

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

GLENDORA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006110090

DECISION

Administrative Law Judge Clara L. Slifkin (ALJ), Office of Administrative Hearings (OAH) Special Education Division, State of California, heard this matter on March 20, 2007, through March 22, 2007, in Los Angeles California.

David M. Grey, Esq. represented Petitioner (Student). Student's mother (Parent) was present every day during the hearing.

John E. Hayashida, Esq. represented Respondent Glendora Unified School District (District). District's Director of Instruction and Student Support Services Ted McNevin was also present during the hearing.

On November 3, 2006, Student filed a request for Due Process Hearing. OAH issued a notice of mediation for December 14, 2006, and hearing for December 28, 2006. On December 14, 2006, the case was continued to January 2, 2007, for a trial setting conference. On January 2, 2007, the hearing was set for March 20, 2007. The hearing convened on March 20, 2007, and testimony and other evidence were received until March 23, 2007. At the request of the parties, the record remained open until April 11, 2007, to allow submission of written closing arguments. Both parties filed timely closing arguments. Student's closing argument is identified for the record as exhibit 16. District's closing argument is identified as exhibit M. The record was closed and the matter submitted for Decision on April 11, 2007.

ISSUE

Did the District fail to provide Student with a Free Appropriate Public Education (FAPE) in its October 3, 2006 Individualized Education Program (IEP) for the 2006-2007 school year? ¹

CONTENTIONS OF THE PARTIES

Student contends that District failed to provide her with FAPE in the October 3, 2006 IEP for the 2006-2007 school year by failing to offer a program with appropriate goals and services that address Student's unique needs as a student with a low incidence disability, hearing impaired. More specifically, Student contends that the IEP team failed to design a program that met Student's deficits in the areas of communication and academics in basic reading skills, reading comprehension, spelling and math calculation. Since District's proposed IEP had one goal that Student passes all classes with a C or better, with no benchmarks or objectives, Student asserts the IEP was not designed to meet her unique needs. Thus, Student asserts District failed to offer Student FAPE.

Student also contends that the District's offer of a sign language interpreter in a general education class does not meet her communication and academic special needs. Student states that District should have offered Student Communication Access Real-Time Translation (CART), so that she can make educational progress and to address her deficits in vocabulary, reading comprehension, and classroom participation. Student asserts that when the IEP team offered a sign language interpreter, it failed to consider Student's and family's preferred mode of communication, linguistic needs, severity of hearing loss, social and emotional needs, including opportunities for peer interaction, and communications. Thus, Student argues, District must provide Student with CART to meet her unique needs.²

District contends its offer of placement and services was reasonably calculated to provide Student with some educational benefit and address her unique needs. More specifically, District asserts that the October 3, 2006 IEP, a review and adoption of Student's April 28, 2006 IEP developed when she attended high school in Covina Valley District,

¹ Student's major contention is District's failure to offer Student Communication Access Real-time Translation, real-time captioning.

² CART is a computer-aided transcription device that converts typing from the court reporter's stenographic machine into English language text displayed on a computer screen in "real-time." It is an assistive technology device that can be used as an aid for hearing impaired students to facilitate communication and access to classroom information. An assistive technology device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability.

offered Student a program that provided some educational benefit. District asserts that the goal it adopted that Student's grades should be above a "C" was appropriate and she was making educational progress by meeting this goal. Thus, District concludes it offered Student FAPE.

District further contends that its offer of a sign language interpreter for the entire school day, audiology services, a FM listening device³ and Deaf Hard of Hearing (DHH) services provided Student with FAPE. District asserts that Student rejected District's offer of pullout services and direct contact with Student from District's DHH teacher which would have addressed Student's deficit in vocabulary. Finally, the District argues using CART in Student's classes violates Education Code section 51512, a misdemeanor. This section prohibits the use of any electronic recording device in a classroom without the prior consent of the teacher and the school principal. Both Student's teachers and the principal are opposed to its use. Thus, District concludes that Student's request for CART is unsupported by the evidence.

FACTUAL FINDINGS

Jurisdiction

1. Student is sixteen years old and has been receiving special education and related services as a child with a hearing impairment. She resides within the geographical boundaries of the District with her parents and brother. She attends tenth grade at Glendora High School (Glendora) where she is mainstreamed. She is enrolled in general education classes with a note taker, a FM listening device, DHH consultation services and individual audiology services.

