



Special Education Hearing Office

ORDERS AND DECISIONS DATABASE SEARCH

Record Detail

General Case Information

Case Year:	1996
Case Number:	890
Petitioner:	Student
Respondent:	SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT
Name of Document:	DECISION

Hearing Officer Information

Type of Case:	Decision Only
Type of Disability:	Deafness
Issue:	EDGARNon Public SchoolRelated ServicesResource Specialist Program
Topic:	

Assistant Calendar Clerk Information

California Children's Services:	0
Public School District:	07-61804 San Ramon Valley USD
Mental Health Agency:	
SELPA:	
COE:	

Issues Findings:**Body of Text:**

This matter was heard before Leonard Garfinkel, Hearing Officer of the California Special Education Hearing Office, McGeorge School of Law, in Danville, California, on September 10 and 11, 1996.

Petitioner STUDENT attended the hearing and was represented by attorney Kathryn Dobel. Also present on behalf of STUDENT were her parents, PARENTS. Bobbie Skiles, Carol Sue Richardson and Anna Mindess, sign language interpreters, were present to assist STUDENT.

Respondent was represented by attorney Sandra Woliver. Also present on behalf of the District was Dr. Dana Sassone, director of special education.

The following witnesses were called by Petitioner: STUDENT, PARENT and PARENT, and John Cardoza, assistant principal, Carondelet High School. The following witnesses were called by Respondent: Dr. Sassone; Jane Sweet, sign language interpreter; Joni Norris, aural handicapped/speech and language specialist; Henry Bailey, school counselor; Valerie Baugh, resource specialist; Melissa Cochran, program specialist, Contra Costa County Special Education Local Plan Area (SELPA); and Sean McElroy, former assistant principal, California High School.

Oral and documentary evidence was received. At the request of the parties, the record was left open until October 7 for the receipt of closing briefs. At that time the record was closed and the matter submitted for decision.

ISSUE

Must the District provide STUDENT with the services of a sign language interpreter and an aural handicapped/speech and language therapist on the premises of her private, parochial high school?

POSITIONS OF THE PARTIES**1. Petitioner**

Petitioner asserts that, pursuant to an Individualized Education Plan (IEP) dated May 30, 1996, the District agreed to provide STUDENT with the services of a sign language interpreter and an aural handicapped/speech and language therapist (hereafter referred to as "AH services") at a private, parochial school, Carondelet High School, for the 1996-97 school year. Then, Petitioner asserts, in an IEP dated August 14, the District reneged

on that agreement. Petitioner asserts that the District should be ordered to provide STUDENT with on-site services at Carondelet for the remainder of the 1996-97 school year because (1) it agreed in an IEP to do so, (2) STUDENT enrolled at the school in reliance on that IEP, and (3) in any event, based on STUDENT's educational needs, the District is required to provide such on-site services pursuant to regulations known as EDGAR. (FOOTNOTE 1)

2. Respondent

The District asserts that it offered STUDENT a free, appropriate public education (FAPE) at a public high school, California High School, including a sign language interpreter and AH services. The District asserts that, under EDGAR, it has no duty to provide her with services on the premises of her private school.

SUMMARY OF RELEVANT EVIDENCE

STUDENT is sixteen years old and lives with her family in San Ramon, within the District and Contra Costa County. She is eligible for special education and related services because she is deaf.

STUDENT was diagnosed with severe hearing loss as an infant. She attended programs for hearing-impaired children through age five. Since kindergarten, she has attended regular education classes with nondisabled peers. In grades three through six, STUDENT attended private, sectarian schools. During this time period the Contra Costa County SELPA provided STUDENT with AH services at her private school. Also during this time, she experienced progressive hearing loss. In April 1992, toward the end of her sixth grade year, STUDENT was injured and lost all of her remaining hearing. For the rest of that school year, she received instruction at home from a District tutor.

In seventh and eighth grade, STUDENT attended Pine Valley Middle School in the District. In June 1993, at the end of her seventh grade year, she received a cochlear implant. The implant provided internal stimulation of the auditory nerve. Along with a speech processor worn externally, it allowed STUDENT to hear and decipher some sounds. With the implant, her hearing was similar to that of a person with a moderate to severe hearing loss. In addition to the implant, STUDENT continued to rely in class on her speechreading and visual abilities, and the assistance of a sign language interpreter.

In ninth grade (1994-95), STUDENT began attending the District's California High School in San Ramon. Her IEP for that year called for her to receive the following services: (1) a sign

language interpreter for academic classes and the basketball team after school, (2) one hour per week of AH services, and (3) consultation from a resource specialist (RSP) regarding academic classes as needed. Pursuant to the IEP, AH specialist Joni Norris worked with STUDENT on speech drills (including complex consonant blends), vocabulary development, auditory training, and written language skills. (FOOTNOTE 2)(Resp. Exh. 6-7) (FOOTNOTE 3) The resource specialist, Jeff Sawers, at times acted as a "troubleshooter" for STUDENT with respect to her academic classes. He assisted primarily with such issues as making sure she was seated in a location where she could see the interpreter and the teacher.

During ninth grade, STUDENT achieved a "B" average in college preparatory classes, as follows: History: A, B-; English: B, A-; Algebra, C-, C; Physical Education: A, A; Health/Foods: B, A-; and Core Study Skills: A, A. She struggled in Algebra. During the spring semester, STUDENT received extra help from the Algebra teacher, and her parents paid for a private tutor for that subject.

For tenth grade at California High School (1995-96), STUDENT's IEP called for her to receive the same services that she had received in ninth grade. She again achieved a "B" average in college preparatory classes, as follows: Biology: C, C; English: B+, B+; Photography: B-, A-; Keyboarding/Word Processing: A-, B; Athletics: P, P; Geometry/Teacher's Aide: C+, A; and History: C. Ms. Norris continued to work with STUDENT on those skills they had worked on the year before. (Resp. Exh. 10, 11, 12) In addition, because STUDENT had received a new speech processor for her cochlear implant during the summer of 1995, Ms. Norris provided further auditory training. That year, the resource specialist, Mr. Sawers, was less involved in STUDENT's program than he had been during ninth grade.

In tenth grade, STUDENT had some difficulty in geometry and biology. On one occasion, the geometry teacher was not receptive to STUDENT's request for extra help. Eventually, concerned about her performance, STUDENT dropped the class. On one occasion, she perceived that her biology teacher had demeaned her in class. (STUDENT's sign language interpreter, Jane Sweet, believes STUDENT misread the situation.) STUDENT worked with the AH specialist, Ms. Norris, on biology vocabulary, and also participated in extra credit field trips to bolster her biology grade.

Socially, STUDENT was unhappy at California High during tenth grade. On one occasion, she observed a drug transaction in a school restroom, and she generally found the restrooms to be dirty with cigarette remains. Additionally, according to her father, her friendships with some of the girls on the basketball team turned sour.

