BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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# CASE NO. 2020060522

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PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

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# DECISION

OCTOBER 29, 2020

On June 16, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Los Angeles Unified School District. OAH continued this matter for good cause on July 1, 2020. Administrative Law Judge Linda Johnson heard this matter via videoconference in San Diego, California on August 25, 26, 27, and 31, and September 1, and 2, 2020.

Attorneys Valerie Vanaman and Eric Menyuk represented Student. Parents attended all hearing days on Student's behalf. Attorneys Mark Waterman and

Amanda Cordova represented Los Angeles. Theana Kezios attended all hearing days on Los Angeles's behalf.

At the parties' request the matter was continued to September 21, 2020, for closing briefs. The record was closed, and the matter was submitted on September 21, 2020.

## ISSUE

1. Did Los Angeles Unified School District's offer of programs and services made at the December 10, 2019 individualized education program team meeting deny Student a free appropriate public education because:

    a. The placement was predetermined outside of the meeting based upon Los Angeles's policies and directives,

    b. The offer was not clearly made because services were stated as being on a "frequency band" and therefore Parents were unable to understand how Student's services were to be implemented or monitored,

    c. The offer was not for a program of sufficient length, such as a full day program,

    d. The offer was not appropriate to meet Student's needs as it lacked adequate individual services of appropriate frequency,

    e. The offer was not appropriate to meet Student's needs because it lacked adequate levels of individual speech and language and auditory-verbal therapy,

    f. The individualized education program team failed to consider the full continuum of appropriate placement options,

    g. The placement did not offer an appropriate classroom with adequate peer language modelling for Student to make meaningful progress,

h. The placement offered was not the least restrictive environment, and

i. The placement would have caused Student to regress in her speech and language abilities?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see

20 U.S.C. § 1415(i)(2)(C)(iii).) Student has the burden of proof as to all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was three years old and in preschool at the time of hearing. Student was diagnosed as profoundly deaf in August 2018. Student was implanted with bi-lateral cochlear implants on December 10, 2018, and the implants were activated on January 3, 2019. Student resided within Los Angeles's geographic boundaries at all relevant times. Student was eligible for special education under the eligibility category of deafness.

## ISSUE 1: DID LOS ANGELES UNIFIED SCHOOL DISTRICT'S OFFER OF PROGRAMS AND SERVICES MADE AT THE DECEMBER 10, 2019 INDIVIDUALIZED EDUCATION PROGRAM TEAM MEETING DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION?

Student contends she requires a full day preschool program with both deaf and hard of hearing peers as well as typical hearing peers. Student further contends Los Angeles does not have such a program therefore she should be placed in the full day preschool program at the John Tracy Center. Additionally, Student contends Los Angeles's December 10, 2019 individualized education program offer was not appropriate or clear.

Los Angeles contends it offered Student a program in the least restrictive environment that was reasonably calculated to enable her to make progress in light of her circumstances. Los Angeles further contends Student failed to meet her burden that it denied her FAPE and is not entitled to a remedy.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ___ [137 S.Ct. 988, 1000].)

Los Angeles provided deaf and hard of hearing infant services to Student between March 2018 and her third birthday on January 21, 2020. Briseida Favela, Christina Levin, and Heather Goldstein all provided deaf and hard of hearing services to Student during that time. Los Angeles conducted Student's initial assessment for special education during November 2019 and held Student's initial IEP team meeting on December 10, 2019.

## SUB-ISSUE A, PREDETERMINATION

Student contends Los Angeles predetermined Student's placement outside of the meeting based upon Los Angeles's policies and directives. Los Angeles contends it did not predetermine Student's placement and the IEP team discussed multiple placement options during the IEP team meeting.

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 team 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) 239 Fed.Appx. 342, 344; see also, *Ms. S. ex rel G. v. Vashon Island School 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.].)

Both Parents attended Student's initial IEP team meeting along with school psychologist Tanyka Nelson-Robinson, transition coordinator Romy Sperling, general education teacher Rina Duarte, speech and language pathologist Natalie Rubinstein, deaf and hard of hearing teachers Favela and Goldstein, deaf and hard of hearing assessor Debbie Lutz, and audiologist Chelsey Caprine. The IEP team meeting lasted approximately an hour and a half. The IEP team discussed the assessments Los Angeles conducted, Student's present levels of performance, annual goals, services, and placement.

The IEP team discussed three placement options, the deaf and hard of hearing special day class at Saticoy Elementary School, the total communication deaf and hard of hearing special day program, and deaf and hard of hearing itinerant support at Student's school of residence. The deaf and hard of hearing special day class at Saticoy Elementary School will be referred to as the Saticoy program. Although Rubinstein, Sperling, and Nelson-Robinson met before the IEP team meeting to discuss placement options, they did not decide the placement they would offer Student prior to the IEP

team meeting. All team members, including Parents, had the opportunity to provide input regarding the proposed placements during the IEP team meeting. Los Angeles did not provide a draft IEP with the placement listed in the document prior to the IEP team meeting. Los Angeles made changes to the draft IEP document during the IEP team meeting and gave Parents a copy to review after the IEP team meeting. Student did not establish that Los Angeles's had policies and directives that dictated its December 2019 placement offer. Therefore, Student did not prove that Los Angeles denied her a FAPE by predetermining Student's placement prior to the December 2019 IEP team meeting.

## SUB-ISSUE B, CLARITY OF THE OFFER

Student contends the audiology and speech and language services offered were not clear because they were offered in a frequency band and could be provided in multiple different durations. Los Angeles contends the frequency band is a methodology which it is free to choose as it sees fit.

The IDEA requires that an educational program be individually designed and reasonably calculated to provide meaningful educational benefit to a child with a disability. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1310.) The purpose of a written offer is to alert parents of the need to consider seriously whether a school district's proposed placement is appropriate under the IDEA. A written offer helps parents determine whether to oppose or accept the placement with supplemental services. (*Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, *cert. denied* (1994) 513 U.S. 965 (*Union*).) The IDEA explicitly requires written prior notice to parents when an educational agency proposes or refuses, to initiate or change the educational placement of a child with a disability or the provision of a FAPE. (*Id.* at p. 1526; see also 20 U.S.C.

§ 1415(b)(3).) The IEP must include a projected start date for services and modifications, as well as 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).)

The requirement of a formal written offer creates a clear record that will eliminate troublesome factual disputes about what additional educational assistance the school district offered to supplement a placement. Failure to make a clear written offer of placement and services is a procedural violation of the IDEA. (*Union*, *supra*., 15 F.3d at p. 1527). See also, title 20 United States Code § 1414(d)(1)(A)(i), title 34 Code of Federal Regulations § 300.320(a), and Education Code § 56345, subd. (a).

A procedural violation results in a denial of FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

The IEP is to be read as a whole. No requirement exists that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

An IEP is not required to include the specific instructional methodologies the school district will use to educate the child. (34 C.F.R. § 300.320(d)(1); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) 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. 208.)

Courts are ill-equipped to second guess reasonable choices that school districts have made among appropriate instructional methods. (*T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.) A parent's disagreement with a school district's educational methodology is insufficient to establish an IDEA violation. (*Carlson v. San Diego Unified School Dist.* (9th Cir. 2010, unpublished) 380 F. App'x 595; *see also*, *Lachman v. Illinois State Bd. of Educ.* (7th Cir. 1988) 852 F.2d 290, cert. denied at 488 U.S. 925 [holding that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a student with a disability].) School districts may contract with another public agency to provide special education or related services. (Ed. Code, § 56369.)

Los Angeles offered Student 20 minutes of audiology services to be provided between one and five times per month. Los Angeles offered Student 30 minutes of language and speech services to be provided between one and 10 times per week. Parents did not understand from the IEP offer how frequently Los Angeles would deliver either of the services. Parents did not know if Student would receive one session of audiology services per month for 20 minutes, five sessions per month for four minutes each, or some other combination of sessions and minutes.

Parents were equally confused about the speech and language services. Los Angeles did not clarify anywhere in the IEP document how many sessions it would provide for either service. Parents were unable to decide if they agreed with the proposed services without knowing how Los Angeles would provide the services.

Los Angeles did not clearly define the audiology services. When reviewing the IEP during the hearing, Nelson-Robinson did not know how the services would be provided. Nelson-Robinson understood that the audiology services could be provided

one time for 20 minutes per month or split into multiple sessions. Caprine would have provided the audiology services to Student. Caprine understood the frequency of one to five times per month to mean generally the services would be once a month for a total of 20 minutes, but the offer as written allowed for flexibility if Student was absent or had an additional need.

Los Angeles also did not clearly define the speech and language services. Nelson-Robinson understood that the speech and language services could be provided one time for 30 minutes per week or split into multiple sessions. Rubinstein understood that she could provide the speech and language services as she saw fit, either once a week for 30 minutes or multiple times a week for varying amounts of time that added up to 30 minutes total. Rubinstein opined that at Student's age, flexibility in the delivery of speech therapy sessions was important, particularly if Student did not want to participate in the session. Unlike Caprine, Rubinstein would not have used that flexibility if Student was absent during the regularly scheduled speech and language session to make the session up later in the week. Rubinstein's explanation of how the services would be delivered was confusing.

Los Angeles also argued that the frequency that the services would be provided is a methodology and therefore up to the service provider's discretion. The argument was not persuasive. While Los Angeles was not required to include every detail or specific methodology of how the services would be implemented, Los Angeles was required to make clear the frequency and duration of the services. Offering speech and language services once a week for 30 minutes is very different than offering 10 weekly sessions of three minutes each. The way the services were written in the IEP offer allowed Los Angeles to freely implement the service in multiple different ways. Parents

were left without vital information they needed to decide if they agreed with the services offered.

Los Angeles's offer of audiology services and speech and language services was not clear. Los Angeles argued that Parents would know when the services were provided because they would receive service logs with the frequency and duration of all services. Providing service logs after the fact does not negate Los Angeles's obligation to provide Parents with a clear written offer within the IEP. Neither Parents, nor Los Angeles's staff, knew how the services would be provided when reading the IEP as a whole. Student proved Los Angeles's offer of audiology services and speech and language services was not clearly written. (*Union*, *supra.*, 15 F.3d at p. 1527)

## SUB-ISSUES C, F, G, H, AND I, LENGTH OF PROGRAM, CONTINUUM OF OPTIONS, INAPPROPRIATE CLASSROOM PLACEMENT, LEAST RESTRICTIVE ENVIRONMENT

Student contends the program Los Angeles offered was not appropriate because it was a half day program and Student required a full day program. Student also contends Los Angeles did not consider the full continuum of appropriate placement options. Student further contends the placement was not appropriate because it did not offer an appropriate classroom with adequate peer language modelling for Student to make meaningful progress and was not the least restrictive environment. Finally, Student contends she would have regressed in her speech and language abilities in a program with only deaf and hard of hearing students.

Los Angeles contends the program it offered was reasonably calculated to allow Student to make educational progress. Los Angeles further contends the IEP team

discussed the full continuum of placement options and the program it offered was the least restrictive environment.

School districts are required to provide each special education student a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate:

- that children with disabilities are educated with non-disabled peers; and
- 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.)

In determining the educational placement of a child with a disability a school district must ensure that:

- 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 least restrictive environment;
- placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

- 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).

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:

- "the educational benefits of placement full-time in a regular class";
- "the non-academic benefits of such placement";
- "the effect [the student] had on the teacher and children in the regular class"; and
- "the costs of mainstreaming [the student]."

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)].

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment 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.)

Federal and State law require that, in developing an IEP, the team must consider both general and special factors. (20 U.S.C. § 1414(d)(3); 34 C.F.R.§ 300.324(a)(2006); Ed. Code, § 56441.1.) The general and special factors are stated in broad terms, and do not include the requirement to consider a specific service, program option or parental request.

For a pupil who is deaf or hard-of-hearing, the special factors include a consideration of "the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." (20 U.S.C. § 1414(d)(B)(iv); see also 34 C.F.R. § 300.324(a)(2)(iv)(2006); Ed. Code, § 56341.1, subd. (b)(4).) In addition, the special factors include a consideration of whether the child needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v)(2006); Ed. Code, § 56341.1, subd. (b)(5).)

California law has an extra set of special factors that an IEP must consider in developing the IEP for a pupil who is deaf or hard-of-hearing. (Ed. Code, § 56345, subd. (d).) State procedures that more stringently protect the rights of disabled pupils and their parents are consistent with the purposes of the IDEA, and are enforceable.

(*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.) Education Code § 56345, subd. (d), provides, in part: "Consistent with Section 56000.5 and Section 1414(d)(B)(iv) of Title 20 of the United State Code, it is the intent of the Legislature that, in making a determination of services that constitute an appropriate education to meet the unique needs of a deaf or hard-of-hearing pupil in the least restrictive environment, the individualized education program team shall consider the related service and program options that provide pupil with an equal opportunity for communication access."

The Saticoy program was a special day class with only deaf and hard of hearing students. The program was four and a half hours a day five days a week, for a total of 22 and a half hours a week. The program consisted of circle time, activity centers, lunch, and recess. Students did not take a nap during the Saticoy program. There was another preschool program at Saticoy Elementary School with typically developing peers, however, most of those students were English language learners. The two preschool programs occasionally had joint activities, such as holiday celebrations, and shared the same playground for recess. During the academic portion of the program Student would not have had have access to general education peers. Student could have attended the Saticoy program when she turned three years old on January 21, 2020. Parents toured the Saticoy program before the December 2019 IEP team meeting, but Student never attended the program.

Parents privately placed Student at the John Tracy Center on a half-day trial basis in October 2019. Student began attending John Tracy Center as a fulltime student in February 2020. The John Tracy Center is a certified nonpublic preschool for deaf and hard of hearing students. The John Tracy Center program was a blended program with both deaf and hard of hearing students and typical hearing students in the same

classroom. The program consisted of six and a half hours a day four days a week and a half day on Fridays, for a total of approximately 29 hours a week. Students in the program napped or otherwise quietly rested for about 75 minutes per day, except on Fridays.

Student did not prove there was any significant difference in the length of academic time between the John Tracy Center and the Saticoy program. Although the John Tracy Center program lasted two hours more than Saticoy's program four days a week, students in the John Tracy Center program napped for 75 minutes a day. The John Tracy Center program lasted only half day on Fridays. The difference in duration of instructional time between the two programs was minimal, approximately one and a half hours a week. Bridgette Klaus, the chief program officer for the John Tracy Center, explained the program Student attended. Klaus was not able to offer any significant difference in the academic time between the two programs. Student did not prove that Los Angeles denied her a FAPE in offering the half day Saticoy program.

Los Angeles conducted an initial special education assessment for Student on November 12, 2019, in the areas of general ability and cognitive functioning, academic performance and school readiness, communication, motor abilities, social emotional status, and self-help and adaptive behavior. Student was not quite three years old and had her cochlear implants activated for less than one year at the time of the initial assessments. Sperling interviewed Mother while the assessors worked with Student and Father. Sperling asked Mother questions about Student's abilities, developmental milestones, and Parent concerns. Sperling recalled asking Mother if Student attended a daycare or preschool program, however, Mother did not recall that question. Mother discussed the John Tracy Center with Levin during the auditory verbal therapy sessions but did not discuss the John Tracy Center with Sperling.

After reviewing the initial psychoeducational assessment report, present levels of performance, and proposed goals, the December 2019 IEP team discussed programs and services for Student. Los Angeles based its placement recommendations on the assessment results. In addition to the Saticoy program, the IEP team discussed a total communication program which the team agreed would not be a good fit for Student. The total communication program utilized sign language and Student's preferred mode of communication was spoken language. The IEP team also discussed providing speech and language, audiology, and auditory verbal therapy services at Student's home school without a preschool component. The team did not discuss a general education program or a blended program with both typical hearing peers and deaf and hard of hearing peers. The team also did not discuss nonpublic school options.

Los Angeles argued Parents never informed it that Student was attending the John Tracy Center. While the IEP team may have had a different conversation during the IEP team meeting if Parents brought up the John Tracy Center, that does not relieve Los Angeles of its obligation to discuss the full continuum of placement options or to place Student in the least restrictive environment.

The parties did not dispute that a regular education classroom without supports and services was not appropriate for Student. Although Student had average cognitive abilities, motor function, social emotional functioning, and self-help skills, she was new to the hearing world and still learning how to communicate with her newfound ability to hear. None of Los Angeles's witnesses, Parents, or Student's own experts, opined that a general education preschool class would be appropriate for Student.

Los Angeles had a duty to explore all placement options so Student could be mainstreamed to the maximum extent that was appropriate. (*Daniel R.R.*, *supra*, 874

F.2d at p. 1050.) Los Angeles offered only one option for Student, the Saticoy program. Los Angeles never discussed during the IEP meeting the benefit to Student of being educated around general education peers or discuss any academic mainstreaming opportunities for Student. Los Angeles had an additional obligation to consider the continuum of related service and program options that would provide her with an equal opportunity for communication access because Student was deaf, including education time with typical hearing students.

Klaus explained the benefits to preschool students having access to both deaf and hard of hearing students as well as typical hearing students. Klaus had a master's degree in education with a deaf and hard of hearing credential. Klaus was also a certified auditory verbal therapist, had an education specialist credential, and had 20 years of experience working with deaf and hard of hearing students. Klaus was qualified to opine on what would be an appropriate program for Student.

Klaus explained how important it was for deaf students to have access to typical hearing peers. Klaus taught a preschool class at John Tracy Center before they had a blended program with both deaf and hard of hearing students and typical hearing students. Before the John Tracy Center had a blended program, deaf and hard of hearing students attended a community preschool program in addition to the John Tracy Center to facilitate communication opportunities with typical hearing peers. In 2010, the John Tracy Center changed its program to its current model to include typical hearing peers in its deaf and hard of hearing preschool classes to facilitate peer communication. Alyssa Soto, the Saticoy program teacher agreed that mainstreaming opportunities are beneficial to language growth for deaf and hard of hearing students.

Los Angeles did not consider or offer any meaningful mainstreaming opportunities for Student. The program at Saticoy was comprised of solely deaf and hard of hearing students and Student was not offered any academic mainstreaming opportunities. The only interaction Student would have with typical hearing peers was at an occasional holiday celebration and unstructured recess time. Recess was on the playground at Saticoy and not in an acoustically sensitive environment to allow her equal opportunity for communication access.

Parents were also concerned that Student would regress in her communication abilities if she attended the Saticoy program. Student made consistent progress in her speech and language and communication abilities after having her cochlear implants activated in January 2019. Although Student did mimic some grunting sounds she heard another student make while attending a community program, Student's mimicking only lasted for a day and she did not regress in any of her communication skills.

In summary, Los Angeles did not deny Student a FAPE by failing to offer more than a program for 22 hours a week. Los Angeles denied Student a FAPE because it did not consider the full continuum of appropriate placement options for Student or place her in the least restrictive environment with mainstreaming opportunities. Additionally, without mainstreaming opportunities with typical hearing peers, Los Angeles denied Student a FAPE because it did not offer an appropriate classroom with adequate peer language modelling for Student to make meaningful progress. Student did not, however, prove that Los Angeles denied her a FAPE by offering the Saticoy program because she would have regressed in her speech and language abilities if she attended the Saticoy program.

## SUB-ISSUES D, AND E, SERVICES

Student contends Los Angeles failed to offer appropriate services for Student. Student contends she required more individual speech and language services and auditory verbal therapy than what Los Angeles offered. Student also contends the offer was not specific because the speech and language services were not specified as individual or group services and she required individual speech and language services. Los Angeles contends the speech and language services and auditory verbal therapy it offered was based on its assessors' recommendations and was appropriate.

An IEP is a written statement for each child with a disability that should include:

- the child's present levels of academic achievement and functional performance;
- a statement of measurable annual goals;
- a description of how the child's progress on the annual goals will be measured;
- a statement of special education and related services;
- any program modifications or supports necessary to allow the child to make progress;
- an explanation of the extent to which the child will not be educated with nondisabled children in general education classes; and
- the frequency, location, and duration of the services.

(20 U.S.C. § 1414(d)(1)(A); Ed. Code, § 56345, subd (a.).)

The IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) An IEP must contain a statement of measurable academic and functional annual goals, designed to meet the child's needs related to a disability, to

enable the child to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

Los Angeles offered Student 30 minutes per week of speech and language as a direct and collaborative service. The IEP did not specify if the service was individual or group based, nor did it explain how the service was both direct and collaborative. Rubinstein assessed Student, drafted the speech and language goal, and recommended services. Rubinstein drafted one articulation goal for Student, however, during the hearing she opined that Student needed to focus on increasing her vocabulary instead of articulation.

Jennifer Reeder reviewed Rubinstein's assessment but did not assess Student herself. Reeder had a master's degree in speech language pathology, a California license in speech-language pathology and audiology, and a certificate of clinical competence from the American Speech-Language-Hearing Association. Reeder was qualified to offer an opinion regarding the amount, frequency, and duration of speech and language services Student required.

Reeder opined that Student needed two 30-minute sessions of individual speech and language therapy per week to address final consonant deletion. Reeder opined the sessions needed to be individual so Student could hear the presence and absence of the sound.

Reeder's opinion regarding the amount of therapy Student needed was not as persuasive as Rubinstein's. Reeder did not assess Student and had not worked with Student. Student only had one goal to address articulation. Reeder did not provide any

persuasive testimony as to why 60 minutes per week was necessary. Student did not prove that 30 minutes per week was insufficient.

However, Reeder's testimony regarding the need for individual therapy was persuasive. Student's one speech and language goal was articulation. Reeder persuasively explained that for Student to work on articulation she needed to hear, learn, and use the articulation sounds she was working on with a therapist. Rubinstein did not clarify if the proposed speech and language services would be individual or group. Nor did Rubenstein provide any rational for Student's speech and language services to be in a group setting. Student proved that she required individual speech and language services, but she did not prove that she required more than 30 minutes per week of speech and language services. Los Angeles denied Student FAPE by failing to offer individual speech and language services. Los Angeles did not deny Student FAPE by offering 30 minutes a week of speech and language services.

Los Angeles offered Student 60 minutes per week of auditory verbal therapy. During the hearing Student argued she required two 60-minute sessions of auditory verbal therapy a week. However, in her closing brief Student clarified she was only seeking clarification that she was entitled to one 60-minute session of auditory verbal therapy in addition to placement at John Tracy Center. Student did not offer any credible evidence that she required more than 60 minutes per week of auditory verbal therapy, and she no longer contends she is entitled to more. Therefore, this decision will not address any increase to Los Angeles's offer of auditory verbal therapy.

## CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Issue 1, Sub-Issue a: The December 10, 2019, IEP team did not predetermine Student's placement outside of the meeting based upon Los Angeles's policies and directives. Los Angeles prevailed on Issue 1, subsection a.

Issue 1, Sub-Issue b: The December 10, 2019, IEP offer was not clearly made because services were stated as being on a "frequency band" and therefore Parents were unable to understand how Student's services were to be implemented or monitored. Student prevailed on Issue 1, subsection b.

Issue 1, Sub-Issue c: The December 10, 2019, IEP offer was for a program of sufficient length. Los Angeles prevailed on Issue 1, subsection c.

Issue 1, Sub-Issue d: The December 10, 2019, IEP was partially appropriate to Student's needs however, it lacked specificity regarding individual speech and language services. Student partially prevailed on Issue 1, subsection d.

Issue 1, Sub-Issue e: The December 10, 2019, IEP offer was appropriate to Student's needs as to the amount of speech and language and auditory-verbal therapy. Los Angeles prevailed on Issue 1, subsection e.

Issue 1, Sub-Issue f: The December 10, 2019, IEP team failed to consider the full continuum of appropriate placement options. Student prevailed on Issue 1, subsection f.

Issue 1, Sub-Issue g: The December 10, 2019, IEP placement did not offer an appropriate classroom with adequate peer language modelling for Student to make meaningful progress. Student prevailed on Issue 1, subsection g.

Issue 1, Sub-Issue h: The December 10, 2019, IEP team did not offer Student a program in the least restrictive environment. Student prevailed on Issue 1, subsection h.

Issue 1, Sub-Issue i: The December 10, 2019, IEP placement would not have caused Student to regress in her speech and language abilities. Los Angeles prevailed on Issue 1, subsection i.

## REMEDIES

Student prevailed on Issue 1, Sub-Issue b, and partially prevailed on Sub-Issue d, proving that Los Angeles denied Student a FAPE by not making a clear offer as to service duration and frequency and by not specifying the speech and language services would be individual. Student also prevailed on Issue 1, Sub-Issues f, g, and h, that Los Angeles denied Student a FAPE by failing to place her in an appropriate program. As a remedy, Student requested publicly funded placement at the John Tracy Center for the 2020-2021 school year with an hour a week of individual speech and language therapy and one hour a week of auditory verbal therapy, and reimbursement for the amount Parents paid to the John Tracy Center from the time Student turned three until June 2020.

Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Committee of Burlington, Mass. v. Dept. of Education* (1985) 471 U.S. 359, 370 (*Burlington*); *Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) The broad authority to grant relief

extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168.)

To remedy a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The purpose of the IDEA is to provide students with disabilities a FAPE which emphasizes special education and related services to meet their unique needs. (Burlington, supra, 471 U.S. 359, 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (Puyallup, supra, 31 F.3d at p. 1497.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (Reid ex rel. Reid v. Dist. of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524 (Reid).)

These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide "day-for-day compensation." (Puyallup, supra, 31 F.3d at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (Puyallup, supra, 31 F.3d at p. 1496.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (Reid, supra, 401 F.3d 516, 524; R.P. ex rel. C.P v. Prescott Unified School Dist. (9th Cir. 2011) 631 F. 3d 1117 , 1122.)

A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a

due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, § 56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also Burlington , supra, 471 U.S. at pp. 369-370 (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (Florence County School Dist. Four v. Carter (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361].)

Here, Los Angeles did not offer Student FAPE because the offer of the Saticoy program was not the least restrictive environment for Student. The offered program did not offer adequate peer language modelling. The IEP team did not consider the full continuum of appropriate placement options. Additionally, Los Angeles did not clearly state its offer of speech and language services as to frequency, duration, and individual or group therapy. Similarly, Los Angeles's offer of audiology services was not clear as to frequency and duration.

Therefore, Parents reasonably decided to place Student at John Tracy Center where she had access to both deaf and hard of hearing peers and typical hearing peers in the classroom. While attending John Tracy Center Student made educational progress.

Parents signed the December 10, 2019 IEP rejecting Los Angeles's offer and requesting reimbursement for the John Tracy Center on January 24, 2020. Los Angeles received the signed IEP on January 27, 2020. Parents are entitled to reimbursement beginning February 7, 2020, through May 2020. John Tracy Center charged parents $500 for February and March 2020. Because the amount John Tracy Center charged

Parents was significantly discounted, a reduction in reimbursement to account for the 10-business day notice to Los Angeles in not warranted. Reimbursement may be reduced or denied if the parents did not give a 10-business day written notice to the district. (20 U.S.C. § 1412(a)(10)(C)(iii).) John Tracy Center charged Parents $375 for April and May 2020. The John Tracy Center offered a discount for April and May 2020, because of Covid-19. Parents chose to pay $500 instead of the $375 charged. Parents are entitled to $500 in reimbursement for February and March 2020, and $375 for April and May 2020, for a total reimbursement of $1,750.

Los Angeles did not have a similar program to John Tracy Center and did not have any opportunities for Student to be mainstreamed for academic opportunities with typical hearing peers. Student made educational progress at the John Tracy Center. Therefore, as an equitable remedy for Los Angeles failing to offer an appropriate placement, Student is entitled to placement and services, funded by Los Angeles, at the John Tracy Center for the entire 2020-2021 school year. However, this equitable placement does not constitute stay put because Student has never had an agreed upon and implemented educational program. (See Huerta v. San Francisco Unified Sch. Dist. (N.D. Cal. November 14, 2011, No. C 11–04817 CRB) 2011 WL 5521742, *7.)

## ORDER

1. Within 15 days of the date of this decision Los Angeles shall amend Student's December 10, 2019 IEP to reflect placement for the 2020-2021 school year at the John Tracy Center. Los Angeles shall specify in the IEP the exact frequency and duration of speech and language and audiology services and shall specify that the speech and language services will be delivered on an individual basis.

2. Los Angeles shall fund the cost of tuition and IEP services at John Tracy Center for the 2020-2021 regular school year, and shall reimburse Parents for costs incurred for tuition and services, subject to proof of payment, from the first day of the 2020-2021 regular school year through the date of this Decision. Los Angeles shall reimburse Parents within 45 days of Parents' submission of proof of payment documentation.
3. Within 45 days of this Decision, Los Angeles shall reimburse Parents $1,750 for the cost of Student's tuition at John Tracy Center for the period of February 2020, through May 2020. No further proof of payment is required for this time period as sufficient proof was submitted at hearing.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Linda Johnson
Administrative Law Judge
Office of Administrative Hearings