Background

2. At two years, four months, Student was diagnosed with a hearing loss and fit with binaural amplification. Student used hearing aids for approximately eight years. She received a Nucleus 24 device (cochlear implant) in her left ear on March 22, 2001, with initial stimulation of the device on April 24, 2001. Student wears a hearing aid on her right ear.

3. Student is of above average intelligence, challenged by a low incidence disability, hearing impairment. She attended South Hill High School (South Hill) in the Covina Valley Unified School District (Covina District) during the 2005-2006 school year where she was fully mainstreamed with sign language interpreting support. On April 28, 2006, Covina District's IEP team met for an annual review of Student's IEP. On May 31,

³ A FM listening system is a voice amplification assistive technology device that Student's teachers use to help Student hear them speaking during class.

2006, at Parent's request, Covina District convened the IEP team to discuss and request CART. At this meeting, Parent requested that Student return to District (Glendora) and receive services necessary to be mainstreamed. Student transferred to District in September 2006 for the 2006-2007 school year. District convened an October 3, 2006 IEP meeting for a 30-day review of Student's program.

Whether October 3, 2006 IEP Provided Student FAPE for the 2006-2007 School Year

4. The District has provided FAPE if its program or placement was designed to address Student's unique educational needs and was reasonably calculated to provide some educational benefit in the least restrictive environment. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. The District's program must provide a "basic floor of opportunity" that consists of access to specialized instruction and related services. If District's program met the substantive factors, then District provided a FAPE, even if Student's Parent preferred another program and even if his Parent's preferred program would have resulted in greater educational benefit. An IEP is evaluated in light of the information available at the time it was developed, it is not judged in hindsight.

Information Available to the IEP Team at the Time the October 3, 2006 IEP was Developed

5. On April 28, 2006, the Covina District IEP team met to review Student's IEP and discuss Student's Individual Transition Plan (ITP). The team consisted of Student, special and general education teachers, and administrator Julie Starrett. Covina District did not perform any new assessments of Student. Student had special needs in the area of communication and academic deficits in basic reading skills, reading comprehension, spelling and math calculation. The Covina District IEP team members acknowledged that Student's hearing impairment adversely affected her success in the mainstream general education curriculum and she would need interpreting services to be successful. However, Parent voiced concerns about Student being more assertive regarding her communicating and speaking in class.

6. In the April 28, 2006 IEP, Covina District team members offered Student: (1) a general education class (full mainstreaming) in Covina District for the 2006-2007 school year; (2) an in-class sign language interpreter daily for six periods; (3) audiological services once a year for 60 minutes; (4) an assistive technology FM listening system; (5) an extended school year (ESY) program for summer; and (6) accommodations in testing and in the classroom. The IEP team proposed one annual goal: "when given spring progress reports, Student will be passing all classes with a 'C' or better." Parent consented to the IEP.

7. On May 31, 2006, at Parent's request, the Covina District IEP team met to discuss CART. The team included administrator Julie Starrett, Parent, a special education teacher, a general education teacher, a language specialist, a program specialist, an audiologist, a DHH support teacher, a sign language interpreter, a school psychologist, a family friend, and Karen Rothwell-Vivian, an auditory-verbal therapist. Ted McNevin,

District's Director of Instruction and Student Support Services (Mr. McNevin), representing Student's district of residence (District), was also present.

8. Parent contended CART would address Student's academic deficits in reading, vocabulary, and communication. Parent related that at the April 28, 2006 IEP meeting, Student's English teacher reported that Student had weaknesses in reading and vocabulary. Parent was concerned because Student had become dependent on her sign language interpreter to speak for her; Student only reluctantly used her speaking voice. Parent asserted that Student, an oral learner, must be encouraged to speak to enable her to better communicate with her typically developing peers. The IEP team discussed Parent's two major concerns regarding Student's deficits in the areas of socialization and academics. Parent believed that CART would enable Student to make progress in these areas. However, the other members of the IEP team indicated that Student was making academic progress using a sign language interpreter and the accommodations in her IEP. The team concluded that Student received educational benefit from the current IEP, as demonstrated by meeting her goal of obtaining a grade of C or better. The team rejected Parent's request for CART. However, the team approved Student's return to Glendora District with mainstreaming in the general education classroom and the aforementioned services.