During the spring of her tenth grade year, STUDENT visited Carondelet High School, a private Catholic high school in Concord. (Resp. Exh. 27) (FOOTNOTE 4) STUDENT had previously met some members of Carondelet's girls' basketball team during a summer tournament. Upon her visit, she found the school clean, the students well-behaved and friendly, and the teachers helpful.

During the spring of 1996, the parents informed the District that STUDENT would transfer to Carondelet for the 1996-97 school year. They requested assurance that the District would provide a sign language interpreter and AH services at the private school. (Pet. Exh. G) Dr. Sassone, the District's special education director, orally confirmed that the District would do so. Dr. Sassone testified that the reasons for this decision included her familiarity with court decisions on this issue and the fact that the District had been through litigation with the PARENTS regarding the same issue several years earlier. (FOOTNOTE 5)

At an IEP meeting on May 30, 1996, Melissa Cochran, Contra Costa County SELPA program specialist, who led the meeting, confirmed that the District would provide a sign language interpreter and AH services at Carondelet. At the parents' request, it was agreed that the California High School resource specialist, Mr. Sawers, would be available by telephone, as necessary, as a source of advice for the family and Carondelet teachers. The parents did not request that the District pay STUDENT's tuition at Carondelet. It was understood by all parties that the parents intended to pay the tuition.

The IEP document prepared on May 30 identified STUDENT's school of attendance as "RSP/California High/Carondelet." (Resp. Exh. 13) The document stated: "IEP team recommends resource, AH/Sp. & Lang., and interpreter as the least restrictive placement in which IEP goals/objectives can be met." The program description was: "RSP (monitored at CHS), AH/Sp. & Lang. (Carondelet) and school interpreter to support STUDENT in academic classes and related areas." The specific description of services to be provided was as follows:

- (1) RSP: monitored at home school per parent/student request.
- (2) AH/Sp. & Lang.: 1 X per week, 60 minutes, individual.
- (3) Interpreter: 5X per week, full school day and including school-sponsored sports in which STUDENT participates as a team member. (Resp. Exh. 13)

Shortly after the IEP meeting, the parents signed a tuition contract, formally enrolling STUDENT at Carondelet for the 1996-97 school year.

In June, Ms. Sweet, the District sign language interpreter who had worked with STUDENT at California High, expressed concern to District administrators about the prospect of interpreting religious material at Carondelet. In early July, Dr. Sassone contacted PARENT, who stated that she did want interpretation of religious material for STUDENT. Dr. Sassone next contacted a Carondelet administrator, Sister Elinor, who confirmed that the school had a religion class and expected STUDENT's interpreter to assist her in that class. (FOOTNOTE 6)

Dr. Sassone then contacted the District's lawyers for advice about the issue. In mid to late July, the lawyers advised the District to reverse the May 30 IEP team decision to provide services at Carondelet. The lawyers' advice did not relate to the concern raised by the interpreter, Ms. Sweet, regarding religion. Rather, the lawyers advised that the District was not required, under current law, to provide the services at the private school. The lawyers also advised that providing STUDENT with an interpreter at Carondelet could have potentially costly and widespread implications for the District. More specifically, they advised that if the District chose to provide services to any one student at any one private school, it might be obligated to provide services to many more students at many more private schools in the future. The lawyers also expressed concerns about the District's ability to supervise multiple District employees at multiple, distant private schools. According to Dr. Sassone, during this time period, she learned of a District policy not to provide services to parentally-placed students at their private schools. (FOOTNOTE 7)

Based on the lawyers' advice, a District assistant superintendent decided to reverse the May 30 IEP team decision to provide services at Carondelet. In early August, Dr. Sassone contacted the parents to arrange an expedited IEP meeting. (Resp. Exh. 15, 16, 17) Dr. Sassone wrote:

Should you choose to enroll STUDENT at the private parochial high school, we will not offer the services of a sign language interpreter. Under current law, we believe we are not required to do so. (Resp. Exh. 17) (Emphasis supplied.)

At an IEP meeting on August 14, the District offered to provide STUDENT with sign language interpreter, AH, and RSP services at California High School. A District representative wrote on the IEP document, "The District will not provide services at Carondelet."

(Resp. Exh. 19) The description of RSP services was changed slightly from that contained in the May 30 IEP. It now read: "Consultation/monitoring as needed." At the meeting, the District did not indicate that it believed STUDENT's educational needs had changed since May 30. Both Dr. Sassone and PARENT testified that there was no discussion at the meeting regarding the District providing AH services at a public school site. (FOOTNOTE 8) The parents did not consent to the District's proposal to change the May 30 IEP.

That day (August 14), the parents filed a request for a due process hearing and a stay put order, noting that classes at Carondelet were to begin on August 19. On August 16, Hearing Officer Paxson issued a Stay Put Order, ruling that the District must implement STUDENT's May 30 IEP pending resolution of due process. This meant that the District was required to provide STUDENT with an interpreter and AH services at Carondelet. Shortly after the stay put order was issued, the parties agreed that Ms. Sweet need not interpret STUDENT's religion class at Carondelet.(FOOTNOTE 9)

On August 19, STUDENT began classes at Carondelet with Ms. Sweet serving as her interpreter (except for religion class) and Ms. Norris providing weekly on-site AH services. Ms. Norris testified that, while it was not educationally necessary that she serve STUDENT at Carondelet -- that is, she could provide AH services just as effectively at California High before or after school -- there was no additional cost to the District in having her provide services at Carondelet rather than at California High. Ms. Norris also testified that she believed it was no more expensive for Ms. Sweet to provide services at Carondelet than at California High.(FOOTNOTE 10) The District presented no contrary evidence regarding cost. While the District asserted that it has to pay Ms. Sweet for not working during the religion class at Carondelet, the evidence showed there were also portions of the school day at California High when Ms. Sweet did not interpret for STUDENT but was paid.

On August 27, District resource specialist Valerie Baugh visited Carondelet to observe the interaction between STUDENT, Ms. Sweet, and the teachers in academic classes. On September 9, the District's special education director, Dr. Sassone, met with Carondelet assistant principal, John Cardoza. The primary focus of the meeting was to ascertain the method by which the District would supervise and evaluate its employee, Ms. Sweet, at the private school.(FOOTNOTE 11) Although District administrators had observed Ms. Sweet only once or twice per year when she worked with STUDENT at California High -- and Ms. Sweet was described as a model employee -- Dr. Sassone requested that the District be permitted to observe Ms. Sweet twice each month at Carondelet.(FOOTNOTE 12) Mr. Cardoza expressed concern that this could be distracting and

suggested, instead, that credentialed Carondelet teachers periodically observe and evaluate Ms. Sweet on the District's behalf. No final agreement was reached that day. At the hearing two days later, Mr. Cardoza testified that he would permit the District to observe Ms. Sweet in a manner chosen by the District.

