

BEFORE THE SPECIAL EDUCATION HEARING OFFICER

In the Matter of the Due Process,)
Review Hearing for)
)
A.M. BY AND THROUGH S.M.) Case No. 21DP__-001
)
vs.)
)
USD __, _____)
COMMUNITY SCHOOLS)

NOTICE OF HEARING OFFICER'S DECISION

NOW on this 12th day of October, 2021, this matter comes before the Special Education Due Process Hearing Officer for decision.

I. PROCEDURAL BACKGROUND

The following represents significant dates in the procedural history of this matter:

A. May 26, 2021: The parties participated in a Pre-Hearing Scheduling Conference during which the parties discussed potential July 2021 hearing dates; a deadline for disclosure of expert witnesses; the availability of an agreed ASL interpreter during the hearing; and other due process-related issues. It was agreed that counsel for the parties would meet and confer to discuss potential hearing dates and agreed ASL interpreter(s).

B. June 4, 2021: The parties participated in a Pre-Hearing Scheduling Conference during which the parties discussed, for good cause shown, potential July 2021 hearing dates; deadline for disclosure of expert witnesses; date for exchange of documents; disclosure of witnesses; exchange of exhibits; and agreed ASL interpreter(s).

C. June 21, 2021: The parties submitted a joint report on ASL interpreters for the due process hearing.

D. July 13, 2021: The parties participated in a Pre-Hearing Scheduling Conference during which the parties discussed the need to provide additional hearing dates to accommodate for the number of witnesses and experts that were scheduled to testify and to provide additional time to ensure that interpreter services are adequately provided. For good cause shown, the parties mutually agreed to maintain hearing dates scheduled for July 21, 22 and 23, 2021, and add three additional dates of August 2, 3 and 4, 2021.

E. July 21, 22 and 23, 2021 and August 2, 3 and 4, 2021: The Administrative Hearing was held for six (6) days. Both parties had the opportunity to present evidence and examine and cross-examine witnesses.

F. September 1, 2021: Upon receipt of the hearing transcripts, the Hearing Officer directed that the parties would have until the close of business on September 23, 2021, in which to submit proposed Findings of Fact and Conclusions of Law. The proposed Findings of Fact and Conclusions of Law would be submitted to the opposing party and the Hearing Officer. The parties were granted until the close of business on October 4, 2021, to submit their rebuttal briefs.

G. October 5, 2021: The hearing in this matter was closed.

II. FINDINGS OF FACT.

A. A.M.'s Background:

1. A.M. is 11 years old. She attends ___ Elementary School in the _____ Community School District, which is the Respondent U.S.D. 294 and served by Northwest Kansas Education Service Center (collectively referred to herein as the "Districts"). During the 2020/2021 school year, she was 10 years old and in fifth grade at _____ Elementary. (Ex. 120 at 4). At the time of the hearing, she was 11 years old and headed into sixth grade. (Tr. 555:14). She has attended _____ Elementary since kindergarten. (Tr. 10:25-11:1). A.M. was born deaf. (Tr. 18:12-19:16). She has received special education services since before kindergarten. (Tr. 28:2-12). The services are provided by the Respondent Northwest Kansas Educational Service Center, U.S.D. 602 ("NKESC").

2. A.M. lives with her mother (S.M.), stepfather, two sisters and a stepsister. She is the youngest of the children (Tr. 15:18-25). One of A.M.'s sisters also receives special education services from the Districts (Tr. 16:6-7). A.M.'s mother, stepfather, one sister and her stepsister all sign fluently and frequently with A.M. (Tr. 16:12-13).

3. A.M. loves horses and horseback riding. (Tr. 555:21). As of now, she says she would like to be a veterinarian when she grows up or something else related to horses. (Tr. 556:6-7). S.M., A.M.'s mother, testified that A.M. wants to go to college and would be expected to go to college. (Tr. 27:5; Tr. 26:21-27:5).

4. S.M. described her daughter's personality overall as super expressive, goofy, witty, funny and smart. (Tr. 26:1-6). She said A.M. also loves painting. (Tr. 26:1-6).

5. A.M. failed the hearing test conducted at birth, as well as a follow up test given in the days following her birth. At two months old, she was diagnosed with severe to profound hearing loss in one ear and moderate to severe hearing loss in the other ear. (Tr. 15:18-19).

6. A.M. received cochlear implants when she was 2 years old (Tr. 20:2-17). However, she really gets very little benefit from them. (Tr. 21:14-22). Dr. Gail Sprecher, audiologist at the Kansas School for the Deaf ("KSD") tested A.M. and testified that, even with the cochlear implants, A.M.'s hearing loss is profound enough that she is not getting enough auditory information to develop or understand spoken language (Tr. 165:6-8). Also, at this point, eight or nine years post-implant, she cannot expect the implants to begin to work any better. (Tr. 167:68).

7. A.M. was on an Individualized Family Service Plan ("IFSP") prior to kindergarten and has been on an Individualized Education Program ("IEP") since entering kindergarten. (Tr. 28:10-12; Tr. 30:6-9). In third grade, A.M. began to struggle with reading and math academically. (Tr. 34:21-24). Additionally, she reported strain in social relationships and self-confidence.

8. A.M.'s mother has attended every IFSP and IEP meeting that has been held and has consented to all of the interventions included in the IFSP and each IEP up until A.M.'s fifth grade year (Tr. 30:12-13; Tr. 30:17-35:16).

9. A.M. attended an Extended School Year ("ESY") program at Kansas School for the Deaf ("KSD") in Olathe, Kansas, during the summer after kindergarten (Tr. 54:16-18). According to her mother's testimony, A.M. thrived at KSD (Tr. 54:16-18). There was a Teacher of the Deaf and Hard of Hearing from _____ named Theresa who observed A.M. during ESY that year (Tr. 54:16-55:7). Theresa suggested placing A.M. at KSD full-time, but her mother thought she was too young at that point and needed to stay at home with her family (Tr. 54:16 to 55:17).

10. Each school year, A.M.'s mother advocated for her to be able to attend ESY at KSD and each year, Respondents denied that request until the summer after A.M.'s fourth-grade

year (Tr. 54:13-15; Tr. 55:18-23; Tr. 57:1-4). Respondents kept insisting that they could provide services. (Tr. 20-22). During the intervening years, A.M. took part in ESY at _____ Elementary. A.M.'s mother said she never saw a teacher with A.M. during ESY at _____; she only recalled seeing A.M. sit alone in a room with an interpreter. (Tr. 55:24-56:10). She said that A.M. would question why she was the only child in ESY and that she felt "stupid." (*Id.*) Due to the COVID-19 pandemic, ESY was virtual after A.M.'s fourth-grade year (Tr. 57:22-58:1). A.M. also attended in-person ESY at KSD after her fifth-grade year, in the summer of 2021 (Tr. 58:1621).

11. During A.M.'s fourth grade year, 2019-2020, Districts provided remote learning, due to the Coronavirus pandemic. At that time, Ms. M_____ worked with A.M. and noted A.M.'s difficulties in reading and math. Additionally, that year materials became less visual with more emphasis on "lecture style" presentation. (Tr. 36:14-25).

12. S.M. testified that when she realized how far behind A.M. had fallen in her academics, she took time off of work as a nurse to stay at home with A.M. and help her through online classes and her homework. (Tr. 36:14-25).

13. S.M. stated that her daughter did receive 100% in that last quarter in reading comprehension but that was because S.M. assisted her in finding the answers in the book as A.M. could not do so independently. (Tr. 37:3-18).

14. In May of her fourth-grade year, A.M. had a birthday party at her home and invited several girls over for a sleepover. In the evening, the girls communicated with each other and refused A.M.'s request to sign, resulting in A.M. becoming upset and advising her mother that "they don't want to talk to me. They tell me it's not important. I don't understand. You know, my friends don't even want to try to talk to me." "Mom, please let me go to KSD." (Tr. 39:4-22).

15. Susan Bailey the District's Behavior Consultant, asked A.M. during an interview if A.M. had friends at school. A.M. responded that her only friend was Mikayla. (Tr. 798:20-25—799:1-2).

16. S.M. testified that while A.M.'s peers are often invited to the home, A.M. does not seem to get the same reciprocation in invitations from her peers. A.M.'s best friend, Mikayla, told S.M. two months before the hearing that her mom had said she could no longer have A.M. over to the house because Mikayla's mom didn't know sign language and couldn't talk to A.M. As a result, A.M. was not allowed to visit. This was a frequent problem. (Tr. 17-18:13-2).

17. A.M. has attended Extended School Year (ESY) services at _____ Elementary School and at KSD. (Tr. 55-56). She attended ESY at KSD in the summer of 2021. (Tr. 58-59).

18. A.M.'s mother contacted the Director of Special Education for NKESC, Kathy Kersenbrock-Ostmeyer, to discuss a change of placement to send A.M. to KSD (Tr. 43:11-12). Since that time, Respondents have refused to change A.M.'s IEP to allow her to go to KSD. A.M. began attending her IEP meetings to advocate for the change (Tr. 499:14; Tr. 500:3-5).

19. Throughout A.M.'s fifth-grade year, IEP meetings were held and IEP changes proposed in August and October of 2020 and February 2021; none of these meetings or proposals resulted in a resolution of this issue. Because no IEP allows for A.M. to attend KSD and because she disagrees with the efficacy of other supports and services proposed, A.M.'s mother has refused to consent to these IEPs. She eventually filed a request for Due Process Hearing, which was conducted July 21-23 and August 1-2, 2021. (Tr. 30:10-16; 30:17-35).

20. Between the August 2020 and October 2020 IEP meetings, A.M. completed an evaluation at KSD, but not all results were received before the October 2020 meeting. The Districts' employees did not make changes to the recommendations between the August and October meetings. (Tr. 46-47).

21. Reports from the October 2020 evaluation at KSD were received in the middle of November 2020. Following that, the Districts did additional evaluations to consider along with KSD materials at a future IEP meeting that was scheduled for February 2021. (Tr. 47-48).

22. Educational materials are presented to A.M. by the Districts in Signed Exact English (SEE). The Districts have testified that SEE is used because it helps students develop grammatical structures of English while they are learning. (Tr. 61-62).

23. A.M. received SEE translation support from Olivia Fellhoelter, a Teacher for the Deaf and Hard of Hearing (TODHH). Olivia and A.M. signed together in SEE, and Olivia works with A.M. on learning strategies in reading, vocabulary and math. (Tr. 52-53).

B. Professionals Involved in A.M.'s Testing and Education:

24. On October 10-12, 2020, A.M. was assessed by various academic professionals at KSD. Each of the professionals testified at the Due Process Hearing, including Angie Walker, Reading Specialist and Educational Consultant; Twila Latini, ASL Specialist and Evaluator; Amy Esplund, Outreach Speech Language Pathologist; and Jennifer Kucinski, School Psychologist, who covered some academic subject matter in her evaluation of A.M. At the Due Process Hearing, Carol Wasson, Title I Teacher at _____ Elementary, testified about A.M.'s test scores in fifth grade.

Angie Walker, KSD Reading Specialist and Education Consultant

25. Ms. Walker is an Education Consultant and Reading Specialist on the KSD Outreach Team. (Tr. 174:20-22). She holds a Bachelor's Degree in Special Education (Mild, Moderate A12) and a Master's Degree in Special Education (Deaf and Hard of Hearing). (Tr. 175, 4:8).

26. Ms. Walker previously worked in a mainstream school, using SEE. (Tr. at 175:16-18).

27. Ms. Walker observed A.M. as a kindergartener, but never directly interacted with her until A.M. was evaluated at KSD in October 2020. (Tr. 176:11).

28. In evaluating A.M., Ms. Walker used a mix of Conceptually Accurate Signed English (CASE), SEE, and American Sign Language (ASL). (Tr. 178, ln. 14-20). She tested

29. Ms. Walker tested A.M. in reading, writing and math (Tr. 178:25). She administered the following tests: Standardized Reading Inventory, Second Edition; portions of the Test of Written Language, Fourth Edition; and portions of the KeyMath, Third Edition, Diagnostic Assessment (Ex. 5 at 1). She found that A.M.'s overall reading score was well below average when compared with hearing peers (Tr. 185:20-186:2). In fact, A.M. ranked in the first percentile, meaning that 99 percent of those who took the same assessment at her age scored better than A.M. (Tr. 186:13-19).

30. The assessment tools were not normed for deaf children but standardized to hearing children. (Tr. 182:7-13). The tests are developed for children who use spoken English and require adoption for use with deaf children. (Tr. 82-85). Similarly, scores are normed to, and compared against, hearing children of the same age. (Tr. 185-186).

31. Under the reading umbrella was a subtest of passage comprehension and word recognition accuracy (Tr. 187:3-4). On the passage comprehension, A.M. scored in the fifth percentile (Tr. 188:7-10). Ms. Walker, although she urged caution, testified that she was fairly confident in assessing that A.M.'s passage comprehension puts her at a 1.8 grade level, meaning someone 8 months into first grade. (Tr. 189:9). As for word recognition accuracy, A.M. was placed at a 2.2 grade level and in the 16th percentile (Tr. 190:3-9).

32. Ms. Walker testified that having a low language level, as A.M. does, impacts every other academic area a student faces. (Tr. 199:4-6).

33. On KeyMath, A.M. scored below or well-below average as compared with her same-age peers (Ex. 5 at 2).

34. Ms. Walker's report included her assessment that A.M. performed "considerably below what would be expected of her typical hearing peers." (Ex. 5 at 1). One implication of the results Ms. Walker pointed out is that A.M. needs more support in reading, writing and math than she currently gets (Ex. 5 at 2). Further, Ms. Walker opined that A.M. is not making the progress she is capable of making in her current environment and that she would benefit from receiving her education in a fully visual learning environment, such as KSD. (Ex. 5, AM0128).

35. Ms. Walker addressed the fact that as A.M. progresses in grade level, things will begin to move faster in the classroom (Tr. 200:13-201:6): A.M. must observe the teacher, interpreter and peers; she must pay attention to things in her peripheral vision; she has to look at things being posted in front of the class on the board; she must determine who is speaking, all at a faster pace (Tr. 201:6-14). The fact that A.M. has to wait for the interpreter to get her the information from the teacher means she is always behind in getting the information, which causes further exhaustion (Tr. 201:18-23).

36. Ms. Walker testified that "in [A.M.'s] case, based on all of the data, my professional expert opinion is that receiving her education in a fully visual environment with direct communication with peers and teachers and other adults would be appropriate for her." (Tr. 203). A.M. needs to be with peers and adults who can communicate with her directly. (Tr. 206:3-8).

37. Short of a fully visual environment, Ms. Walker recommended that A.M. be taught with an ASL interpreter, not SEE (Tr. 204:10; Ex. 5 at AM0129).

38. Adding pull-out time for instruction would not change the way A.M. is being instructed and that is the biggest issue with her current placement, according to Ms. Walker (Tr. 232:8-17).

Twila Latini, KSD ASL Specialist and Evaluator

39. Ms. Latini is an ASL specialist and evaluator in the KSD Outreach Department. She has a Bachelor's in Early Childhood Education and an MMA in Teacher of the Deaf, English and ASL, both from Gallaudet University. (Tr. 245).

40. Ms. Latini and Amy Esplund worked together to assess A.M.'s language development, Ms. Latini focusing on ASL and Ms. Esplund on English. (Tr. 246: 13-18). Their evaluation of A.M. was performed in October 2020. (Tr. 246).

41. Ms. Latini evaluated A.M.'s skills in ASL, both receptive and expressive. Receptive is A.M.'s ability to understand and comprehend what is being signed, and expressive is A.M.'s ability to sign accurately. (Tr. 248:12-15; Tr. 248:19-21). Ms. Latini presented her findings in a report in which she consulted with her colleague, Amy Esplund, who tested A.M.'s English language skills. (See generally, Ex. 8). Ms. Latini also was part of a group from KSD's Outreach Team who observed A.M. at _____ Elementary on Oct. 6, 2020. (Tr. 333:7-11).

42. The tests Ms. Latini administered included the following: Kendall Conversational Proficiency Level and the Test of Narrative Language, Second Edition. (Tr. 249:23-250:5; Tr. 257:11-258:2; Ex. 8 at AM0160).

43. The Kendall test starts with social emotional conversations and builds to academics, in conversational dialogue to test A.M.'s academic level signs. (Tr. 249:23-250:5). It is scored in P-level, or proficiency level. On the Kendall test, A.M. received a P-level of between 4 and 5 (Tr. 250:21). This score indicates that A.M.'s conversational proficiency level in ASL corresponds to the chronological age of four to five years old. (Tr. 251:11-14). A.M. was 10 years old when she took the test. (Tr. 252:6), but her proficiency is more like pre-kindergarten preparedness level in terms of academics. (Tr. 254:6-8).

44. In the Test of Narrative Language, the test-taker is told a story in ASL and then asked questions. A.M. is also asked to sign the story back and come up with a made-up story that applies (Tr. 257:11-258:12), testing receptive and expressive storytelling (Tr. 261:10-16). A.M. scored 9 out of a possible 20 points on each part.

45. In naming items within a category, such as name three colors or name three body parts, A.M. scored below the first percentile. (Tr. 269:5-9). Vocabulary deficiency kept her from being able to name items in categories. (Tr. 270:23-271:4).