9. In September 2006, Student transferred to District that was in the same Special Education Local Plan Area (SELPA). On October 3, 2006, the District IEP team convened to review Student's April 28, 2006 IEP and to discuss goals, services, accommodations and CART. The IEP team consisted of: Student; Parent; Covina Valley DHH itinerant teacher Carol Vodovoz; Ms. Rothwell-Vivian; sign language interpreter Pam Williams; Mr. McNevin; case carrier Robert Bracken; school psychologist Todd Hill; history teacher Carlos Calderon ; and two family friends who taught deaf students. The team met and reviewed Student's only goal: "when given spring progress reports, Student will be passing all classes with a 'C' or better." The team approved the goal and found that no other goals were necessary. With its approval of this goal, the team also approved the second short-term objective to be met by January 31, 2007: "given semester grades, Student will pass with a 'C+' or better."

10. The October 3, 2006 IEP team also reviewed Student's services and accommodations including the sign language interpreter; incorporating peer note taking, working with the school counselor, and using closed caption videos. The team discussed the pros and cons of using an interpreter or CART. Student did not use the interpreter very much in class because Student wanted to be in "the hearing world," and be more independent. Student and Parent preferred the oral learning method that utilized speaking and reading lips and did not communicate through sign language. Parent indicated that Student required CART so that she could access the curriculum and participate in class discussions. During the team's discussion of the sign language interpreter, Parent distributed and discussed a list of "dos and don'ts" prepared by Student. The interpreter became upset, indicated that she could no longer work with Student, and left the IEP meeting.

11. The October 3, 2006 team offered Student full mainstreaming and the same services and accommodations that Covina District offered in the April 28, 2006 IEP. These included a sign language interpreter, audiology services once a year, DHH consultation once a month with case carrier, an FM auditory system, and preferential seating. The IEP team also recommended that Student's teachers face her when speaking and repeat questions asked by other students. The IEP team rejected Parent's request for CART. The team concluded that Student's passing grades indicated that she was making good educational progress and she was meeting her stated goal and objective. Student and Parent signed the October 3, 2006 IEP.

District's Offer of FAPE Was Not Designed to Address Student's Unique Educational Needs and Provide Some Educational Benefit

Student's Unique Needs

12. As established by the evidence, Student is in the high cognitive range. Student scored 138 or in the 99th percentile on the Test of Nonverbal Intelligence, Third Edition. The evidence also established that Student has unique needs in the area of communication because of her hearing impairment and her primary method of communication, oral learning. Student's special needs in communication were specifically described by Ms. Rothwell-Vivian, an auditory verbal therapist and educational audiologist, who testified as Student's expert witness. In 1976, Ms. Rothwell-Vivian received a Master of Science in Education and three years later received a Master of Arts in Audiology. Since 1985, she has been in private practice tutoring in language and developing speech skills in hearing impaired children through their residual hearing. From 1986 through 1991, the Newport-Mesa Unified School District employed her as an educational audiologist, evaluating auditory skills and designing oral programs for students with hearing loss. Since Student's cochlear implant in 2001, Ms. Rothwell-Vivian has given Student auditory-verbal therapy one to two hours per week.

13. Ms. Rothwell-Vivian established that Student had unique communication needs as an oral learner, and sign language is not and should not be her primary means of communication. Ms. Rothwell-Vivian testified that Student's hearing impairment interfered with her participation in classroom discussion, an important element in cognitive growth for an oral learner. Ms. Rothwell-Vivian's testimony and Student's testimony confirmed that Student had difficulty following class discussion, because it was difficult to simultaneously lip read, use the FM decoder and follow the sign language interpreter. The evidence established that Student's increased participation in classroom discussion is important to improve her deficits in communication, particularly vocalization. Thus, the ALJ finds that as an oral learner Student had unique communication needs and Student's IEP must address these needs so that Student can access her education and make some educational progress.

14. Student also had unique needs in academics, specifically in the areas of reading comprehension, vocabulary, expressive vocabulary and math computation. This finding was supported by Ms. Rothwell-Vivian's testimony and her communication assessment performed in September 2006. She administered to Student the Expressive

Vocabulary Test, Peabody Picture Vocabulary Test, Third Edition and the Structured Photographic Expressive Language Test. Ms. Rothwell-Vivian reported that Student demonstrated minimal growth in language development, scoring in the fifth percentile in vocabulary and the 23rd percentile in expressive vocabulary. School psychologist Mr. Hill also confirmed Student's need for support and intervention in academics. On September 18, 2006, he administered to Student the Woodcock-Johnson III, Tests of Achievement. Generally, Student's scores were within the average to low average range. Student scored poorly in letter word identification (2nd percentile), passage comprehension (9th percentile), math calculation (16th percentile), and spelling (6th percentile). Mr. Hill participated in District's October 3, 2006, and concluded from his tests that Student may have difficulty performing at level with same age peers without intervention and support in academic areas.⁴ In spring 2006, Student scored below basic on the California Standards Test in English language arts and math. Thus, the evidence established that Student has deficits in academics, in the areas of reading comprehension, vocabulary, expressive vocabulary, and math computation. Student's deficits in these academic skills also interfered with her making progress in oral communication.

15. District contends that it did not have knowledge of Student's unique needs because Student transferred from Covina District. However, at the May 31, 2006 IEP meeting convened by Covina District, Mr. McNevin participated as a District representative and Ms. Rothwell-Vivian and Parent, discussed Student's unique communication and academic needs.⁵ Student's unique needs were also discussed at District's October 3, 2006 IEP. Thus, the ALJ finds that District had knowledge of Student's unique needs in the areas of communication and academics, specifically reading comprehension, vocabulary, expressive vocabulary and math computation. As discussed below, District failed to offer Student a program to address Student's unique needs.

Student's Annual Goal Was Not Designed to Meet Student's Unique Needs

16. Parent contends that District set only one goal and it was not designed to meet Student's unique needs. Student has deficits in communication, language, reading and vocabulary which are typical of deaf children. Communication skills are particularly important skills for a hearing impaired student to learn to succeed in high school and to transition towards postsecondary goals and independent living skills. The District failed to include a communication goal in its educational program.

17. An IEP must contain measurable annual goals, related to meeting the pupil's needs that result from the pupil's disability to enable the pupil to be involved in and progress

⁴ Student presented expert testimony regarding Student's communication and academic unique needs. Because Mr. Hill did not testify, the ALJ admitted his psychoeducational report, Student's exhibit 3, as administrative hearsay.

⁵ At Parent's request, Covina convened a May 31, 2006 IEP meeting. The IEP team rejected CART and made no changes to Student's April 28, 2006 IEP.

in the general curriculum. District's failure to develop a measurable goal deprives the teacher of the information needed to make any adjustments that might be required to allow the student to progress.

18. At District's October 3, 2006 IEP, the team reviewed and approved the one annual goal set by Covina District's April 28, 2006 IEP team: Student will be passing all classes with a C or better. This single goal adopted by District's IEP team does not address Student's unique needs in areas of communication, and academics, specifically reading comprehension, vocabulary, expressive vocabulary and math computation. The evidence supports the finding that there are no goals designed to address Student's unique needs in communication and vocalization. Student's passing all classes with a C or better is not an academic goal that addresses Student's specific academic needs in reading and math skills. This goal also fails because it is so vague that it does not give a teacher any guidance on how to make adjustments that might have been required to assist Student in reaching this goal. Thus, the ALJ finds that the October 3, 2006 IEP does not contain any measurable annual goals related to meeting Student's needs that result from her disability (hearing impairment) to enable her to be involved in and progress in the general curriculum.

19. An appropriately drafted short-term objective can sometimes compensate for inadequate annual goals. At the October 3, 2006 IEP meeting, District reviewed and approved the two short-term objectives set by the Covina District. First, by June 12, 2006, the short-term instructional objective was: "Given a fall schedule of classes, [Student] will be passing the."⁶ Second, by January 31, 2007, the short-term instructional objective was: "Given semester grades [Student] will pass with a C+ or better." The IEP indicated that Student's DHH teacher was the person responsible for these short-term objectives. The first short-term objective is inadequate because it is incomprehensible. The second short-term objective merely repeats the goal. Based on the evidence, the ALJ finds these short-term objectives are not designed to give the DHH teacher or Student's general education teachers any guidance on how to work with Student to accomplish the one annual goal. The short-term objectives are inadequate because they do not provide any guidance to teachers in how to achieve Student's goal. Thus, these objectives do not compensate for District's inadequate annual goal.

20. District contends that Student is making good progress because she has C or better grades. However, that argument is not persuasive. As discussed above, Student's passing grades, does not excuse District's failure to develop a meaningful IEP that addresses Student's unique needs. Without proper goals, objectives and benchmarks, it is difficult to ascertain if Student is making some educational progress. A student's ability to progress from grade to grade may indicate that she is making progress. However, it is not a conclusive sign that Student is receiving FAPE.

⁶ Because this is a full recitation of Student's short-term objective, it is unclear what Student will be passing.

The Accommodations and Modifications Offered to Student Are Not a Substitute for Inadequate Goals

21. Student contends that the accommodations and modifications offered to Student cannot substitute for inadequate goals. The modifications to the curriculum do not meet Student's unique needs and help her to benefit from her special education.

22. Accommodations and modifications offered in a student's IEP are provided to enable a student to appropriately advance toward attaining annual goals and be involved in and make progress in the general education curriculum. The purpose of measurable goals is to establish objective criteria to determine the progress or lack of progress a student has made towards annual goals.

23. District's October 3, 2006 IEP team offered modifications and accommodations to be provided by Student's general education teachers, as follows: incorporating peer note taking; using closed caption videos; seating Student in front of the class; facing the Student when talking; repeating the questions from other students; and permitting Student to have extra time on tests. However, the evidence is convincing that Student's teachers were not given any guidance or objective criteria from District's proposed IEP goal as to how to accomplish that goal and address Student's unique needs in communication and academics. Thus, these accommodations and modifications are not designed to enable Student to benefit from her special education.

District's Offer of a Sign Language Interpreter Does Not Afford Student Access to Her Special Education

24. Student contends the District's offer of a sign language interpreter in a general education class does not meet Student's unique communication and academic needs. The District must provide Student with a service or assistive technology device to enable her to benefit from her special education.

25. As a student with exceptional needs, Student is entitled to instruction designed to meet her unique needs coupled with related services as needed to enable the student to benefit fully from her special education. "Related services" include developmental, corrective, audiology, interpreting and supportive services. Hard of hearing and deaf children primarily use two different language modes, sign language and oral (aural). Oral learners express and receive language orally with or without visual cues. In developing an IEP for a child who is hard of hearing or deaf, the IEP team should take into consideration: the student's communication needs; the student's and the family's preferred mode of communication; linguistic needs; severity of the hearing loss; social and emotional needs; and the opportunities for peer interaction and communication.

26. District acknowledges that Student's hearing impairment adversely affects her success in mainstream education. The District must provide Student with service so that she can benefit from her education; it must provide her with interpreter services. At the

District's October 3, 2006 IEP meeting, the team discussed, approved and offered Student the services of a sign language interpreter.

27. The evidence is convincing that in designing Student's October 3, 2006 IEP, the team should have and did not consider Student's and her family's preferred mode of communication as an oral learner. A sign language interpreter utilizes a different mode of communication, a different language. The evidence also shows that the IEP team's offer of a sign language interpreter was not designed to meet Student's unique needs. This is supported by testimony that Student's cochlear implant was activated on April 24, 2001, when she was 11 years old, limiting Student's access to language. Even with a hearing aid, cochlear implant, and FM system, Student has a severe hearing loss. As an oral learner Student expresses and receives language orally and she reads lips. District's offer of a sign language interpreter is not designed to meet Student's unique needs and enable her to access her special education.

28. District contends that its offer of a sign language interpreter met Student's unique educational needs and was reasonably calculated to provide some educational benefit. Although the District continued to offer Student the services of a sign language interpreter, Student's interpreter resigned from her position after the October 3, 2006 IEP meeting. District attempted to hire another sign language interpreter and in the interim hired Gina Butler, as a note taker for Student. Alternatively, the District contends that the note taker meets Student's unique needs and Student does need CART to access her education. As discussed below, the note taker does not meet Student's unique needs nor provide Student with access to her special education.

Student Requires CART to Meet her Special Needs and Make Educational Progress

29. Student contends that District's offer of a sign language interpreter does not meet her special needs. District must offer Student CART, so that she can make educational progress and to address her deficits in communication and academics, specifically in vocabulary, reading comprehension, and math. As person with a hearing deficiency, communication is one of Student's deficits and District must offer her a program that addresses this area of need. In addition, Parent contends that as an oral learner Student has to increase her vocalization through participation in classroom discussion in order to make educational progress and benefit from her special education.

30. When developing a pupil's IEP, the IEP team shall also consider the communication needs of a student. In addition, the IEP team shall consider whether the student requires assistive technology services and devices. A school district is required to provide any assistive technology device that is required to provide FAPE to a child with a disability. An assistive technology device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability. There is no express requirement that a school district perform an assistive technology evaluation. Assistive technology devices or services may be required as part of the

child's special education services, related services, or supplementary aids and services.

31. The evidence is convincing that Student as an oral learner requires CART, an assistive technology device, properly considered a related service, to meet her special education needs and make educational progress. In addition as discussed above, District's offer of a sign language interpreter or alternative of a note taker does not meet Student's unique needs in communication and academics.

32. Student presented persuasive evidence from expert witnesses Sandy Eisenberg and Ms. Rothwell Vivian regarding CART and how it addresses Student's unique needs and enable Student to benefit from her education. Since 1992, Ms. Eisenberg has been a real-time captionist and now owns a business called, "Total Recall Real-time Captioning." In 1992, she established the first real-time captioning program at California State University, and later implemented a captioning system at University of California at Los Angeles. Ms. Eisenberg explained that CART is an assistive technology that has been utilized locally at the Los Angeles Unified School District, the Santa Monica Malibu Unified School District, and Acton-Aqua Dulce District. It has also been used by government, businesses and organizations. Thus, she established that CART has been recognized and utilized.

33. The ALJ finds Ms. Eisenberg's expert testimony informative and persuasive regarding how CART will help Student benefit from special education. Ms. Eisenberg testified that CART will help Student build her vocabulary and reading skills because words appear on the computer screen during the teacher's lecture and class discussion. Seeing the words on the computer screen and hearing the words in context will help Student understand complex concepts. CART will help Student keep up with the classroom discussion so that she will have the confidence to participate in class discussion and vocalize. Ms. Eisenberg emphasized that CART fosters independent learning because Student has a verbatim record of the class or discussion and can determine what is important based on the Student's understanding of the material. Student can have the text file fed through software and then she will be able to highlight the important points or questions. Ms. Eisenberg stated that CART will help Student transition to college, because real-time captioning is frequently used in college. Thus, CART will enable Student to access her education and receive some educational benefit.

34. The ALJ also finds Ms. Rothwell-Vivian's expert testimony credible and persuasive regarding Student as an oral learner requiring CART to access her education. Ms. Rothwell-Vivian explained that Student has a profound hearing loss in both ears and without the cochlear implant and the hearing aid she hears nothing. Student has difficulty hearing with the FM auditory system when there is noise or discussion. Ms. Rothwell-Vivian indicated that even with the equipment, Student feels lost in the classroom because she has difficulty following voices and class discussion. Sign language is not an appropriate means of communication for oral

learners. Thus, she concluded CART will enable Student to access her education because she is an oral learner.

35. Ms. Rothwell-Vivian testified that CART addresses Student's unique needs in communication as an oral learner. CART is a visual aid and if Student "gets lost" or is unable to keep up with class discussion or the teacher's lecture, Student can track it visually in real-time. Ms. Rothwell-Vivian explained that CART will enable Student to follow class discussion, increase Student's participation in class and vocalization, and improve her social skills. CART will also help Student improve her reading comprehension and vocabulary. Using CART, Student can read the words on the computer screen as she also hears them in context through the FM device that amplifies the teacher's lecture. Viewing the words on the computer screen will also help Student read the teacher's and other students' lips. Thus, she concluded that CART will help Student access her education and make progress. Because of Ms. Rothwell-Vivian's experience, expertise, familiarity with Student and CART, the ALJ finds her testimony persuasive.

36. The ALJ finds Student's teacher Mr. Calderon was a credible and persuasive witness. He testified that CART would help Student benefit from her education. Mr. Calderon explained that in his history class students discussed complicated concepts and difficult vocabulary words. CART would allow Student to see words and concepts in writing and would help Student understand complex concepts and increase her vocabulary. He believed that Student would participate in class discussion if she could better follow class discussion. CART would assist Student and give her the confidence that she needs to participate in class discussion.

37. District contends that an alternative to CART is a one-to-one note taker. District argues that with this less intrusive alternative, Student can follow classroom discussion and benefit from her education. The court reporter or real-time captionist does not have to sit next to Student, but can sit anywhere in the classroom. However, a note taker is a one-to-one aid and has to sit close to Student thus creating a more restrictive environment than CART. Student is dependent on her note taker for constant support. In addition, Gina Butler testified that she decides what comments and conversations are pertinent.⁷ This alternative service is not consistent with Student's preferred mode of communication. Student does not have immediate access to notes as she would with CART. The notes and note taker divert Student's attention from processing the oral information that Student receives from the FM device and lip reading. Thus, a one-to-one note taker does not meet Student's unique needs.

38. The ALJ finds the testimony of Caroline Vodovoz, District's expert witness, unpersuasive. Ms. Vodovoz has been a teacher for the deaf and hard of

⁷ Presently, Gina Butler is with Student in all of her classes, taking notes, and copying Student's assignments.

hearing students for Los Angeles Unified School District and District. Since 1974, she has held a California restricted credential for deaf and hard of hearing. Despite her experience, her knowledge about CART was very limited. How the CART system worked and its benefits in improving communication and verbal skills in hard of hearing student's had to be explained to her at Student's May 31, 2006 IEP. Student's preference as an oral learner and Parent's preference did not receive any support from Ms. Vodovoz. Instead, Ms. Vodovoz recommended that Student use a sign language interpreter. She testified that CART was an extreme solution to a problem. However, this testimony is inconsistent with Ms. Eisenberg and Ms. Rothwell-Vivian.

39. The evidence establishes that Student does not need CART in her nonacademic classes, such as Art and Collaboration to benefit from her special education. Testimony presented by Student and District supports this finding. The evidence also establishes that CART is the appropriate assistive technology and service to assist Student in all of her unique needs. Thus, the ALJ finds that Student is not entitled to the services of a sign language interpreter or a one-to-one note taker with the provision of CART.

Conclusion Regarding District's Failure to Provide FAPE in October 3, 2006 IEP for the 2006-2007 School Year

40. District's failure to develop an IEP for Student that met her educational needs is a denial of FAPE. District failed to develop an IEP with measurable goals designed to meet her unique needs and it was not reasonably calculated to provide Student with some educational benefit. Thus, the October 3, 2006 IEP team's offer for the 2006-2007 school year denied Student FAPE.

41. Student has unique communication needs. The IEP team failed to consider these unique needs when it offered Student the services of a sign language interpreter. District's offer of a sign language interpreter was not reasonably calculated to provide Student with some educational benefit. CART is an assistive technology device that District should have offered so that Student's IEP for 2006-2007 school year was reasonably calculated to provide Student with some educational benefit. Thus, the October 3, 2006 IEP team's offer for the 2006-2007 school year denied Student FAPE.

CART is not Prohibited by the Education Code and Does not Have a Chilling Effect

42. District contends that CART is prohibited by Education Code section 51512. This section provides that use of a recording or listening device in a classroom without a teacher's and the principal's permission is a misdemeanor. CART utilizes a captionist to take stenographic-type notes of the entire classroom lecture and discussion and those notes are transcribed and displayed on a computer screen as readable English text in virtual "real-time." The stenography machine does not record sound like a tape recorder or video camera

nor is it a listening device. District does not object to or prohibit the use of an FM device which is a listening device. CART is not prohibited by the Education Code.

43. District also contends that the use of CART in Student's classroom will have a chilling effect on students and is an invasion of their privacy. Neither District nor any other IEP member brought up these issues at Student's May 31, 2006 IEP or October 3, 2006 IEP. Several District teachers indicated that the presence of a captionist taking verbatim notes of class discussion may make other students more reticent in their class room participation. However, all witnesses agreed that once CART is no longer a novelty, students will not even notice the presence of the captionist. They analogized this to students' initial reaction to the sign language interpreter. CART does not have a chilling affect on classroom discussion.

LEGAL CONCLUSIONS

Applicable Law

1. As the party seeking relief, Student has the burden of proof as to the issue designated in this Decision. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.⁸) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9) (IDEIA 2004).)

3. "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25) (IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363(a).)

⁸ All statutory citations to the Education Code are to California law, unless otherwise noted.

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Rowley*, at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Rowley*, at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

5. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District, supra*, 811 F.2d 1314.) If the school district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student’s IEP, then the school district provided a FAPE, even if the student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit. (*Ibid.*) Educational benefit in a particular program is measured by the degree to which the student is making progress on the goals set forth in the IEP. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.)

6. De minimus benefit or trivial advancement, however is insufficient to satisfy the *Rowley* standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d at p.130; *Doe v. Smith* (6th Cir. 1989) 879 F.2d 1340, 1341.) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.* (3d Cir. 2000) 205 F.3d 572, 577.) A child’s academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child’s potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3 1114, 1121.) If a parent disagrees with the IEP and proposed placement, he or she may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).)

7. The IEP is a written document detailing, in relevant part, the student’s current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with

nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) The statement of measurable annual goals must be designed to “[m]eet the individual’s needs that result from the individual’s disability to enable the pupil to be involved in and make progress in the general curriculum” and “[m]eet each of the pupil’s other educational needs that result from the individual’s disability.” (Ed. Code, § 56345, subds. (a)(2)(A) & (B); see also 34 C.F.R. § 300.320(a).)

8. Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period in the child’s special education program. There should be a direct relationship between the annual goals and the present levels of educational performance. An IEP should describe objective criteria, evaluation procedures, and schedules for determining whether instructional objectives are being met. (Ed. Code, § 56345, subd. (a)(6).) A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 115 F.3d 1519, 1526.)

9. When developing a pupil’s IEP, the IEP team shall also “[c]onsider the communication needs of the pupil.” (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code, § 56341.1, subd. (b)(4).) In addition, the IEP team shall consider whether the pupil requires assistive technology services and devices. (20 U.S.C. § 1414(d)(3)(B)(v); Ed. Code, § 56341.1, subd. (b)(5).) A school district is required to provide any assistive technology device that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) An assistive technology device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) There is no express requirement that a school district perform an assistive technology evaluation. Assistive technology devices or services may be required as part of the child’s special education services, related services, or supplementary aids and services. (34 C.F.R. § 300.105.) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services. (34 C.F.R. § 300.304(c)(6).)

10. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁹ An IEP is “a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann*

⁹ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp.2d 1213, 1236).

v. East Hanover Bd. of Education (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*) The focus is on the placement offered by the school district; not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist., supra*, 811 F.2d at p. 1314.)

11. Deafness is a low-incidence disability that requires “highly specialized services, equipment, and materials.” Low incidence disabilities make up less than one percent of a statewide enrollment in special education. (Ed. Code, §§ 56000.5, subs. (a)(1) & (2); 56026.5.) “Deafness involves the most basic human needs—the ability to communicate with other human beings.... It is essential for the well-being and growth of hard of hearing and deaf children that educational programs recognize the unique nature of deafness.” (Ed. Code, § 56000.5, subd. (b)(1).) Hard of hearing and deaf children primarily use two different language modes, sign language and oral (aural). Oral learners express and receive language orally with or without visual cues. (*Ibid.*; Ed. Code, § 56026.2.) In developing an IEP for a child who is deaf, the IEP team should take into consideration: the student’s communication needs; the student’s and the family’s preferred mode of communication; linguistic needs; severity of the hearing loss; social and emotional needs; and the opportunities for peer interaction and communication. (Ed. Code, §§ 56000.5, subd. (b)(2); § 56341.1, subd. (b)(4); Notice of Policy Guidance, U.S. Department of Education, October 26, 1992, at 19 IDELR 463A.)

Determination of Issue

Did the District fail to provide Student with a Free Appropriate Public Education (FAPE) in its October 3, 2006 IEP for the 2006 to 2007 school year ?

Based on Factual Findings 1 through 44 and Legal Conclusions 1 through 12, District’s December 2, 2006 IEP for the 2006-2007 school year failed to provide Student with FAPE.

ORDER

1. Student’s request for CART services for the 2006-2007 and for the 2007-2008 school year is granted. CART services are only to be provided in Student’s academic classes and not in her non academic classes.
2. District is ordered to pay for the costs of CART services.

PREVAILING PARTY

Pursuant to 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. Student, Petitioner prevailed on the Issue.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: May 23, 2007.


CLARA L. SLIFKIN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings