She has been a credentialed educator for DHH students for more than 40 years. She is deaf and communicates using an ASL interpreter. Her duties include serving as a case carrier for DHH students in preschool through fifth grade. She also works with teachers and staff at 13 schools within CVUSD providing support for DHH students. She attends IEPs, conducts assessments, and works with families who are new to the district and have a DHH child to help them adjust. She also serves as a support service specialist for DHH students at Sierra Vista. Ms. Shawn has known Student since he was four year old, was Student's case carrier at Mesa, attended some of his IEPs, and participated in assessments where she provided ASL interpretation for Student. She testified at the hearing with the assistance of an ASL interpreter and demonstrated that she was qualified to testify regarding Student's unique needs and the TCP.

7. Ms. Shawn was concerned even before Student started middle school that Student's parents did not have the level of skills in ASL that were necessary to help him practice his ASL communication at home, particularly given his delayed diagnosis. Father spoke Spanish, and Mother, who was bilingual in English and Spanish, had only basic skills in ASL. In Ms. Shawn's experience, DHH children typically receive CI's at a very young age. Parents' lack of fluent ASL skills, in Ms. Shawn's opinion, contributed to the

delay in Parents finding a provider to implant a CI in Student until age 10, because having a CI required Parents to work with Student to help him develop his communication skills in ASL for effective use of the CI. Her concerns about Parents' lack of skills in ASL continued after Student started middle school. Although Mother could communicate with Student in ASL on a very basic level, her level of skill was not progressing at the same rate as Student.

8. CVUSD Director of Student Services, Ms. Root, has overseen the District's special education department since July 2011. She has a master's degree in educational administration and in language development, and a bachelor's degree in psychology. She holds a multiple subject teaching credential K-8, and an administrative services credential. She has worked in the field of education for 20 years. As part of her job duties, Ms. Root visited Sierra Vista three to four times a year. She demonstrated that she was qualified to credibly testify and offer opinions relating to the special education and DHH programs at CVUSD. Sierra Vista's campus is comprehensive and includes both general education and special education students, including approximately 25-30 DHH students, some of whom use spoken language in addition to ASL. BPUSD refers its DHH students to the TCP because it does not have a similar program for DHH students. The DHH students have opportunities for mainstreaming during breaks, at lunch, in physical education class, and during some academic classes according to their IEPs.

MAY 12, 2011 IEP

9. Student's annual IEP took place on May 12, 2011, at Sierra Vista. Parents, CVUSD administrator designee and educational specialist Heidi Headcock (Ms. Headcock), special education teacher Paul Halpert (Mr. Halpert), speech pathologist Cheryl Weinberg (Ms. Weinberg), speech and language (SL) pathologist Sylvia Kaparos (Ms. Kaparos), and a general education physical education teacher attended the meeting. An administrator from BPUSD did not attend.

10. Ms. Headcock, Ms. Weinberg, Mr. Halpert, and Ms. Kaparos testified at the hearing. Ms. Headcock has a master of arts in special education specializing in DHH; a multiple subject teaching credential; and an education specialist instruction credential in DHH. She worked as an ASL interpreter at Sierra Vista for five years. At the time of the hearing, Student had been in one or more of her classes for the past three years. Ms. Weinberg is a licensed SL pathologist and has worked for CVUSD for 22 years. She has a master of arts in communication disorders, a clinical rehabilitative services credential, and a certificate of clinical competence from American Speech/Language Hearing Association. At the time of the hearing, she had been working with Student for several years. Mr. Halpert received a master of arts in deaf education K-12 multiple subjects in 1974. He has 40 years of teaching experience in DHH programs and has been employed by CVUSD at Sierra Vista for 25 years. At the time of the hearing, he had taught Student in DHH academic classes for the past three years. Ms. Kaparos has a master of science degree in communicative disorders and in education, and a bachelor's degree in psychology. She is a certified auditory verbal therapist and a licensed SL pathologist at CVUSD since 2006. Her work experience includes providing auditory therapy for children with cochlear implants. Her duties at CVUSD included supervising other district's SL therapists. Ms. Kaparaos provided aural rehabilitative therapy (ART) to Student approximately three years prior to the hearing, and supervised the speech therapist that currently provided Student's ART. All of the above witnesses demonstrated that they were qualified to testify regarding Student's educational progress and his unique needs.

11. Mother reported to the IEP team that Parents were concerned that Student was able to read basic books, but when reading became harder he became frustrated and wanted to stop. She expressed her desire that Student read closer to grade level. Mother asked the IEP team to consider the option of a referral to CSDR. She felt that by placing Student in a total emersion ASL program, his communication skills would

increase and would enable him to read and understand written communications closer to his age level.

12. The IEP team reviewed Student's progress toward his IEP goals and objectives based upon his present levels of performance (PLOPs). Student made academic progress in all areas. Student partially met his goals in vocabulary, math, articulation, and auditory comprehension. Student met his reading comprehension and prevocational goals. The IEP team developed new or revised goals with short term objectives in reading comprehension, vocabulary/concept development, written/oral language conventions, mathematics, prevocational, articulation, writing strategies, and auditory comprehension (receptive language)/auditory memory. Each goal was designed to meet Student's unique needs and specifically addressed the challenges he faced due to his deafness and his use of ASL as his primary mode of communication; each had benchmarks/short term objectives to help him meet the goal within one year; and each was measurable. Mother agreed with the proposed goals and objectives.

13. The IEP team discussed and agreed that Student would participate in state/district testing with modifications, and his prevocational/career education would be modified in the special education setting. The IEP team developed accommodations and modifications including allowing extra time for exams, reading exam questions to Student, testing in a small group, and differential grading based on progress toward goals and objectives. Accommodations also included settings that avoided distracting stimuli; clear directions that Student would understand; simplification of complex directions; teaching through multi-sensory modalities; and a variety of activities in each lesson. Supplementary aids and services included interpreting services when needed for assemblies, school functions, field trips and other school related functions.

14. The IEP team recommended, and BPUSD offered Student, specialized academic instruction (SAI) 275 minutes daily in a CVUSD DHH special day class (SDC); SL

services 75 minutes weekly with 30 minutes in a small group and 45 minutes individually; audiological services consisting of testing 45 minutes annually; ART 30 minutes twice weekly; curb to curb transportation; and extended school year (ESY). Thirty percent or less of each instructional day would be in general education, including physical education, breaks, lunch, and special activities. The issue of Mother's request for consideration of a change in placement and a referral to CSDR was left open until a representative of BPUSD could be consulted. Mother signed the IEP and gave consent to its full implementation.

15. The IEP team reconvened on July 15, 2011. BPUSD Director of Student Achievement Madelena Arellano (Ms. Arellano), CVUSD Administrator Abigail Cabrera, Ms. Headcock, Ms. Weinberg, Mother and Student's grandmother were present. Ms. Arellano testified at the hearing. The purpose of the meeting was to discuss Mother's concerns regarding Student's reading, writing and signing abilities and Mother's request for a referral to CSDR. The IEP team noted that, although Mother acknowledged that Student made academic improvement and progress in his current placement, Mother wanted Student to build his fluency in ASL, which she felt he could do more effectively at CSDR. Ms. Headcock noted that increased signing by Parents in the home would help Student increase his fluency. Mother again requested a referral to CSDR's day program and that BPUSD provide transportation to and from CSDR. The IEP team discussed Student's current progress, and strategies that could be implemented at Student's current placement to address Mother's concerns. The IEP team also discussed Student's ability to progress in both programs, and noted that Student's progress toward goals would be similar whether he was placed in CSDR or the CVUSD program. The IEP team also discussed Student's access to signing teachers at CVUSD, and the availability of extra-curricular activities and after school tutoring for DHH students, which were not available or were not feasible for CSDR commuting students. The IEP team concluded

that it needed to consider Student's educational needs in more detail before making a decision about offering a change in placement. Ms. Arellano advised the IEP team that she wanted to visit CSDR and also take into consideration the impact of a change in placement on Student.

16. On August 4, 2011, BPUSD reconvened the IEP. Ms. Arellano, BPUSD general education teacher Kathy Warden and Mother attended. Mother excused Ms. Headcock, Ms. Cabrera and Ms. Weinberg, who were on summer break. The purpose of the meeting was to further discuss Mother's request for referral to CSDR. Ms. Arellano reported the results of a phone conversation she had with an administrator at CSDR. The team discussed the options of the residential versus day program at CSDR. BPUSD staff expressed concern about the commute time to CSDR from Student's home, which would be at least one hour each way. Mother repeated her concerns about Student's levels of performance in reading, writing and communication. The BPUSD IEP members reminded Mother that CVUSD had after-school tutoring and other resources available to support him in those academic areas. Ms. Arellano renewed BPUSD's offer of placement at the Sierra Vista TCP along with the accommodations and modifications, goals and related services articulated in the May 12, 2011 IEP offer. Mother disagreed with the offer but did not withdraw her consent to implement the May 12, 2011 IEP.

2012 ASSESSMENTS

17. In preparation for Student's triennial IEP on May 12, 2012, CVUSD conducted a comprehensive psychoeducational assessment, a SL assessment, and an audiological assessment.

18. CVUSD school psychologist Larissa Isayo (Ms. Isayo) conducted a psychoeducational assessment. Her assessment included records review, classroom and psychometric observations, a parent report, teacher interviews and surveys, and a variety of tests, described below. The tests administered were selected with consideration to

their validity for Student. ASL was utilized during the evaluation. Assessment techniques were chosen to minimize the impact of Student's hearing loss and mode of communication. Some test instruments designed for hearing individuals were used and the scores were reported for comparison purposes only. The assessment materials and procedures were selected and administered so as not to be discriminatory.

19. Ms. Weinberg, Ms. Kaparos, Ms. Headcock, CVUSD general education teachers Jody McCreery (Ms. McCreery) and Matt Froid, the school nurse, and audiologist Blaze Kistler (Mr. Kistler) contributed to the assessment report dated May 11, 2012. Ms. McCreery and Mr. Kistler also testified at the hearing.

20. Ms. Isayo reviewed Student's 2009 psychoeducational assessment and reported that Student's nonverbal cognitive abilities were historically low to low-average. Student's non-verbal intelligence quotient (IQ) measured at 84 in 2009. During her assessment, Ms. Isayo administered the Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI-2), including six subtests. Student's full-scale score index was 85, in the below average range, and was consistent with Student's previous scores. Student demonstrated no visual-perceptual difficulties. Student's non-verbal cognitive abilities remained below average. Ms. Isayo administered some of the subtests of the Wide Range Assessment of Memory and Learning-Second Edition (WRAML-2) to test Student's working memory. Student's performance on the Verbal Memory Index was inconsistent; he struggled with immediate recall of details, was not able to recall or produce responses to a story, and did not retain information. He performed better at tasks involving rote memory. Student demonstrated particular difficulty when the task involved more complex language and sequencing. Student's performance on the Working Memory Index was consistent between its two subtests and he achieved a standard score of 76, which fell within the low range. He also showed memory difficulties with visual information. Student's performance on the

Attention/Concentration Index indicated that he appeared to have adequate memory for rote, sequential information when presented visually. Ms. Isayo concluded that Student had difficulties in short-term memory, and did well with rote memorization, which was consistent with the information reported by Ms. Headcock as part of the report.

21. Ms. Weinberg assessed Student in the area of SL and reported her findings in a report dated May 11, 2012. A summary of her report was included in the psychoeducational assessment report. Ms. Weinberg administered the Ling Phonetic Speech Evaluation and the Southern California Ordinal scales of Development-Communication Scale. The tests administered were selected with consideration to their validity for Student. ASL was utilized during the evaluation. Assessment techniques were chosen to minimize the impact of Student's hearing loss and mode of communication. The assessment materials and procedures were selected and administered so as not to be discriminatory. Student demonstrated growth and improvement in his articulation skills. He continued to depend on visual cues for sound production. His receptive and expressive language skills grew over the past three years from a functional level for receptive language at four years to the upper end of the four to seven year old range, with more emerging skills in the seven to 11 year old range. His expressive language had caught up to his receptive language functional level and he had emerging skills in the range of seven to 11 years old. His interaction skills were age appropriate. Student benefitted from speech therapy in order to assist him in development of sounds.

22. Ms. Kaparos administered an auditory skills assessment, which included the Test of Auditory Comprehension (TAC), Contrasts of Auditory Speech Training (CAST), Peabody Picture Vocabulary Test-4 (PPVT-4), and Grammatical Analysis of Pre-Sentence Level (GAEL-P). The tests administered were selected with consideration to their validity for Student and according to the instructions. The assessment materials

and procedures were selected and administered so as not to be discriminatory. Student's scores on the TAC were not compared with those of hearing-impaired children his age because norms use hearing aid users not cochlear implant users. Student continued to demonstrate sensitivity to the volume of sound when using his CI and did not wear it regularly or at appropriate volumes. Ms. Kaparos concluded that Student showed significantly limited progress in his listening skills with the use of his CI, and he demonstrated a severely limited understanding of spoken vocabulary. In her opinion, although Student might in the future develop some basic listening skills in a closed set, because he was implanted at a later age, she expected him to demonstrate a plateau of skills within three years after implantation. Student had shown limited progress since his last assessment in 2010. Because Student was not making functional gains in his listening skills, she recommended that the IEP team consider discontinuing ART, which was designed to help Student acquire listening skills with the CI. She also recommended that ASL should continue to be Student's primary mode of communication.

23. Ms. Headcock administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) and the Brigance Comprehensive Inventory of Basic Skills-Revised (CIBS-R). She reviewed Student's 2009 triennial assessments as part of her assessment. The assessment tools were selected with consideration to their validity for Student and according to the instructions, and were selected and administered so as not to be discriminatory. Student scored far below average in reading comprehension. He answered sequential questions at grade level two to three in the comprehension passages subtest. He was able to read stories in the classroom in the Step Into Reading program at level two with instructional support. In math, Student scored below average in numerical operations and math reasoning. In general math skills in the classroom, Student's math skills had improved. Student's spelling skills and sentence composition skills were below average and his skills in sentence building were far below average. In

essay composition, Student scored far below average. Based upon teacher observation and writing samples, in written expression in the classroom Student could demonstrate some understanding of English grammar but struggled with parts of speech other than subject and verb word order. Student's performance on the 2012 assessments showed that he had made progress in the areas of reading comprehension, comprehension passages, written expression and spelling. He had also developed confidence and exhibited model citizenship in the classroom.

24. In the area of prevocational and social/emotional, Ms. Isayo reported that, based upon interviews with school staff and teachers, Student was timely and prepared for class, completed classwork carefully, volunteered to take on responsibility without prompting, and worked well with others. He socialized well with hearing and DHH students and staff, and he was able to initiate a conversation in ASL about past, present and future events both in and out of the classroom.

25. The psychoeducational report concluded that Student's greatest areas of need were in reading comprehension, word reading, essay and sentence completion and spelling. His areas of strength were in math.

26. Mr. Kistler conducted an auditory assessment on Student. He has a master of arts in speech pathology, is a licensed audiologist, has a clinical rehabilitative services credential in audiological services, and a certificate of clinical competence in audiology and ASL. Mr. Kistler has been a support services specialist in audiological services for CVUSD for more than 30 years and has been generally qualified as an expert witness in audiology and frequency modulation. He has known and tested Student since the summer of 2004, before Student entered the CVUSD pre-school TCP. Mr. Kistler demonstrated that he was qualified to testify about Student's unique needs and offer expert opinions regarding Student's hearing needs. His assessment consisted of checking Student's hearing aids, examining his ears, middle ear testing, testing with

tones and checking for infections. The testing, which took place in a sound treated booth, took approximately 45 minutes. Student exhibited profound hearing loss in both ears with permanent sensory neural hearing loss. His hearing sensitivity remained stable over the past nine years. His hearing loss impaired his auditory processing of linguistic information and he could not understand spoken language. Student demonstrated sound sensitivity from his CI and, as a result, did not wear it at volume levels that were mapped for Student. Student also did not use ear molds that Mr. Kistler made for him that would have aided him in keeping sounds in his ear if he wore his hearing aid regularly, which he did not. In Mr. Kistler's opinion, Student could not hear most environmental sounds without the use of his CI or hearing aide, which were necessary for his safety.

MAY 11, 2012 IEP

27. The Districts held Student's triennial IEP meeting on May 11, 2012. Mother, Ms. Guerrero, Ms. McCreery, Mr. Halpert, Ms. Isayo, BPUSD representative and school psychologist Rebecca Parres (Ms. Parres), Ms. Weinberg, Ms. Kaparos, Ms. Shawn, an ASL interpreter, Mr. Kistler, and Ms. Headcock attended the meeting.

28. Mother expressed concern that Student was reading far below grade level, that she feared he would graduate illiterate, and that his writing and ASL skills were also weak. Student enjoyed math, science and drawing, and he was very social.

29. The IEP team members discussed Student's assessment results and PLOPs. Mother had no objections to the assessments. Student received A's and B's in the first semester of seventh grade. Ms. Kaparos recommended that the IEP team discontinue ART because Student was not regularly wearing his CI and did not appear to be benefiting from the service. At Mother's request, the IEP team agreed to offer the services for an additional year. Ms. McCreery reported that Student was doing well in home economics class. He participated willingly, readily communicated with his hearing

peers in class through ASL, and volunteered for additional tasks. Mother reported that Student enjoyed using the skills from home economics class at home. Ms. Weinberg recommended that the IEP team reduce Student's individual SL services from 45 to 40 minutes to allow Student to remain in class for more academic instruction. Mr. Halpert, who taught Student world history and math in seventh grade, reported that Student worked at a higher level than his DHH peers in the DHH class. He felt that Student was ready for, and proposed that the team consider, mainstreaming him into a transition math class that included DHH and general education hearing students. He also observed that Student made steady academic and socio-emotional progress since the sixth grade.

30. The IEP team reviewed Student's progress toward his goals. Members of the team reported that Student had a good attitude towards his education; he was attentive, participated in asking questions, and made progress academically. He met his vocabulary, written conversation, writing strategies, math and prevocational goals. He partially met his reading comprehension and auditory comprehension goals. The IEP team developed new goals for Student in reading comprehension, vocabulary/concept development, written/oral language, mathematics, prevocational, articulation, social studies/science vocabulary, and auditory comprehension/auditory memory. All of the goals had short-term objectives, were designed to be completed within one year, were measurable, and were designed to address Student's unique needs in consideration of his hearing loss. The goals were drafted in consideration of Student's primary mode of communication as ASL.

31. The IEP team discussed Student's proposed academic schedule for the 2012-2013 school year. Mother chose to have Student take an elective computers/art class instead of a period of DHH Reading in addition to the DHH English class he was scheduled to be enrolled in.

32. Mother requested that BPUSD refer Student to CSDR. The Districts declined to discuss a change in placement from the TCP to CSDR because of Parents' pending due process case.

33. The IEP team discussed and agreed that Student would participate in state/district testing with modifications, and his prevocational/career education would be modified in the special education setting. The IEP team developed accommodations and modifications including allowing extra time for exams, reading exam questions to Student, testing in a small group, and differential grading based on progress toward goals and objectives. Accommodations also included settings that avoided distracting stimuli; clear directions that Student would understand; simplification of complex directions; teaching through multi-sensory modalities; and a variety of activities in each lesson. Supplementary aids and services included interpreting services when needed for assemblies, school functions, field trips and other school related functions.

34. BPUSD offered continued placement at Sierra Vista in the TCP; SAI 220 minutes daily; SL services 75 minutes weekly; audiology services/testing 45 minutes yearly; ASL interpreter services 165 minutes daily; ART 60 minutes weekly; curb to curb transportation; and ESY. Mainstreaming opportunities included physical education, the transition math class, breaks, lunch, and special events.

35. Mother consented to temporary and provisional implementation of the IEP until the results of the pending due process hearing, so long as Districts provided speech and aural rehabilitation services as stated in the May 2011 IEP using the goals from the May 2012 IEP. She also stated that she did not agree that the IEP correctly characterized her participation as a member at the IEP team meeting.

36. Student completed the 2011-12 school year with three A's, a B+, B, and a C+ in English.

2012-13 SCHOOL YEAR

37. Student attended eighth grade at Sierra Vista during the 2012-2013 school year. CVUSD school psychologist Mona Salehi (Ms. Salehi) observed Student during her periodic visits to the Sierra Vista campus. She testified at the hearing. Ms. Salehi, Mr. Halpert, Ms. McCreery, Ms. Headcock, Ms. Shawn and Student's eighth grade math teacher Rebecca Vail (Ms. Vail) observed that Student actively participated in his eighth grade classes. Ms. Vail, who was not proficient in ASL, also testified at the hearing. In Ms. Vail's class, Student received instruction in ASL, with the assistance of the ASL interpreter, and through printed and other visual materials. He communicated with hearing and non-hearing peers using ASL and ASL interpretation in other classes and during breaks and lunch. He engaged socially with and was well liked by all staff and peers, and he appeared happy. He was well organized, took an active role in learning, asked questions in class, remained on task and was not affected by peers who were off task. Student completed the first semester of eighth grade with an A in physical education and American history, a B+ in math, science and computers, and a B in English literature.

ADDITIONAL WITNESS AND EXPERT TESTIMONY

38. Nancy Sager (Ms. Sager) testified at the hearing. Ms. Sager is employed as a consultant by the California Department of Education (CDE) and was the person designated by CDE to answer questions about its 2000 Guidelines for Quality Standards for programs for DHH students. Ms. Sager participated as the facilitator during the drafting of the Guidelines. The CDE operates the California School for the Deaf (CSD), with one campus in Riverside, California, CSDR, and the other in Fremont, California. School districts may refer DHH students to the CSD for comprehensive assessments for advisory purposes. IEP teams may also refer DHH students to the CSD for educational

placement as provided for in their IEPs if the local educational agency (LEA) does not have an appropriate placement for DHH students within the district or their SELPA. CDE does not have any specific criteria for local IEP teams to use for referral to CSD. If a SELPA or LEA can provide an appropriate program for its DHH students, the CDE defers to the student's IEP team to determine the appropriate placement.

39. Jennifer Machado is employed by CSDR as director of student services. Melissa Brown is also employed by CSDR, as a language arts specialist kindergarten through eighth grades. Both testified at the hearing and neither had ever met Student. Upon referral by a school district, CSDR accepts a student whose primary educational needs are related to hearing impairment on a provisional basis for 60 days, during which the student is assessed in areas of need. Students must be able to access the curriculum with reasonable accommodations, and respond to emergency situations without a lot of prompting. In the classroom, instruction in ASL is the primary mode of communication and teachers do not use their voice or speak during instruction. CSDR uses a state adopted reading program designed for hearing students in middle school that is adapted for DHH students. CSDR does not provide after school tutoring for students. The student population is 100 percent DHH and includes no typically developing hearing peers. If a student wants mainstreaming experience, CSDR will work with the home school district and the student will be transported to and from the home district for mainstreaming opportunities. After-school extra-curricular activities in sports and clubs are available at CSDR to those day program middle school students who have appropriate means of after-school transportation. Sports activities are occasionally played against hearing teams, and CSDR hosts events once or twice a year when hearing students are invited to attend and participate. A student cannot be placed at CSDR without approval from their home school district and placement must be pursuant to an IEP. CSDR does not currently serve any students in its non-residential program from Los

Angeles County schools, primarily because one-way commute time to CSDR typically exceeds an hour.

40. BPUSD Director of Special Education Ms. Beltran visited CSDR, toured the campus, observed instruction, and met with administrators in the fall of 2011. During classroom observations, Ms. Beltran did not hear any oral communication during instruction. Ms. Beltran has also visited Sierra Vista and observed Student in the TCP program. The curriculum and class sizes at CSDR were consistent with those at Sierra Vista; however, CSDR had no intensive reading program and does not offer tutoring. In Ms. Beltran's opinion, 50 to 60 minutes of commute time each way, or more, was not appropriate for Student, particularly if he was in a vehicle without someone who could communicate with him.

41. CVUSD Special Education Administrator Ms. Guerrero oversees the DHH program, at CVUSD. She is a 2013 candidate for a Ph.D. in special education leadership, and has a master of arts in special education, and holds a special education specialist instruction credential, an administrative services credential, and a cross-cultural, language credential. She was familiar with Student, having observed him at Sierra Vista and attended his May 2012 IEP. She demonstrated that she was qualified to testify regarding the CVUSD TCP and Student's academic program. She periodically visited Sierra Vista as part of her job duties. Sierra Vista has a student population of approximately 1000 students. In Ms. Guerrero's opinion, the teachers and service providers at Sierra Vista were highly qualified and had the training and experience necessary to effectively work with DHH students in their primary mode of communication. CVUSD also offered parents ASL training, both at Mesa and at one of the district high schools. Ms. Guerrero was familiar with Student's academic history. Student had access to ASL at Sierra Vista throughout the day, and interacted with hearing children who knew ASL. Sierra Vista had a "deaf-friendly" culture that integrated

DHH students into all aspects of school life. Student's entire academic program was based upon the premise that ASL was his primary mode of communication, and English was his second language. In her opinion, Student received a significant benefit from being with hearing peers during the school day, because he needed to develop skills to function in a hearing world. Student had limited opportunities for communication in ASL at home and learned through communication with his teachers and service providers. Student required continued development of language at home in order to continue making progress in ASL. Ms. Guerrero visited CSDR in late 2011. In her opinion, CSDR offered nothing unique from the TCP. CSDR lacked important mainstreaming opportunities for Student, as well as instruction using ASL integrated with voice and visual instruction, remedial reading programs, and after-school tutoring.

LEGAL CONCLUSIONS

STUDENT'S ISSUE 1

1. In Student's Issue 1, Parents contend that the Districts denied Student a FAPE in his May 12, 2011 IEP because they failed to: consider, in determining their offer, the related services and program options available to Student in his primary mode of communication of ASL, and specifically CSDR, that they contended would have provided Student with an equal opportunity for communication access to his peers (Issue 1(a)); and offer an appropriate placement (Issue 1(b)). Student also argued in his closing brief that the Districts did not appropriately consider Mother's request for a referral to CSDR, and, as a result, denied Parents the opportunity to meaningfully participate in the development of Student's educational program. The Districts contend that the May 2011 IEP team considered all of the program options available to Student when it offered placement at TCP; that the TCP program was appropriate to address all of Student's unique needs as a DHH Student including providing instruction in ASL; that

CSDR was not an appropriate placement in the LRE for Student; and that Student is not entitled to any relief.

BURDEN OF PROOF

2. In a due process hearing under the Individuals with Disabilities Education Act (IDEA), the party filing the request for due process has the burden of proof, which is determined by relevant and credible evidence offered through admissible documents and credible testimony of witnesses. (See *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) As the petitioning party on Issue 1, Student has the burden of proof.

FAPE

3. A child with a disability has the right to a FAPE under the IDEA. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction and services"), includes audiological services, transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subds. (a) & (b).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the

potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031.)

5. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “‘meaningful’ educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School Dist.* (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 LRE. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the

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

7. 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; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

IEP

8. At the beginning of each school year, each local educational agency (LEA) must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a)(2006)⁵; Ed. Code, § 56344(c).) The IEP consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.)

9. Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (Ed. Code, § 56340.) An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results, at the discretion of the parties, other individuals, and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed.

⁵ All further references to the Code of Federal Regulations are to the 2006 edition.

Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

10. If the IEP team determines that to provide a FAPE a child needs a particular 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. (c) & 56345, subd.(a)(4).)

11. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4)(2006); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

12. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the PLOPs, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

13. In making a determination of the services that constitute an appropriate education to meet the unique needs of a DHH student in the LRE, the IEP team shall consider the related service and program options that provide the student with an equal opportunity for communication access. The IEP team shall specifically discuss the language and communication needs of the student, including the pupil's primary language mode and language; the opportunities for direct communications with peers, and the availability of a sufficient number of age, cognitive and language peers of similar abilities, which may be met by consolidating services into a local plan area wide program; appropriate, direct, and ongoing language access to special education teacher and other specialists who are proficient in the student's primary language mode and language; and services to ensure communication-accessible academic instructions, school services, and extracurricular activities. (20 U.S.C. § 1414(d)(3)(iv); Ed. Code § 56345, subds.(d)(1)-(4).)

14. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

LRE

15. School districts are required to provide each special education student with a program in the LRE. To provide the LRE, school districts must ensure, to the

maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 § C.F.R. 300.114 (a)(2006); Ed. Code, § 56031.)

16. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is 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 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 modifications in the general education curriculum. (34 C.F.R. § 300.116.)

17. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) "the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*).])

18. If a school district determines 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., supra*, 874 F.2d at p. 1050.) 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. (Ed. Code, § 56361.)

19. Every deaf person between the ages of three and 21 years, who is a resident of the state and who meets the requisite criteria, is entitled to an education in the CSD free of charge. (Ed. Code § 59020.) Placements in the CSD shall be made only as a result of recommendations from the IEP team, upon a finding that no appropriate placement is available in the local plan area. (Ed. Code § 56367(a).)

ANALYSIS OF ISSUE 1(A): CONSIDERATION OF PROGRAM OPTIONS IN MAY 2011 IEP

20. Student failed to meet his burden of persuasion on this issue.

21. First, Student's third amended complaint asserts that the Districts failed to consider, in determining their offer, the related services and program options available to Student in his primary mode of communication of ASL, and specifically CSDR. The third amended complaint also alleges at page four, lines seven and eight, that "the necessary district staff" did not attend the May 2011 IEP meeting. At the hearing, the parties presented evidence that no BPUSD representative attended the May 2011 IEP meeting. Student argued in his closing brief that Parents were prevented from discussing their concerns about Student with the "full IEP team" and that the July and

August 2011 IEP meetings did not include all of the members of the IEP team. Therefore, Student argued that BPUSD's decision to decline offering CSDR was unilateral and deprived Parents the opportunity for meaningful participation in the development of Student's educational program. The Districts argued that the issue of the absence of a representative of BPUSD at the IEP meeting was not raised in the complaint, or agreed to by the Districts as a new issue, and accordingly should not be considered by the ALJ. The evidence and argument related to who participated at the May 2011 IEP meeting, and subsequent amendment meetings, was considered by the ALJ in the context of Student's Issue 1 (a) and not as a separate issue.

22. The evidence was not conclusive as to why a BPUSD representative did not attend the May 12, 2011 IEP meeting. The IEP team therefore elected to defer consideration of a referral to CSDR until BPUSD could provide input on Mother's request. However, all of the persons required by Title 20 U.S.C. section 1415(d)(1)(B)(3) were present at the meeting on behalf of CVUSD, which was the district that had historically provided Student's educational program on BPUSD's behalf and whose staff were intimately familiar with Student's PLOPs and unique needs. At the May 2011 meeting, for the first time, Mother requested that the IEP team consider the option of a referral to the CSDR at the May 12, 2011 IEP. Mother based her request on her desire to try something different for Student, including providing him with total immersion in ASL instruction with all DHH students, because Student was not reading and writing at grade level and needed stronger ASL skills.

23. The IEP team discussed Mother's concerns about Student's weaknesses in reading and writing, and listened to Mother's request that the IEP team explore the option of CSDR. The IEP team discussed Student's PLOPs, drafted goals, and discussed the need for services, including SL therapy, ART, and ASL interpretation. It also considered the appropriate mode of delivery of Student's educational program, using a

multi-modal approach, to enable Student to communicate in a hearing world. In considering placement, the IEP team concluded that the TCP continued to be an appropriate placement for Student in the LRE, particularly based upon Student's progress in that program. BPUSD, through CVUSD, offered placement, accommodations and services in the TCP that were designed to address Student's unique needs and to provide Student with meaningful educational benefit. Mother signed the IEP and consented to implement it in its entirety at the end of the meeting, with the understanding that BPUSD would further explore her request for referral to CSDR. Student had a complete and agreed-upon IEP in place for the beginning of the 2011-2012 school year, notwithstanding that a BPUSD representative was not at the meeting. Therefore, the absence of a BPUSD representative at that meeting was not material, and did not impede Mother's ability to participate in the IEP on May 12, 2011, or to voice her desires regarding CSDR to the IEP team, which she did. Further, it was not unreasonable for the IEP team to defer discussion of a referral to CSDR until a BPUSD administrator could be consulted.

24. Ms. Cabrera, Ms. Headcock and Ms. Arellano met with Mother and Student's grandmother in July 2011 to discuss Mother's request for a referral to CSDR. They discussed Mother's concerns about Student's reading and writing deficits. Mother actively participated in the meeting, and they again reviewed Student's progress, explored options for addressing Mother's concerns in the TCP program, and agreed to further explore the option of referral to CSDR after consulting with BPUSD's director of special education. Ms. Arellano, Ms. Warden and Mother met again on August 4, 2011, at which time, after further discussing Mother's concerns, they renewed the offer of placement and services at the TCP on the basis that it was an appropriate placement in the LRE. Mother disagreed with their conclusion, and Parents later filed a due process complaint seeking findings from a hearing officer on the issue.

25. The Districts fully considered all of the program options, including services and methods of delivery of instruction in consideration of Student's unique needs. Mother actively and meaningfully participated in the development of Student's educational program for the 2011-2012 school year and Student's IEP team and the Districts adequately addressed her concerns, notwithstanding that she disagreed with the outcome.

26. The Districts were not required by the IDEA, or any state or federal law to refer Student to CSDR if the Districts had an appropriate program that could address Student's unique needs and provide him educational benefit within the meaning of *Rowley*. The Districts appropriately considered Student's unique needs as a DHH student in the context of Education Code section 56345 subdivision (d), and offered a comprehensive educational program, including related services, to address those needs. Student offered no credible evidence to the contrary. Accordingly, the Districts did not deny Student a FAPE by failing to consider, in determining the offer, the related services and program options available to Student in his primary mode of communication of ASL, and specifically CSDR, that would have provided Student with an equal opportunity for communication access to his peers. (Factual Findings 1 through 16, 38 through 41; Legal Conclusions 2 through 25 .)

ANALYSIS OF ISSUE 1(B): PLACEMENT IN THE MAY 2011 IEP

27. Student did not meet his burden of persuasion by the preponderance of the evidence that BPUSD's offer of placement at the TCP in the May 12, 2011 IEP was not appropriate or that it denied him a FAPE. Student offered no credible evidence that he could not receive a FAPE in the LRE in the TCP, which offered Student instruction in his primary language of ASL, while integrating vocal and visual communication. On the contrary, the evidence established that the placement was appropriate and in the LRE.

28. First, the determination of whether Student was offered a FAPE is focused on the appropriateness of the proposed placement under *Rowley*, not on whether the placement desired by Parents, in this case CSDR, is more appropriate. (See *Gregory K.*, *supra*, 811 F.2d at p. 1314.) Although Mother testified regarding her concerns about Student's reading and writing progress, her testimony that she wanted to "try something different" was not enough to credibly challenge the Districts' witnesses' opinions regarding Student's progress academically and socially in the TCP. Student offered no evidence that the TCP did not constitute an appropriate comprehensive educational program delivered in his primary language of ASL, with qualified staff, that was designed to address all of Student's unique needs and to provide him with meaningful educational benefit. Mother's opinions carried less weight than District's witnesses' opinions, based on their academic and relevant professional work experience and their recent assessments of Student. Ms. Sager's testimony established that the CDE defers to the local school district and the IEP team to determine whether it has an appropriate program that will address a DHH student's unique needs. Ms. Brown and Ms. Mercado credibly testified that CSDR did not have remedial reading or tutoring programs, which the TCP offered to Student. CSDR also did not offer Student any meaningful or logistically feasible opportunities for mainstreaming. As discussed below, the IEP team considered all of these aspects of Student's placement before making its May 11, 2012 offer of placement in the TCP.

29. The weight of the evidence established that the Districts' placement offer was appropriate and in the LRE. Although neither party contended that Student should be placed full-time in a general education setting, the ALJ analyzed whether a general education setting was appropriate under *Rachel H.*, *supra*, 14 F.3d at page 1404. Based upon the credible testimony of Ms. Headcock, Mr. Halpert, Ms. Shawn, Ms. Kaparos, Ms. Weinberg, and Mr. Kistler, Student required SAI in a setting that accommodated DHH

students because of his limitations in communication and his below average cognitive levels. At the time of the May 2011 IEP, Student's unique needs were such that he could not receive meaningful academic benefit if he was in a general education setting at BPUSD 100 percent of the school day. Given his unique needs in the area of communication, Student required an ASL interpreter or ASL trained teachers and service providers to communicate, which may have been disruptive to his classmates and teachers if Student were placed in a general education setting full time. Additionally, the opportunities to engage in total communication, using ASL, vocal and visual cues with staff and peers would not have been as readily available to Student at BPUSD in a general education setting as it was in the TCP. Neither party offered evidence of the comparison of the cost factors between general education at BPUSD and the TCP. However, one can infer from the evidence that providing Student with full-time ASL interpretation in the general education setting at BPUSD, which did not have a program for DHH students, could potentially be costly when compared to the TCP, which had a fully integrated program for DHH students with trained staff onsite to meet all of Student's communication needs throughout the day. Thus, when considering all of the *Rachel H* factors, the evidence established that Student was not an appropriate candidate for full-time placement in the general education setting.

30. In considering the continuum of placement options, the evidence established that the TCP offered Student mainstreaming to the maximum extent that it was appropriate in light of the continuum of options. Student engaged socially during physical education, breaks and lunch and during school activities with hearing peers and staff. He was liked by staff and peers, both hearing and non-hearing, and he actively engaged in school social activities including dances and holiday programs. The opportunities for mainstreaming in the seventh grade were appropriate given Student's unique needs. District's placement offer in the May 2011 IEP was in the LRE.

31. Additionally, Student offered no expert testimony or other relevant evidence that supported a finding that Student required total immersion in ASL, without any vocal or written cues, to make meaningful progress or to access his education. Similarly, Student offered no credible or persuasive evidence that placement in the TCP would deprive him of appropriate ASL instruction. Although Mother contended that she wanted to try out having Student educated in a program that provided all instruction in ASL to increase his ability to communicate by ASL, Ms. Shawn and Ms. Headcock credibly testified that Student benefitted from multi-modal instruction that included ASL, vocalization and visual cues. Student needed to learn to communicate with a variety of skills to function in the hearing world as an adult. Ms. Shawn, Ms. Headcock and Dr. Neria expressed concern that Parents' ASL skills were not at Student's level, which, in their opinion, resulted in Student lacking opportunities at home for ASL communication with family members. Both Ms. Shawn and Ms. Headcock were of the opinion that more ASL communication at home would help Student develop his overall ASL skills. Ms. Shawn was particularly credible based not only on her credentials, but because she was hearing impaired and relied on ASL with vocalization to communicate.

32. The overwhelming weight of the evidence established that the TCP offered by the Districts in the May 2011 IEP was designed to address Student's communication needs based upon his PLOPs and unique needs as a DHH student. All of the staff at Sierra Vista were trained and certified in ASL, they had experience working with DHH students, the TCP was designed to provide DHH students with educational benefit, and CVUSD created hearing-friendly campuses because it serviced deaf students for the SELPA on the same campus as typically developing peers.

33. In summary, the Districts were not required under the IDEA, by the CDE, or under any applicable provision of California statutory law to refer Student to CSDR because he was deaf, if the Districts had an appropriate program that was designed to

meet his unique needs. They were required to offer placement in the LRE with program supports and services that addressed all of Student's unique needs. The Districts' placement offer in Student's May 12, 2011 IEP was appropriate, in the LRE, and was designed to meet all of Student's unique needs as a DHH student within the meaning of *Rowley*. (Factual Findings 1 through 16, 38 through 41; Legal Conclusions 2 through 33.)

STUDENT'S ISSUE 2 AND DISTRICT'S ISSUE

34. In Student's Issue 2, Parents contend that the Districts denied Student a FAPE in his May 11, 2012 IEP because they failed to: consider, in determining their offer, the related services and program options available to Student in his primary mode of communication of ASL that they contended would have provided Student with an equal opportunity for communication access to his peers (Issue 2(a)); and offer an appropriate placement (Issue 2(b)). Student also contends that the Districts did not appropriately consider Mother's request for a referral to CSDR at the IEP meeting, and, as a result, denied Parents the opportunity to meaningfully participate in the development of Student's educational program. The Districts contend in Student's case that the May 2012 IEP team considered all of the program options available to Student when it offered placement at CVUSD TCP; that the TCP program was appropriate to address all of Student's unique needs as a DHH Student including instruction in ASL; that CSDR was not an appropriate placement for Student in the LRE; and that Student is not entitled to any relief. In the Districts' case (Issue 3), the Districts contend that they procedurally complied with the IDEA in all respects and that the May 11, 2012 IEP offered Student a FAPE in the LRE.

BURDEN OF PROOF

35. As petitioning party in Issues 2(a) and (b), Student has the burden of proof. In the Districts' case, Issue 3, the Districts have the burden of proving that the May 11, 2012 IEP offered Student a FAPE. (*Schaffer v. Weast, supra*, 546 U.S. at p.p. 56-62.)

APPLICABLE LAW

36. Legal conclusions 2 through 19 are repeated and incorporated as if restated below.

37. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) Districts must not use any single measure, such as a single intelligence quotient, to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

38. Individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area” must assess students’ suspected disabilities for the district. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

39. If a school district determines that the proposed special education program component to which a parent does not consent is necessary to provide a free appropriate public education to the child, the school district shall initiate a due process hearing in accordance with Section 1415(f) of Title 20 of the United States Code. (Ed. Code § 56346, subds. (d) & (f).)

ANALYSIS OF ISSUES 2 AND 3

40. Because Student’s issues 2(a) and (b) overlap with Issue 3, they will be analyzed together.

41. Student did not meet his burden of persuasion by the preponderance of evidence that the Districts denied Student a FAPE in the May 11, 2012 IEP by failing to consider, in determining its offer, the related services and program options available to Student in his primary mode of communication of ASL that they contended would have provided Student with an equal opportunity for communication access to his peers (Issue 2(a)) and offer an appropriate placement (Issue 2(b)). On the other hand, the Districts met their burden of persuasion that the May 11, 2012 IEP offered Student a FAPE in the LRE (Issue 3).

42. First, the District complied with the procedural requirements under IDEA in connection with the May 2012 IEP. District assessed Student in all areas of need in late April and early May 2012, before his triennial IEP, including the areas of psychoeducational, speech, and hearing. Ms. Weinberg, Mr. Kistler, Ms. Headcock and Ms. Kaparos knew Student and had worked with him in past years. Based upon their experience working with Student, and their professional and educational backgrounds, they were qualified to administer the assessments given to Student. Although Ms. Isayo did not testify, Student did not offer any credible evidence that challenged the validity of her testing or findings. The assessments were administered using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent and teachers. The tests included the CTONI-2, WRAML-2, Ling Phonetic Speech Evaluation, Southern California Ordinal scales of Development-Communication Scale, TAC, CAST, PPVT-4, GAEL-P, WIAT-III, the CIBS-R, and auditory testing. No single measure or assessment was used as the sole criterion for determining Student's unique needs. In addition to testing, where appropriate the assessors relied on a review of records, observations of Student, and feedback from Student's teachers and Parents. The assessment tools were technically sound instruments that were administered in a manner that took Student's needs as a DHH child into account, and were modified where appropriate. The assessments were selected and administered so as not to be discriminatory on a racial or cultural basis; they were provided in Student's primary language of ASL where appropriate; and they were used for purposes for which the assessments were valid and reliable, including under circumstances where the results were informational and not normed in comparison to typically developing peers; they administered by trained and knowledgeable personnel; and they were administered in accordance with any

instructions provided by the producer of such assessments. Student offered no evidence nor did he contend that any of the assessment results were not valid.

43. The requisite members of the IEP team were present at the May 11, 2012 IEP meeting, and everyone in attendance, including Mother, participated in the development of the IEP offer.

44. Further, the Districts met their burden to prove that the IEP goals were appropriate and addressed Student's unique needs. The evidence established that IEP team discussed Student's PLOPs, and that Student had historically made measurable academic progress and progress on his goals up to the time of the hearing, which was all that is required under *Rowley, supra*, 458 U.S. at pp. 200, 203-204, 207. The IEP team developed appropriate annual goals in reading comprehension, vocabulary/concept development, written/oral language, mathematics, prevocational, articulation, social studies/science vocabulary, and auditory comprehension/auditory memory. Members of the IEP team, including Ms. Headcock, Ms. Weiner, Mr. Halpert, Ms. McCreery, Ms. Shawn, and Ms. Vail, credibly testified that each goal was based upon Student's PLOPs leading up to the IEP meeting, including the results of the May 11, 2012 multidisciplinary psychoeducational assessment report. Each of the goals had benchmarks/short-term objectives; the IEP team developed each goal so as to be completed within one year; each was measurable; and each addressed Student's unique needs as a DHH Student whose primary mode of communication was ASL.

45. Student offered no credible expert testimony or other evidence to support his claim in Issue 2(a) that the Districts failed to consider, in determining their offer, the related services and program options available to Student in his primary mode of communication of ASL, and specifically CSDR, that they contended would have provided Student with an equal opportunity for communication access to his peers. Student's contention that Parents were denied the opportunity to meaningfully participate in the

IEP or that Student was denied a FAPE because the Districts declined to discuss the option of referral to CSDR at the May 2012 IEP meeting was not supported by the evidence. As discussed above in connection with Issue 1(b), the Districts were not required under the IDEA, by the CDE, or under any applicable provision of California statutory law, to refer Student to CSDR at Mother's request because he was deaf. They were required to offer placement in the LRE with program supports and services that addressed all of Student's unique needs as a DHH student, which they did. Districts' decision to decline discussion on referral to CSDR at the May 11, 2012 IEP meeting because Parents' due process matter was pending was reasonable, and did not deny Parents the opportunity to meaningfully participate in Student's educational program. On the contrary, by filing a due process complaint, Parents were exercising their ultimate right to have the issue of referral to CSDR decided by an administrative law judge. Parents were not denied any rights and the Districts acted appropriately when they declined to discuss referral to the CSDR at the May 11, 2012 IEP.

46. On the other hand, the May 11, 2012 IEP team offered Student an appropriate educational program, including appropriate related services, based upon a thorough consideration of his unique needs as a DHH student whose primary mode of communication was ASL. As discussed above in connection with Issue 1, the TCP offered Student a comprehensive program that included staff trained in ASL, exposure to hearing and DHH students and staff, after-school tutoring, remedial reading programs, after school activities. Regarding related services, Ms. Kaparos' informed the IEP team that Student had reached a plateau in connection with his CI, and that he would not likely receive much more benefit from continued ART. Nevertheless, at Mother's request, the District agreed to offer continued ART. Ms. Weinberg credibly testified that, based upon her SL assessment, Student continued to require speech therapy in order to assist him in development of sounds, although she recommended reducing the amount of

time by five minutes to enable Student to spend more time in the classroom. The IEP team also offered an ASL interpreter, annual auditory testing, SAI, transportation and ESY.

47. The IEP included testing and academic modifications and supports that were designed to address Student's unique needs, including state/district testing with modifications including allowing extra time for exams; reading exam questions to Student; testing in a small group; and differential grading based on progress toward goals and objectives. Instructional accommodations also included settings that avoided distracting stimuli; clear directions that Student would understand; simplification of complex directions; teaching through multi-sensory modalities; and a variety of activities in each lesson. Supplementary aids and services included interpreting services when needed for assemblies, school functions, field trips and other school related functions.

48. As to Student's Issue 2(b), Student failed to meet his burden of persuasion that the placement offer denied Student a FAPE, for the same reasons as discussed above in Issue 1(b). On the other hand, as discussed above in Legal Conclusion numbers 29 through 32, the Districts met their burden of persuasion that their placement offer in the TCP at Sierra Vista was appropriate, in the LRE, and met all of Student's unique needs in the areas of DHH within the meaning of *Rowley*. Student's unique needs continued to be such that a general education placement 100 percent of the school day was not an appropriate placement for Student when considering the *Rachel H* factors, for the same reasons as discussed above in connection with the May 2011 IEP. The overwhelming weight of the evidence established that the Districts' offer of placement in the TCP program, with mainstreaming including during breaks, lunch, physical education, Ms. Vail's transition math class, school programs and other activities, continued to be an appropriate placement in the LRE. All of the staff at Sierra Vista were trained and certified in ASL, they had experience working with DHH students, the TCP

was designed to provide DHH students with educational benefit, and CVUSD created hearing-friendly campuses because it serviced deaf students for the SELPA. The placement offer was made in consideration of Student's unique needs as a DHH Student, including development of ASL and other modes of communication to learn and function in a hearing world. (Factual Findings 1 through 41; Legal Conclusions 26 through 33, 35 through 48.)

49. In summary, the Districts met their burden of persuasion on Issue 3 that the May 11, 2012 IEP offered Student a FAPE in the LRE.

ORDER

1. Student is not entitled to any relief.
2. The May 11, 2012 IEP is a FAPE in the LRE, and District may implement it in its entirety without parental consent.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed as to all issues that were heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: May 13, 2013

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings