

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

THE CONSOLIDATED MATTERS INVOLVING:  
PARENT ON BEHALF OF STUDENT, AND  
SAN DIEGO UNIFIED SCHOOL DISTRICT.

CASE NO. 2024120686

CASE NO. 2025040617

DECISION

JULY 24, 2025

On December 17, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming San Diego Unified School District, called San Diego.

On March 12, 2025, OAH granted Student's motion to amend her complaint and reset the calendar. On April 14, 2025, San Diego filed a due process hearing request naming Parent on behalf of Student. On April 21, 2025, OAH granted San Diego's motion to consolidate, naming Student's case as primary, and the parties' joint request for a continuance of the consolidated matter.

Administrative Law Judge Cararea Lucier heard this matter via videoconference on May 6, 7, 20, 21, 22, 27, 28, 29, and June 6, 2025.

Attorneys Jennifer Holzman, Matthew Storey, and Marymichelle Lotano represented Parent and Student, supported by law intern Kaye Valdez. Parent attended all hearing days on Student's behalf. Rebecca Diddams represented San Diego. Program Specialist Dr. Royal Lord attended all hearing days on San Diego's behalf.

At the parties' request, the matter was continued to July 3, 2025, for written closing briefs. The record was closed, and the matter was submitted on July 3, 2025.

## STUDENT'S ISSUES

A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

1. During the 2022-2023 school year, from December 17, 2022, did San Diego deny Student a FAPE because the IEPs dated March 23, 2023, and April 4, 2023, failed to offer:
  - a. appropriate specialized academic instruction; and
  - b. placement in the least restrictive environment?
2. During the 2023-2024 school year, did San Diego deny Student a FAPE because the December 14, 2023, IEP amendment, and March 7, 2024 IEP, failed to offer:
  - a. appropriate specialized academic instruction; and
  - b. placement in the least restrictive environment?

## SAN DIEGO'S ISSUES

3. Was San Diego's December 16, 2024 psychological assessment of Student appropriately conducted such that it is not obligated to fund an independent educational evaluation?
4. Did San Diego's February 5, 2025 IEP, continued on February 19, 2025, as amended March 12, 2025 offer Student a FAPE in the least restrictive environment such that it may implement the IEP without parental consent?

At the beginning of the first day of the due process hearing, the parties stipulated to corrections of their respective issues. Student clarified Issue 1 should have referred to a March 23, 2023 IEP, rather than a March 3, 2023 IEP. San Diego clarified Issue 4 referred to a February 5, 2025 IEP, continued on February 19, 2025, and amended March 12, 2025. Student also withdrew former Issue 2, subsection (b), regarding transportation. The issues have been renumbered accordingly, but no other changes have been made to the issues.

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## 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, called 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; 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).)

Here, Student bears the burden of proof on Student's Issues, 1 and 2. San Diego bears the burden of proof on San Diego's Issues, 3 and 4. 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 15 years old and in tenth grade at the time of hearing. She resided with Parent within San Diego's geographic boundaries at all relevant times. Student was eligible for special education under the categories hard of hearing and other health impairment.

## STUDENT'S EDUCATIONAL BACKGROUND AND HEARING IMPAIRMENT

Student's educational strengths included:

- a strong work ethic;
- high motivation to succeed academically, especially in reading;
- good attendance;
- a good ability to follow instructions in both the general and special education environments; and
- positive relationships with teachers and peers.

Student's educational challenges included:

- hearing impairments;
- language deprivation for the first 18 months of her life;
- below average cognitive skills;

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- deficits in memory, processing, and executive functioning, likely caused by her birth mother's alcohol use while pregnant;
- apraxia of speech, causing speech motor planning difficulties; and
- anxiety.

She enjoyed ice-skating, playing on her phone, and going out to eat sushi.

Student was born with bilateral sensorineural hearing loss, profound in her right ear and profound rising to moderate in her left ear. Parent adopted Student from an orphanage in Russia and brought her to the United States when she was 18 months old. For the first 18 month of her life, Student did not have access to hearing or language. Parent promptly had Student evaluated and fitted with hearing aids. At age seven, Student received a cochlear implant in her right ear. At age 15, Student received a cochlear implant in her left ear. For the time period at issue, she could understand 88 percent of auditory speech at normal conversational level, in a quiet environment.

Student was bilingual, communicating through American Sign Language and spoken English. Student was bicultural, participating in Deaf community and culture as well as the hearing community around her.

Student's preferred mode of communication varied depending on the situation and the individuals around her. Student communicated with her Deaf friends and teachers in American Sign Language and did not use her voice. She communicated with her hearing friends, teachers, Parent, and family, in spoken English and did not want to be seen signing. She could switch between communication styles depending on her environment and communication partners.

This Decision recognizes that some in the Deaf community reject the idea that deafness is a disability. Speech and language pathologist Cynthia Konow-Brownell and math teacher John Brooks explained “small d deafness” was a clinical designation but “big D deaf” referred to individuals in the Deaf community. They did not consider deafness a disability, but rather a unique quality with which some individuals are born. Konow-Brownell cautioned it was insulting to Deaf individuals to be described as disabled or handicapped.

This Decision, while respecting the perspective of Deaf culture, must necessarily refer to deafness as a disability because it is categorized as such by the IDEA. This Decision will refer to individuals experiencing deafness and hearing loss as “Deaf” or “DHH,” meaning Deaf or Hard of Hearing. Individuals who were not experiencing deafness or hearing loss are referred to as “hearing.” Students who were not eligible for special education are broadly referred to as “non-disabled.”

ISSUE 1(a): DURING THE 2022-2023 SCHOOL YEAR, FROM DECEMBER 17, 2022, DID SAN DIEGO DENY STUDENT A FAPE, BECAUSE THE IEPS DATED MARCH 23, 2023, AND APRIL 4, 2023, FAILED TO OFFER APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION?

Student contends she has not made progress in reading, writing, and math over the past four years. Student alleges San Diego continued to offer the same services year after year despite her lack of academic progress. Student asserts San Diego failed to provide specialized academic instruction based on her individual needs so she could make meaningful academic progress.

San Diego contends it offered Student appropriate specialized academic instruction in the March 23, 2023 and April 4, 2023 IEPs to address her Deafness, and deficits in memory and processing. San Diego asserts its DHH programs offered Student curriculum at her instructional level, small group instruction, a teacher of the Deaf fluent in American Sign Language, and access to signing peers.

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 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 (*Rowley*); *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000] (*Endrew F.*).

An IEP must be "appropriately ambitious." (*Endrew F.*, *supra*, 580 U.S. 386, 402-403.) An IEP that offers "merely more than de minimis" progress violates the IDEA. (*Id.*) An IEP must be crafted to meaningfully benefit a student. (*Los Angeles Unified School Dist. v. A.O.* (9th Cir. 2024) 92 F.4th 1159.)



An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child. An IEP must include a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals. It must state how the child will be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and nondisabled children in the activities described in federal regulations. (34 C.F.R. § 300.320(a)(4).)

Related services are supportive services that a disabled student requires to benefit from special education. (34 C.F.R. § 300.34.) Related services include developmental, corrective, and supportive services. (*Ibid.*) Specialized academic instruction is the term San Diego used to describe the related service of academic intervention.

The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide educational benefit. (*R.P. v. Prescott Unified Sch. Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122.)

During the 2022-2023 school year, Student attended eighth grade at Innovation Middle School within San Diego. Innovation was a comprehensive campus and included San Diego's specialized DHH program. Student attended the DHH program for all classes except physical education. Student enjoyed school during eighth grade. She liked learning and had Deaf friends, who were the same cohort of students with whom she had been educated for many years. Most of her DHH classes had six to eight

students. She was significantly behind eighth-grade levels in all academic areas. She needed more time and repetition to learn than non-disabled students, but performed academically in the middle of her cohort of DHH classmates. She was not an outlier in terms of her academic skills in the DHH program.

Teacher Jason Nichols taught Student's DHH English and history classes using simultaneous communication, meaning he both signed in American Sign Language and used spoken English at the same time. Reading and writing assignments required printed English. Nichols believed Student's academic abilities were at the third-grade level. However, Nichols, like all San Diego witnesses believed Student could make academic progress and expected her to reach fourth-grade levels, and beyond.

On March 23, 2023, and April 4, 2023, San Diego convened IEP team meetings for the yearly review of Student's educational program. Student had difficulty with

- reading comprehension,
- vocabulary,
- grammar,
- math computations, and
- word problems.

She required sign language support and specialized academic instruction. Additionally, Student required adapted teaching techniques and accommodations for assignments.

San Diego offered Student specialized academic instruction delivered within the DHH program for the majority of her school day. This amounted to 23 hours, 45 minutes of specialized academic instruction per week in eighth grade at Innovation, and 19 hours, 30 minutes per week in ninth grade at Madison High School.

The preponderance of the evidence showed San Diego's specialized academic instruction offer, as delivered through the DHH program, was not appropriate for Student in light of the information available to the IEP teams at the March 23, 2023 and April 4, 2023 meetings. Data from standardized assessment tools credibly demonstrated Student was not making academic progress. At the time of the meetings, the IEP team had data showing Student had not made academic progress in reading, writing, or math since March 2021.

In reading, Student was at a third-grade level. The IEP team reviewed Student's present levels of performance. Student's reading was assessed using the Basic Reading Inventory, which ranked a student's reading level by grade year. However, Student's reading scores on the Basic Reading Inventory in 2023 were substantially similar to her scores in March 2021 and 2022, remaining at a third-grade level. Despite Student's lack of progress in reading, San Diego failed to adjust Student's specialized academic instruction in reading.

In writing, Student struggled and had not made meaningful progress since 2021. In March 2021, Student could write 10 sentences but struggled to write paragraphs. She could write simple, complete sentences involving a subject and predicate but had trouble with grammar. In April 2023, she was still working on writing more than one paragraph, as she had in 2021. Nichols believed she made progress in writing because he believed her sentences were getting longer. This vague recollection, not demonstrated by assessments or objective data, was not persuasive. Despite Student's lack of progress in writing, San Diego failed to adjust Student's specialized academic instruction in writing.

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Similarly, in math, Student made minimal academic progress from March 2021, through March 2023. In March 2021, Student was functioning in the third-grade range in math. Some of her skills were at a second-grade level, such as her ability to add and subtract multi-digit numbers with grouping. Some of her skills touched on fourth and fifth-grade levels but required teacher prompting and modeling. For example, attempting to multiply three-digit by two-digit numbers and understanding division concepts was an emerging skill requiring teacher prompts and repetition. She could solve third-grade level skills such as her times tables, from sets of threes through sets of nine, by counting on her fingers and using the stars and circles method. Overall, math teacher and case carrier Brooks confirmed the skills Student demonstrated in 2021 were around the third-grade level. The next year, the April 18, 2022 IEP documented Student continued to demonstrate third-grade math skills. And, in March and April 2023, Student still only demonstrated third-grade math skills. Despite Student's lack of progress in math, San Diego failed to adjust Student's specialized academic instruction in math.

The specialized academic instruction delivered through San Diego's DHH program was designed to allow Deaf students to learn at their own pace. However, Student was heavily prompted and supported by teachers and staff for academic tasks. For example, one of Student's reading goals asked her to read a passage and offer a claim or opinion supported by her personal experience, or evidence from the text. To accomplish this task, Student was given a third-grade level reading passage. Then the teacher prompted Student to think about what she read. Next the teacher gave her an example question, such as "Which invention do you think is best?" The teacher gave Student three options of inventions from which to choose. She chose one. Then, the teacher prompted Student with "why?" Next, the teacher provided Student with sentence frames. Sentence frames provide sentences with spaces to fill in the blanks.

The teacher helped Student with vocabulary and spelling so she could fill in the blanks. In this way, Student completed a sentence with a “because” explanation. However, the heavy level of prompting and support made Student a passive participant in her own education.

Progress reports of Student’s progress on her annual goals were not reliable. Service providers offered anecdotes and general assurances, but not data or objective evidence that Student was progressing in the areas the goals targeted. The testimonial evidence demonstrated Student was heavily prompted on her academic goals in all areas. Ultimately, the progress reports on her goals did not reveal what she could independently accomplish. Similarly, the March 23, 2023 and April 4, 2023 IEPs were vague in describing whether or not Student was in fact making progress on her goals.

San Diego offered several defenses regarding Student’s lack of academic progress. San Diego staff pointed to statistics that on average, Deaf students completed high school with a third-grade reading level. District American Sign Language Specialist Dr. Alexander Zernovoj, who assessed Student, explained this was a well-established fact from research and data. He suggested this was caused by early language deprivation. In contrast, Deaf children with Deaf parents who signed at home were more likely to reach developmental milestones at the same time as hearing children, and less likely to struggle with reading. However, with respect to Student, this argument was contradicted by the fact that all San Diego witnesses believed Student was capable of progressing to a fourth-grade reading level. Student successfully impeached numerous San Diego witnesses on this point.

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San Diego also sought to characterize Student's lack of academic progress as a plateau. Program Specialist Amy Seaman explained many students, in general, plateau in reading between the third and fourth-grade levels. She felt it was possible Student was experiencing such a plateau, but expected Student to emerge from this plateau and reach a fourth-grade reading level in the future. She could not estimate a timeframe. Brooks, who was Student's case carrier and knew her well, also believed many Deaf students hit a plateau in reading. Again, the Supreme Court's decision in *Endrew F.* does not allow for a school district to accept a student making *de minimis* progress over multiple years. (*Endrew F.*, *supra*, 580 U.S. 386.)

Next, San Diego suggested Student had made academic progress, but such progress could not be quantified on most assessments or through objective data. Administrator Cory Hoffman believed Student was making progress in reading, but that it was "subtle." San Diego's arguments that Student had plateaued academically and was making academic progress were not credible, because they were contradictory, subjective and not supported by objective assessment data.

San Diego witnesses also suggested Student's lack of academic progress was caused in part by Parent's inability to sign fluently. Many witnesses explained that Deaf students with the highest achievement in reading tend to come from families with Deaf parents, where the family signs at home. Deaf parents can help Deaf children make key connections about what they are learning and discuss what the children learned in school each day, through American Sign Language. Brooks felt Student was deprived of language at home because of Parent's rudimentary skills in American Sign Language.

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He also felt there was not successful collaboration between Parent and school staff, which negatively impacted Student's education and contributed to her lack of academic progress. School psychologist Dr. Renate Ward also testified Student's lack of a Deaf parent could be contributing to her reading levels.

Several facets of the DHH program appeared to negatively impact Student's academic progress. First, Student was heavily prompted on academic tasks, to the extent she did not acquire the skills. Second, DHH program staff believed Deaf students made slow progress or plateaued for long periods of time and did not see the urgency in responding to Student's lack of academic progress. Third, the DHH program prioritized language development over academic achievement. Finally, the curriculum did not cover grade-level content comprehensively, leaving Student with holes in her knowledge and skills.

San Diego's specialized academic instruction offer in the DHH program was not reasonably calculated to allow Student to make meaningful academic progress because the data demonstrated the strategies and curriculum the program used were not effective for Student. The law required San Diego to respond to Student's lack of academic progress by relying on the expertise of the professional educators within San Diego to develop alternative strategies and curriculum that could reach Student by considering new programs, curriculum, or methodologies. The evidence suggested her progress may have been slow, but that she did have the ability to exceed third-grade academic levels.

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San Diego failed to offer Student appropriate specialized academic instruction in the March 23, 2023 and April 4, 2023 IEPs. San Diego staff in the DHH program cared about Student and sincerely tried to provide her appropriate academic supports.

However, what they offered did not work. Year after year Student made minimal academic progress.

As such, San Diego failed to offer Student specialized academic instruction designed to provide educational benefit through an IEP reasonably calculated to enable her to make progress appropriate in light of her circumstances.

ISSUE 1(b): DURING THE 2022-2023 SCHOOL YEAR, FROM DECEMBER 17, 2022, DID SAN DIEGO DENY STUDENT A FAPE BECAUSE THE IEPS DATED MARCH 23, 2023, AND APRIL 4, 2023, FAILED TO OFFER PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT?

Student contends San Diego placed her in the segregated DHH program because that is where the supports were, rather than considering how to provide supports within the general education environment. Student asserts she would have benefitted socially, academically, and in spoken language, by hearing more spoken English from peers and teachers. Student contends she was isolated with her DHH cohort and could not build meaningful friendships with hearing students.

San Diego contends the IEP team reviewed the continuum of placement options and offered Student a placement in the least restrictive environment. San Diego contends she might have more interaction with hearing peers in general education, but at the cost to her academics due to the pace of the general education classes and lack



of opportunities for repetition. San Diego asserted it would not be possible to accommodate or modify general education academic classes to the extent necessary to educate Student satisfactorily.

School districts are required to provide each special education student with an appropriate program in the least restrictive environment. Removal from the regular education environment may only occur when the nature or severity of the student's disabilities 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)(2); Ed. Code, §§ 56031, 56033.5.) The IDEA also requires, to the maximum extent appropriate, that a child with a disability be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced:

- the educational benefits of full-time placement in a regular classroom;
- the non-academic benefits of full-time placement in a regular classroom;
- the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and
- the cost of placing the child with a disability full-time in a regular classroom.

*(Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1136-1137;  
*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404  
(*Rachel H.*).)

Deaf students are not exempted from the least restrictive environment mandate. However, the determination of the least restrictive environment for a Deaf student requires a nuanced consideration of the student's communication needs. As Student's reading teacher Mary Ann Gross artfully explained, "A vision impairment separates you from objects, but a hearing impairment separates you from people."

Education Code section 56000.5 includes a list of legislative findings from 1994, sometimes called the Deaf Children's Bill of Rights. The law states: "Each hard-of-hearing and deaf child should have a determination of the least restrictive educational environment that takes into consideration these legislative findings and declarations." The legislating findings include:

- "Hard-of-hearing and deaf children would benefit from an education in which they are exposed to hard-of-hearing and deaf role models."
- "It is essential that hard-of-hearing and deaf children, like all children, have an education with a sufficient number of language mode peers with whom they can communicate directly and who are of the same, or approximately the same, age and ability level."
- "It is essential for the well-being and growth of hard-of-hearing and deaf children that educational programs recognize the unique

nature of deafness and ensure that all hard-of-hearing and deaf children have appropriate, ongoing, and fully accessible educational opportunities.”

- “It is essential that hard-of-hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of proficiency.”
- However, Education Code section 56049 includes legislative findings from 2022:
  - “All pupils are general education pupils first, including pupils with disabilities.”
  - “Inclusion in general education classrooms and programs should be considered the first setting for all pupils, unless the individualized education program for a pupil with a disability determines that another setting is more appropriate to guarantee a free and appropriate public education.”

School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to:

- regular education;
- resource specialist programs;

- designated instruction and services;
- special classes;
- non-public, non-sectarian 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 instruction in hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

If it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050.)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*)

At the March 23, 2023 and April 4, 2023 IEP team meetings, San Diego offered Student continued placement in the DHH program at Innovation Middle School for the remainder of eighth grade. She spent the majority of her school day in a segregated

classroom setting, without non-disabled peers. She attended math, English, science, and history in small classes consisting entirely of other DHH students. She had access to non-disabled peers in physical education class, lunch, and passing periods.

Similarly, for ninth grade, San Diego continued to offer Student placement in the DHH program for the majority of her school day. She attended general education physical education, along with around five other students in her DHH program, assisted by one American Sign Language interpreter for the group. She continued to have access to non-disabled peers at lunch, in passing periods, and in the event she chose to participate in extracurricular activities.

Student was very social and friendly. She “sparkled” when amongst friends, according to speech and language pathologist Konow-Brownell. Student wanted to have more hearing friends at school, which she told Parent and school staff, including her case manager and math teacher Brooks, and her counselor, Clare Bobis. Her friends at school were primarily the same five DHH peers she had been educated with for most of her life. However, when her DHH friend group devolved into teenage drama, Student felt like she was the odd one out. She wanted more opportunities to develop additional friendships at school with hearing peers.

The preponderance of the evidence showed San Diego failed to offer Student a placement in the least restrictive environment in the March 23, 2023 and April 4, 2023 IEPs. There is no dispute Student could not have been educated in a full-time general education classroom, but the IEP team did not seek to educate her to the maximum extent appropriate with students who were not disabled.

## ACADEMIC AND NON-ACADEMIC BENEFITS

Applying the *Rachel H.* balancing test, Student could have received educational benefit from being educated in the general education environment. General education classes provided credits toward a high school diploma. Student told Brooks her goal was to earn a high school diploma. This was also Parent's goal for Student. Classes in the DHH program at Madison did not provide credits toward a high school diploma, instead placing Student on track for a certificate of completion.

General education classes would have exposed Student to grade-level concepts and skills. Gross found Student had holes in her knowledge of history that impeded her reading comprehension. For example, Student had never heard of the Holocaust, which was unusual for a high school student.

However, San Diego was concerned Student would have negative academic impacts from being in general education classes. The curriculum and pace of the classes might have been overwhelming for Student, exacerbating her anxiety. Student might have struggled to understand the content due to her cognitive ability and memory deficits. She required repetition of vocabulary, skills, and concepts. These downsides would have been more apparent in language intensive classes, such as English and history, although less so in classes with more visual and hands-on lessons like science.

Additionally, language was a concern. If Student chose to use American Sign Language in a general education class, she would not be able to have direct communication with peers in real time because she needed to rely on an interpreter. However, exposure to content and discussion of academic concepts with peers, even through an interpreter, would have provided Student with academic benefit.

Student obtained non-academic benefits from the general education environment by exposing her to more spoken English. As the Ninth Circuit explained in *Los Angeles Unified School Dist. v. A.O.* (9th Cir. 2024) 92 F.4th 1159, because children with cochlear implants were deprived of sound at a young age, they need as much exposure to language as possible so they can catch up to their typically hearing peers. Although Student signed, she also has cochlear implants and could use hearing and voice to communicate when she chose to do so. Additionally, the general education environment allowed Student opportunities to make friends with hearing students, which was a personal goal. Being in the general education environment would also help prepare Student for life after high school when she would likely interact with hearing individuals for employment, housing, and daily living needs.

## CLASSROOM IMPACT AND COST

As to the third *Rachel H.* factor, Student had a positive effect on the teachers and other students. By all accounts she was a sweet, social child who worked hard, followed instructions, and behaved within classroom expectations. As to the fourth factor, according to Bobis, the cost of educating Student in general education would not be more than her current placement.

Overall, the *Rachel H.* balancing factors reveal Student was not placed in the least restrictive environment in the March 23, 2023 and April 4, 2023 IEPs, because Student could have received significant academic and non-academic benefits from additional general education classes with the use of supplementary supports and services.

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## SUPPLEMENTARY AIDS AND SERVICES

The IEP team failed to meaningfully explore the use of supplementary aids and services to assist Student in participating within the general education environment at both Innovation Middle School and Madison High School. San Diego did not seriously consider less restrictive classes such as those co-taught by a DHH teacher and a general education teacher, available at both schools. The IEP team did not consider whether the general education curriculum could be modified to allow Student to learn with the same pace and content.

The IEP team did not consider steps it could take to meaningfully include Student with hearing peers during lunch, passing periods, and extracurricular activities. It was not sufficient to write in the IEP that Student had “access” to general education peers because her hearing impairment and anxiety required her to have support and adult facilitation to take advantage of social opportunities with non-disabled students.

San Diego also erred by not giving her opportunities to take general education electives and instead placing her in segregated electives such as “Freshman Foundations” for DHH students and DHH Reading Development.

San Diego’s failure to offer Student a placement with more general education classes was due, at least in part, to the philosophy of the DHH program that Deaf students belonged in Deaf classrooms with other Deaf students. San Diego’s DHH counselor Catherine Burge expressed directly what many witnesses alluded to: they did not believe that Deaf students should be educated with hearing students to the maximum extent possible. Teachers and staff in the DHH program did not prioritize



mainstreaming Deaf students with hearing students. As Brooks explained, it was not his role to encourage Student to interact with hearing peers. It was Student's personal decision as a Deaf student.

## SAN DIEGO'S DEAF AND HARD OF HEARING PROGRAM

San Diego was proud of its DHH program, which was located on three comprehensive campuses throughout the school district and was a well-respected program. The DHH program provided students with Deaf adults to serve as role models. It offered instructors with specialized understanding of Deaf learning and respect for Deaf culture. These Deaf adults, and hearing members of the Deaf community, rejected the idea that deafness was a disability. DHH Administrator Hoffman described the DHH program as fostering Deaf students' self-esteem and self-concept. Brooks modeled for his students that he was proud to be Deaf and did not feel the need to be "fixed."

Hearing staff within San Diego's DHH program were supportive members of the Deaf community. Speech and language pathologist Konow-Brownell proudly described herself as a child of deaf adults. She was fiercely protective and supportive of the Deaf students in San Diego. She supported any Deaf student who wanted to be placed in DHH classes surrounded by other Deaf students, if that was their choice, even if the student's IEP team determined general education was the child's least restrictive environment. In such a situation, she would stand up for the Deaf student's choice by penning a dissent in the IEP notes and elevating her concerns to her supervisor.

The DHH classrooms were housed on comprehensive school campuses, which technically allowed DHH students to access hearing students. District Audiologist Dr. Evelyn Smith described this setting as “the best of both worlds.” However, interactions between Deaf students and hearing students were never forced. This was a matter of principle, self-determination, and dignity for Deaf students. It was their choice.

San Diego considered placement of Deaf students in a cohort of DHH students to be less restrictive than placement with non-disabled peers because it allowed the Deaf students direct communication through American Sign Language, which is a separate language from English. Bobis described American Sign Language as an important part of Deaf culture. Hoffman described it as a human right for Deaf individuals to have access to their own language, American Sign Language. Deaf educators employed by San Diego recalled feeling isolated as children when they were placed in mainstream classroom settings with hearing peers who did not sign. All Deaf witnesses, and many hearing witnesses, unequivocally opined American Sign Language was not inferior to spoken English. They uniformly urged that Deaf students have the opportunity to choose their preferred communicate mode, and not be told it was preferable to use their voice.

San Diego’s DHH staff believed the DHH program was where Student would be happiest. Bobis believed Student identified as Deaf, and with Deaf culture. Brooks believed it would help Student build resilience to be a part of a large group of Deaf students going through the same thing at the same time. He also believed support from Deaf peers would be a springboard for advanced learning for Student. Student was comfortable with her Deaf peers and could communicate ideas freely through

American Sign Language. While an American Sign Language interpreter could support a Deaf student, the interpretation experience meant the Deaf student would not have direct communication with teachers and peers. Additionally, Brooks explained the DHH program provided Deaf students opportunities they would not receive in general education, such as instruction on social etiquette and how to be a successful Deaf person in the world.

Burge was Deaf. She attended a school for the hearing as a child and was not provided an interpreter. She felt isolated and disconnected from the hearing students around her. In her view, it is hard for Deaf individuals to make connections with hearing individuals. For Deaf students, their peers are other Deaf students.

Brooks was Deaf. In high school, he was mainstreamed as the only Deaf student among 400 hearing peers. While this helped him develop grit and resilience, it also made him feel isolated and lonely.

Although San Diego's DHH program offered much to Deaf students, San Diego prioritized protecting Deaf culture at the expense of educating Student to the maximum extent appropriate with students who were not disabled. It did not properly consider Student's ability to communicate in both American Sign Language and spoken English. She could also communicate with peers, Deaf and hearing, by texting on her phone. Texting friends was one of her preferred activities. Despite San Diego's belief the DHH program was the most beneficial placement for Student, the *Rachel H.* factors weighed in favor of offering Student more time with non-disabled peers. Because the March 23, 2023 and April 4, 2023 IEPs failed to offer Student a placement in the least restrictive environment, San Diego denied Student a FAPE.

ISSUE 2(a): DURING THE 2023-2024 SCHOOL YEAR, DID SAN DIEGO DENY STUDENT A FAPE BECAUSE THE DECEMBER 14, 2023 IEP AMENDMENT, AND MARCH 7, 2024 IEP, FAILED TO OFFER APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION?

Student contends San Diego failed to offer her appropriate specialized academic instruction in the December 14, 2023 IEP amendment, and March 7, 2024 annual IEP, because Student continued to make no academic progress. Student asserts San Diego should have, but did not offer any new reading program, curriculum or methodology to address Student's lack of academic progress.

San Diego contends it continued to offer her appropriate specialized academic instruction in the December 14, 2023 IEP amendment, and March 7, 2024 annual IEP. San Diego contends the IEP team considered Parent's concerns and responded that Student would take electives later in her high school career, and that the benefits of being with hearing peers did not outweigh her needs for highly specialized academic support. San Diego asserts its offer of specialized academic instruction was reasonable based on all the information available at the time, including Parent's input.

On December 14, 2023, San Diego convened an IEP team meeting to discuss Parent's concerns and amend Student's IEP. Student was attending ninth grade at Madison High School, in the DHH program.

The IEP team reviewed Student's present levels of performance. Student continued to read at the third-grade level. She had been recently assessed using the San Diego Quick Reading Assessment which showed her independent reading level to be at the second to third-grade level. Third to fourth-grade reading was a challenge

for her, and she scored in the frustration range at that level. On the Critical Reading Inventory assessment Student continued to perform at the third-grade level. Student's reading teacher Gross agreed Student's reading skills at the time of this IEP were at a third-grade level.

In writing, Student required heavy teacher prompting and support. The teacher highlighted portions of text with critical information and gave her example passages at her reading level. Student was provided multiple opportunities to receive comments and feedback from her teacher and to revise her work. She struggled with identifying complete sentences, which she could do 62 percent of the time. She struggled with repeating sentences and grammar.

In math, Student was assessed using the Brigance assessment. She scored in the third-grade level for math computation, while using a calculator. Her word problem skills were at a second-grade level. These scores reflected her mathematics skills had not changed from previous years.

Overall, at the December 14, 2023, IEP team meeting, San Diego had clear data showing Student's academic performance remained at a third-grade level, as it had for two years. However, the IEP team did not adjust her specialized academic instruction curriculum or strategies. The IEP team did not consider new methodologies. San Diego continued to offer Student 19 hours, 30 minutes per week of specialized academic instruction in the DHH program at Madison.

San Diego failed to offer Student appropriate specialized academic instruction in the December 14, 2023 IEP amendment because the offer was not designed to provide educational benefit through an IEP reasonably calculated to enable her to make progress appropriate in light of her circumstances. The IEP team believed Student was

capable of making progress beyond third-grade levels of academics. The IEP team had data reflecting Student's lack of academic progress for over two years. Despite this knowledge, the IEP team continued to offer the same specialized academic instruction delivered through the DHH that was not benefiting Student academically.

On March 7, 2024, San Diego convened an IEP team meeting for the one-year review of Student's educational program. Prior to the IEP team meeting, counselor Bobis interviewed Student to develop a Person-Centered Plan. A Person-Centered Plan was a document designed to assist a student in identifying and achieving their goals and aspirations for the future. Student told Bobis she needed more support for reading. She reported struggling with anxiety and with making friends with hearing students.

At the March 7, 2024 IEP team meeting, the team reviewed Student's present levels of performance. Student's reading had been assessed in February 2024 using the Critical Reading Inventory. The team used those scores along with informal reading assessments in her classroom to determine her independent reading level was at the second-grade level and her frustration level was at beginning third grade.

In writing, Student's skills were primarily the same as they were in March 2023, although she had improved in not repeating sentences. She continued to receive high levels of teacher support to draft essays. In math, Student's skills remained unchanged from March 2023. She could complete one-step problems, but not multi-step problems. However, Student's teacher noted Student seemed more confident participating in class and more accurate in using the calculator function on her phone to solve mathematics problems.

Parent was unhappy with Student's lack of academic progress. She complained at the IEP team meeting she did not see Student's growth. She felt Student's reading

level stayed at a second to third-grade level year after year. She questioned why the IEP team expected a different outcome when they were not changing the interventions. She asked what could be done to make a change. San Diego team members responded that they were focused on Student's language development, including her fluency in American Sign Language. They also believed Student was making some progress in decoding and reading comprehension.

San Diego members of the IEP team at the March 7, 2024 IEP team meeting anticipated that in tenth grade Student would continue to take five classes in the DHH program and one general education class, physical education. However, one of the classes she intended to take for tenth grade was American Sign Language. Madison offered one American Sign Language class for DHH students, and a separate class for general education students. At the time of the March 7, 2024 IEP team meeting, the team assumed Student would take the DHH American Sign Language class, but at Parent's insistence, Student was placed in the general education American Sign Language class.

San Diego failed to offer Student appropriate specialized academic instruction in the March 7, 2024 IEP because the offer was not designed to provide educational benefit through an IEP reasonably calculated to enable her to make progress appropriate in light of her circumstances. Student continued to make minimal academic progress, at best. At the due process hearing, numerous school staff working with Student said she was capable of making academic progress and expected her to do so in the future. They continued to describe her lack of progress in reading, writing, and math from 2021 through 2024 as a plateau that would soon be overcome. However, they could not explain how Student would overcome this plateau and did not offer specialized academic

instruction that proved successful in helping Student overcome this plateau. Instead, they maintained Student's progress could not be quantified through assessments.

San Diego's opinions were not persuasive in light of the conflicting evidence. Assessment scores and objective data showed Student was not making academic progress. School staff in the DHH program were talented and qualified educators who cared about Student. However, the academic interventions they offered Student were not effective and they knew it. Despite this knowledge, the IEP team continued to offer the same specialized academic instruction that was not benefiting Student academically, denying her a FAPE.

ISSUE 2(b): DURING THE 2023-2024 SCHOOL YEAR, DID SAN DIEGO DENY STUDENT A FAPE BECAUSE THE DECEMBER 14, 2023 IEP AMENDMENT, AND MARCH 7, 2024 IEP, FAILED TO OFFER PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT?

Student contends she benefitted from general education classes, including physical education and American Sign Language because she learned to communicate better in spoken English from hearing peers and teachers, and had the opportunity to make new friends. Student further asserts Madison High School was not the least restrictive environment for her because it was too far away from her home. This meant a long bus ride and by the time she got home, she did not have time to socialize with other children in her neighborhood.

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San Diego contends Student required placement in the DHH program because she lacked the foundational skills to be successful in general education. San Diego contends the DHH academic courses were aligned with grade-level curriculum and intended to prepare students for a diploma on an individualized timeline, including within San Diego's post-secondary adult transition program. San Diego contends Student's educational needs could not be satisfactorily met in her school of residence, even with all available supports and services, because she would be unable to meaningfully access most academic curriculum and she would experience significant social-emotional challenges. San Diego doubted Student had the ability to form meaningful connections in spoken English spaces. Finally, San Diego argued placement at a school other than Madison would harm Student's ability to define her identity.

In the December 14, 2023 IEP amendment, and March 7, 2024 annual IEP, San Diego continued to offer Student a placement for the majority of her day in the DHH program at Madison High School, which was not her home school. The bus ride was approximately one hour each way, meaning Student spent around two hours per day on the school bus.

Applying the *Rachel H.* factors, at the time of the December 14, 2023 IEP amendment, and March 7, 2024 IEP, Student would have received the same educational and non-academic educational benefits as described in Issue 1(b), above. She would have earned credits toward a high school diploma. She would have been exposed to grade-level content and concepts. She demonstrated from her first day of high school an ability to follow instructions from teachers and a strong work ethic that would allow her to achieve success in classes that were not heavily language dependent.

Student was successful in general education physical education classes. Physical education teacher Steven Booth recalled Student enjoyed physical education class and received A's. She interacted with both hearing and Deaf peers. She appeared comfortable in class, and communicated with hearing peers through the interpreter, making comments such as "This is fun!" and "I'm thirsty, do you want to get water?"

Student's case manager and math teacher Brooks believed Student could have been successful in a ninth-grade general education elective such as art or film production, that did not rely heavily on language. He believed these general education electives would have been an excellent opportunity to develop Student's social and interactive skills with hearing students.

As discussed above in Issue 1(b), Student would not have had a negative impact on teachers and peers in the general education environment. Finally, the cost would be the same to educate Student more in the general education environment. As such, the *Rachel H.* factors weighed toward offering Student more opportunities to be educated with non-disabled peers.

The IEP team was protective of Student and concerned she would suffer negative impacts in the general education environment away from her DHH peers, such as falling behind in the curriculum and feeling socially isolated. They believed although Student might obtain some academic or non-academic benefit from general education classes, she would receive more benefit, academically and social-emotionally, in the DHH program. This is not the placement standard of the IDEA. As such, San Diego failed to offer Student a placement in the least restrictive environment in the December 14, 2023 IEP amendment, and March 7, 2024 IEP.

### ISSUE 3: WAS SAN DIEGO'S DECEMBER 16, 2024 PSYCHOLOGICAL ASSESSMENT OF STUDENT APPROPRIATELY CONDUCTED SUCH THAT IT IS NOT OBLIGATED TO FUND AN INDEPENDENT EDUCATIONAL EVALUATION?

San Diego contends the December 16, 2024 psychological assessment of Student met all legal requirement. San Diego asserts school psychologist Dr. Renate Ward was responsive to Student's emotional reaction during testing and used her professional judgement to determine what information was necessary for the IEP team. San Diego contends additional testing would not provide valuable information to the IEP team to determine Student's eligibility and the offer of FAPE. San Diego asserts Student's scores were consistent with past assessments, showing Student's recent cochlear implant surgery and test anxiety did not invalidate the assessment.

Student contends San Diego failed to conduct an appropriate psychological evaluation of Student and that Student should receive an independent educational evaluation. Student asserts San Diego's assessment failed because it was conducted too soon after Student's surgery for her second cochlear implant, and because Student's anxiety ended the assessments before they were completed.

School district evaluations of students with disabilities under the IDEA serve two purposes. First, identifying students who need specialized instruction and related services because of an IDEA-eligible disability. And second, helping IEP teams identify the special education and related services an eligible student requires. (34 C.F.R. §§ 300.301 (2007), 300.303 (2006).) The first refers to the initial evaluation to determine if the child has a

disability under the IDEA, while the latter refers to follow-up or repeat evaluations. (See Comments, 71 Fed. Reg. 46,640 (Aug. 14, 2006).) California law refers to evaluations as assessments. (Ed. Code, § 56302.5.)

A reassessment of a child with a disability must generally be conducted in accordance with the requirements for an initial evaluation. (34 C.F.R. § 300.303.) Assessments must be conducted with parental consent and proper written notice, which includes a proposed assessment plan and a copy of the parent's procedural safeguards. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3), (c)(1); Ed. Code, § 56321, subd. (a).) The plan must be in the parent's native language, clearly describe the assessments to be conducted, identify qualified assessors, and state that no IEP will result without parental consent. (Ed. Code, § 56321, subds. (a), (b)(1)-(4); 20 U.S.C. § 1415(b)(3)-(4); 34 C.F.R. § 300.9(a).)

Reassessments must be conducted by persons who are trained and knowledgeable in the pupil's disability, and who are competent to perform them as determined by the local educational agency. (20 U.S.C. §§1414(b)(3)(A)(iv); 34 C.F.R. 300.304(c)(1)(iv)(2006); Ed. Code, §§ 56320, subd. (g), 56322.) The assessor must be competent in the student's primary language or mode of communication, and have knowledge and understanding of the cultural and ethnic background of the student. (Cal. Code Regs., tit. 5, § 3023, subd. (a).) A psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code §§ 56322, 56324, subd. (a).)

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A reassessment must be sufficiently comprehensive to identify all the student's needs for special education and related services, whether or not commonly linked to the identified disability category. (20 U.S.C. §1414(b)(3); 34 C.F.R. § 300.304(b)(1)(ii) &(c)(6)(2006); Ed. Code, § 56320, subd. (c).)

In conducting an assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(2006).) An assessor may not rely on a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)(2006).)

An assessor must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305(2006); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

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The assessment materials must be valid and reliable for the purposes for which the assessments are used, and must be administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3)(A)(iii) and (v); Ed. Code, § 56320, subd. (b)(2).) The assessor must select and administer assessment materials in the student's native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) An assessment must be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally. (20 U.S.C. § 1414(b)(3)(ii); Ed. Code § 56320, subd. (b).)

Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. The report shall include, but not be limited to:

- whether the student may need special education and related services and the basis for making that determination;
- the relevant behavior noted during observation of the student in an appropriate setting;
- the relationship of that behavior to the student's academic and social functioning;
- the educationally relevant health, development, and medical findings, if any;
- if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and

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- consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.)

The assessment report must be provided to the parent. (Ed. Code, § 56329, subd. (a)(3).)

A parent has the right to obtain an independent educational evaluation if the parent disagrees with a district's assessment. (34 C.F.R. § 300.502 (2006); Ed. Code, § 56329, subd. (b).) If a parent requests an independent educational evaluation at public expense, the education agency must, without unnecessary delay, file a due process hearing request to demonstrate that its assessment is appropriate, or ensure that an independent educational evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subds. (b) & (c).)

If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent still has the right to obtain an independent educational evaluation, but not at public expense. (34 C.F.R. § 300.502(b)(3); Ed. Code, § 56329, subd. (c).)

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San Diego conducted a three-year reassessment of Student during the 2024-2025 school year, Student's tenth-grade year. On November 7, 2024, Brooks generated an assessment plan in Parent's native language of English and sent it to Parent. The plan stated a school psychologist would assess Student in:

- intellectual development and processing;
- social, emotional, and behavioral functioning; and
- adaptive skills and self-help.

On November 22, 2024, Parent returned the signed assessment plan to Brooks. She consented to the plan. She did not check the box indicating she read and understood the enclosed procedural safeguards.

San Diego tasked Dr. Ward with conducting a psychological assessment of Student. Dr. Ward had a doctorate in Teaching and Learning and a post-doctoral certification from the School Neuropsychology Institute. She had three master's degrees: Curriculum Design, Deaf Education, and School Psychology. She had a bachelor's degree in Psychology. Dr. Ward worked as a school psychologist for San Diego for 19 years. She had a personal connection to the Deaf community through family members, and was fluent in American Sign Language.

Dr. Ward assessed Student on three previous occasions for Student's three-year evaluations, in 2015, 2018, and 2021. She did not have a strong rapport with Student, as Student did not enjoy being assessed. However, Dr. Ward viewed Student as a sweet kid who was shy but worked hard. Dr. Ward reviewed Student's previous assessment results as part of her 2024 assessment.



On November 11, 2024, Student had outpatient surgery to implant a second cochlear implant. On November 27, 2024, Student's second cochlear implant was activated.

A cochlear implant is a small electronic device inserted in a person's head through outpatient surgery. The surgeon cuts around the individual's ear, wraps electrodes around the cochlea, shaves part of the bone, and inserts an electronic receiver. The individual is fitted with an external processor that is worn on the head attached with a magnet. Sounds create vibrations, transmitted through the wires around the cochlea. However, the individual must then be trained to interpret the sounds to language, which can take three months to a year.

On December 2, 2024, Dr. Ward arrived at Madison to assess Student. This was the first school day following the Thanksgiving break. Dr. Ward brought four standardized tests with which she planned to assess Student:

- Universal Nonverbal Intelligence Test, Second Edition;
- Comprehensive Test of Phonological Processing;
- Test of Visual-Perceptual Skills; and
- Wide Range Assessment of Learning and Memory, Third Edition.

Dr. Ward assessed Student's cognitive ability using the Universal Nonverbal Intelligence Test, Second Edition. This assessment was entirely nonverbal. Student's full-scale intellectual quotient, called IQ, was 81, in the below average range.

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Dr. Ward assessed Student's memory using four subtests from the Wide Range Assessment of Learning and Memory, Third Edition. Dr. Ward deviated from the publisher's instructions by giving Student instructions in American Sign Language. This assessment tool was not normed for DHH students.

Student became anxious and distraught as Dr. Ward gave her the Wide Range Assessment of Learning and Memory, Third Edition, assessment. She appeared on the verge of tears. Her face turned red. She put her head down and asked how long the testing would take. Dr. Ward believed Student's scores may have been impacted by her anxiety.

Student was so upset, Dr. Ward decided not to assess Student further. She did not administer the Comprehensive Test of Phonological Processing or Test of Visual-Perceptual Skills as she had planned. She did not reschedule these assessments or attempt to assess in these areas on any other days.

Dr. Ward sent two rating scales to Parent and Student's teachers: the Behavior Assessment System for Children, Third Edition, and the Adaptive Behavior Assessment System. The Behavior Assessment System for Children assessed Student's social and emotional functioning. Student's teacher, Kristin Gunion, rated her as "clinically significant," suggesting a high level of impairment in

- internalizing problems,
- anxiety,
- depression,
- somatization,
- learning problems, and
- withdrawal.

She rated her "at risk," meaning a significant problem, in

- school problems,
- atypicality,
- adaptive skills,
- adaptability,
- leadership, and
- functional communication.

Parent rated Student as clinically significant in anxiety, withdrawal, social skills, and functional communication. Parent rated Student at risk in

- internalizing problems,
- attention,
- adaptive skills,
- somatization, and
- leadership.

The Adaptive Behavior Assessment System assessed Student's adaptive behavior at school and home. Her scores showed below average adaptive behavior at school and extremely low adaptive behavior at home.

Dr. Ward observed Student in the DHH classroom for 25 minutes on December 2, 2024, following her assessment of Student. She sent Parent an interview form, and sought input from Student's teachers.

Dr. Ward documented her findings in a written report dated December 16, 2024. She determined Student continued to qualify for special education under the categories

deaf and hard of hearing and other health impairment. She made 11 recommendations for accommodations at school. Dr. Ward presented her report at the February 5, 2025 IEP team meeting.

At the February 5, 2025 IEP team meeting, Parent raised concerns that Student was tested so soon after her cochlear implant was activated, and that Student had not been informed in advance of the testing date and time, which increased her anxiety. When Parent picked her up from school that day, she was upset about the testing and complained of a headache. Parent also questioned why Student was not assessed in phonological processing, visual perception, and executive functioning, as she had been in previous three-year reassessments.

On March 27, 2025, in an email to Brooks and Hoffman, Parent requested an independent psychoeducational evaluation. Parent hoped an independent assessor would take a fresh look at Student and find a logical reason she had not made academic progress in four years. On April 7, 2025, San Diego denied Parent's request through a prior written notice letter. On April 14, 2025, San Diego filed this current due process matter to defend Dr. Ward's psychological assessment.

The preponderance of the evidence showed San Diego's December 16, 2024 psychological assessment of Student was not appropriately conducted in compliance with the law. San Diego failed to assess Student in all areas of suspected disability, including phonological processing, visual perception, and executive functioning. Dr. Ward's testimony that she did not feel assessment in these areas was necessary because she assessed them in previous years misses the point. The IDEA mandates re-evaluation every three years unless the parent and school district agree re-evaluation is unnecessary, which did not happen here. A school district cannot presume a student's

scores will not change. Furthermore, Dr. Ward's testimony was not persuasive because she intended to assess Student in those areas. She did not complete her assessment on December 2, 2024, because Student was upset. She failed to reschedule her assessments even though she had ample time before the February 5, 2025 IEP.

Further, San Diego failed to assess Student in the form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally because it assessed her too soon after her cochlear implant was activated. Even Dr. Ward testified she would have waited longer before assessing Student if she had realized the cochlear implant was activated on November 27, 2024. It was not reasonable to assess her five days after activation, given that it takes weeks to months for a person to adjust. San Diego also failed to consider that with Student's anxiety she required advance notice of the assessment date and time. Her emotional state impacted the results of the testing.

Finally, San Diego failed to administer the Wide Range Assessment of Learning and Memory in accordance with instructions provided by the producer, and failed to meet its burden of proof that it provided Parent with her procedural safeguards with the assessment plan. In all other aspects, the December 16, 2024 psychological assessment of Student was appropriately conducted and legally compliant.

Overall, San Diego failed to prove by a preponderance of the evidence its December 16, 2024 psychological assessment of Student was appropriately conducted. Dr. Ward was qualified to assess Student's psychoeducational functioning. However, the assessment was not sufficiently comprehensive to identify all Student's needs for special

education and related service, the test of Student's memory was administered contrary to publisher's instructions and not normed to DHH students, and the testing done was incomplete and administered under conditions not likely to obtain valid results.

As such, Student is entitled to an independent psychoeducational evaluation at public expense.

ISSUE 4: DID SAN DIEGO'S FEBRUARY 5, 2025 IEP, CONTINUED ON FEBRUARY 19, 2025, AS AMENDED MARCH 12, 2025, OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT SUCH THAT IT MAY IMPLEMENT THE IEP WITHOUT PARENTAL CONSENT?

San Diego contends the February 5 and February 19, 2025 IEP as amended March 12, 2025, offered Student a FAPE in the least restrictive environment. San Diego contends it met its procedural obligations and offered a substantively appropriate IEP to Student. San Diego asserts the unique structure of the DHH program at Madison offered Student the best of both worlds. San Diego contends Student required her specialized academic instruction delivered in a full communication class by a DHH credentialed teacher, with access to a critical mass of Deaf students, DHH role models, and embedded DHH services such as audiology and American Sign Language interpreters.

Student contends San Diego failed to offer Student a FAPE in the least restrictive environment because it was a continuation of a program that had led to no significant academic progress and deprived Student of opportunities to develop spoken language skills and friendships with hearing peers.

The IDEA requires school districts to offer eligible students a FAPE in the least restrictive environment. When a school district seeks to demonstrate that it offered a FAPE, the legal tribunal applies a two-part analysis. First, the school district must prove it complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-207.) Second, the school district must prove the IEP was designed to meet the child's unique needs, and provide educational benefit through an IEP reasonably calculated to enable her to make progress appropriate in light of her circumstances. (*Ibid; Endrew F., supra*, 580 U.S. 386, 402-403.)

Harmless procedural errors do not constitute a denial of FAPE. (*L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2008) 556 F.3d. 900, 910.) Procedural violations of the IDEA are a violation of FAPE if they:

- Impede the child's right to FAPE;
- Significantly impede the parents' opportunity to participate in the decision-making process; or
- Cause a deprivation of educational benefit.

(See *N.B. v. Hellgate Elem. Sch. Dist.* (9th Cir. 2008) 541 F.3d 1202; see also Ed. Code, 56505, subd. (f)(2).)

## NOTICE OF IEP TEAM MEETINGS AND PROCEDURAL SAFEGUARDS

To ensure parent participation in placement determinations, public agencies must provide parents with notice of meetings that will be held to decide placement. (34 C.F.R. § 300.501(b)(1).) The IEP team meeting must be scheduled at a mutually agreed upon time and place. (Ed. Code, § 56341.5(c).)

A school district must provide parents with a copy of their procedural safeguards. State and federal law require districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. § 1415(d)(2); 34 C.F.R. §§ 300.503(c)(1), 300.504.) Furthermore, at each IEP team meeting, the district must inform a parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).)

San Diego did not offer into evidence any invitations to the IEP team meetings on February 5, 2025, February 19, 2025, and March 12, 2025. However, email correspondence between Brooks and Parent on January 30, 2025, and February 3, 2025, referred to the meeting on February 5, 2025. As such, Parent had notice of the meeting. Additionally, the February 5, 2025 IEP team action notes indicated another meeting would be convened on February 19, 2025, showing Parent had notice of that meeting. Email correspondence between Parent and Hoffman on March 11, 2025, showed Parent had notice of the March 12, 2025 IEP team meeting. As such, San Diego met its burden of proof that it provided Parent with notice of the IEP team meetings on February 5, 2025, February 19, 2025, and March 12, 2025.

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Parent marked the box on the final February 5 and February 19, 2025 IEP, as amended March 12, 2025, document indicating she received a written copy of the procedural safeguards in the prior year.

As such, San Diego complied with this requirement.

## REQUIRED IEP TEAM PARTICIPANTS

A school district must ensure the IEP team includes all legally required participants. The IEP team must include:

- one or both of a student's parents;
- no less than one general education teacher if the student is, or may be, participating in the regular education environment;
- no less than one special education teacher or, if appropriate, a special education provider of the student;
- a representative of the district who is qualified to provide or supervise specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources;
- an individual who can interpret the instructional implication of assessment results;

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- at the discretion of the parents or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and
- whenever appropriate, the student with exceptional needs.

(20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, § 56341, subd. (b).)

The evidence showed San Diego included all required participants at the February 5, 2025, February 19, 2025, and March 12, 2025 IEP team meetings.

Participants included:

- Parent;
- Arinn Smith, general education teacher for American Sign Language;
- John Brooks, special education teacher for DHH math;
- Cory Hoffman and Frederick Hilgers, representatives of the school district;
- Clare Bobis, Catherine Burge, Danielle Knack, Wendy Hoy, Nataly Romo, Dr. Evelyn Smith, and Dr. Renate Ward, who all presented and explained assessment results; and
- Annette Miner and Anna Molina, American Sign Language interpreters.

## PARENT PARTICIPATION

The IDEA guarantees parents the right to participate in meetings with regard to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b).) The IDEA requires school districts to

ensure the parents of disabled children are members of any group that makes decisions about their child's educational placement. (34 C.F.R. § 300.327; 34 C.F.R. § 300.501(c)(1) (2006).)

A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*M.M. v. Lafayette School District* (Feb. 7, 2012) 2012 WL 398773, *affd. in part, revd. in part and remanded on other grounds, MM. v. Lafayette School District* (9th Cir. 2014) 767 F.3d 842, citing *N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.)

San Diego proved Parent participated in the February 5, 2025, February 19, 2025, and March 12, 2025 IEP team meetings. Parent requested, and received copies of the assessment reports prior to the meetings. She attended all three meetings, asked questions, and expressed her concerns. There was no evidence that suggested Parent was not an active participant at these meetings.

San Diego complied with its legal obligation to ensure Parent's participation in Student's IEP at issue.

## THE IEP PROCESS AND DOCUMENT

Students eligible for IEPs are entitled to special education and related services to address the child's unique needs resulting from the disability. (34 C.F.R. § 300.39(b)(3).) The IDEA requires States to provide a FAPE to all eligible students. (*Endrew F., supra*,

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580 U.S. 386, 390.) States are required to provide instruction calculated to "confer some educational benefit" by offering an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Ibid.*)

The educational benefit to be provided to a student requiring special education is not limited to addressing the student's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

A focus on the particular child is at the core of the IDEA. (*Endrew F., supra*, 580 U.S. 386, 400.) The IEP team addresses a student's unique needs by assessing the child in all areas of suspected disability, documenting the needs in the present levels of performance sections of the IEP, and offering the child appropriate goals, services, accommodations, and special factors to meet the child's needs.

"In determining what it means to 'meet the unique needs' of a child with a disability, the provisions governing the IEP development process are a natural source of guidance: It is through the IEP that '[t]he free appropriate public education required by the Act is tailored to the unique needs of' a particular child." (*Id.*)

A school district must ensure that an IEP document contains all components required by the IDEA and California special education law. The IDEA does not require the IEP document to be in any particular format as long as all the contents requirements are included. (34. C.F.R. § 300.320.)

## PRESENT LEVELS OF PERFORMANCE

An IEP must include a student's present levels of performance. The present levels of academic achievement and functional performance must include how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).)

In developing the IEP, the IEP team must consider:

- the strengths of the child;
- the concerns of the parents for enhancing their child's education;
- information about the child provided by or to the parents;
- the results of the most recent assessments;
- the academic, developmental, and functional needs of the child;
- and any lack of expected progress toward the annual goals.

(20 U.S.C. § 1414(d)(3)(A), (d)(4)(A)(ii); 34 C.F.R. § 300.324(a), (b)(1)(ii); Ed. Code, § 56341.1, subds. (a), (d).)

San Diego included appropriate and accurate present levels of academic achievement and functional performance in Student's February 5 and February 19, 2025 IEP, as amended on March 12, 2025. The IEP team considered how Student's disability affected her involvement and progress in the general education curriculum, and summarized their findings in two paragraphs in the IEP document.

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The IEP team considered Student's strengths. The team noted Student was ambitious, self-aware, and had an excellent work ethic. She was a visual learner. She was interested in women's sports, but not participating in any extracurricular sports at the time of the meeting.

The IEP team considered Parent's concerns and information she shared about Student. Parent had many concerns. The team documented this information in 26 paragraphs within the IEP document. Parent's primary concerns were Student's lack of academic progress, the length of the bus ride to and from Madison, Student's path toward a certificate of completion rather than a diploma, and the lack of mainstreaming opportunities for Student.

The IEP team considered the results of Student's most recent assessments. San Diego conducted Student's three-year reassessments prior to the IEP team meeting. The team reviewed the:

- psychology assessment by Dr. Renate Ward;
- audiology assessment by Dr. Evelyn Smith;
- academic assessment by John Brooks and Wendy Hoy;
- mental health assessment by Danielle Knack;
- counseling assessment by Cathy Burge;
- speech assessment by Nataly Romo; and
- transition assessment by Clare Bobis.

The team considered Student's academic, developmental, and functional needs and determined she had deficits in reading, writing, math, communication, and social-emotional functioning.

The IEP team considered Student's progress on her annual IEP goals and documented their findings in the IEP document. The IEP team described her progress in convoluted terms that obfuscated more than they illuminated. Nonetheless, San Diego complied with the technical requirements of the law when developing the present levels component of the IEP document. The IEP team also included the results of Student's recent standardized assessment, which did not reflect the same progress reported on goals, and documented their responses to Parent's concerns about Student's lack of academic progress.

## ANNUAL GOALS

An IEP must include appropriate annual goals in all areas of need. The IEP must contain a statement of measurable annual goals designed to meet the student's needs that result from their disability to enable the student to be involved in and progress in the general curriculum and meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code, § 56344; *Letter to Butler* (Office of Special Education and Rehabilitative Services Mar. 25, 1988); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).)

The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. § 1414(d)(1)(A)(i)(III);

34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

San Diego offered Student 11 annual goals in the February 5 and February 19, 2025 IEP, as amended on March 12, 2025. Ten of the annual goals were appropriate and legally compliant. One goal failed to meet the standards set forth in the IDEA and California law.

Specifically, social-emotional goal 9, was not measurable. Counselor Burge drafted this goal. Burge clearly cared about Student and was invested in helping her through counseling. However, Burge acknowledged goal 9 was not data-based. It was unclear how the goal would be measured and how data could be collected on it. As such, San Diego failed to prove goal 9 was legally compliant.

With respect to reading, San Diego offered Student two goals, which were designated goal numbers 3 and 6. Gross drafted the reading goals, in consultation with speech and language pathologist Romo. Goal 3 required Student to use metacognitive skills and expand vocabulary in expanded sentences to engage in a collaborative conversation about a shared reading activity. Goal 3 would be measured by a rubric Romo developed. Romo testified goal 3 was appropriate for Student because it sought to push Student's reading beyond decoding into a deeper understanding of the text and the themes. Gross also believed goal 3 was appropriate, and important, for expanding Student's reading comprehension.

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Goal 6 required Student to expand her vocabulary by incorporating at least 20 words per reading unit into her personal lexicon. The goal would be measured by using checklists in a vocabulary notebook. Gross testified goal 6 was appropriate because Student needed to increase, and generalize, her vocabulary to make progress in reading.

Testimony from Romo and Gross persuasively established both reading goals were appropriate and measurable.

In writing, San Diego offered Student two goals, which were designated goal numbers 1 and 2. Goal 1 required Student to include claims, evidence, and reasoning when given writing prompts. Hoffman testified goal 1 was appropriate because it would help Student understand the main idea of her writing, which would further progress her writing skills. Goal 2 required Student to independently research two topics of interest and develop an outline for an essay, which was appropriate in developing her critical thinking skills. Goals 1 and 2 would be measured by a student portfolio and teacher records.

Hoffman's testimony persuasively established both writing goals were appropriate and measurable.

In math, San Diego offered Student three goals, which were designated goal numbers 7, 8, and 11. Brooks drafted the math goals. Goal 2 required Student to choose and interpret the scale and origin in graphs. Goal 8 required Student to add time on a timecard and calculate wages. Goal 11 required Student to complete three-step word problems. The goals would be measured through trials, as shown on student work samples. At hearing, Brooks provided an articulate and insightful description of the skills the math goals were targeting, and Student's abilities. Brook's testimony persuasively established all three math goals were appropriate and measurable.

In communication, San Diego offered Student two goals, which were designated goal numbers 4 and 5. Romo drafted the communication goals. Goal 4 required Student to accurately produce all sounds with appropriate pitch, tone, and prosody by self-monitoring and making corrections. Romo testified goal 4 was appropriate to address Student's apraxia of speech. Goal 5 required Student to increase her utterances in spoken English. Romo believed this goal would help Student have conversations in spoken English. The goals would be measured through data collected by the speech therapist in speech therapy sessions. Romo's testimony persuasively established both communication goals were appropriate and measurable.

With respect to social/emotional/behavioral, San Diego offered Student two goals, designated goal numbers 9 and 10. Goal 9 is discussed above. Goal 10 was drafted by Knack, Student's mental health counselor. Goal 10 required Student to identify and practice coping skills. Burge testified goal 10 was appropriate to help Student manage her anxiety in the school setting. The goal would be measured through Student's self-reporting and the therapist's data collection. Burge's testimony persuasively established goal 10 was appropriate and measurable.

Overall, San Diego offered Student 10 legally compliant goals and one goal that failed to meet legal standards in the February 5 and February 19, 2025 IEP, as amended March 12, 2025.

## PLACEMENT

An IEP must include a description of the placement, services, and accommodations offered to the student. An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research

to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:

- to advance appropriately toward attaining the annual goals;
- to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and
- to be educated and participate with other children with disabilities and nondisabled children. (34 C.F.R. § 300.320(a)(4).)

Specific educational placement means that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042.)

## CONTINUUM OF PLACEMENT OPTIONS AND PREDETERMINATION

School districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) In determining placement, a school district must consider a continuum of alternative placements. (34 C.F.R. § 300.115(b); Ed. Code, § 56342, subd. (b).)

School districts may not unilaterally predetermine a child's special education and related services prior to an IEP team meeting. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858., cert. denied, 546 U.S. 936 (U.S. 2005).) School administrators and staff must enter the IEP team meeting with an open mind and must meaningfully consider the parents' input. (*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 Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.)

San Diego continued to offer Student placement in the DHH program at Madison in the February 5 and February 19, 2025 IEP, as amended March 12, 2025.

For the remainder of her tenth-grade year, San Diego offered Student four DHH classes:

- DHH Applied English;
- DHH Reading Development;
- DHH Applied Math; and
- DHH Applied Science;

San Diego offered Student two general education classes:

- Physical Education; and
- American Sign Language.

For eleventh grade, San Diego offered Student four DHH classes:

- DHH Applied English;
- DHH Reading Development;
- DHH Applied History; and
- DHH Transition Skills.

San Diego offered Student two general education classes:

- Integrated Mathematics 1, co-taught by a general education teacher and Brooks; and
- Art.

At the February 5, 2025, February 19, 2025, and March 12, 2025 meetings, the IEP team discussed Student's placement and responded to Parent's concerns. Parent requested a hybrid program, where Student attended Madison only for classes earning credit toward a high school diploma, and the remainder of her day at home in private therapies. San Diego did not agree, but it engaged with Parent's request with an open mind. In response to Parent's concerns, San Diego also moved Student from DHH math to a co-taught general education math class, and offered her a general education elective. San Diego proved it did not predetermine Student's placement in the February 5 and February 19, 2025 IEP, as amended March 12, 2025.

### FORMAL, SPECIFIC, WRITTEN OFFER OF PLACEMENT

A school district must make a formal, written offer of placement and services in the IEP document. (*Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) Additionally, an IEP must include the projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications. (34 C.F.R. § 300.320(a)(7).) An IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. (34 C.F.R. § 300.320(a)(5).)

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San Diego offered Student a formal, written offer of placement and services in the February 5 and February 19, 2025 IEP, as amended March 12, 2025. San Diego included a legally compliant description of the anticipated frequency, location, and duration of her services through the grid of services offered, clarified by the section labeled "special education service delivery." For example, in the service grid, San Diego offered Student 30 hours per year of related services by a speech and language pathologist. In the "special education service delivery" San Diego clarified these services would be delivered to support Student's communication skills, 60 minutes per week during the regular school year, with one individual 15-minute session, and one 40-minute group session. In each service area, San Diego complied with its obligations to specify clearly the frequency and duration of services.

## APPROPRIATE PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

San Diego failed to prove the February 5 and February 19, 2025 IEP, as amended March 12, 2025, offered Student an appropriate placement in the least restrictive environment.

San Diego erred by continuing to offer Student a placement in which she was not making academic progress. At the February 5, 2025, February 19, 2025, and March 12, 2025 IEP team meetings, San Diego had more data showing Student was still at third-grade levels in reading, writing, and math. Brooks, Gross, and Hoy conducted an academic assessment of Student. The January 29, 2025 report showed Student continued to read at a third-grade level. On the Critical Reading Inventory, Student's reading scores were virtually unchanged from December 14, 2023. On the Woodcock-

Johnson assessment, Student's reading scores were mostly at the second-grade level, although she did reach a fourth-grade level on one subtest, Word Attack. The academic report concluded Student could independently read a narrative text at a third-grade level and an informational text at second-grade level. In math, Student continued to perform at the third-grade level on standardized assessments.

San Diego pointed to one particular assessment, Measuring Academic Proficiency, as evidence Student made academic progress from spring of her 2023-2024 school year to winter of her 2024-2025 school year. San Diego gave students this assessment three times per year. Brooks believed the assessment showed Student made incremental progress in academics. The scoring showed Student increased her raw number score in reading from 187 in spring of 2024 to 211 in winter 2024. Student increased her raw math score from 189 in spring of 2024 to 194 in winter 2024.

However, the test publishers did not translate raw scores to grade-level equivalents. The mere reporting of a slight increase in a number without context was not helpful in assessing whether Student was making more than minimal progress. The scores were also contradicted by the weight of the evidence showing Student stagnated at a third-grade level in academics.

As discussed in Issues 1(b) and 2(b), the team had data showing Student had not made academic progress in several years. Since 2021, Student showed up for school ready to learn, had good attendance, and an excellent work ethic. Yet, she remained at a third-grade level in academics without improvement. Considering this, continued placement in the DHH program with the same methodologies, supports, and curriculum was not reasonably calculated to enable Student to make progress appropriate in light of her circumstances.

San Diego's arguments that Student made academic progress that could not be discerned through data or testing over a four-year period was not persuasive. San Diego staff testified Student was capable of progressing past third-grade levels of academics despite her educational challenges. While Student had below average cognitive abilities, she was not intellectually disabled. She had a hearing impairment and early language deprivation; however, she had age-appropriate skills in American Sign Language and was proficient enough to use academic sign language for learning at school. She could hear 88 percent of speech sounds in her environment, and could communicate using spoken English. While Student might not have been capable of making a year's worth of academic progress in a school year, she had the ability to progress past third-grade level academics over a four-year period.

San Diego also failed to offer Student a placement in the least restrictive environment in the February 5 and February 19, 2025 IEP, as amended March 12, 2025. The assessors interviewed Student as part of the academic assessment. She told them she did not fully like Madison. She wanted to take more general education classes. She wanted to earn a high school diploma. She wanted to have more choices as to her friends.

Applying the *Rachel H.* factors, as discussed in Issues 1(b) and 2(b), Student would have received academic benefit from more time in the general education environment at the time of the February 5, 2025, February 19, 2025, and March 12, 2025 IEP team meetings. She could have earned credits toward a high school diploma. She would have been exposed to grade-level content and concepts.

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In her tenth-grade year, Student's IEP team had even more data showing the non-academic benefits of her being in the general education environment, when properly supported. At Parent's request, Student was placed in a regular physical education class rather than the one with her DHH cohort. Bobis facilitated a friendship connection between Student and two girls in the class. Student became friends with the girls and was thrilled to be invited to a birthday party for the first time in her life. This success in social-emotional functioning clearly demonstrated that Student would benefit from placement in general education classes. It is reasonable to infer that Student would make even greater gains in social skills and interacting with hearing peers with affirmative supports or adult facilitation to be meaningfully included in general education classes.

As for the last two factors, Student was not a determinant to the teacher or her classmates, and there was no evidence the cost of mainstreaming, even with adult facilitation and additional American Sign Language support, would be prohibitive.

The *Rachel H.* factors weighed toward educating Student in the general education environment for more than two class periods, with supplementary aids and services. The IEP team took some steps toward including Student in the general education environment. It offered her a co-taught general education math class and a general education art class. Aside from that, San Diego continued to maintain its non-IDEA compliant position that Student would receive the most benefit in the DHH program around a critical mass of Deaf students, with interactions with hearing peers left to Student's own initiative.

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San Diego did not prove it adequately considered the use of supplementary aids and services that could have supported Student in the general education environment. The IEP team failed to have an open-minded and creative conversation about how it could support Student in the general education environment, such as:

- more co-taught classes in areas like science;
- inclusion facilitation services;
- visual supports tailored to Student's learning needs;
- modifications to the course material so Student could access them at her reading level;
- graphic novels;
- notes and vocabulary provided in advance;
- peer buddies; and
- facilitated connections with non-disabled students.

Accordingly, San Diego failed to prove the February 5 and February 19, 2025 IEP, as amended March 12, 2025, offered Student an appropriate placement in the least restrictive environment.

## APPROPRIATE SERVICES, SUPPORTS, AND ACCOMMODATIONS

Related services are supportive services that a disabled student requires to benefit from special education. (34 C.F.R. § 300.34.) Related services include developmental, corrective, and supportive services. (*Ibid.*)

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San Diego offered Student 30 hours per year of speech and language. Romo made this recommendation based upon her recent assessment and her ongoing sessions with Student. San Diego proved these services were appropriate to address Student's communication deficits.

San Diego predetermined Student's audiological services in the February 5 and February 19, 2025 IEP, as amended March 12, 2025. Dr. Smith was responsible for determining Student's audiological services. At the due process hearing, she explained that San Diego offered two hours of audiological services per year to students with cochlear implants. That was true for all San Diego students with cochlear implants. Students with hearing aids received one hour per year. Because Student had cochlear implants, San Diego offered her the predetermined amount of audiological services of two hours per year.

San Diego offered Student seven hours per year of counseling from a school counselor for the Deaf, and nine hours of counseling from a mental health technician. These recommendations were based upon the recent assessment by Burge and Knack and their ongoing sessions with her. San Diego proved these services were appropriate to address Student's social/emotional/behavioral deficits.

San Diego offered Student 10 hours per week of interpreter services and five hours per week of note taking services to support Student when she was in the general education environment. San Diego proved these services were appropriate to address some of Student's needs while she was in the general education environment.

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Finally, San Diego offered Student one hour per year of transition services. This recommendation was based upon the recent transition assessment, the Person-Centered Plan, by Bobis. San Diego proved these services were appropriate to address Student's post-secondary transition needs.

San Diego also offered Student a lengthy list of accommodations. These accommodations were developed based upon Dr. Ward's recommendations. San Diego proved these accommodations were appropriate to address Student's needs.

Overall, the February 5 and February 19, 2025 IEP, as amended March 12, 2025, failed to offer Student appropriate related services in specialized academic instruction, inclusion supports, and audiology.

## SPECIAL FACTORS AND TEST ACCOMMODATIONS

The IEP must include a consideration of special factors, including

- behavioral supports,
- language support for students with limited English proficiency,
- supports for visually impaired, blind, hearing impaired and deaf students,
- and assistive technology devices and services. (34 C.F.R. § 300.324(a)(2).)

When a child's behaviors impede the child's learning or that of others, the IDEA requires that the IEP team consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).)

The February 5 and February 19, 2025 IEP, as amended March 12, 2025, included a legally sufficient description of the special factors considered and offered to Student. Student required low incidence services and equipment to address her hearing impairments. The IEP team determined that she did not require assistive technology devices. Student was not an English language learner. Her behavior did not impede her learning. San Diego met the IDEA's procedural requirements with respect to special factors.

Each IEP must contain a statement of any individual appropriate accommodations that are necessary to measure the child's academic achievement and functional performance on statewide and districtwide assessments. (34 C.F.R. § 300.320.)

San Diego offered Student testing appropriate accommodations for statewide and districtwide assessments including simplified test directions, closed captioning, and American Sign Language. San Diego complied with this legal requirement.

## EMERGENCY CONDITIONS

IEPs must include a description of the means by which the IEP will be provided under emergency conditions, in which instruction or services, or both, cannot be provided to the pupil either at the school or in person for more than 10 school days. (Ed. Code, § 56345, subd. (a)(9).)

San Diego failed to include an emergency conditions provision describing the instruction and services Student would receive in the event of an emergency lasting more than 10 school days. The IEP team overlooked this procedural requirement when developing the Student's February 5 and February 19, 2025 IEP, as amended March 12, 2025.

## TRANSITION GOALS AND SERVICES

IEPs must include a statement of transition goals and services at the first IEP in effect when the child turns 16 years old. (34 C.F.R. § 300.320(b).) Transition services are a coordinated set of activities for a child with a disability that are:

- (1) designed to be within a results-oriented process, focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including:
  - postsecondary education;
  - vocational education;
  - integrated employment (including supported employment);
  - continuing and adult education;
  - adult services;
  - independent living; or
  - community participation; and
- (2) based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes:
  - Instruction;
  - Related services;
  - Community experiences;
  - The development of employment and other post-school adult living objectives; and
  - If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (34 C.F.R. § 300.43(a).)

Hoffman testified the individual transition plan was appropriate because it was based upon an assessment of Student through the Person-Centered Plan interview. Furthermore, Student's annual goal 8 in math was tied to the transition plan because it teaches her about workplace skills such as filling out a timecard. It offered Student transition services, including attending resource fairs, participating in a transition skills class, completing a career interest survey, and instruction related to using money in real-world situation. The individual transition plan addressed her post-secondary, employment, and independent living goals. Student intended to take adult classes, teach ice skating, and live with family. San Diego offered Student a legally compliant individual transition plan with appropriate transition goals and services in Student's February 5 and February 19, 2025 IEP, as amended March 12, 2025.

In sum, the February 5 and February 19, 2025 IEP, as amended March 12, 2025, was not legally compliant because it failed to include necessary components required by the IDEA and California special education law including:

- A measurable social-emotional goal addressing Student's use of positive self-talk;
- Audiological services based on Student's unique needs that are not predetermined;
- An appropriate placement in the least restrictive environment; and
- A description of the means by which the IEP will be provided under emergency conditions.

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## 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(a):

San Diego denied Student a FAPE because the IEPs dated March 23, 2023, and April 4, 2023, failed to offer Student appropriate specialized academic instruction.

Student prevailed on Issue 1, subsection (a).

### ISSUE 1(b):

San Diego denied Student a FAPE because the IEPs dated March 23, 2023, and April 4, 2023, failed to offer Student placement in the least restrictive environment.

Student prevailed on Issue 1, subsection (b).

### ISSUE 2(a):

San Diego denied Student a FAPE because the December 14, 2023 IEP amendment, and March 7, 2024 IEP, failed to offer Student appropriate specialized academic instruction.

Student prevailed on Issue 2, subsection (a).



## ISSUE 2(B):

San Diego denied Student a FAPE because the December 14, 2023 IEP amendment, and March 7, 2024 IEP, failed to offer Student placement in the least restrictive environment.

Student prevailed on Issue 2, subsection (b).

## ISSUE 3:

San Diego's December 16, 2024 psychological assessment of Student was not appropriately conducted. It is obligated to fund an independent educational evaluation.

Student prevailed on Issue 3.

## ISSUE 4:

San Diego's February 5, 2025 IEP, continued on February 19, 2025, as amended March 12, 2025, did not offer Student a FAPE in the least restrictive environment and it may not implement the IEP without parental consent.

Student prevailed on Issue 4.

## REMEDIES

Student prevailed on all issues.

As a remedy, Student requests a change of placement to her neighborhood school, 720 hours of compensatory education, and a psychological or neuropsychological independent educational evaluation at public expense.

San Diego contends Student failed to put forth any evidence of appropriate relief. This is correct. Nonetheless, Student is entitled to equitable relief.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 (*Burlington*).) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

In remedying 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) (2006).) 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. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*).) 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. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Puyallup, supra*, at 1496.)

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An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-23.)

A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, \*12.) An award of compensatory education need not provide day-for-day compensation. (*Puyallup, supra*, at pp. 1496-1497.)

San Diego denied Student a FAPE from March 23, 2023, through March 12, 2025, because it failed to offer Student appropriate specialized academic instruction. Student made minimal academic progress during this time. Student is entitled to compensatory education. In this matter, it is equitable to award Student five hours of compensatory education for each school week in which she was denied a FAPE because San Diego failed to offer her appropriate specialized academic instruction, which is 75 weeks. This calculation reflects a denial of FAPE of approximately 11 weeks during the 2022-2023 regular school year; approximately 37 weeks during the 2023-2024 regular school year; and approximately 27 weeks during the 2024-2025 regular school year. As such, Student is awarded 375 hours of compensatory education.

San Diego denied Student a FAPE from March 23, 2023, through December 17, 2024, because it failed to offer Student a placement in the least restrictive environment. However, Student did not offer evidence as to what constitutes an appropriate placement

in the least restrictive environment for Student. Parent wanted Student placed at her neighborhood school, but conceded she was not aware of the supports Student required or could be offered at that school.

Student would benefit from an independent assessment by an inclusion facilitator or specialist to assess Student, review the continuum of placement options available, and to offer new and creative ideas as to how to ensure Student is meaningfully included in the general education environment within San Diego. As such, Student is awarded an independent educational evaluation by an inclusion facilitator or specialist to evaluate Student and provide recommendations to Student's IEP team, including a written report, as to how to educate Student with children who are not disabled to the maximum extent appropriate. Because this assessment will involve observations of Student and interviews with Student, Parent, and school staff, it may be time consuming and therefore may exceed the cost criteria San Diego sets for other types of independent educational evaluations. Parent shall select the independent evaluator, with an assessment not to exceed \$12,000.00. Additionally, San Diego shall provide or fund, without cost to Parent or the assessor, a qualified sign language interpreter for any interviews between the assessor and Student, and Deaf school staff.

San Diego shall convene an IEP team meeting to review the independent inclusion evaluation. San Diego is required to consider the recommendations of the independent inclusion evaluation but is not required by this Decision to adopt any or all of the recommendations from the report.

San Diego's December 16, 2024 psychological assessment of Student was not appropriately conducted. Student is entitled to an independent psychoeducational evaluation at public expense.

## ORDER

1. Within 30 days of being notified of Parent's selection, San Diego shall contract with a certified non-public agency of Parent's choice to provide 375 hours of compensatory education to be used in any educationally-related area of Parent's choice. Parent may choose more than one certified non-public agency to provide the compensatory education. Any compensatory education services not used by July 25, 2027, shall be forfeited by Student.
2. Parent shall select an independent educational assessor, at a cost not to exceed \$12,000.00, to conduct an assessment of Student in the area of inclusion in the general education environment to the maximum extent appropriate. This cost shall also include time for the independent assessor to present their assessment results at an IEP team meeting. Within 30 days of being notified by Parent of the selected independent assessor, San Diego shall contract with the independent assessor.
3. Parent shall select an independent educational assessor, within San Diego's special education local plan area criteria, to conduct a psychoeducational assessment, which shall also include time for the independent assessor to present their assessment results at an IEP team meeting. Within 30 days of being notified by Parent of the selected independent assessor, San Diego shall contract with the independent assessor.

4. San Diego shall provide or fund qualified American Sign Language interpreters to interpret between the independent assessors and Student, and any Deaf teachers and staff from San Diego.
5. San Diego may not implement the February 5, 2025 IEP, continued on February 19, 2025, as amended March 12, 2025, without parental consent.

All other 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.

Cararea Lucier

Administrative Law Judge

Office of Administrative Hearings