STUDENT testified that she is happier at Carondelet than she was at California High. The classes are harder and there is more homework, but the teachers are helpful and she is learning more. During religion class, when she is not assisted by Ms. Sweet, she concentrates intently on reading the teacher's lips, but cannot hear what the other students say. Because of the lack of an interpreter, the religion class is very difficult for her, causing visual stress and giving her a headache.

DISCUSSION

1. Did the District offer STUDENT a free, appropriate, public education at California High School for the 1996-97 school year?

Petitioner did not specifically raise the appropriateness of California High for STUDENT as an issue. On the other hand, counsel for Petitioner asserted that the District had the burden to show that California High was appropriate, and that Petitioner would not stipulate to that fact. The District did not state a position on the burden issue. At the hearing, both parties presented considerable evidence relating solely to the issue of whether California High was appropriate for STUDENT. For this reason, and because resolution of the appropriateness issue in Petitioner's favor would be one possible basis for granting Petitioner the relief she seeks, the Hearing Officer addresses the issue below.

Under the Individuals with Disabilities Education Act (IDEA), the federal government provides monetary grants to participating states for assistance in educating disabled students.

Participating states must assure all disabled students the right to a free, appropriate public education (FAPE). 20 U.S.C. §1400(c); §1401(a)(16-18); §1412(1) and (2)(B). The local school district must prepare for each disabled student an Individualized Education Plan (IEP) that identifies the special education and related services necessary to meet that child's needs, and the district must then offer to provide those services at full public expense. 20 U.S.C. §§1412(4), 1414(a)(5). Special education means specially designed instruction to meet the needs of a child with a disability. 20 U.S.C. §1401(a)(16). Related services are those required to assist a child with a disability to benefit from special education. 20 U.S.C. §1401(a)(17).

If a district is unable to provide the necessary services in

a public school, the district must then place the student in a private school at public expense in order to provide a FAPE. 20 U.S.C. §1413(a)(4)(B).(FOOTNOTE 13) Such a student must be provided special education and related services in conformance with his IEP at no cost to the parents, just as if he was attending public school. 20 U.S.C. §1413(a)(4)(B)(i). IDEA's implementing regulations confirm that a student placed in a private school by the school district pursuant to his IEP has "all of the rights of a child with a disability who is served by a public agency." 34 C.F.R. §300.401.

In determining whether a FAPE has been offered, one must decide whether the student's IEP is reasonably calculated to enable him or her to receive educational benefit. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207 (1982). Although the Supreme Court in Rowley declined to set any one standard for determining the adequacy of substantive educational benefit conferred upon a child, it noted that one important factor is whether the child progresses from grade to grade. Rowley, supra, at 203-204.

In determining whether the District has offered a FAPE, one must focus on the adequacy of the District's proposed program. Gregory K. v. Longview School District, 811 F.2d 1307, 1314 (9th Cir. 1987). If the District's program is adequate, the District has offered a FAPE, even if the parents prefer another program. Id. The school district is not required to provide the best possible education or to maximize educational benefits to the child, but rather to provide a "basic floor of opportunity." Rowley, supra, 458 U.S. at 200.

In some cases, it may be determined that a school district has neither offered a FAPE in a public school nor a private school. Under IDEA, hearing officers have the authority to award "appropriate" relief for such violations of FAPE. 20 U.S.C. §1415(e)(2). For example, if the school district fails to offer a FAPE and the parents unilaterally obtain a proper private education for their child, the school district may be found responsible for funding tuition and other expenditures necessary to support the private placement, retroactively and/or prospectively. School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 369-370 (1985). Thus, if the District failed to offer STUDENT a FAPE for 1996-97, and she obtained a proper education at Carondelet, that could be a basis for requiring the District to fund an interpreter and AH services at Carondelet for the remainder of the 1996-97 school year. (In this case, Petitioner is not seeking reimbursement for Carondelet tuition.)

With these principles in mind, the Hearing Officer examines whether the District offered STUDENT a FAPE at California High School for the 1996-97 school year. During ninth and tenth grade

at California High (1994-95 and 1995-96), STUDENT attended regular education, college preparatory classes, achieved a "B" average, and excelled on the girls' basketball team. She received specialized services pursuant to her IEP to meet her unique needs and enable her to successfully participate in school. These included sign language interpretation, AH/speech and language services, and assistance from a resource specialist as needed.

Based on the evidence presented at the hearing, the Hearing Officer concludes that STUDENT received a FAPE during ninth and tenth grade. Because the August 14, 1996 IEP offered STUDENT a similar program at California High for eleventh grade, the Hearing Officer concludes that the District offered STUDENT a FAPE for 1996-97. Therefore, there are no grounds to grant relief based on an allegation that the District's proposed placement at California High did not offer a FAPE.

2. Must the District provide STUDENT with a sign language interpreter at her private school pursuant to EDGAR?

a. Statute and regulations

IDEA and its implementing regulations impose somewhat ambiguous obligations on school districts regarding disabled students who are voluntarily placed in private schools by their parents. If a disabled student has a FAPE available to him in the public schools and the parents voluntarily choose to place him in a private school, the school district is not required to pay for the private tuition. 34 C.F.R. §300.403(a). Rather, with regard to these so-called "parentally-placed children," school districts must "make services available" in accordance with three general principles. 34 C.F.R. §300.403(a); 34 C.F.R. §450-452. Those three principles appear to have some inconsistencies amongst themselves in describing the extent of the school district's obligation. First, school districts "shall" provide special education and related services designed to meet the needs of parentally-placed students residing within their jurisdiction. 34 C.F.R. §300.452. Second, state special education plans must ensure that:

[T]o the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services.

20 U.S.C. §1413(a)(4)(A); 34 C.F.R. 300.451(a). Third, the school district must comply with the Education Department General

Administrative Regulations (EDGAR). 34 C.F.R. §300.451(b); 34 C.F.R. §76.651-76.662.

Under EDGAR, states and their local school districts must provide parentally-placed students with a "genuine opportunity for equitable participation" in a manner that is consistent with the number of eligible private school students and their needs. 34 C.F.R. §76.651(a)(1-2). EDGAR mandates that public agencies consult with appropriate representatives of parentally-placed students before determining such matters as which children will receive benefits, what benefits will be provided, and how the benefits will be provided. 34 C.F.R. §652-653. The program benefits that are provided to parentally-placed students must be "comparable in quality, scope and opportunity for participation" to the program benefits provided to disabled students enrolled in the public schools. 34 C.F.R. §76.654(a).

b. Agency interpretation of statute and regulations

The U.S. Department of Education's Office of Special Education Programs (OSEP) has consistently expressed the opinion, in policy letters, that parentally-placed students do not have an "individual entitlement" to services, but rather that EDGAR confers discretion on school authorities in this regard. OSEP's position is that:

These regulations do not confer on every parentally-placed child with a disability an individual entitlement to services. Rather, these regulations authorize State and local educational agencies to make determinations as to the number of private school children with disabilities who will be served, and about the nature and extent of services to be provided. Although a public agency is not required to serve each and every private school child residing in its jurisdiction, nor to make the full range of services available to those children whom it has elected to serve, the services that are provided must be comparable to those provided to public school students.