46. Ms. Latini (along with her colleague Ms. Esplund) concluded that A.M. “presents with a significant delay in all language areas of both English and signed language.” (Tr. 272:16-17; Ex. 8 at AM0166). They further observed that A.M.’s “language skills fall significantly behind those of her peers.” (Ex. 8 at AM0167).

47. In Ms. Latini’s opinion, A.M. needs much more exposure to a diverse group of signers, different styles of signers, and ASL to help her grow and learn. (Tr. 277:25-278:3). She testified that A.M. needs full access to language. (Tr. 292:19-22). According to the evaluation report, A.M.’s “current environment does not provide her with opportunities to use language with her peers in a way that will allow her language skills to grow.” (Ex. 8, AM0167). She also concluded that A.M. “needs full immersion in a signing environment for her language skills to thrive and for her to gain academic proficiency.” (Ex. 8, 0167).

Amy Esplund, KSD Speech and Language Pathologist

48. Ms. Esplund is the Outreach Speech Language Pathologist at KSD. (Tr. 308: 8-9). She has Bachelor’s degrees in English Linguistics and Speech Language Hearing and a Master’s in Speech Language Pathology from the University of Kansas. She is certified in Kansas. (Tr. 308:11-18).

49. Ms. Esplund observed A.M. at ___ in October 2020, as well as when A.M. was observed in kindergarten in 2015. (Tr. 309:10-14).

50. Speech language pathology looks at language acquisition based on cognitive abilities and age (Tr. 308:21-309:1). Ms. Esplund collaborated with Ms. Latini to create the Speech and Language Evaluation Report (Ex. 8) after evaluating A.M.

51. Ms. Esplund’s role was to evaluate A.M.’s English language capabilities (Tr. 310:1-5). She administered the following tests: Peabody Picture Vocabulary Test, Fifth Edition; Expressive Vocabulary Test, 3rd Edition; Rhode Island Test of Language Structure; and the SPELT-3 (See generally, Ex. 8).

52. The Peabody test has four pictures, and the taker must pick out the picture that goes with the word given. (Tr. 314:17-315:7). On that test, A.M.'s score put her in the first percentile. (Tr. 315:15-16).

53. On the Expressive Vocabulary Test, the taker is shown a picture and asked a question about which the taker must write out an answer. (Tr. 317:14-18). On that test, A.M. scored in the third percentile (Tr. 317:21).

54. On the Rhode Island test, the taker reads a sentence and would have three picture options to match to the sentence. (Tr. 322:22-323:6). There was no score given to A.M. on that, but she scored below what would be expected for her age. (Tr. 326:8-10).

55. The SPELT-3 is a test using picture options with questions that the taker must write answers to. (Tr. 326:18-24). A.M. got 34 percent correct on that test. (Tr. 327:12).

56. Ms. Esplund also tested A.M.'s lip-reading skills and found that she did well on individual words, but not sentences. (Tr. 329:1-17). A.M. would not be able to read a teacher's lips in lieu of using an interpreter. (Tr. 330:4-13).

57. Ms. Esplund concurred with Ms. Latini in the opinion that "Overall, [A.M.] presents with a significant delay in all language areas of both English and signed language." (Tr. 330:19-22; Ex. 8, AM0166).

58. She also recommended that A.M. be granted full access to a visual language so she can acquire age-appropriate language skills and academic skills. (Tr. 331:12-15).

59. Further evidence of A.M.'s academic deficits can be found in results of standardized tests administered at _____ Elementary and the testimony of educators there.

Carol Wasson, Title I Teacher at _____

60. Ms. Wasson is the Title I Teacher at ____ in U.S.D ____. (Tr. 683:10-12). She has a Bachelor of Science Degree in Elementary Education from the University of Wisconsin at Eau Claire and has completed approximately 50 hours of graduate credit. She has taught first, third, fourth, and fifth grade at ____, and has been the Title teacher for 11 years, working with test scores for the last six of those years. (Tr. 683:14-23). She has taught at ____ for 27 years all together. (Tr. 684: 3-4).

61. Ms. Wasson testified to A.M.'s test scores in fifth grade. She said that on the state assessment for language arts, A.M. scored at the lowest level, which is level 1. (Tr.

690:8-12; Ex. 135 at 1). A score at level 1 translates to a showing that the student shows a “limited ability to understand and use the English language arts skills and the knowledge needed for college and career readiness.” (tr. 690:10-25; Ex. 135 at 1). A.M. scored at level 1 in language arts the prior year as well. (Ex. 135 at 1).

62. In her fifth-grade math state assessment, A.M. also scored a level 1. (Tr. 692:6-11; Ex. 136 at 1). A score at level 1 shows that A.M. lacks the math skills necessary for college and career readiness. (Ex. 136 at 1). In math, she scored at level 2 the year prior, so her performance decreased by one level between fourth and fifth grade. (Ex. 136 at 1).

63. A.M. scored at level 1 on her fifth-grade science state assessment. (Tr. 694:1-4; Ex. 137 at 1). A score at level 1 shows that A.M. lacks the science skills and knowledge necessary for college and career readiness. (Ex. 137 at 1).

64. Ms. Wasson also testified about A.M.’s performance on Star tests in reading and math and Star growth reports based on A.M.’s scores on each of those tests. (See generally Ex. 138 and 139). The Star growth report for math showed A.M. exhibited low growth and low proficiency. (Ex. 138 at 1). Low growth means that the student did not show one year’s worth of progress in an academic year. (Tr. 716:3-4).

65. The Star growth report for reading showed A.M. exhibited high growth but continued low proficiency. (Ex. 139 at 1). And even with the growth in reading A.M. did show, she still was found to be at a level 2.9, which is not quite at the third-grade level and still performed in just the fourth percentile. (Tr. 702:18-22; Ex. 139 at 1).

66. Ms. Wasson acknowledged that in assessing a student of average intelligence, such as A.M., she would expect to see growth each year. (Tr. 715:21-25). A.M. did not score at grade level on any of the tests Ms. Wasson testified about. (Tr. 719:1-7).

67. In looking for reasons A.M. might be delayed academically, several witnesses testified to the fact that, as is the case with many deaf children, A.M. lacked incidental learning, which hearing children get simply by hearing TV, overhearing conversations, interactions with peers and adults, etc. (See, e.g., Tr. 193:1-13 (Angie Walker); Tr. 808:12-16 (Olivia Fellhoelter); Tr. 494:24-495:6 (Joan Macy)).

68. Also, in part due to this lack of incidental learning, A.M. has struggled with language and vocabulary throughout her school career. (Tr. 60:3-23). (See generally, Ex.

100-120). When tested at KSD, A.M.'s vocabulary fell to the 1st percentile, according to Ms. Kucinski. (Tr. 347: 4-6).

69. Many of the witnesses from KSD testified that the best way to make up for some of the absence of incidental learning and to grow in her vocabulary would be for A.M. to be immersed in a language-rich environment with direct communication with peers and teachers, such as KSD. (See, e.g., Ex. 8 at AM0167).

Jennifer Kucinski, School Psychologist at KSD

70. Ms. Kucinski is the School Psychologist at KSD. (Tr. 338:24-339:1). She has a Bachelor's degree in Pathology, Master's Degrees in Developmental Psychology and Psychology, and is working on a Ph.D. in Educational Leadership. (Tr. 339:4-12).

71. Ms. Kucinski observed A.M. in U.S.D. 294 on October 6, 2020, and met with her at KSD during the October 2020 evaluations. (Tr. 340:3-10). She prepared the Psychoeducational Evaluation Report. (Tr. 340:11-14).

72. For testing, instructions were given in ASL. (Tr. 340:22-342:1). If A.M. did not initially understand, directions were rephrased in ASL, and would finally be given in Signed Exact English after attempts in ASL were exhausted. (Tr. 363:6-14).

73. Ms. Kucinski administered the Wechsler Intelligence Scale for Children – Fifth Edition. In nonverbal sections, A.M. scored in the average range. (Tr. 341:14-21). In verbal sections, Similarities and Vocabulary, she was in the low average range and the low range, respectively. (Tr. 341:20-342:1). These tests are normed to hearing children of the same age. (Tr. 347:15-16).

74. Ms. Kucinski gave A.M. the Kindall Conversational Proficiency Levels Test. (Tr. 249:18-24).

75. A.M. rated herself, answering 60 questions related to different categories of self- conceptualization. (Tr. 349:12-22). A.M. scored low in Behavior, Freedom from Anxiety, Happiness, Intellectual/School Status, Physical, and Social. (Tr. 352:9-355:16).

**Dr. Sharon Baker, Assistant to the Superintendent
of the Oklahoma School for the Deaf**

76. Dr. Baker has a Bachelor's degree in Deaf Education, a Master's in Educational Administration, and a Doctorate in Curriculum and Instruction. (Tr. 366:3-6). She is an Assistant to the Superintendent of the Oklahoma School for the Deaf. (Tr. 367:3-7).

77. Dr. Baker reviewed KSD's and the Districts' evaluations over a two-day period but did not meet with A.M. in person. (Tr. 367:10-17). Dr. Baker stated that she had not seen a more comprehensive evaluation and that KSD did a very good job of identifying A.M.'s present level of performance and her weak areas. (Tr. 369:14-20).

78. Dr. Baker testified that around third grade, the impacts of missing out on incidental learning from environmental exposure become more apparent where reading comprehension skills fall behind. (Tr. 372:18-373). Regarding achievement and third grade, she further testified:

That's when their reading instruction becomes comprehension. So, you read a text and you comprehend it, and reading comprehension relies heavily on vocabulary development, which she is weak in. Up to that point, they're learning words; they're learning sounds for words; they're learning long E's and short I's and vowel sounds and consonant sounds and how to blend them together and make syllables, and they're reading books, but reading comprehension kicks in about third grade.

I mentioned the SAT-HI before, which was a test used by most school districts in the country through the '80s, '90s, and even 2000's, up to like 2011, and that data showed that -- let me get this exactly right here -- that the achievement gaps remain large, and test performance has not changed in three decades. These researchers were from the Gallaudet Research Institute, and they said it's likely the result of a lack of opportunity to learn language and deficiencies in curriculum.

So, an average reading level of fourth grade is common, so that means 50% read less than fourth grade and 50% read above, and longitudinal studies out of Gallaudet have shown that the more hearing a child has, the better their ability to read, which makes sense; right?

So, children are -- deaf and hard of hearing children are a huge group of kids that are very diverse, so if you start desegregating that and looking at the good readers, they're usually more hard of hearing. (Tr. 376:24—378:4).

79. Dr. Baker stated that [A.M.'s] test scores are sufficiently low enough that it indicates that a different approach needs to be taken and that the interventions that have been planned for children who can hear and have that hearing ability would not be appropriate for A.M. (Tr. 371:9-14).

80. Dr. Baker stated that there were inconsistencies in all of the data and that a comprehensive view must be taken. (Tr. 370:14-20). Based upon her review of A.M.'s records, Dr. Baker is very concerned about [A.M.]. (Tr. 370:22-24). Dr. Baker concluded that what A.M. needs right now is full access to language. (Tr. 371:7-8).

81. Dr. Baker testified that if A.M. is college bound and she goes to a college classroom where there is long lectures, and there is going to be an ASL interpreter in there, so she needs to have fully functional ability in using an ASL interpreter if she is going to go to college. (Tr. 384:5-11). Dr. Baker further stated that "so I feel that the Kansas School for the Deaf will provide her more than the District can, and that she will--there is a tremendous possibility and potential for her recapturing some of that language loss, learning a new language, being bimodal, being able to speak and sign, and all of this is positive..." (Tr. 384:12-21).

**Dr. Wyatt C. Hall, Research Assistant Faculty at
University of Rochester Medical Center**

82. Dr. Hall has a Bachelor's degree in Psychology from Rochester Institute of Technology, and a Master's degree and Ph.D. in Clinical Psychology from Gallaudet University. He is currently research assistant faculty at University of Rochester Medical Center. (Tr. 390:6-21).

83. Dr. Hall testified that SEE is still used in educational systems in many places but that Exact English takes up a tremendous amount of working memory. (Tr. 400:8-9—400:18-20).

84. Dr. Hall responded to the differences between signing Exact English and ASL:

"ASL is a natural human language. It is developed naturally over hundreds, if not thousands of years. So, it's a natural language like any other language: French, English, German. It developed naturally, and all over the world. We see visual languages develop and that is a long process, so it's based on a community of shared users and it's based on our biology. (Tr. 399:17-24).

Signing Exact English is an artificially invented system that was invented by hearing people who were concerned about deaf people's ability to learn to read and write, so they tried borrowing from a natural language to represent another language and it violates very many of the principles, not only of ASL grammar but of the human brain. (Tr. 399:25-400:1-7). Sign Exact English, for example, tries to use auditory foundation and represented visually, which makes no sense to the brain. (Tr. 400:8-12).

85. Dr. Hall stated:

Signed Exact English '...puts a cognitive load on the deaf person to decode and translate mentally from this—this artificial code into something that is visually sensible. A famous example in the community that we often use is a butterfly. So, this is a sign for a butterfly (indicating), but people in SEE will sign the sign for "butter" the food, butter, and then "fly" or like a bug, like a fly. So how does butter and a bug become a butterfly? Who does that work to make sense of that? That's what SEE signs are.' (Tr. 401:13-15—402:1-9).

86. In responding to the notion of a split attention that a deaf child deals with in the hearing school, Dr. Hall stated:

In a hearing classroom—let me back up and say hearing children in the normal classroom can look wherever they want with their eyes while they are listening, so their eyes move around the room. If they are bored, they look out the window. If they're tired, they look down at their shoes, they can mentally—not mentally, but they can visually detach and rest in certain mental ways, whereas the demand for full visual attention for eight hours a day, or however many hours the school day is, without any breaks whatsoever, is not a normal human demand.

You have to look at the board. You have to look at the interpreter. You can't see people behind you. You are not supposed to turn your head and look, and that's a constant stimulation that is absolute exhausting. I remember that feeling of exhaustion very well from my own mainstream experiences, and there is no chance to ever decide how to use your own attention. It is being demanded of you all day long, every single second, and, you know, you—couldn't manage it.

I couldn't—like you—can't look down at your paper in front of you. They handout a paper to everyone. Everyone else looks at it, but as a deaf person, you are not allowed to look at the paper, but then you are supposed to know what's on the paper. So this hyper-vigilance attention that's expected of deaf children, and we get punished if we don't do it. It's exhausting. In a way, that's difficult to describe. (Tr. 410:15-25—411:1:20).

87. Dr. Hall believes that SEE is never an appropriate alternative to ASL in a grade school classroom for a deaf child. (Tr. 412:12-17).

88. Further, Dr. Hall states that SEE is not prevalent within the deaf community. (Tr. 412:18-22).

89. Dr. Hall did not testify as to having reviewed any materials related to A.M., did not testify to having met with A.M., or otherwise referenced A.M. in his testimony.

**Dr. Petra Horn-Marsh, Teaches ASL Deaf Studies and
ASL Advanced at KU Edwards Campus**

90. Dr. Horn-Marsh holds Bachelor degrees from Gallaudet University in Secondary Education and History, Master's degrees in History and Sociology and a Ph.D. in Sociology from Utah State University, as well as a Master's degree in Educational Leadership and School Administration from University of Missouri in Kansas City. (Tr. 415:10-21). She currently teaches ASL Deaf Studies and ASL Advanced at KU Edwards Campus. (Tr. 415:23-25).

91. Dr. Horn-Marsh was provided materials related to A.M.. (Tr. 431:9-11).

92. Dr. Horn-Marsh testified that a school district must not simply address academics but must also take into account the child's social and emotional aspects. (Tr. 431:13-19).

93. Dr. Horn-Marsh further testified that the student requires social and incidental learning. The student needs to be able to read, to write, to understand to make connections. (Tr. 431:19-24).

94. Dr. Horn-Marsh opined that that students coming together once a week at noon, at lunch, in an attempt to find one or two friends is very detrimental. (Tr. 432:16-21).

95. Dr. Horn-Marsh stated that "so if you've got one child the same age as a deaf child, that's not life. That's not living. It's not developing social skills. You know, it's encouraging positive self-esteem. (Tr. 433:10-13).

**Tawny Holmes-Hlibok, Assistant Professor of Deaf Studies
and Legal Policy at Gallaudet University**

96. Ms. Holmes-Hlibok has Bachelor's degrees in Deaf Studies and Sociology and a Master's degree in Deaf Education from Gallaudet University, and Juris Doctorate from

University of Baltimore. (Tr., Vol. 3, at 444, ln. 19-25). She is an Assistant Professor of Deaf Studies and Legal Policy at Gallaudet University. Before teaching at Gallaudet, she worked at the National Association for the Deaf as their Education and Policy Council.

97. Ms. Holmes-Hlibok opined that if the family or a student indicated the preferred mode of communication is ASL, that information should be in the IEP when reviewing the communication needs of the child and the family and their preference of mode of communication; linguistical needs; the severity of the hearing loss and the ability to use residual hearing; the academic level and the social and emotional and cultural needs, including the opportunity of socializing with peers. (Tr. 455:5-16).

98. In 1992, the United States Department of Education provided guidance related to the least restrictive environment as it relates to deaf children. (Tr. 445-446). The guidance does not relieve a district of their obligation to place student with a disability in a regular classroom if free appropriate public education (FAPE) can be provided in that placement. (Tr. 460:14-18).

99. In describing the guidance, Ms. Holmes-Hlibok testified as follows:

The secretary said that the least restrictive environment must be made fully by the IEP Team and made by full consideration of the child's needs and follow the process of the IEP to evaluate everything academic, and there's four specialty factors that are in the IDEA law that apply to the deaf and hard-of-hearing children: in other words, the deaf, social, emotional with your peers; how you socialize with your teachers; the emotional level, the emotional needs; also language and communication needs.

So these are four things that need to be—four factors that need to be taken into consideration for what's best for the child, and it basically says the underlying thing is that many departments, many districts, are like 'oh, I have to have this kid really close to here. I don't want to follow the federal law,' but that's not true. The deaf child can be placed in a deaf school and still have a wonderful LRE in the deaf school (Tr. 447:1-19).

100. Ms. Holmes-Hlibok testified that direct communication from the teacher that is provided by the School for the Deaf is vital inasmuch as the student can ask questions directly. If the student does not understand, you have back and forth dialogue. The teacher can observe where the student is at their level and can model and show visual representations. By contrast, if the student must go through a third-party interpreter, the student is looking back and

forth between the teacher and the interpreter, and the teacher and the interpreter, thereby losing focus. It is not at all like being able to speak directly to the teacher. (Tr. 423:8-19).

101. Ms. Holmes-Hlibok further stated that much depends on the interpreter's qualifications. Some interpreters are subpar and some interpreters are very, very skilled. Interpreters who work in public school settings often are not the highest qualified interpreters. (Tr. 423:20-25—424:1-2).

102. Ms. Holmes-Hlibok describes research supporting the use of Signed Exact English in the academic setting as being very, very limited. There is, however, an overwhelming amount of support for ASL in the classroom setting. (Tr. 425:4-14).

103. Ms. Holmes-Hlibok recognizes that deaf culture is a way of life. A belief system and a value system whereby there is literature, movies, videos, stories, poetry, art, all connected to the deaf cultural experience. (426:22-25—427:1-5). Ms. Holmes-Hlibok describes deaf culture as a way of life. "It is a way of thinking and feeling and experiencing and shared approaches based upon our language and, again, our shared experiences." (Tr. 427:19-22).

**Robert Cooper, Executive Director for Kansas Commission for the
Deaf and Hard of Hearing**

104. Mr. Cooper is the Executive Director for Kansas Commission for the Deaf and Hard of Hearing ("KCDHH"). (Tr. 462:4-6).

105. Mr. Cooper describes the KCDHH as a state agency that was established to focus on communication advocacy for the deaf and hard of hearing individuals across the state and is also responsible for the oversight of interpreter registry in the State of Kansas. The Agency housed within the Department of Children and Family Services ("DCF"). (Tr. 462:9-15).

106. Mr. Cooper testified that K.S.A. 75-4355b requires all interpreters – educational and otherwise - be part of the KCDHH registry. (Tr. 464:20—465:11).

107. Mr. Cooper stated that if a person isn't licensed anywhere and they are simply relying on test scores as their qualifications, that person would not qualify as an educational interpreter in Kansas. (Tr. 475:20-25—476:1)

Joan Macy, Director of Outreach Services at KSD

108. Ms. Macy is the Director of Outreach Services and related services at KSD. (Tr. 487:18-19). Ms. Macy has interacted with A.M. and/or her family through parent events; A.M. has attended ESY at KSD; and more recently has attended A.M.'s IEP meetings. (Tr. 489:7-15). Ms. Macy attends IEP meetings for students who want to attend KSD to see that everyone is on the same page. (Tr. 491:1-5). In this case, she attended at the request of A.M.'s mother. (Tr. 498: 17-18).

109. At an IEP meeting in the spring of 2020, the team agreed to ESY at KSD, but the family and Ms. Macy requested that the plan call for placement at KSD starting in A.M.'s fifth grade year, the fall of 2020. At that time, the Districts stated that they felt the IEP met A.M.'s needs. (Tr. 490:1—491:3).

110. In the August 2020 IEP meeting, the Districts maintained their position that placement in U.S.D. 294 remained appropriate based upon A.M.'s grades and that the progress she has made. A.M. asked if failing in her classes would create a situation where the team would send her to KSD. (Tr. 505:10-19). KSD is part of the continuum of placement options to be considered. (Tr. 506:10-12).

111. Ms. Macy testified:

I mean, I think the one thing I would want to say is, I mean, _____ is a -- is a good school. They've got good staff. You know, it's a very good school for hearing kids. I mean, they -- it is a very positive climate there so, I mean, and I think [A.M.] knows that they care about her there. Okay?

What struck me, though, is the lack of access, but that has nothing to do with the school. It has to do with the nature of hearing loss. I mean, with hearing loss, there's just certain access points that are not going to be available in a hearing environment. So, I just want to make sure that it's clear that, you know, that's the focus. (Tr. 506:10-12).

112. Ms. Macy submitted a letter of dissent to the February 2021 IEP. (Tr. 514:3-4).

113. Ms. Macy recalled that in the October 2020 IEP meeting, Olivia Fellhoelter discussed how far away KSD is from home for A.M.. (Tr. 533:8-17).

114. KSD students participate in Kansas State Assessments. In English Language Arts, 80% of KSD students tested scored in the bottom quarter of those tested

statewide. In Math, 82% of KSD students tested were in the bottom quarter of takers. In Science, 84% of KSD students tested in the bottom quarter of takers. (Tr. 547-550). All students who take these assessments take them at grade level, not their instructional level. (Tr. 551:17—552:15).

**Kathy Kersenbrock-Ostmeyer,
Director of Special Education at NW Kansas Educational Center**

115. Ms. Kersenbrock-Ostmeyer is the Director of Special Education at Northwest Kansas Educational Service Center (NKESC). (Tr., Vol. 4, at 584, ln. 1). She has over 40 years of experience in special education. (Tr. 584:4-22). She has a Bachelor's degree in Family Life and Human Development and a Master's degree in Special Education - Emotional Disabilities. She has license endorsements in Home Economics, Emotionally Disturbed, Behavior Disordered, and Learning Disabilities. She is licensed for Building Level Leadership, District Level Leadership, Coordinator of Special Education, and Director of Special Education Endorsement in Pre-K through 12. (Tr. 584:5-13).

116. IEP documents in evidence with handwriting on them reflect changes to the draft IEP that were made during the meeting. (Tr. 588:12-18). Evaluation Reports are compilations of evaluation data the team or other evaluators have collected. (Tr. 588:10-12). Prior Written Notice (PWN) documents serve as notice and consent of actions the Districts or IEP team want to take. (Tr. 589:3-21). Team Meeting Records are meeting notes that track the discussions through the IEP meeting. (Tr. 589:24—500:1).

117. The February 17, 2020, IEP is the current plan, as there was not consent to any plan after that time. (Tr. 592:14-16). The anticipated services call for three different "pull out" services that A.M. would receive separated from the rest of her class. (Tr. 593:7-11). One for 75 minutes per week, one for 20 minutes once every fourth week, and another for 60 minutes per week, for a maximum of 155 minutes per week, but generally around two hours per week. (Tr. 593:14—594:10). U.S.D. 294 Schools have approximately 37 hours in a regular school week. (Tr. 594:14).

118. The February 12, 2021, plan, which was proposed but not consented to, calls for several instances of pullout services; one for 100 minutes per week; one for 60 minutes per week; one for 30 minutes per week; one for 20 minutes per week; one for 210 minutes per week; and, a maximum of 90 minutes in any one day. (Tr. 590:20—591:12).

119. Ms. Kersenbrock-Ostmeyer never addressed transportation issues as a reason why A.M. should not or could not be placed at KSD. (Tr. 597:11-23). There are many options available for transportation if the team decided to send A.M. to KSD. (Tr. 598:2-17).

120. There was an incident early in the 2020-21 school year in which A.M.'s interpreter was absent, and iPad with the Stratus app/software was not where it was supposed to be. (Tr. 599:13-21). Ms. Kersenbrock-Ostmeyer talked with the team members to let them know they should have been prepared, and discussed the situation with administrators from U.S.D. 294, so they could address issues with U.S.D. 294 members of the team. (Tr. 599:24—600:8).

Karla Wilson, Hearing-Impaired Interpreter with NKESC

121. Ms. Wilson is a Hearing-Impaired Interpreter with NKESC. (Tr. 623:16-17). She has interpreted with the Service Center in some capacity for over 20 years. (Tr. 623:20-25). She uses SEE, as she has worked with students learning English grammar, reading, and writing. (Tr. 624:10-17). Ms. Wilson is working towards her Bachelor's degree. (Tr. 623:22-23).

122. Ms. Wilson is tested by the SEE Center. In April 2012, she rated 4.0 on expressive skills and 3.0 on receptive skills. In May 2015, she scored 3.3 on expressive skills and 3.7 on receptive. She tested again July 12, 2021, and, was awaiting results at the time of the hearing. (Tr. 624:25—628:18).

123. Ms. Wilson stated that if you get a score that 3.5 or below, you should try to test every two years to try to bring it up to a 4.0. The state Department of Education would prefer a 4.0 with 5.0 being perfect. (Tr. 629:1-7).

124. In the past, KQAS testing happened onsite at the school district, rather than in an artificial environment. (Tr. 628:9-18).

125. Ms. Wilson does not know of or believe there is any requirement that interpreters join the KCDHH registry. (Tr. 631:4-6).

126. Interpreting for A.M. from early elementary until late elementary has created a transitional period for Ms. Wilson and A.M. (Tr. 632:10-12).

127. Ms. Wilson testified that due to COVID-19, there were several times where she could not be physically present at the school but was able to provide interpretation

services through the computer, through home, either through google classroom or Zoom. She estimates that she was not able to be in the classroom 50-60% of the time. (Tr. 631:11-25).

128. Ms. Wilson does recall a time during an IEP meeting where it was discussed that she would attend more trainings to improve because her skills were not what they should be. (Tr. 640:11-16).

129. Ms. Wilson testified that she was “pretty sure” that she did not need to register with the Kansas Commission for Deaf and Hard of Hearing. (Tr. 640:17-25).

130. Ms. Wilson testified her role in the classroom is that of just interpreting what the teachers are saying, what the other students in the classroom are talking about and being in the role of communication for the deaf and hard-of-hearing students. (Tr. 632:7-11).

131. Ms. Wilson provided an example when using SEE:

You can have a run in your hose, you can have a runny nose. You can have all these different kinds of a run, and when you do that, you sign the word the way that it would be signed, but you also need to kind of get some clues as to what kind of run you are talking about. If it’s a runny nose, showing that it’s coming out of your nose. If it’s a run in your hose, then showing that you have—you know—there is a run in your hose. Different things like that. So you have to add to the sign, also with finger spelling it, in case the student isn’t understanding what you are talking about. (Tr. 633:22-25—634:1-12).

132. Ms. Wilson stated that in one of her tests, the mode score rating for ASL was 20%. (Tr. 637:8-13). Ms. Wilson testified that she was “not an ASL person,” and did not have the credentials to be an ASL Educational Interpreter. (Tr. 637:21-25—638:1-7).

133. Ms. Wilson testified that she was not aware that A.M.’s preferred or primary language is ASL. In response to a question she stated: “I have been using Signed Exact English with [A.M.] for a long time, since I have been working with her, and I guess I never—my bad—I never paid attention to the language of the student being ASL so I was never—never mind.” (Tr. 653:5-15).

134. Ms. Wilson stated that it was a Team decision to utilize the SEE system, stating we’re in public education and the students we would be working with would need to write in sentence form, and when we sign, we sign in sentence form. (Tr. 624:18-19).

135. Ms. Wilson was anxious in front of the KSD observers. One pointed out a mistake she made, but later doubled back and said that in SEE, the sign was correct. (Tr. 633:1—634:12).

136. During a performance of the high school play during the school day for the elementary students, A.M. asked Ms. Wilson not to interpret, but Ms. Wilson sat near A.M. to sign for her or be prepared if A.M. changed her mind. (Tr. 635:4-18).

Sandra Ketterl, 5th & 6th Grade Teacher for USD 294

137. Ms. Ketterl is a fifth and sixth grade teacher for U.S.D. 294, teaching Reading and Social Studies. (Tr. 658:18-20). She has taught at _____ for 15 years, and before that, taught Special Education for NKESC in another district. (Tr. 658:23—659:5).

138. A.M. was in Ms. Ketterl's class during the 2020-21 school year. (Tr. 659:7-8).

139. Social Studies materials are provided through a magazine or on the computer. Students are allowed to choose their preferred method of accessing the materials. (Tr. 659:18—660:5).

140. In Ms. Ketterl's class, A.M. sits in the front to ensure that A.M. always can see the interpreter. (Tr. 661:15-24).

141. Students do an "anticipation guide" before starting new units in Social Studies, to expose them to vocabulary and concepts before they are brought up in materials. (Tr. 662:16—663:19).

142. Ms. Ketterl recognizes signs of interest and understanding in A.M. in Social Studies. (Tr. 663:25—664:18).

143. In Reading, the focus is on reading different materials and working on comprehension. (Tr. 664:24-25). The curriculum uses a textbook of basal stories, but they also use chapter books and complete 2 book reports in fifth grade. (Tr. 665:8-16). The students choose their own books, but Ms. Ketterl approves the books. (Tr. 665:19-24). There are parameters the book reports must meet. (Tr. 666:5-17). A.M.'s first book report, submitted in December, fell short of many of the criteria, was not written in paragraph form, omitted necessary information. (Tr. 667:13-668:3). The second book report, turned in in May, was much more complete and better satisfied the requirements of the assignment. (Tr. 668:4-18).

144. Ms. Ketterl believes that she observed growth and improvement in A.M. during her fifth-grade year. (Tr. 671:14-17).

145. Ms. Ketterl used specific procedures to prepare students for standardized testing, including Star 360 tests, DIBELS tests, and the State Assessment, which included A.M., before A.M. went to the resource room to be tested in a separate environment. (Tr. 672-674).

III. LEGAL ISSUES PRESENTED TO THE HEARING OFFICER.

A. Did the Districts deny A.M. FAPE by denying request for placement at the Kansas School for the Deaf?

B. Is U.S.D. 294 the least restrictive environment for A.M.?

IV. CONCLUSIONS OF LAW.

A. LEGAL STANDARDS.

1. The Hearing Officer has jurisdiction to decide the issues before him pursuant to K.S.A. 72-9720.

2. The burden of proof and the burden of persuasion lie with the party challenging the IEP. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.*, 921 F.2d 1022, 1026 (10th Cir.1990).

3. The party seeking relief bears the burden of proving the appropriateness or inappropriateness of the education. *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006).

4. In this matter, the parents are the party challenging the IEP.

5. "The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to a free and appropriate public education designed to meet their unique needs." *LB. v. Nebo Sch. Dist.*, 379 F.3d 966, 968 (10th Cir. 2004).

6. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., establishes a substantive right to a "free appropriate public education" ("FAPE"). *Board of Ed. of Hendrick Hudson Central School Dist., Westchesteray. v. Rowley*, 458 U.S. 176 (1982).

7. "Free appropriate public education" (or "FAPE") means special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State

involved; and (D) are provided in conformity with the individualized education program. 20 U.S.C. § 1401(9).

8. A FAPE includes both "special education" and "related services". 20 U.S.C. § 1401 (9). "Special education" is "specially designed instruction...to meet the unique needs of a child with a disability." 20 U.S.C. § 1401.

9. The U.S. Supreme Court expanded this definition in the *Rowley* case (cited above), holding that a district satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.

10. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id. at 203-204*

11. The U.S. Supreme Court in *Rowley* set forth a two-part test to determine whether the district has complied with federal special education law: First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id. at 206-07.*

12. In reviewing such cases to determine whether the above requirements have been met, the U.S. Supreme Court cautioned that the courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

13. The U.S. Supreme Court reviewed the standard the Tenth Circuit Court of Appeals had applied to the second prong of the *Rowley* test and found the Tenth Circuit's *de minimis* benefit test lacking. Instead, the Supreme Court held that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2017).

14. The Supreme Court went on to explain: The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials....The Act contemplates this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians....Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Id.* Internal citations omitted).

15. In *Endrew F.*, the Supreme Court reiterated *Rowley*'s deference to school authorities with respect to educational policy, stating: “We will not attempt to elaborate on what ‘appropriate’ progress will look like from case to case. It is in the nature of the Act and the standard we adopted to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Endrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S., at 206, 102 S. Ct. 3034).

16. As modified by *Endrew F.*, the two-prong *Rowley* test is now properly stated as: First, has the school complied with the procedures set forth in the Act? And second, has the school offered an IEP reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances? (137 S.Ct. 988, 999, 2017).

17. The duty to offer a FAPE, and to issue an Individualized Educational Plan (“IEP”), resides with a child’s home school district, or “local educational agency.” 20 U.S.C. § 1414(b) (imposing obligations to create and administer IEPs on local educational agencies); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 451 (2d Cir. 2015) (“the duty to offer a FAPE remains with the agency where the child resides; and a FAPE cannot be offered unless an IEP is issued”). “Generally, a ‘local educational agency’ is synonymous with the local school district.” *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1110 n.7 (9th Cir. 2016) (citing 20 USC. §1401(19)). The “local institution responsible for complying with the terms of the IDEA is the local school district in which the student actually resides.” *Joshua W. v. Bd. of Educ.*, No. 971042-JTM, 1997 U.S. Dist. LEXIS 9457, at *7 (D. Kan. June 10, 1997).

18. The IDEA offers states federal funds to assist in educating children with disabilities. See *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006). In exchange

for the funds, a state pledges to comply with a number of statutory conditions. 20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.17; K.A.R. 91-40-2(b)(1).

19. A child with a disability means a child evaluated in accordance with §§300.304-300.311 as having an intellectual disability, **a hearing impairment (including deafness)**, a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, or other health impairment, a specific learning disability, deaf, blindness, or multiple disabilities, and who, by reason thereof, need special education and related services. 34 CFR 3008. [emphasis added].

20. A child with a disability, who by reason thereof, needs special education and related services, qualifies for benefits under IDEA. 20 U.S.C. § 1401(3)(A); K.S.A. 72-3404(g), (z); K.A.R. 91-40-1(k). A child with a disability is also known as an “exceptional child” in Kansas. K.A.R. 91-40-1(w).

B. LEAST RESTRICTIVE ENVIRONMENT (“LRE”)

1. The U.S. Department of Education issued guidance in 1992 regarding deafness and the LRE requirement of the IDEA (and Section 504 of the Rehab Act). The Secretary issued the guidance because of concerns that “the least restrictive environment provisions of the IDEA and Section 504 are interpreted, incorrectly to require the placement of some children who are deaf in programs that may not meet the individual student’s educational needs.” (See Ex. 3). The Secretary went on to say that “meeting the unique communication and related needs of a student who is deaf is a fundamental part of providing a ... FAPE to the child. Any setting, including a regular classroom, that prevents a child who is deaf from receiving an appropriate education that meets his or her needs including communication is not the LRE for that child.” (See Ex. 3 at 3). [emphasis added].

2. The Secretary cautioned the states and school districts that they must consider “the potential harmful effect of the placement on a deaf child or the quality of services she needs” in determining the LRE. The need to weigh the harmful effect also is included at 34 CFR § 300.116 with regard to LRE and placements. This regulation states in pertinent part, “In determining the educational placement of a child with a disability... each public agency must

ensure that – (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs.” (34 CFR § 300.116).

3. It was recognized in the guidance that deficits in language and communication profoundly affect most aspects of the education process. This means that deficits in language can impact negatively on a student’s ability to learn in other, less obviously language-dependent classes, such as math, social studies, etc., which are additional areas in which A.M. struggles.

4. The Secretary outlined factors to be taken into account in developing an IEP for deaf children to ensure placement in the LRE. Those factors include: (1) Communication needs and the child’s and family’s preferred mode of communication; (2) Linguistic needs; (3) Severity of hearing loss and potential for using residual hearing; (4) Academic level; and (5) Social, emotional and cultural needs including opportunities for peer interactions and communication. (See Ex. 3). (See also, 20 U.S.C. § 1414(d)(3)(B(iv).)

5. In concluding remarks regarding LRE, the Secretary recognized that a “center or special school may be the least restrictive environment” in order to meet the needs of a deaf student and that “a full range of alternative placements as described at 34 CFR § 300.551(a) and (b)(1) of the IDEA regulations must be available to the extent necessary to implement the child’s IEP.” Further, the Secretary concluded, “removal from the regular classroom is required when the child’s needs cannot be met in that setting with the use of supplementary aids and services.”

6. In a 2010 guidance letter, the Department of Education addressed the problem of unqualified sign language interpreters in general education settings and the benefits of schools for the deaf. (See Letter to Edward H. Bosso Jr. from Alexa Posny, Ph.D., U.S. Department of Education, August 23, 2010). This letter reiterated that “any setting that does not meet the communication and related needs of a child who is deaf does not allow for the provision of a free appropriate public education (FAPE) for that child.” (Letter to Bosso, 56 IDELR 236 (OSERS 2010) (Attached). The letter also reiterates the IDEA’s mandate that “personnel providing special education and related services to children with disabilities be appropriately and adequately prepared and trained.” (*Id.* at 2).

7. The IDEA says that children with disabilities are to be educated in the least restrictive environment (“LRE”), which means educated with non-disabled peers “to the

maximum extent appropriate” and that separate schooling occurs “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412 (a)(5)(A).

8. Further, federal and Kansas regulations contemplate that in the determination of LRE and placement, a “continuum of alternative placements” is considered. (See 34 C.F.R. § 300.115). (See also K.A.R. § 91-40-21 and the *Kansas Special Education Process Handbook*, Introduction to Chapter 6).

9. Chapter 6 of the *Kansas Special Education Process Handbook* reiterates that in determining LRE, “school districts are to make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for a continuum reinforces the importance of the individualized inquiry, not a ‘one size fits all’ approach, in determining what placement is the LRE for each child with a disability. The continuum of alternative educational placements include instruction in general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (K.A.R. § 91-40-21(b); 34 C.F.R. § 300.115(b)(1)).”

10. In the 10th Circuit, in the case of *L.B. ex rel K.B. v. Nebo School Dist.*, 379 F.3d 966 (2004), adopted the test outlined in the Fifth Circuit’s decision in *Daniel R.R. v. State Bd. Of Educ.* 874 F.2d 1036 (1989), for determining whether the LRE requirement has been met. The two-part *Daniel R.R.* test tasks courts with determining (1) whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, if the school district has mainstreamed the child to the maximum extent appropriate. (See *Nebo*, 379 F.3d at 976). These factors are weighed on a case-by-case basis.

11. In this case, education in a regular classroom, with the use of supplemental aids and services, cannot and has not been achieved satisfactorily, given A.M.’s academic struggles outlined in the “Findings of Fact” section above. Also, she has spent, and under the proposed IEP would spend, a significant amount of time – three and a half hours out of a 37-hour week -- each week in pullout sessions with special education personnel (See Ex. 120, p. 25 and Tr. 607:12-14; 594:11-14), and that hasn’t worked either. Pullout sessions, by definition, consist of time spent away from the general education classroom, and as such are not the LRE for A.M.

12. Respondents have not made available a range of placement options – or a continuum of alternative placements. No evidence was presented that Respondents ever considered any alternative placement. In fact, an anecdote A.M.’s mother testified to shows that Respondents never intended to discuss placement at KSD: S.M. testified that she once again requested A.M. be sent to KSD at the August 12, 2020, IEP meeting. Respondents agreed to draft a “clean copy” of the prior written notice and IEP with additions and revisions suggested after that meeting. (Tr. 63:24-25:6). A.M.’s mother received that clean copy at the August 19, 2020, meeting. (Tr. 64:7-9). She said that the “clean copy” of the prior written notice she was provided at the August 19 meeting still stated that A.M. would attend _____ Elementary despite the fact that A.M. and her mother had both requested she be allowed an alternative placement. (Tr. 64:13-15).

13. Further evidence of the Respondents’ failure to make available a range of alternative placements can be found in accounts of the February 2021 IEP meeting. In her letter of dissent, Joan Macy from KSD noted that the meeting – originally slated to last from 9 to 10 a.m. – lasted a little over six hours. (Ex. 123 at 7). She explained that it was 2:45 before A.M.’s placement and harmful effects were discussed. (*Id.*) A.M.’s parents attempted to advocate for her to be sent to KSD, when the Respondents insisted the meeting needed to be wrapped up. (*Id.*) When asked to explain why Respondents would not consent to placement at KSD, parents were told simply that the team had developed an IEP they felt would meet A.M.’s needs. (*Id.*) A.M.’s mother echoed that account in her testimony. She testified that she pressed for further explanation from Ms. Kersenbrock-Ostmeyer as to why she would not consider KSD as an option after Ms. Kersenbrock-Ostmeyer stated, “We feel we can provide services.” (Tr. 71:1-2). When pressed, Ms. Kersenbrock-Ostmeyer stated there was an additional issue: that Respondents were short on [paraeducators] so there would be an issue transporting A.M. back and forth. (Tr. 71:4-6). Although Respondents have characterized this statement as a casual statement made after the meeting, it still shows that inappropriate considerations were possible driving forces behind the Respondents’ decision and that Respondents never planned to consider KSD. This is further evidenced by accounts that Ms. Kersenbrock-Ostmeyer’s pat response from the beginning of this process has always been something along the lines of “We feel we have an IEP that will meet A.M.’s needs.” (See, e.g., Tr. 71:1-2; Ex. 123 at 7).

14. Ms. Macy from KSD testified that in her 37 years at KSD, she never has had a school district not even willing to allow a child to go on a trial basis. (Tr. 503:17-24). She testified that she proposed this option at the August 2020 IEP meeting and subsequently. (Tr. 502:5-19). Ms. Macy testified that in response to that request, Ms. Kersenbrock-Ostmeyer once again simply stated that they had an IEP that meets A.M.'s needs. (Tr. 502:17-20).

15. Furthering Claimant's argument that the LRE requirement has not been met in this case is the IDEA's emphasis on determining a student's unique needs and the importance of weighing the LRE test on a case-by-case basis. A.M. is unable to be educated in the regular classroom due to the inconsistency of attendance of her interpreter at school and in certain classes, as well as the lack of qualifications of her interpreter. Further, the supplementary service that could be used upon her interpreter's absence is not reliable (See, e.g., Ex. 157).

16. Although the LRE test cautions that a category of disability is not to be taken into consideration, deafness can be argued to be an exception in certain circumstances, such as in this case, where A.M. is the only deaf child and – perhaps due to the rural nature of her school district – qualified personnel such as interpreters are hard to find.

17. One of the factors to be considered in determining LRE for a deaf child is that child's social, emotional and cultural needs. See 20 U.S.C. § 1414(d)(3)(B)(iv) and Exhibit 3.

18. As outlined in more detail in the Facts section above, A.M.'s social and emotional needs are not being met at her current school. A.M.'s peer relationships at her current school are rocky and one teacher even pointed out that “_____’s friendships with her classmates appear strained, and the communication barrier held her back getting to know and having conversations with her peers.” (Ex. 114 at 6). The teacher went on to say A.M. often feels left out. *Id.* A.M. has told the IEP team that when she can't understand peers' communication, she feels as though they are laughing at her and talking about her. (*Id.* at 7). Several times a week, A.M. has “unpleasant altercations” with her peers due to the strained relationships. (*Id.* at 7).

19. A.M.'s social and emotional needs are not being met in her current school as evidenced by her testimony that she has just one friend, which she then clarified to say that person is “kind of a friend” but that they aren't really that close. She characterized the friendship as casual and testified that they don't do much together. That friend doesn't sign well and so A.M. feels they can't have full conversations. (Tr. 559: 4-16).

20. This is a stark contrast to A.M.'s experience socially and emotionally at KSD. While attending extended school year at KSD during the summer of 2021, A.M. reports making many friends in just three weeks due to a common language. S.M. testified that A.M. has begun to experience anxiety at her school and that she frequently cries at home about issues with regard to feeling inadequate at school in her current placement. S.M. reported that A.M. does not get invited to other children's homes for sleepovers or parties. (Tr. 17: 19- 18:2). Even though A.M. identified one friend at her current school (Makayla), that friend's parents have said A.M. is not allowed to come visit due to the parents' inability to sign. (Tr. 17: 11- 18:2)

21. The 1992 Guidance, which recognizes academic struggles of deaf children, also says that compounding the educational considerations of deaf students is the fact that "the communication nature of the disability is inherently isolating, with considerable effect on the interaction with peers and teachers that make up the educational process." (See Exhibit 3 at p.2). This section goes on to state that the interaction with peers and teachers, "for the purpose of transmitting knowledge and developing the child's self-esteem and identity, is dependent upon direct communication." (*Id.* (Emphasis added).

22. Since her ESY experience at KSD, A.M. has been invited to spend weekends at friends' homes and friends have spent weekends at A.M.'s home. (Tr. 563:16-21). She has stayed in communication with several of her new friends from ESY at KSD. (Tr. 129:20—130:2).

23. Several experts testified to the debilitating effects of language deprivation and isolation on deaf children inherent in placement in mainstream classrooms, especially if one is the only deaf student so situated. Dr. Wyattte Hall recalled his own experience with mainstreaming as "trauma," and he was in a school where there were other deaf children, but not in his classroom (See Tr. 404:15-405:15). And Dr. Horn-Marsh, who grew up with a variety of communication and classroom experiences, described her time at a mainstream school as "my worse experience" and "awful" (Tr. 417:5 and Tr. 417:11) She further describes getting home and crying, which matches A.M.'s experience of feeling very lonely (Tr. 417:7; Tr.82:24).

24. Deaf people have a culture of their own (Tr. 426:22-427:22). There is deaf literature, movies, poetry, art and music (Tr. 427:2-5 and 427:15-18). Also, deaf culture takes into consideration factors that hearing people do not think of. For example, spaces are well-lit, free of visual barriers, with people in a circle instead of rows, etc. (Tr. 427:6-14). Deaf

people can understand each other based on language and shared experiences (Tr. 427:19-22). A.M. is getting no introduction to deaf culture, other than through the extended school year program at KSD.

25. Any child who is limited to communicating with peers once every nine weeks and then for 3 weeks in the summer is being deprived of social interaction.

26. More about A.M.'s struggles with social, emotional and cultural needs due to her mainstreamed schooling can be found in the Facts section above. But A.M. argues that these needs would be met and fulfilled by KSD and she knows that from her experience with the extended school year program.

V. DECISION:

1. The Hearing Officer has carefully reviewed the arguments and authorities presented by Petitioner and Respondent. For the reasons detailed in the Findings of Fact and Conclusions of Law above and, pursuant to K.S.A. 72-3430 and 34 CFR § 300.507, the Hearing Officer has determined the following:

A. The Districts have failed to implement A.M.'s IEP to the extent that she was denied a free and appropriate public education as alleged in Petitioner's Due Process Complaint. 34 CFR § 300.17.

B. The Kansas School for the Deaf is the least restrictive environment for A.M.

C. The Petitioner has demonstrated by a preponderance of the evidence that the Districts are not equipped to meet A.M.'s needs. The Hearing Officer finds:

- (1) A.M. has failed to make academic progress as evidenced by her testing scores.
- (2) The Districts failed to engage in services of a qualified interpreter.
- (3) The Districts refused to consider the child's and the family's preferred mode of communication, ASL.
- (4) The Districts failed to take into full consideration A.M.'s social, emotional and cultural needs.
- (5) The Districts have disregarded the severity of A.M.'s hearing loss.

D. The Due Process Hearing Officer lacks jurisdiction to determine issues related to the American's with Disabilities Act or § 504 of the Rehabilitation Act.

E. The Districts are directed to immediately begin the process of transferring A.M. to the care of the Kansas School for the Deaf. In so doing, the Districts will be responsible for payment of any direct or indirect costs related A.M.'s placement at KSD, including the reasonable costs of transportation to and from KSD and her home. A.M.'s transfer to KSD should be considered a priority by the Districts.

F. The Districts are further directed to, within a reasonable time, meet with A.M. and her parents to fully communicate the methodology and timing of A.M.'s administrative transfer to KSD.

G. The Districts shall assume responsibility for coordinating with KSD a quarterly academic report to A.M.'s parents outline her academic progress, and whether her social, emotional and cultural needs are being met.

H. The Districts shall pay Petitioners accrued attorney fees and costs.

I. Any party may appeal this decision to the State Board of Education, pursuant to K.S.A. 72-3418(b), by filing a written notice of appeal to:

Notice of Appeal
ATTN: Special Education and Title Services
Landon State Office Building
900 SW Jackson Street, Suite 620
Topeka, Kansas 66612-1212

The Notice of Appeal must be filed with Special Education and Title Services, designee of the Commissioner of Education, not later than 30 calendar days after the date of the postmark on the envelope containing this decision. Filing is complete upon receipt of the Notice of Appeal in the office of Special Education and Title Services. Emailed submissions will not be accepted for filing.

Be advised that upon receipt of a Notice of Appeal by either party, Special Education and Title Services will inform both parties of a Designated State Review Officer. Upon

notification, the local education agency shall ensure the official record is transmitted in a timely manner by the Hearing Officer to the Designated State Review Officer.

IT IS SO ORDERED.

October 12, 2021

Date


Larry Rute, Hearing Officer

CERTIFICATE OF SERVICE

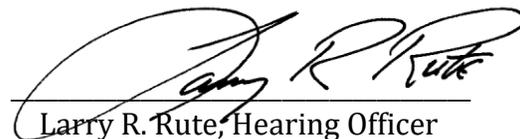
I, Larry R. Rute, do hereby certify that I have provided a true and correct copy of the above and foregoing Notice of Hearing Officer's Decision upon the following parties:

Ms. Elizabeth Hueben
Mr. Ben Cohen
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by mailing the same by U.S. mail, postage prepaid and by e-mailing a copy to all parties, this 12th day of October, 2021.


Larry R. Rute, Hearing Officer