

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060214

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

DECISION

NOVEMBER 18, 2022

On June 8, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming the San Diego Unified School District. At the parties' request, the matter was continued on June 22, 2022. Administrative Law Judge Charles Marson heard this matter by videoconference on September 13, 14, 15, 16 and 27, 2022.

Wendy R. Dumlao and Erica L. Mortenson, Attorneys at Law, represented Student. One or both of Student's Parents attended all hearing days on Student's behalf. Jonathan P. Read and David A. Graham, Attorneys at Law, represented San Diego. Brian Spry, San Diego's Director of Due Process Hearings and Mediations, attended all hearing days on San Diego's behalf.

At the parties' request the matter was continued to October 17, 2022, for written closing briefs. The record was closed, and the matter was submitted on October 17, 2022.

ISSUES

Did San Diego deny Student a free appropriate public education, called a FAPE, from January 1, 2022, to June 8, 2022, by

1. failing to offer a placement that meets Student's academic needs;
2. failing to offer a placement in the least restrictive environment;
3. failing to offer Student a full day of instruction;
4. failing to offer adequate deaf and hard of hearing services;
5. failing to offer specialized academic instruction in math and reading; and
6. failing to provide a clear and specific offer?

At the beginning of the hearing, Student withdrew claim five in the Order Following Prehearing Conference, which was that San Diego denied him a FAPE by failing to offer adequate speech services. The issues have been renumbered accordingly.

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 FAPE 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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student requested this hearing and bore the burden of proof. 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 six years old and in kindergarten at the time of hearing. He resided within San Diego's geographic boundaries at all relevant times but attended a private school in Culver City. Student was eligible for special education in the categories of Deaf/Hard of Hearing and Language or Speech Disorder.

BACKGROUND

At age two Student was a client of a regional center, which provided him deaf and hard of hearing services, called DHH services. He required hearing aids for both ears. Student had mild to moderate hearing loss in his right ear and moderate to severe hearing loss in his left ear. Parents enrolled him from October 2018 through December 2018 in San Diego's Deaf and Hard of Hearing Infant Toddler School Based Program.

As Student approached age three, Parents and San Diego met to decide upon a program for him but were unable to agree on one. Parents then privately placed Student in a series of preschools. Student has never attended a San Diego school since age three. He has attended private school, and now attends Echo Horizon School, a non-public school in Culver City. Parents have rented an apartment in Los Angeles, and one stays with him there on alternate weeks while he attends school.

In fall 2021, Parents expressed interest in enrolling Student in a San Diego school if his individualized education program, called an IEP, contained certain services they thought were essential. San Diego conducted a three-session IEP team meeting for Student on December 16, 2021, and January 12 and March 16, 2022, during which the team reviewed Student's triennial assessments, but the parties could not agree on a program for Student. San Diego made an IEP offer on March 25, 2022, but Parents

declined it, and Student remained at Echo Horizon. The sufficiency of that offer is at issue here. The relevant time period is from January 1, 2022, to June 8, 2022, because the parties settled their previous disputes through December 21, 2021.

ISSUES 1 AND 4: DID SAN DIEGO DENY STUDENT A FAPE FROM JANUARY 1 TO JUNE 8, 2022, BY FAILING TO OFFER ADEQUATE DEAF AND HARD OF HEARING SERVICES AND A PLACEMENT THAT MET STUDENT'S ACADEMIC NEEDS?

Student contends that he required DHH services in class throughout the day. Parents wanted San Diego to replicate the Echo Horizon program, which they said included a full-time DHH-trained co-teacher in Student's general education classroom. San Diego contends that its offer of placement and services, including three hours a day of in-class DHH services, was adequate to provide Student a FAPE.

Parents and the director of Student's private school testified that Student's appearance in class can be deceptive because he looks like he understands something but sometimes does not, and observation throughout the class by a DHH-trained co-teacher would identify the times in which he needed assistance. Parents opined that the support of such a full-time DHH co-teacher in his general education classroom at Echo Horizon was what enabled Student to make the substantial progress he has made.

San Diego contends that its offered placement in a general education classroom at its Lafayette Elementary School would meet all of Student's educational needs. San Diego argues that the DHH program at Lafayette Elementary, when combined with the numerous accommodations, modifications and supports in the proposed IEP, would be

sufficient to allow Student to benefit from his education there. San Diego also contends that Student is succeeding in private school without the full-time DHH support he alleges is required to provide him a FAPE.

A FAPE means special education and related services that are available to an eligible child who meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); see also Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363, subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2007), & 300.501 (2006).)

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 [102 S.Ct. 3034, 73 L.Ed.2d 690]; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 197 L.Ed.2d 335]. In determining the validity of an IEP, an ALJ must focus on the placement offered by the school district, not on the alternative preferred by the parents. The appropriateness of the school district's program must be upheld if it was reasonably calculated to provide the student with educational benefits. (*Gregory K. v. Longview Sch. Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.) The offered program need not be as beneficial to the student as the parents' preferred program, as long as it provides a FAPE. (*Ibid.*)

Because Student had not been enrolled in a San Diego school since fall 2018 at age two, San Diego made unusual efforts to determine his present levels of performance

and his program needs. In December 2021 a team of San Diego assessors traveled to Echo Horizon School in Culver City to conduct triennial assessments of Student in his pre-kindergarten class over a period of two days. Resource teacher and DHH specialist Amy Seaman, the District's lead DHH teacher and Student's case manager, led the team and produced an academic assessment report on December 13, 2021, shortly before the first session of Student's triennial IEP team meeting. DHH teacher Debbie Slavick also assessed Student's academics, with a focus on self-advocacy. Speech-language pathologist Sarah Kukuchek assessed Student's speech, and school psychologist Renate Ward produced a psychoeducational assessment. Student does not challenge the adequacy of these assessments.

In its final form, on March 25, 2022, San Diego's proposed IEP offered to place Student in a general education kindergarten class at San Diego's Lafayette Elementary School for 97 percent of his class time. He would spend 3 percent of his time in a small group for speech and language and self-advocacy support. The IEP's extensive descriptions of Student's present levels of performance were drawn from the four assessments Seaman's team conducted at Echo Horizon in December 2021. The IEP proposed eleven annual goals, mostly relating to English language arts. Student does not challenge the adequacy of the goals.

Under the March 25, 2022 IEP, Student would receive as related services two hours a year of audiological services delivered directly outside of class, a model referred to as pull-out. He would also receive 30 hours a year for direct pull-out language and speech therapy, and 15 hours a year of direct push-in language and speech services, meaning delivered in the classroom. He was offered 15 minutes each week of consultation between the general education teacher and the DHH specialist. The IEP

also offered 15 hours a week of direct push-in DHH services during Student's first 60 days at Lafayette, followed by an IEP team meeting to consider whether that level of DHH services should be extended.

The March 25, 2022 IEP included a wide variety of accommodations designed to address Student's hearing deficit such as preferential seating, closed captioning when available, visuals to support auditory presentations, a DM/FM system with surround sound for Student, and passing a microphone among classmates when possible during whole group instruction. The IEP also proposed accommodations requiring checks for understanding, repeating and rephrasing verbal instructions as necessary, and the requirement that teachers face Student when giving instructions. The accommodations also required repeating information from peers during class discussion, contextual cues, and the pre-teaching of vocabulary prior to instruction. Student does not challenge the sufficiency of the accommodations.

Several school district witnesses established without contradiction that the educational setting offered by San Diego was particularly suited to students who are deaf and hard of hearing. San Diego had operated a program for DHH students at Lafayette Elementary School for more than 30 years. At the time of hearing, there were approximately 199 students at Lafayette, 62 of whom were deaf and hard of hearing. This mix offered DHH students ample opportunities to interact with and model themselves after their nondisabled peers, but also prevented DHH students from feeling singled out and different, and prepared them for a future in the DHH and hearing communities.

One San Diego witness described the entire Lafayette campus and staff as "deaf-friendly" as a result of the school's long history with DHH students. The school had an

on-campus audiological testing center that was also equipped to monitor and repair hearing aids and supply batteries. The classrooms had surround-sound systems, lights that indicated the bell was ringing, and flashing lights for alarms. The classrooms were either fully carpeted to reduce noise, or were scheduled to receive carpeting and in the meantime had tennis balls on the legs of chairs to reduce noise.

Most importantly, all of the teachers at Lafayette, including the general education teachers, were quite experienced in instructing and interacting with DHH children. Lafayette staff included a speech-language pathologist, psychologists, counselors, program specialists and administrators who were all experienced in working with DHH children. Even the nursing, cafeteria and custodial staff were experienced in interacting with and assisting DHH students.

Parents declined to consent to Student's placement at Lafayette. They told the IEP team that to provide Student a FAPE, his IEP would have to contain several specific additional services that San Diego did not offer. San Diego responded with a prior written notice to Parents declining those additional requests.

The issue most debated between the parties concerned Parents' request for the addition of a full-time DHH co-teacher to Student's general education class to observe him for lack of understanding. Parents told San Diego that there was such a co-teacher in Student's class at Echo Horizon. Since Student was doing well there, Parents proposed the same staffing arrangement for his general education class at Lafayette. San Diego IEP team members declined the proposed staffing change on the ground that it would risk making Student unnecessarily dependent on the DHH co-teacher, and might lead to learned helplessness. Parents insisted that Student had not become overly dependent under the same structure at Echo Horizon, and requested that San

Diego provide any pertinent research to show the danger of learned helplessness. Seaman sent two studies to Parents which showed that risk, but Parents rejected them as addressing populations dissimilar to Student.

At hearing, several well-qualified San Diego witnesses testified that Student did not need a full-time DHH co-teacher in his classroom. Their testimony was generally based on their assessments, was careful and detailed, and was not damaged in any significant way in cross-examination. Three of the witnesses, as described more fully below, had significant personal experience with deafness. They were credible witnesses, and their testimony is given substantial weight here.

Seaman, the lead DHH teacher at Lafayette, has been deaf since she was 14 years old, wears cochlear implants, and testified with the assistance of closed captioning. She holds a Master of Arts in Special Education–Deaf/Hard of Hearing, a Level II California Education Specialist Credential-Deaf/Hard of Hearing with an authorization to teach English language learners, and is completing her Administrative Services Credential. She has taught children with disabilities in preschool, kindergarten, middle and high school since 2001, and now consults with private schools.

At hearing, Seaman discussed each of the eleven goals in the proposed IEP and explained how each would benefit Student. She was confident Student could make progress in general education under the provisions of the offered IEP.

Seaman also confirmed the view that she expressed in her December 2021 academic assessment and to the IEP team, that with the help of a DM system like the one Student wore in his Echo Horizon class, he could understand lessons and prompts

and keep up with the class. Seaman opined to the IEP team and at hearing that a full time DHH teacher in Student's general education classroom was unnecessary and could lead to overdependence on that teacher.

On the question of overdependence, the other San Diego members of the IEP team, all of whom had experience educating and working with DHH students, agreed with Seaman. The notes of the IEP team meeting in January 2022 stated that the IEP team was concerned that too much adult support in the classroom could have harmful effects because it could create dependence on adults, reduce opportunities for interactions between Student and his peers, and hinder his progress. The notes of the March 2022 meeting stated that having a dedicated teacher for Student all day was not the least restrictive environment, and his present levels of performance did not necessitate that level of support.

Speech-language pathologist Debbie Slavick had been a DHH teacher for 30 years. She is married to a deaf person. She observed Student at Echo Horizon during the two-day visit and administered a wide variety of standardized and other instruments measuring various aspects of his speech and hearing. She also reviewed Student's records and interviewed him, his Parents and his teachers.

At hearing, Slavick opined that Student did not need a full-time DHH co-teacher in his general education class. In her experience, when she assisted a child too much in the classroom, the student became dependent on her. Slavick reported, and confirmed at hearing, that during her observation at Echo Horizon, Student engaged in and sometimes initiated conversations. He interacted with peers across a variety of

situations. He followed two-step directions with minimal repetition, including some novel instructions, and was beginning to understand three-step instructions. He needed occasional repetition but responded appropriately to teacher questions. He raised his hand when he wanted to talk and contributed on-topic comments and questions. Echo Horizon teachers stated in response to questionnaires that Student had good access to sound and did well even in noisy situations. Slavick thought he understood the lessons very well. She thought the March 25, 2022 IEP offered adequate instruction in reading and math, and she was confident that Student could receive a FAPE under its terms.

Other San Diego witnesses agreed that the level of services in San Diego's final IEP offer would provide Student a FAPE. These included Ward, the school psychologist who had 17 years of experience teaching the deaf, is married to a deaf person, and has a deaf son. Ward believed that one hour of DHH services a day in class was sufficient for Student's needs. Speech-language pathologist Sarah Kukuchek opined that the placement at Lafayette and the services in the offered IEP were sufficient for Student's needs, and audiologist Amy Ferrall-Pack established that the audiological services in San Diego's offer were sufficient for Student's audiological needs.

Parents testified that Student needed full-time DHH support in class. They explained that the purpose of having a full-time DHH co-teacher in the Lafayette class would be to have someone trained in teaching DHH students watch Student throughout the day for signs of lack of understanding and intervene as necessary.

Student called two expert witnesses who testified that Student needed more DHH support than San Diego's offer provided. Joan Hewitt, a pediatric audiologist in private practice, had a doctoral degree in audiology. She was certified by the American

Board of Audiology, held a certificate of clinical competence from the American Speech-Language-Hearing Association, and was licensed in dispensing audiology by the State of California. She had many years of experience in audiology in a variety of roles.

Hewitt had administered audiological tests to Student every six months for several years, most recently in March and August 2022. Her written reports from those tests made some educational recommendations, but they did not address any need for a DHH co-teacher or for any observation in class.

However, Hewitt opined at hearing that Student was far behind his chronological peers in the development of speech and language. She estimated that a student that far behind would need to make 18 months of progress every year to catch up to his peers. She observed that Student was four years behind his peers. By that formula Student would therefore require eight years of intensive remedial instruction.

Hewitt testified that for DHH support, Student needed teachers who were specially trained in supporting speech and language, and someone in the classroom at all times to pre-teach and post-teach. Having a full-time DHH teacher in his general education classroom would be “incredibly beneficial” to him, she stated, because a general education teacher often cannot tell that a smiling, apparently attentive student is missing everything. Without that level of support, Hewitt believed that Student could not make the progress he needed to make.

Hewitt’s opinion on the need for a full-time DHH teacher in Student’s classroom was unpersuasive for several reasons. There was no evidence that Hewitt had any training or experience that would equip her to arrive at such an opinion. She was an audiologist, and her information about Student was derived from audiological tests.

She was not a credentialed teacher or a speech-language pathologist and had no significant background in early childhood language development or education. There was no evidence Hewitt

- was familiar with the March 25, 2022 IEP offer,
- ever observed Student in any classroom,
- knew anything about the DHH program at Lafayette Elementary, or
- had any knowledge of the skills or training of the Lafayette staff that would serve Student.

In addition, Hewitt's disagreement with San Diego's offer assumed that Student would have received about one hour a day of DHH support. In fact, he would have received three hours a day under the final IEP offer. Hewitt was not asked to address the sufficiency of that much DHH support, and did not offer an opinion on that subject.

Finally, the evidence showed that the opinions Hewitt offered at hearing were apparently new, and were never communicated to Student's IEP team before or during the December 2021 or January or March 2022 sessions of the IEP team meeting. The meeting notes of the three sessions did not mention her, and the signature pages for those meetings did not include her. There was no evidence that she provided her opinions on needed DHH services in any written report.

Hewitt's testimony is thus partially precluded from consideration by the snapshot rule. An IEP is evaluated on the basis of a snapshot in time capturing the information that was available to the IEP team when it made the decisions at issue, not on the basis of subsequent developments or later-formed opinions. An IEP is not judged in hindsight. A tribunal must look to the IEP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably

calculated to confer Student with a meaningful benefit. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Hewitt's testimony was helpful in explaining the technical nature of Student's disabilities, but it cannot be used to undermine the decisions made in the January or March 2022 sessions of the IEP team meeting.

For the reasons above, Hewitt's opinions about Student's needs and the District's offer are not given substantial weight.

Student's other expert witness, Jennifer Mascolo, was a DHH teacher at Echo Horizon from 2002 to 2022. She then became the Director of the Echo Center, the unit of the school that educates DHH students. At the time of hearing, Echo Horizon had approximately 199 students, 15 percent of whom were deaf and hard of hearing. Mascolo had an Educational Specialist/DHH credential and was one of Student's teachers in his first year at Horizon, when he was in pre-kindergarten. However, she did not know anything about San Diego's program at Lafayette. She had never taught in a public school.

Mascolo attended the December 2021 and January 2022 IEP team meetings and expressed opinions there that were consistent with her testimony at hearing. She testified that Student had very strong student skills and was a diligent worker, but that his student skills might be deceiving because he sometimes looked like he was understanding more than he really was. Mascolo opined that Student would benefit from DHH support all day, because he sometimes looked like he was understanding the material but if questioned closely might have holes in his understanding. She was asked twice for specific examples but responded only with the generality that he sometimes missed things.

Mascolo testified that the DHH teacher in Student's current class was not actually a credentialed DHH teacher, and the evidence showed that the DHH teacher did not spend all of her in-class time watching Student for signs of misunderstanding. What Mascolo and Parents called full-time intensive DHH support proved to be only the physical presence all day of the DHH teacher. Neither Mascolo nor Parents claimed that the DHH teacher was there just to assist Student.

This confirmed the observations of the San Diego assessors who spent two days at Echo Horizon. They saw the DHH teacher individually help the two other DHH students in the pre-kindergarten class, and sometimes assist some of the eight nondisabled students in the class. Kukuchek reported seeing frequent checks for understanding with all students. But in their assessments and testimony, the four assessors did not report any instance during their two-day observation of any intervention with Student because of any misunderstanding or confusion he might have had, nor did they report seeing any pre-teaching or post-teaching. Seaman did not recall any instance during her observation that the DHH teacher approached Student, and school psychologist Ward established that she did not see any instance in which Student misunderstood instructions.

In short, the evidence showed that Student was doing well at Echo Horizon without the type of full-time DHH support that Student now argues he must have. In terms of staffing, the only significant difference between San Diego's Lafayette classroom and Student's class at Echo Horizon was the difference between the physical presence of a DHH teacher three hours a day, and one for the full day. The length of the school day at Lafayette is not in the record, and there was no evidence that this minor difference would have had any effect on Student's access to the curriculum.

Mascolo was asked whether she thought Student could have benefited under the Lafayette program and responded that he would need more than one hour of support. However, that was based on her understanding of the IEP draft of January 2022, not the final offer of March 25, 2022. Mascolo was not asked whether Student would need more than three hours of DHH support. And she offered her opinion without knowing of or evaluating the rest of the services and supports in the IEP and embedded in the Lafayette classroom, including the assistance of general education teachers experienced in teaching DHH students. Seaman established without contradiction that because of their long experience with DHH students, the general education teachers at Lafayette knew how to recognize when DHH students were missing information, and how to prompt them.

Much of Student's closing brief is dedicated to attacking the IEP drafts that were the products of the December 16, 2021 and January 12, 2022 portions of the IEP meeting, and particularly the preliminary proposal for one hour a day of DHH support. However, Student identifies no authority that would suggest an IEP should be evaluated according to provisions in preliminary drafts. Parents considered and rejected the March 25, 2022 IEP offer, not any earlier version. Student concedes that Parents' decision to leave him in private school and seek reimbursement was based on that March 25, 2022 offer.

Student did not meet his burden of proving that San Diego's March 25, 2022 IEP would have provided insufficient DHH support in class, or even that a single hour of DHH support would have been insufficient. Nor did he carry his burden of proving that Student needed more support in reading and math than the offer provided. Mascolo was asked directly whether she thought Student could get no benefit at all from San

Diego's offered program. She declined to agree with that statement. She testified only that he would not get enough DHH services to achieve the level of progress she believed appropriate for him. This, even if correct, does not establish a denial of FAPE.

Student did not prove that San Diego denied him a FAPE between January 1 and July 8, 2022, by failing to offer a placement that met his academic needs, or by failing to offer adequate deaf and hard of hearing services.

ISSUE 2: DID SAN DIEGO DENY STUDENT A FAPE FROM JANUARY 1 TO JUNE 8, 2022, BY FAILING TO OFFER A PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT?

Student contended in his complaint and prehearing conference statement that San Diego did not offer him a placement in the least restrictive environment. However, Student did not produce any evidence at hearing to support the contention and only tangentially addresses it in his closing brief. Student mentions the concept of least restrictive environment twice, but only as part of his argument that San Diego's offer was confusing and unclear. Student does not address why the offered placement might not comply with the least restrictive environment requirement.

San Diego contends that its offer would have placed Student in the least restrictive environment, in a general education class with typical peers, on a campus where typical peers were in the majority, with pull-out for small group instruction only 3 percent of his time.

Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2006); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers to the maximum extent appropriate, and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general 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)(2)(ii)(2006); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403; *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

In *Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, the Ninth Circuit set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment. A tribunal must balance

1. the educational benefits of full-time placement in a regular classroom,
2. the non-academic benefits of full-time placement in a regular classroom,
3. the effects the presence of the child with a disability has on the teacher and children in a regular classroom, and
4. the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404.)

On balance, considering these factors, the general education classroom San Diego offered was the least restrictive environment for Student. The parties agree that Student is benefiting from being in a general education classroom. He had shown at Echo Horizon that he could keep up with the grade level curriculum in a general education class and fully participate in the class.

Placement at Lafayette would have provided Student substantial nonacademic benefit because it would have given him many language models, and many nondisabled peers with whom to interact, and also the benefit of large numbers of other DHH students.

All the evidence showed that Student was well-behaved and never disrupted his class or troubled his teachers. There was no evidence that he had any adverse effect on any school staff or his peers. In addition, there was no evidence at hearing about the cost of the placement.

Student did not introduce any evidence at hearing that would have suggested the offered placement ran afoul of the *Rachel H.* criteria. Student did not prove that San Diego denied him a FAPE from January 1 to June 8, 2022, by failing to offer him a placement in the least restrictive environment.

ISSUE 3: DID SAN DIEGO DENY STUDENT A FAPE FROM JANUARY 1 TO JUNE 8, 2022, BY FAILING TO OFFER STUDENT A FULL DAY OF INSTRUCTION?

Student did not address this issue in his closing brief. The evidence did not support the argument. Seaman established that in her school district, a kindergarten providing less than a full school day did not exist. Student introduced no evidence to the contrary.

Student did not prove that San Diego denied him a FAPE from January 1 to June 8, 2022, by failing to offer him a full day of instruction.

ISSUE 5: DID SAN DIEGO DENY STUDENT A FAPE FROM JANUARY 1 TO JUNE 8, 2022, BY FAILING TO OFFER HIM SPECIALIZED ACADEMIC INSTRUCTION IN MATH AND READING?

In his complaint and prehearing conference statement, and throughout the IEP process, Student contended that to provide him a FAPE, San Diego was required to provide him 45 minutes a week of specialized academic instruction in math and 45 minutes a week of specialized academic instruction in reading.

Student in his closing brief does not mention this contention. The evidence did not support the contention.

In the IEP process, the parties disputed the meaning of the term “SAI,” or specialized academic instruction. Parents did not regard in-class DHH support for subjects like math and reading as SAI, while San Diego did.

The evidence showed without contradiction that the instruction in math and reading that Student would have been provided under the offered IEP by DHH specialists pushing into his classroom constituted specialized academic instruction. California law does not specifically define the term “specialized academic instruction,” but the understanding of that term in California is that its meaning is the same as the federal term “specially designed instruction.” (See, e.g., California Legislative Analyst, Overview of Special Education in California, Jan. 3, 2013 (<https://lao.ca.gov/reports/2013/edu/special-ed-primer/special-ed-primer-010313.aspx> [as of June 15, 2021]); California Teachers’ Assn., Special Education in California (2012) (<http://www.cutacentral.org/wp-content/uploads/2017/08/CTA-SPED-resource-guide.pdf>, p. 13 [as of June 15, 2021]). Federal law defines the term “specially designed

instruction” as “adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction” to meet the child’s unique needs. (34 C.F.R. § 300.39(b)(3) (2006).) That definition includes individualized in-class support by a DHH specialist for a particular student, which of necessity involves adapting content, methodology and delivery of instruction to the needs of the student receiving the support.

Slavick holds a special education teaching credential for DHH. She established at hearing that her credential qualifies her to provide specialized academic instruction to students, which includes support in math and reading. Mascolo agreed, testifying that the in-class DHH support provided in Student’s class at Echo Horizon constituted specialized academic instruction. There was no evidence to the contrary.

The specialized academic instruction in the March 25, 2022 offer exceeded 90 minutes a week, the amount Parents requested. Student did not prove that San Diego denied him a FAPE from January 1 to June 8, 2022, by failing to offer him specialized academic instruction in math and reading.

ISSUE 6: DID SAN DIEGO DENY STUDENT A FAPE FROM JANUARY 1 TO JUNE 8, 2022, BY FAILING TO PROVIDE A CLEAR AND SPECIFIC OFFER?

Student argues that the January 13, 2022 draft IEP document was fatally defective because it was unclear and contradictory. At the IEP team meeting the day before, the parties discussed possible placements at Lafayette Elementary School and at Florence Elementary School, Student’s home school. The January draft stated in some places that Student’s services would be delivered at Lafayette, but in other places that they would be delivered at Florence. It also stated in the IEP notes that DHH services would be

delivered in class, but stated on the educational settings page that specialized academic instruction would occur in a separate class. Student contends that the confusion engendered by these contradictions made it impossible for Parents to decide whether to accept or reject the offer.

San Diego contends that whatever minor confusion the conflicting provisions in the January 13, 2022 draft IEP might have caused was resolved by the final IEP offer on March 25, 2022. It also contends that any confusion was harmless because Parents had no intention of accepting San Diego's offer whether it was at Lafayette, at Florence, or at some other district school.

In *Union Sch. Dist. v. Smith* (1994) 15 F.3d 1519 (*Union*), the school district sent a brief letter to the parents discussing a particular school as a possible placement, and mentioning available counseling. But the district made no formal written offer to the parents, and argued in court that this was acceptable because parents had previously expressed opposition to placement at that particular school, and therefore would not have accepted the offer even if it had been in writing. (*Id.* at pp. 1525-1526.)

The Ninth Circuit disagreed, holding that the district had violated the IDEA because a district is required to make a clear written IEP offer that parents can understand and accept or reject. The Court emphasized the need for rigorous compliance with this requirement because a written offer would do much to eliminate troublesome factual disputes years later about what was offered, and because a clear written offer would greatly assist parents in presenting any complaints they might have about the offered placement. (*Union, supra*, 15 F.3d at p. 1526; see also *Redding Elem. Sch. Dist. v. Goyne* (E.D. Cal., March 6, 2001, No. Civ. S001174WBSGGH) 2001 WL 34098658, pp. 4-5 (no formal offer of placement at a public school).

Later decisions have extended the *Union* requirement to cases in which the district made a written offer, but the offer was for multiple placements and the district declined to choose one, leaving that duty to parents. In *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, the district offered four placements in different programs at four different schools. The district declined to use its expertise to select one of the programs, and declined to propose a single placement, leaving it to parents to determine which was best for their child. (*Id.* at pp. 1098, 1107-1108.) The district court held that this was a violation of *Union*. It held that school districts must clearly identify an appropriate placement from the range of possibilities. It was the school district's responsibility to use its expertise to decide which program was best suited for the student's unique needs. (*Id.* at p. 1108; see also *A.K. v. Alexandria City Sch. Bd.* (4th Cir. 2007) 484 F.3d 672, 681 (district proposed five placements and would not commit to any one of them).)

Once again, Student's attack is focused on a preliminary draft of the IEP, not the final offer. Seaman sent the draft from the January meeting to Parents on January 13, 2022, with an email that described it three times as a draft. Parents likely understood it as a draft, since they did not accept or reject it but asked for additional changes in it. Student does not identify any decision that holds a preliminary draft of an IEP violated *Union* when the final offer was sufficiently clear.

The January 2022 draft IEP was in fact confusing. Seaman explained at hearing that the persistence of the mention of Florence instead of Lafayette was due to a limitation in the software San Diego used to print IEPs, and it was not until well after the January meeting that San Diego was able to fix that.

District witnesses testified persuasively at hearing that after the January meeting, everyone on the IEP team understood the placement offer was for Lafayette. Father testified he thought it was for Lafayette. Mother testified that after the January meeting she was confused but thought the offer was for Florence. However, she also testified that she did not understand the offer until she saw the IEP document, which she received on January 13, 2022, the day after the January 12 IEP team meeting.

In any event, the March 13, 2022 IEP team meeting and the final offer in the March 25, 2022 IEP removed all doubt and clearly established that the offer was for placement at Lafayette. Parents understood it that way when they rejected it. The team notes for the March 25, 2022 IEP team meeting directly addressed the previous confusion, stating that the offer was for Lafayette Elementary and any reference to Florence was an error. The IEP document also stated consistently that DHH services would be delivered in the classroom.

Because the final offer ended the confusion and was clear, this case is not like *Union* or *Almasi*. Here San Diego discussed multiple placements in the IEP process, but by March 25, 2022, the final offer was for a single school and a single program. Parents knew exactly what the offer was, and made their decision based upon the offer in the March 25, 2022 IEP after full consideration. Notably, Parents did not testify that any confusion or lack of clarity at any stage of the IEP process had any effect on their decision-making.

Student claims in his closing brief that the final March 25, 2022 IEP document had inconsistencies, but did not identify these alleged inconsistencies in his brief or at

hearing. If Student meant to refer to the few mentions of Florence Elementary still embedded in the March 25, 2022 IEP, any confusion was eliminated because the error was fully explained in the March 25, 2022 document itself.

In his closing brief, Student argues at length that some provisions in the final offer were inconsistent with the testimony of some San Diego witnesses at hearing. If there were inconsistencies, they did not arise until those witnesses testified at the hearing in September 2022 and could not have had any effect on the clarity of an offer made in March 2022.

Student did not prove that San Diego's final offer was confusing or unclear. However, even if Student had proved that proposition, the confusion and lack of clarity would have constituted harmless error. A procedural violation of the IDEA results in a denial of a FAPE only if

- the violation impeded the child's right to a FAPE, s
- significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parent's child, or
- caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subds. (f)(2), (j).)

During the IEP process Parents showed little concern about the location of the offer, and did not make any significant effort to clear up any confusion. Parents' central concern was that the services offered were insufficient. From the outset of the IEP

process, Parents advocated adoption of a specific list of requests that, if included in the IEP, would convince them to return Student to a San Diego school. At every session of the IEP team meeting, and repeatedly in writing between meetings, they requested that the District make them an offer that included

- a full-time DHH co-teacher in the general education class,
- a dedicated 90 minutes a week of collaboration between the general education and DHH teachers,
- three 30-minute sessions a week of speech-language instruction, one delivered on a push-in basis and the other two delivered individually outside of class,
- 45 minutes a week of push-in specialized academic instruction in math,
- another 45 minutes of push-in specialized academic instruction in reading, and
- one hour a week of auditory verbal therapy by a person trained in that skill.

These requests did not vary throughout the IEP process, and San Diego's unwillingness to adopt them led directly to Parents' rejection of the offer. On May 6, 2022, Parents rejected the May 25, 2022 IEP because they did not feel the goals and services offered by the district were adequate or appropriate. In that rejection Parents made no objection to placement at Florence or Lafayette. At hearing, Father testified that Parents were hoping to get services similar to those in Echo's program. He testified emphatically that he would have rejected San Diego's offer of placement had it been

offered at Florence. He also testified that, even if Echo Horizon had changed Student's instruction to such a program, he would have rejected it. Parents' rejection of the final offer was based on their perception of the merits of the offer. There was no evidence that Parents rejected the offer because of any confusion about the offered location or confusion about anything else.

Student in his closing brief argues that San Diego should have had a clear and understandable IEP in place at the beginning of the school year. (See 34 C.F.R. § 300.323(a)(2006); *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) However, the timeliness of the offer was not an issue raised in Student's complaint, and is not at issue here. Student's claims are limited to San Diego's actions or inactions from January 1, 2022 through June 8, 2022.

The evidence showed that an IEP team meeting to develop Student's educational program was convened in December 2021 pursuant to the parties' written settlement agreement in February 2021. The agreement provided that Student would be regarded through December 31, 2021 as a privately placed student and would not be entitled to any special education or services during that time, specifically including creation of an IEP.

Parents participated fully in the IEP process, were able to present complaints about the offer, and understood the offer. Student did not prove that San Diego denied him a FAPE from January 1 to June 8, 2022, by failing to provide a clear and specific offer. If it had, any violation would have been harmless.

It is not necessary to address Student's arguments concerning reimbursement of his Parents for tuition and related costs at Echo Horizon. His request for reimbursement fails at the threshold because Student did not prove that San Diego failed to offer him a FAPE. The IDEA excuses a local educational agency from paying for the cost of education of a disabled child if that agency made a FAPE available to the child and the parents elected to place the child in a private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(a)(2006).) That is the case here.

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:

San Diego did not deny Student a FAPE between January 1 and June 8, 2022, by failing to offer a placement that met his academic needs.

San Diego prevailed on Issue 1.

ISSUE 2:

San Diego did not deny Student a FAPE between January 1 and June 8, 2022, by failing to offer him a placement in the least restrictive environment.

San Diego prevailed on Issue 2.

ISSUE 3:

San Diego did not deny Student a FAPE between January 1 and June 8, 2022, by failing to offer Student a full day of instruction.

San Diego prevailed on Issue 3.

ISSUE 4:

San Diego did not deny Student a FAPE between January 1 and June 8, 2022, by failing to offer adequate deaf and hard of hearing services.

San Diego prevailed on Issue 4.

ISSUE 5:

San Diego did not deny Student a FAPE between January 1 and June 8, 2022, by failing to offer specialized academic instruction in math and reading.

San Diego prevailed on Issue 5.

ISSUE 6:

San Diego did not deny Student a FAPE between January 1 and June 8, 2022, by failing to provide a clear and specific offer.

San Diego prevailed on Issue 6.

ORDER

All of Student's requests for relief are denied.

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.

Charles Marson

Administrative Law Judge

Office of Administrative Hearings