Letter to Burch, 23 IDELR 560, 562 (1995); Letter to Anonymous, 23 IDELR 650, 652 (1995); Letter to Graham, 22 IDELR 502, 503 (1994), Letter to Mentink, 18 IDELR 276, 279 (1991). Similarly, OSEP takes the position that a school district is not necessarily required to provide services to a parentally-placed student on the premises of the private school. Letter to McConnell, 22 IDELR 369 (1994); Letter to Anonymous, 21 IDELR 745, 746 (1994); Letter to Schmidt, 20 IDELR 1224, 1225 (1993). A public school site or a neutral site may be appropriate. Letter from Davila, 16 EHLR 1398, 1399-1400 (1990). Whether a school district would have to provide services at a private school would depend on the specific facts respecting

all parentally-placed students to whom it is providing services.
Id. at 1400.

c. Case law interpreting statute and regulations

The Fourth Circuit was the first federal circuit court of appeal to address the school district's obligation under EDGAR in factual circumstances similar to those present here -- that is, where it is agreed that the on-site service requested is one required by the student's unique needs.(FOOTNOTE 14) *Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), cert. denied, 502 U.S. 864 (1991), further proceedings reported at 60 F.3d 168 (4th Cir. 1995), cert. denied, ___ U.S. ___ (1996). In *Goodall*, the Fourth Circuit held that a school district could properly decline to provide a deaf student with a cued speech transliterator at a private, parochial school. The court determined that the school district satisfied its obligation to the student by offering a FAPE, including a cued speech transliterator, at a public high school. The *Goodall* court also based its holding on the independent ground that the school district was prohibited from using public funds to pay for an educational service at a religious school.

Subsequent to the Fourth Circuit's decision in *Goodall*, the Supreme Court decided *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In *Zobrest*, the Court held that the Establishment Clause of the First Amendment to the U.S. Constitution does not prohibit a public school district from providing a sign language interpreter to a deaf student unilaterally enrolled by his parents at a private, parochial school. The Court did not address whether the District could be required to do so under EDGAR. (FOOTNOTE 15)

In *Dreher v. Amphitheater Unified School District*, 22 F. 3d 228 (9th Cir. 1994), an Arizona school district offered a deaf child a FAPE, including speech therapy, at a public school. The parents placed the child in a private school in Missouri and sought reimbursement for speech therapy that employed a different methodology than was called for in the student's IEP.

First of all, the Ninth Circuit took note of the distinction between private school tuition, on the one hand, and special education and related services, on the other. The court found that offering a FAPE relieves the school district of responsibility to pay for private school tuition, but not of responsibility to provide special education and related services that are "designed to meet the needs" of parentally-placed students. 22 F.3d at 233-234. The court stated:

The regulations distinguish between the [parentally-placed] child's private

school tuition, which the school district does not have to pay if it offers a FAPE, and the child's special education and related services, for which the school does have to pay. 34 C.F.R. 300.403 and 300.451. Under the latter regulation, the school district has to provide special education and related services to children in private schools in the state. See also 34 C.F.R. 76.654(a). 22 F.3d at 234.

The Ninth Circuit noted, however, that the distinction between tuition and special education and related services was not controlling in this case because the speech therapy that the student was receiving at the private school was not in conformity with the speech therapy called for in the student's IEP. IDEA requires that services be provided to students in conformity with their IEPs. 22 F. 3d at 234; 20 U.S.C. §1401(a)(18)(D). Thus, because the speech therapy the student was receiving at the private school was not designed to "meet [her] needs," the court denied reimbursement. *Id.*

This year, two more federal circuit courts of appeal have addressed the issue of the school district's obligation to parentally-placed students under EDGAR. First, in *K.R. v. Anderson Community School Corporation*, 81 F.3d 673 (7th Cir. 1996), a student with severe multiple disabilities had an IEP calling for a full-time instructional assistant. The parents unilaterally enrolled her in a private, parochial school. The school district agreed to provide her with occupational therapy, physical therapy, and speech and language therapy at a public school site, but declined to provide an instructional assistant at the private school.

The Seventh Circuit found that school districts need not provide "comparable benefits" to parentally-placed students in every instance, but rather that they have "a great deal of discretion" in determining which such students will receive benefits and what benefits they will receive. 81 F.3d at 678. The court cited cost as one example of a factor the school district can take into consideration:

[P]ublic schools may legitimately regulate the provision of expensive services, such as full-time assistants, in order to ration limited resources across more students. 81 F.3d at 679.

The court noted that the standard for determining whether the school district has properly exercised its discretion to deny benefits in a particular case is whether the student was given a "genuine opportunity for equitable participation." *Id.* at 680; 34 C.F.R. §76.651(a)(1-2). Applying this standard to the facts in

K.R., the Seventh Circuit found that the student was in fact afforded such an opportunity, because the school district offered to provide a full-time instructional assistant at a public school. The court concluded:

We have no reason to doubt the opportunity was genuine: nothing in the record demonstrates that K.R. was prevented from attending the public school by anything other than a desire to attend private school; and nothing demonstrates that the public school would have failed to provide the instructional assistant had K.R. decided to return. *Id.* at 680.

Finally, the Seventh Circuit found significant the fact that the school district agreed to provide some related services to K.R. at a public school site. The court found this was evidence that, although the school district declined to provide the instructional assistant at the private school, it had fairly exercised its discretion as to what benefits it would provide. *Id.* at 680. The court wrote:

A complete failure to provide any services, especially those that can be provided at a neutral or public school site at flexible times, would be strong evidence that the public school had abused its discretion. *Id.* at 680.(FOOTNOTE 16)

Shortly after K.R. was decided, the Second Circuit decided *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996). In *Russman*, a student with mental retardation had an IEP calling for the assistance of (1) a consultant teacher to work with the regular classroom teacher in modifying the academic curriculum and (2) a teaching aide to directly assist her. The parents unilaterally enrolled the student in a private, parochial school. The school district refused to provide the consultant teacher and teaching aide at the private school.

The Second Circuit held, in analyzing IDEA's phrase "to the extent consistent with the number and location of children with disabilities,"(FOOTNOTE 17) that the key factor was cost:

The reference to the "number" of students suggests only that school districts have discretion to deny on-site provision of services at private schools where economies of scale in providing the services at one place exist. With respect to the statutory reference to "location", we read the IDEA to mean only that, where the provision of services at a distant private school would entail significant additional costs, e.g., transportation, to be borne by the state, public school authorities may fulfill their IDEA obligations by offering the services at a

local public school. 85 F.3d at 1056.

The Second Circuit concluded that "where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools." *Id.* at 1056. The court noted that services required by an IEP may need to be provided during school hours to be effective. *Id.* at 1057. The court continued:

If public school authorities may freely refuse to provide such benefits at private schools, therefore, disabled students must either forego the IDEA benefits, bear their cost, or transfer to the public schools. This result, however, seems to be precisely what the statute and regulations seek to preclude. Indeed, the principal purpose of the statutory and regulatory commands appears to be to make a child's disability irrelevant to the family's choice of school, at least where differences in costs of provision do not exist. *Id.* at 1057.

The Second Circuit found that there was no evidence that providing the student with a teaching consultant and aide at the private school was significantly more expensive than providing her with the same services at the public school. Therefore, the court ordered the school district to provide the student with the services at the private school. *Id.*

Two federal district courts have recently found that a school district must provide a sign language interpreter to a parentally-placed deaf student at a private school. *Cefalu v. East Baton Rouge Parish School Board*, 907 F.Supp. 966 (M.D. La. 1995) (parochial school); *Fowler v. Unified School District No. 259*, 900 F.Supp. 1540 (D. Kan. 1995) (nonsectarian school). (FOOTNOTE 18) In each case the court reasoned that the requested service would be meaningless unless provided at the private school site. *Cefalu*, 907 F. Supp. at 968; *Fowler*, 900 F. Supp. at 1546. (FOOTNOTE 19)

d. Analysis

The first question presented is how to describe the rights, if any, that parentally-placed students have, under EDGAR, to receive specialized services from the school district. The Seventh Circuit in *K.R.* relied on the reasoning of Goodall and OSEP in finding that these students do not have an individual entitlement to services and that school districts have a "great deal of discretion" in determining which such students will receive benefits and what benefits they will receive. 81 F.3d at 678. The Second Circuit in *Russman* acknowledged that IDEA does not require on-site provision

of "any and all services that might be required in the context of public education," 85 F.3d at 1055, but disagreed with the notion of broad District discretion and found rather that the statute and regulations are, overall, "more consistent with mandatory entitlements than with discretionary authority." 85 F.3d at 1056.(FOOTNOTE 20) See also Dreher, supra, 22 F.3d at 234 (9th Cir. 1994) (school district has to pay for special education and related services designed to meet the needs of parentally-placed students).

The statute and regulations and the case authorities cited herein do not clearly indicate how to describe the rights of parentally-placed students. What seems clear, at a minimum, is that parentally-placed students have some rights to services, although these rights are not necessarily as extensive as those of students enrolled in the public schools. Further, it is clear that school districts have some discretion in deciding which students will receive benefits and what benefits they will receive. However, the appropriateness of the District's exercising its discretion in a particular case is subject to review, based on a number of factors identified by the statute and regulations and the case authorities.

One important factor that distinguishes this case from all of the case authorities cited herein is that in the IEP of May 30, 1996, the District agreed to provide STUDENT with a sign language interpreter and AH services at her private school for the 1996-97 school year. In other words, the District, in exercising its discretion under EDGAR, chose to (1) serve STUDENT, (2) provide her with all of the same special services she had received pursuant to her IEP while attending public school, and (3) provide the interpreter and AH services on-site at the private school. The District was represented at the IEP meeting by SELPA program specialist Ms. Cochran, who had been informed by the District's special education director, Dr. Sassone, that the District would provide STUDENT with services at her private school. Dr. Sassone had made that determination based on her understanding of case law interpreting EDGAR and of the fact that the District had been involved in previous litigation with the PARENTS regarding this issue.

The Supreme Court has noted that the IDEA places great importance on compliance with procedural safeguards. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 205-206 (1982). The cornerstone of the process is the IEP. It is understood that parents will rely on the IEP and take action related to the education of the child, based on what the IEP says and/or does not say. See, e.g., Union School District v. Smith, 15 F.3d 1524, 1526 (9th Cir. 1994), cert. denied, ___ U.S. ___ (1994) (emphasizing that a proposed IEP must contain sufficient

information about the services offered to allow parents to make informed decisions in reliance thereon). For this reason, the regulations state that the District's representative at an IEP meeting must have the authority to commit resources to the student's education:

. . . the representative should be able to ensure that whatever services are set out in the IEP will actually be provided and that the IEP will not be vetoed at a higher administrative level within the agency. Thus, the person selected should have the authority to commit agency resources . . . [emphasis added]. 34 C.F.R. Part 300, Appendix C, question 13.

Additionally, the regulations provide that the school district "must" provide special education and related services to a child with a disability in accordance with an IEP. 34 C.F.R. §300.350.

In reliance on the IEP of May 30, 1996, the PARENTS signed a tuition contract formally enrolling STUDENT at Carondelet for the 1996-97 school year. Notwithstanding this, and despite the significant, undisputed fact that STUDENT's educational needs did not change, the special education director's decision to serve STUDENT at Carondelet was ultimately vetoed by a District assistant superintendent -- that is, "at a higher administrative level within the agency" -- based on legal advice.

Having agreed to serve STUDENT at Carondelet, however, the District could not properly decline to provide the services there unless either of two things occurred: (1) it obtained the parents' agreement at an IEP meeting or (2) it prevailed at a due process hearing. The federal regulations provide that when parentally-placed students receive services from a school district, the school district "shall":

(a) initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with §300.343; and

(b) ensure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls. 34 C.F.R. §300.349; Dreher, supra, 22 F.3d at 234-235.

Section 300.343, referenced above, requires that revisions to an IEP be made at a properly convened IEP meeting; section 300.344 requires that parents participate in the meeting.

In early August, the District notified the parents in writing that it intended to change the May 30 IEP. See, e.g., 34 C.F.R. §300.504-505 (requiring written notice of proposal to change IEP). The notice indicated that the District had already unilaterally determined, outside the IEP process and without the participation or consent of the parents or a representative of Carondelet, not to provide the interpreter at the private school. At an IEP meeting on August 14 -- five days before classes were to begin at Carondelet -- the District confirmed that it would not provide services at the private school.

At that time, the parents were entitled to initiate due process procedures. IDEA requires states receiving financial assistance under the Act to establish a system of due process hearings to address disputes regarding the provision of FAPE to a child. 20 U.S.C. §1415(b); 34 C.F.R. §300.506. One of the procedural safeguards afforded to disabled students is the right to "stay put" pending resolution of due process. 20 U.S.C. §1415(e)(3). The only way that the parents could invoke stay put and challenge the District's refusal to honor the May 30 IEP was to initiate due process procedures. Because the District had agreed to provide the services at Carondelet, the parents had a right to initiate due process just as if the District had, during STUDENT's attendance at California High, suddenly and unilaterally decided that it would no longer provide her with a sign language interpreter there.(footnote 21)

In analyzing whether the District properly exercised its discretion in deciding to change the location of sign language interpreter services, the Hearing Officer below considers three factors identified by the statute, regulations and/or case authorities: (1) whether the District engaged in the consultation process mandated by EDGAR, (2) whether the District provided STUDENT with a "genuine opportunity for equitable participation" and "comparable benefits," and (3) whether providing a sign language interpreter at Carondelet would be more costly to the District than doing so at California High. The Hearing Officer also examines one factor raised by the District: (4) whether the District could properly deny on-site interpreter services because of personnel management issues.

1. Consultation

EDGAR mandates that public agencies consult with appropriate representatives of parentally-placed students before determining such matters as which children will receive benefits, what benefits will be provided, and how the benefits will be provided. 34 C.F.R. §652-653. (Footnote 22) As noted above, the IDEA places great importance on compliance with procedural requirements. Rowley, supra, 458 U.S. at 205-206; Union School District, supra, 15 F.3d

at 1526. At least one federal district court has found that whether a school district has complied with this consultation requirement is an important factor in determining whether it properly exercised its discretion under EDGAR. Natchez-Adams School District, *supra*, 918 F.Supp. at 1036; see also Letter to Williams, 18 IDELR 742, 744 (OSEP 1992).

In this case, the District has neither alleged nor proven that it undertook any of the consultation required by the law. In fact, based on the evidence presented at the hearing, the only contact the District had with any private school representative, prior to deciding not to provide a sign language interpreter at Carondelet, was the conversation between Dr. Sassone and Sister Elinor. In that conversation, Sister Elinor confirmed that the school had a religion class and that it expected an interpreter to accompany STUDENT to that class. Even if the PARENTS were requesting that the District provide sign language interpretation for STUDENT's religion class, this is not prohibited by the Establishment Clause of the First Amendment to the U.S. Constitution. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

The evidence showed that the decision not to provide STUDENT with an on-site interpreter was based on legal advice, not on a process of consultation that incorporated an equitable method of allocating educational services to children with disabilities.

2. "Genuine opportunity for equitable participation" and "comparable benefits"

As noted above, the focus of IDEA is on the unique, individual needs of each disabled student. 20 U.S.C. §1400(c); 1401(a)(16-18); *Rowley*, *supra*. See also *Dreher*, *supra*, 22 F. 3d at 234; 34 C.F.R. §300.452 (school district shall provide parentally-placed students with special education and related services "designed to meet [their] needs"). In determining whether the school district properly exercised its discretion in declining to provide an on-site sign language interpreter to a parentally-placed deaf student, one must take into consideration the fact that the IDEA places a priority on the education of students with the most significant disabilities. See, e.g., 20 U.S.C. §1412(3); 1414(a)(1)(C)(ii).

Similarly, California special education law places an emphasis on the education of students with "low incidence disabilities," which are defined as severe disabling conditions with an expected incidence rate of less than one percent of the total statewide enrollment in grades K-12. Education Code §56026.5. Severe disabling conditions include hearing impairments, vision impairments, and severe orthopedic impairments, or any combination thereof. *Id.* The California legislature has found that students with low-incidence disabilities require highly specialized

services, equipment, and materials. Education Code §56000.5(a)(2). Specifically with respect to deafness, the legislature has stated:

Deafness involves the most basic of 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 and ensure that all hard-of-hearing and deaf children have appropriate, ongoing, and fully accessible educational opportunities. Education Code §56000.5(b)(1) (emphasis supplied).

Most parentally-placed students do not require related services during regular classes or at their private school sites. Most of the services parentally-placed students require -- for example, occupational therapy, physical therapy, and speech and language therapy -- can be provided at public school sites at flexible hours. See, e.g., *Foley v. Special School District of St. Louis County*, 927 F.Supp. 1214 (E.D. Mo. 1996) (offer to provide occupational therapy, physical therapy and speech and language therapy to parentally-placed student with cerebral palsy at public school site held appropriate).

On the other hand, a limited number of students -- those with the most significant disabilities -- require on-site related services, such as hearing-impaired students requiring interpreters, blind students requiring orientation and mobility training, and students with severe orthopedic and/or multiple disabilities requiring a one-to-one aide in the classroom. These services, of course, are essential to the student's successful participation during the school day.

In this case, a sign language interpreter for STUDENT must be present on-site, at her school, throughout her school day, in order to benefit her. It is undisputed that STUDENT requires this service in order to benefit from her education. It is equally undisputed that she would receive the service on-site if she were enrolled in public school. Therefore, the only "comparable" benefit to providing a sign language interpreter at a public school is to provide the service on-site at the private school. 34 C.F.R. §76.654(a).

The District's purported blanket policy of not providing services at private schools (Resp. Exh. 29), if upheld, would guarantee that in all cases in which an essential service for a parentally-placed student with a significant disability must be provided on-site to be meaningful, the student would be forced to forego the IDEA benefits, bear the cost of the service, or transfer to a public school. See, e.g., *Russman, supra*, 85 F.3d at 1057. The blanket policy ignores the emphasis in federal and state

special education law on the education of students with the most significant disabilities and the California legislature's particular emphasis on the education of deaf children. The blanket policy is contrary to IDEA's focus on the unique, individual needs of each disabled student. The application of blanket policies in providing services to disabled students violates the requirement that students' IEPs be designed to meet their individual needs. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 177-178 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989).

The Seventh Circuit's finding in *K.R.* that the school district satisfied EDGAR's "genuine opportunity for equitable participation" requirement by offering a FAPE at the public high school -- a FAPE that the student rejected -- is not persuasive. 81 F.3d at 680. EDGAR specifically applies to those students who have enrolled in private school despite the availability of a FAPE in the public school. Thus, for purposes of analysis under EDGAR, one assumes that the school district offered the student a FAPE in the public school and that the student rejected it. Offering a FAPE establishes only that the school district need not pay the private school tuition. However, it has nothing to do with whether, once the student enrolls in private school, the District provides her with a "genuine opportunity for equitable participation." Conditioning the provision of specialized services on enrollment in the public schools does not provide an equitable opportunity for parentally-placed students to participate in a program of benefits.

Nor is the Seventh Circuit's finding in *K.R.* that the school district properly exercised its discretion because it offered some services at the public school persuasive. The school district in *K.R.* chose to serve the significantly, multiply disabled student but then, in deciding which services to provide, omitted the one service that was essential to her successful participation during the school day -- a full-time, on-site instructional assistant. Similarly, the fact that the District here offered RSP consultation and AH services at a public school site does not establish that the District properly exercised its discretion as to which services to provide to STUDENT. Without a persuasive reason, the District has failed to offer STUDENT, a deaf student, the one service that is essential to her successful participation at Carondelet -- a full-time, on-site sign language interpreter.

In conclusion, the evidence showed that by conditioning STUDENT's access to a sign language interpreter on her attending public school, the District failed to provide her with a genuine equitable opportunity to participate in a program of benefits. In the May 30 IEP, the District offered to provide STUDENT with a sign language interpreter at Carondelet. Even assuming that a parentally-placed student's right to comparable benefits is limited to those services that the District actually offers to provide, the

District on May 30 offered to provide STUDENT with interpreter services. Therefore, she was entitled to "comparable benefits." The only comparable benefit to a sign language interpreter at California High is an interpreter at Carondelet. When the District, on August 14, purported to change the location of STUDENT's interpreter services to California High, it denied her comparable benefits.

3. Cost issues

Both the Seventh Circuit in *K.R.* and the Second Circuit in *Russman* referred to cost as a factor upon which a school district might base a decision not to provide on-site services. *K.R.*, 81 F.3d at 679; *Russman*, 85 F.3d at 1056. Both did so without reference to any specific portion of EDGAR, which includes only one section that refers to cost. Section 76.655 states as follows:

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

At least one federal district court has held that the plain language of this regulation shows that the primary factor in determining what services to provide parentally-placed students is the need of each student, not the cost of the service. *Fowler*, supra, 900 F. Supp. at 1545. It is not clear, based on the wording of this regulation, that EDGAR in fact specifically authorizes school districts to use cost as a primary factor in denying on-site services. In any event, given that two circuit courts of appeal have adopted cost as a factor, the Hearing Officer below analyzes the evidence presented at the hearing that relates to cost.

The evidence presented at the hearing established that it is no more expensive for the District to provide sign language interpreter and AH services to STUDENT at Carondelet than at California High. Ms. Norris, the AH specialist, testified that (1) there was no additional cost to the District in having her provide services at Carondelet rather than at California High, (2) she believed the same was true with respect to the interpreter, Ms.

Sweet, and (3) the SELPA program specialist, Ms. Cochran, confirmed this to her. Neither Ms. Sweet nor any other witness offered any contrary testimony. Dr. Sassone testified that the District's lawyers advised her that providing STUDENT with an interpreter at Carondelet could have potentially "costly and widespread" future implications for the District.

In this case, the only evidence offered by the District that was somewhat related to the issue of cost was that the District must pay Ms. Sweet for not working during STUDENT's religion class at Carondelet. However, the evidence showed that there were portions of the school day at California High when Ms. Sweet did not interpret for STUDENT at California but was paid. In conclusion, the evidence showed that it is no more expensive for the District to provide sign language interpreter and AH services to STUDENT at Carondelet than at California High.

4. Personnel management issues

The District argues that placing District employees at private schools could create personnel management problems. First, the District asserts that there could be logistical problems in observing and evaluating District employees, particularly at distant private schools. In this case, however, (1) Mr. Cardoza, Carondelet's assistant principal, testified that he would permit the District to observe Ms. Sweet in a manner chosen by the District and (2) Carondelet is located in Concord, which is only about 6-8 miles from the District boundary and 12-14 miles from California High and is where the county SELPA's main office is located.

Second, the District asserts that, if it is required to place interpreters at private, parochial schools, it may face problems in the future with interpreters who refuse to interpret religious material. In this case, however, the parent is not requesting that Ms. Sweet interpret STUDENT's religion class. Even if the PARENTS were requesting that the District provide sign language interpretation for STUDENT's religion class, this is not prohibited by the Establishment Clause of the First Amendment to the U.S. Constitution. *Zobrest, supra*. Further, EDGAR contemplates that, under certain circumstances, school district employees may provide services to parentally-placed students at their private schools. Section 76.659 states:

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

In other words, because STUDENT requires a sign language interpreter on-site at her private school to benefit from her education, and because Carondelet does not normally provide sign language interpreters, the District may provide an interpreter at Carondelet. Even assuming that personnel management issues may be taken into consideration in determining whether to provide services at a private school, in this case there is no persuasive reason to withhold interpreter services based on personnel matters.

e. Conclusion

The District's decision in the May 30 IEP to provide STUDENT with a sign language interpreter at Carondelet was correct, based on applicable law and the facts of this case. The District has not put forth a persuasive reason not to honor the agreement. The Hearing Officer finds that the decision to renege on the agreement was improper as a matter of law for a number of reasons. Among them are the following: (1) the parents had, in reliance on the IEP, signed a tuition contract enrolling STUDENT in the private school, (2) the District did not properly consult the parents or the private school or consider STUDENT's needs prior to making a unilateral, last-minute change based on legal advice, (3) the District did not engage in the consultation process mandated by EDGAR, (4) the educational needs of this deaf child did not change, (5) having chosen to provide STUDENT with interpreter services, the District failed to provide her with the only comparable benefit to a full-time sign language interpreter at a public high school -- a full-time sign language interpreter at a private school, (6) having chosen to serve STUDENT, the District failed to provide the one service that was essential to her successful participation in school, (7) it is no more costly to the District to provide the interpreter at the private school, and (8) there are no persuasive logistical and/or personnel reasons for declining to provide the service at the private school.

Accordingly, the Hearing Officer finds that the District must provide STUDENT with sign language interpreter services at Carondelet High School for the remainder of the 1996-97 school year. Pursuant to the stipulation of the parties, the interpreter need not assist STUDENT in her religion class or at any on-campus religious service.

3. Must the District provide STUDENT with aural handicapped/speech and language services at her private school pursuant to EDGAR?

Petitioner has not cited any legal authority to support the proposition that the one hour, once weekly AH services must be provided on-site at Carondelet in order to provide STUDENT with "comparable benefits" under EDGAR. Ms. Norris testified without contradiction that she can provide the service just as effectively at California High School or another public school site, and that she would be willing to provide the services there before or after school.(footnote 23) Unlike the sign language interpreter services, there was no evidence that AH services must be provided on-site to benefit STUDENT. Therefore, the District's decision to provide AH services at a public school site at flexible hours constitutes a proper exercise of its discretion under EDGAR.

The Hearing Officer concludes that the District's offer to provide AH services at a public school site at flexible hours satisfies its obligation to provide "comparable" benefits in this area.

ORDER

1. The District shall continue to provide STUDENT with the services of a sign language interpreter for academic classes and the after-school basketball team at Carondelet High School for the remainder of the 1996-97 school year. Pursuant to the stipulation of the parties, the interpreter need not assist STUDENT in her religion class or at on-campus religious services.
2. The District shall continue to provide STUDENT with aural handicapped/speech and language services, once weekly for one hour, for the remainder of the 1996-97 school year. The District may provide these services at a public school site at flexible hours.

PREVAILING PARTY ON EACH ISSUE

Pursuant to Education Code §56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this requirement: Petitioner prevailed with respect to the location of interpreter services. Respondent prevailed with respect to the location of aural handicapped/speech and language services.

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. Education Code §56505(i).

Dated: October 21, 1996 _____
Leonard Garfinkel
Hearing Officer
California Special Education
Hearing Office

Footnotes:

FOOTNOTES 1. As explained below, the parents are not requesting that the District sign language interpreter interpret STUDENT's religion class at the private school. 2. Ms. Norris is not a District employee. She contracts her services to the District as a "non-public agent." See Education Code §§56365-56366. 3. Petitioner's exhibits are designated by "Pet. Exh." followed by letters A through H; Respondent's exhibits are designated by "Resp. Exh." followed by numbers 1 through 29 4. Concord is located north of the District, which includes the cities of San Ramon, Danville, and Alamo, from south to north. Concord is located within Contra Costa County and is part of the same SELPA that includes the District. The main office of the SELPA is located in Concord. No one testified as to the distance between Carondelet and either the District's northern boundary in Alamo or California High School in San Ramon, which is in the southernmost portion of the District. In her opening statement at the hearing, counsel for the District stated that Carondelet is located about seven miles north of the District's northern boundary in Alamo and about twenty miles north of California High School in San Ramon. In her closing brief, counsel for the District wrote that Carondelet is located about ten to fifteen miles "north of the District." The Hearing Officer takes notice that, on the map, it appears that Carondelet is located about 6-8 miles north of the District's northern boundary in Alamo and about 12-14 miles north of California High School in San Ramon. 5. See Decision in STUDENT v. San Ramon Valley Unified School District, California Special Education Hearing Office Case No. SN 516-91, dated June 10, 1992. 6. The required religion class for eleventh grade students such as STUDENT at Carondelet is entitled "Theological Explorations" and covers such topics as "morality, personal faith, Church and Sacraments, and Holy Scripture." (Pet. Exh. H, p. 23) 7. The SELPA plan states: Eligible [parentally-placed students] may receive special education and related services. The program is provided during the regular school day at various public school sites. Whenever feasible, the student is served in the public school in his/her attendance area. Students voluntarily placed in private schools are offered services in the public school whenever appropriate through the IEP process. Consultation with the private school is provided upon request. (Resp. Exh. 29, pg. 4) 8. At the hearing, the District's special education director, Dr. Sassone, testified that she believed the PARENTS nevertheless understood that the District was offering to provide STUDENT with AH services from Ms. Norris at a public school site at flexible hours. 9. The parties have subsequently agreed, additionally, that Ms. Sweet need not accompany STUDENT to any on-campus religious service. 10. Ms. Norris also testified that about the time of the May 30 IEP meeting, Ms. Cochran, the SELPA

program specialist, told her she believed there would be no additional expense to the District if it provided services to STUDENT at Carondelet. 11. Dr. Sassone and Mr. Cardoza also discussed minor personnel matters such as having Ms. Sweet sign in and out each day and providing her with a lunch break of appropriate length. 12 The District did not express any particular interest in observing and/or evaluating AH specialist Ms. Norris, who is not a District employee. 13. The word "public" in "free, appropriate public education", or FAPE, is a term of art which means "public expense," whether at public or private schools. 20 U.S.C. §1401(a)(18)(A); *Dreher v. Amphitheater Unified School District*, 22 F. 3d 228, 233, n.10 (9th Cir. 1994). 14. In *McNair v. Cardimone*, 676 F.Supp. 1361 (S.D. Ohio 1987), the federal district court found that the school district was not required to provide a parentally-placed student with transportation to her private school because the district had offered a FAPE, with transportation, at a public school. On appeal, the Sixth Circuit affirmed on other grounds. 872 F.2d 153 (6th Cir. 1989). More specifically, the Sixth Circuit found that the child's unique needs did not require transportation as a related service. Therefore, the Sixth Circuit did not reach the issue of whether the district would have been required to provide transportation to the private school if the child's unique needs did require transportation as a related service. 15. In his dissent, Justice Blackmun argued that the Court should not have reached the Constitutional issue without first deciding whether the IDEA would otherwise require that the district provide a sign language interpreter at the private school. *Zobrest*, 509 U.S. 1 at 14-17 (Blackmun, J., dissenting). He argued that the majority had issued what amounted to an advisory opinion. *Id.* at 17. One possible interpretation of the majority opinion in *Zobrest* is that the Court believed that IDEA would otherwise require the district to provide the interpreter, and therefore proceeded directly to the constitutional issue. After *Zobrest*, further proceedings in *Goodall* focused on the parents' claim that the refusal to provide a cued speech transliterator at the private school imposed a substantial burden on their free exercise of religion. 60 F.3d 168 (4th Cir. 1995). The Fourth Circuit noted that, to the extent its previous holding was based on an interpretation of EDGAR, it was not overruled by *Zobrest*. 60 F.3d at 173. 16. See also *Natchez-Adams School District v. Searing*, 918 F.Supp. 1028 (S.D. Miss. 1996)(decision to discontinue all special education services for student with cerebral palsy, once parentally-placed, held an abuse of discretion). 17. 20 U.S.C. §1413(a)(4)(A); 34 C.F.R. §300.451(a). 18 The Hearing Officer is informed that Cefalu and Fowler are on appeal to the Fifth and Tenth Circuits, respectively. 19 Both Cefalu and Fowler cited with favor, and relied heavily on, the analysis of the federal district court in *K.R. v. Anderson Community School Corporation*, 887 F.Supp. 1217 (S.D. Ind. 1995), whose decision was later reversed by the Seventh Circuit. 81 F.3d 673 (7th Cir. 1996). 20. One federal district court has held that the phrase "[school districts] shall provide special education and related services designed to meet the needs of [parentally-placed students]", 34 C.F.R. §300.452, does create an individual entitlement to related services required by a particular parentally-placed child's needs. *Tribble v. Montgomery County Board of Education*, 798 F.Supp. 668, 672 (M.D. Ala. 1992), vacated after joint motion to dismiss appeal granted, 20 IDELR 661 (11th Cir. 1993). 21 Although the District did not raise the jurisdictional issue at the hearing, the Hearing Officer believes that, nevertheless, it merits some discussion. First of all, the Hearing Officer notes

that the courts have for the most part not addressed the jurisdictional issue, inferring that there is jurisdiction to hear disputes involving individual parentally-placed students under EDGAR. OSEP takes the position that (1) parentally-placed students have a right to initiate a due process hearing regarding the nature and extent of the services actually offered to the child -- for example, whether the services are being provided in the manner specified in the child's IEP -- but that (2) such students may not initiate a due process hearing regarding whether the school district erred in failing to offer any services to the child or should have offered another service or services in lieu of or in addition to the services actually offered. Letter to Anonymous, 23 IDELR 650, 652 (1995); Letter to Champagne, 22 IDELR 1136, 1138. (With respect to (1), OSEP further expresses the opinion that the issue whether the services actually offered to the child are "comparable in quality" to those offered to students enrolled in the public schools would not be subject to due process "in and of itself.") It is not necessary here to determine whether OSEP is correct about (2), because this case falls squarely within the situation described in (1). That is, the May 30 IEP called for STUDENT to have a sign language interpreter at Carondelet, yet the District stated at the August 14 IEP meeting that it would only offer an interpreter at California High where, it knew, STUDENT would not be in attendance. Therefore, because the interpreter services offered in the August 14 IEP were not in conformity with the interpreter services promised in the May 30 IEP, the PARENTS had the right to initiate due process. 22 EDGAR does not specifically identify which persons are "appropriate" representatives 23 See also Benjamin P. v. City of Lackawana, 23 IDELR 430 (W.D.N.Y. 1995) (while related services may be provided at a public school site, they must be scheduled so as to minimize any missed class time at the private school).

[New Search](#)