

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015050819

DECISION

Student filed a due process hearing request (Complaint) with the Office of Administrative Hearings, State of California, on May 1, 2015, naming the Los Angeles Unified School District. On June 17, 2015, OAH continued the matter on joint motion of the parties, for good cause shown.

Administrative Law Judge Elsa H. Jones heard this matter in Van Nuys, California, on October 27, 28, and 29, 2015, and on November 3, 2015.

Parents were self-represented.¹ Parents were present on all days of hearing.

District was represented by Lee G. Rideout and Yovnit M. Kovnator, Attorneys at Law. Ms. Rideout was present on all days of hearing and Ms. Kovnator was present on the first three days of hearing. Francine Metcalf, District's Litigation Coordinator, was

¹ Father is a practicing attorney. Exhibits admitted into evidence at hearing reflected that Mother is also an attorney.

present on all days of hearing.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted until November 17, 2015, for the parties to file written closing arguments. The parties timely filed their written closing arguments on November 17, 2015, at which time the record was closed and the matter was submitted for decision.²

ISSUES

1. Whether District deprived Student of a free appropriate public education by failing to offer auditory verbal therapy services from September 17, 2014, the date of Student's initial individualized education program team meeting, until the IEP team meeting of February 5, 2015?

2. Whether District deprived Student of a FAPE by failing to offer the services of Student's nonpublic provider of auditory verbal therapy in the IEP of February 5, 2015?³

² Student's written closing argument did not include a proof of service. On November 19, 2015, Student filed a proof of service, showing service on District on November 17, 2015. Student's written closing argument is deemed to have been timely filed.

³ For the sake of clarity, the issues have been restated compared to how they appeared in the prehearing conference order dated October 19, 2015. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Additionally, Student's Complaint alleged a variety of issues, including failing to assess in all areas of suspected disability prior to the initial IEP meeting, failing to include all required members of the IEP team, failing to offer appropriate goals and to offer a placement to support those goals, failing to implement goals, and failing to offer appropriate low

SUMMARY OF DECISION

This decision finds that District offered Student a FAPE through the February 5, 2015 IEP. District's offers of FAPE in the two IEP's that preceded the February 5, 2015 IEP were reasonably calculated to offer Student some educational benefit, and the weight of the evidence demonstrated that Student benefitted from the services offered in those IEP's. Student did not demonstrate that he required auditory verbal therapy to receive a FAPE.⁴ This decision also finds that District had no legal obligation to offer the services of Student's nonpublic provider of auditory verbal therapy in the IEP of February 5, 2015. Therefore, District did not deny Student a FAPE on that ground.

incidence equipment and support services. At the prehearing conference of October 16, 2015, Student withdrew all of these issues, without prejudice. In his closing brief, Student attempted to revive many of these issues, and attempted to raise even more issues. However, the two issues set forth above, both of which involve whether District offered Student a substantive FAPE, are the only issues confirmed by the parties during discussions at the prehearing conference and hearing. Except for such sub-issues as may be necessary to perform a legal analysis pertaining to those two issues, those two issues are the only issues decided in this Decision. (Ed. Code, § 56502, subd. (i).)

⁴ Auditory verbal therapy consists of techniques and strategies that focus on developing listening skills in children with hearing loss who wear hearing aids or cochlear implants. Through learning to listen, children learn language and speaking skills. District's descriptor for auditory verbal therapy is listening and spoken language intervention.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. At the time of the hearing, Student was a four-year-old boy who resided in District's boundaries with Parents at all relevant times. Student's hearing loss was identified at birth, and on October 28, 2011, the House Research Institute diagnosed Student as having a mild high frequency sensorineural hearing loss in both ears, based upon Auditory Brainstem Response testing. Parents sought a second opinion from the John Tracy Clinic, which also performed Auditory Brainstem Response testing and rendered the same diagnosis. Student has been eligible for special education under the category of hard of hearing at all relevant times.

2. After his diagnosis, Student began wearing hearing aids, and his hearing status was followed at the University of California, Los Angeles. On November 16, 2011, District performed an Early Start Infant-Toddler Assessment, and on November 30, 2011, District convened a meeting to develop Student's Individualized Family Service Plan for Early Start services.⁵ At the meeting, the team discussed the methodology options of listening and spoken language strategies, total communication, and sign language. Parents chose listening and spoken language strategies.

3. Student wore his hearing aids until he was six months old, at which time he began to pull them off and refused to cooperate in wearing them. Student had small ear canals, and produced large amounts of ear wax. Parents struggled to keep Student

⁵ Under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), states can receive funding to provide IDEA part C "Early Start" services to enhance the development of infants and toddlers up to three years old who have disabilities. This hearing and decision only concerns part B services for students whose ages are between 3 and 21.

wearing his hearing aids, until he was approximately one year old, when he ceased wearing them. When he was approximately one year old, when he still was wearing the hearing aids, Mother spoke with Dr. Rima Baumberger, a District educational audiologist, at the Family Center, which is a District program where parents and children meet with a classroom teacher and with each other. Dr. Baumberger received her bachelor's degree in communication disorders from California State University, Los Angeles, and her master's degree in audiology from the same institution. She received her doctorate in audiology from A.T. Still University. She is a state licensed audiologist, and she has been employed as an audiologist with District since 2004.

4. According to Dr. Baumberger, Mother advised her of Parents' concerns and struggles with keeping the hearing aids on Student. Mother told Dr. Baumberger that Student had tiny ear canals, and issues with ear wax, and that there seemed to be no difference in Student's response to sound or to somebody speaking to him regardless of whether he was wearing the hearing aids. Dr. Baumberger checked the hearing aids, and the amplification was so mild she could not tell whether there was sound coming through. Dr. Baumberger was concerned that that the hearing aids might be acting as ear plugs, given Student's level of hearing loss, the minimal amount of sound coming through the hearing aids, his small ear canals, his ear wax issues, and Mother's report that his response to sound did not change whether or not he was wearing his hearing aids. In an attempt to reassure Mother, because she could see Mother's stress over Parents' struggles to have Student wear his hearing aids, Dr. Baumberger advised that, at that time, he was accessing spoken language, as he was being carried in Mother's arms and she was speaking to him. She also advised that her opinion was based on Student's infant status, and if he was in a different setting or in a classroom, her opinion could be different. Additionally, she warned Mother to monitor Student's hearing, because any changes in his hearing could also warrant that he wear

his hearing aids. Dr. Baumberger attempted to follow up with Mother on two occasions regarding Student's hearing status but Mother never returned her calls. Student did not wear hearing aids thereafter, until he met Sylvia Rotfleisch, an auditory verbal therapist, as discussed below.

5. Mother also testified about this conversation with Dr. Baumberger. According to Mother, during the conversation Dr. Baumberger advised her that Student did not need to wear his hearing aids, because she was holding him close in her arms and therefore he could hear her. Mother also testified that, during the same conversation, Dr. Baumberger advised her that the House Institute was giving Mother different advice regarding the hearing aids because the House Institute profited from hearing aids. At hearing, the parties did not question Dr. Baumberger about this portion of the conversation.

6. Regardless of the dispute over Dr. Baumberger's advice during this conversation, both versions of the conversation reflected that Dr. Baumberger's advice was intended to be limited as long as Student was an infant who was held closely in Parents' arms, and that the advice would not apply once Student became more independent of Parents. Especially in view of the undisputed facts, set forth below, that Parents had numerous outside professionals to consult about Student's hearing aids before he was three years old, including the House Institute; specialists at the University of California, Los Angeles; a private speech and language therapist; and an ear, nose, and throat physician who saw Student regularly to clean out his ears, Parents' reliance on Dr. Baumberger's advice as Student proceeded through toddlerhood would have been unreasonable.

7. In fact, the evidence demonstrated that Parents did not rely on Dr. Baumberger's advice. Rather, Parents continued to attempt to place hearing aids on Student. Caroline Mora, Student's Early Start Parent-Infant deaf and hard of hearing

teacher testified at hearing. She discussed the need for Student to wear hearing aids with Parents, and attempted to help Parents in their efforts to place hearing aids on Student, but the efforts were unsuccessful. Parents advised Ms. Mora that they had decided to wait until they could reason with Student as to the benefits of wearing his hearing aids. Indeed, as is further discussed below, Parents continued to struggle unsuccessfully with Student to wear his hearing aids until at least September 11, 2014, when Dr. Baumberger conducted an audiological evaluation of Student.

8. Student received Early Start services through District's deaf and hard of hearing infant program until fall 2014, when he was three years old. In November 2013, while Student was receiving Early Start services, Parents retained a private provider who rendered speech and language services to Student one time per week. Parents also consulted an acquaintance regarding Student's condition who, in August 2014, sent an email to Parents which mentioned auditory verbal therapy. Parents did not review this email until the time of the hearing.

INITIAL ASSESSMENTS

9. Since Student was to transition from District's Early Start program into special education, District did not perform an exit assessment from Early Start. Such assessments are only given to children who are not proceeding to a District special education program. Rather, as part of Student's transition from Early Start services to District's special education services, Parents signed an assessment plan for a speech and language assessment and a language and communication assessment. Parents declined a psychological assessment. They did not request, and District did not offer, a listening and spoken language assessment. Such assessments are not routinely given to hard of hearing children when they are transitioning to preschool, or after a language and communication assessment. Rather, whether a student receives a listening and spoken language assessment is generally based on the severity of a student's hearing loss, a

student's language development, a student's placement, and whether a student had a need for listening and spoken language intervention. An IEP team usually decided whether a listening and spoken language assessment was necessary, and parents could also request one.

10. Marie Zaferis has been a District administrator for preschool IEP's since 2001. District assigned her as Student's initial case manager, and her job included scheduling assessments after parents signed an assessment plan, and scheduling and attending the initial IEP team meeting. She had some familiarity with listening and spoken language assessments and therapy based upon her review of assessment plans. Her job did not include selecting the assessments which a student would receive, or attending any IEP meeting other than the initial meeting. After contacting parents to schedule the assessments for a deaf/hard of hearing child, she would notify District's deaf and hard of hearing department and advise them the dates upon which the assessments were scheduled and possible dates for an IEP team meeting.

11. It was Ms. Zaferis's practice to confirm an assessment plan with parents when she noticed something unusual. In Student's case, she considered it unusual that Parents declined a psychological assessment, so she called Parents and confirmed that they had declined a psychological assessment. Student contends that when Ms. Zaferis called to confirm that Parents did not desire a psychological assessment, she should have advised Parents about the availability of a listening and spoken language assessment. As it was not Ms. Zaferis's job to select assessments, and since, as is further set forth below, Student was not deemed a candidate for a listening and spoken language assessment, Student's contention is not meritorious.

LANGUAGE AND COMMUNICATION ASSESSMENT

12. On August 20, 2014, when Student was a month shy of three years old, Ms. Mora, Student's Parent-Infant deaf and hard of hearing teacher performed a Language

and Communication Assessment. She wrote a report of the assessment. Ms. Mora became Student's teacher in the Early Start program in August 2013, when he was almost two years old. Ms. Mora is a credentialed teacher. She received her bachelor's degree in communication disorders in 2007 from California State University, Los Angeles. She received her Master's of Education in special education with an emphasis in deaf and hard of hearing in 2008 from the University of San Diego. She has had training in listening and spoken language therapy, but is not certified in auditory verbal therapy.

13. Ms. Mora's report included the results of a hearing test performed on September 11, 2014, which reflected that Student's hearing loss was mild to moderately-severe bilaterally. Ms. Mora used the Rossetti Auditory Skills checklist, and assessed Student's language comprehension, expression, and listening skills. He performed in the 33-36 month range in Language Comprehension. This finding reflected that his language was developing appropriately. He showed interest in how and why things worked. He could follow a three-step unrelated command, and he could identify parts of an object. He could respond to "wh-"questions and could follow commands with two familiar attributes.

14. Student also performed in the 33-36 month range in Language Expression, which reflected that his language was developing appropriately. He related recent experiences through verbalization, used verb forms, expressed physical states, and conversed in sentences. He could count to three and used a mean length of 2.5-3.0 morphemes per utterance.⁶ Ms. Mora noted that both as an assessor and as his teacher, she had difficulty understanding Student's utterances, especially when not in context.

⁶ A morpheme is a minimal grammatical unit, constituting of a word or a part of a word, which cannot be divided into smaller independent grammatical parts.

The longer his utterances became, the more difficult it became to understand him.

15. In the area of Listening Skills/Audition, Student could remember groups of words that contained two critical elements (such as "big spoon") and three critical elements (such as "little blue ball").

16. In Ms. Mora's opinion, Student did not require a listening and spoken language assessment, since his language was developing appropriately. She did not believe that the fact that a hard of hearing child was not wearing hearing aids was a "red flag" so as to support a listening and spoken language assessment. She also stated that it was a prerequisite to the receipt of auditory verbal therapy that Student wear hearing aids.

SPEECH AND LANGUAGE ASSESSMENT

17. On September 5, 2014, Ana M. Fragoso, a District-contracted speech and language pathologist, performed Student's speech and language assessment for District. Ms. Fragoso received her bachelor's degree in communication disorders from California State University, Los Angeles, and her master's degree in communication disorders from California State University, Northridge. She has been a speech and language pathologist for 15 years. She holds a state license and a certificate of clinical competence in speech and language pathology from the American Speech-Language-Hearing Association.

18. Ms. Fragoso described Student's history, and noted that he had ceased wearing his hearing aids. She noted that Student had been receiving speech and language services once per week since November 2013, and deaf and hard of hearing services from District two times per month for approximately one year. He had recently begun to attend a preschool program at Encino Presbyterian Center for three hours per day, five days per week. Mother expressed concerns regarding Student's pronunciation. Mother stated she understood approximately 70 percent of what Student said, and other people understood less than 65 percent of what he said.

19. Student participated without difficulty in the assessment. On multiple occasions, he easily followed one- and two-step directions presented without visual cues. He spontaneously used one to eight word utterances for a variety of pragmatic functions, including labeling, requesting, commenting on pictures and play, asking questions, and maintaining a basic topic of conversation. Student was highly interactive and social throughout the assessment.

20. Ms. Fragoso's assessment included a parent interview, clinical observations and a standardized assessment. Ms. Fragoso took Student's hearing loss into account while conducting the assessment. He was not wearing his hearing aids during the assessment. Her visual examination of his oral motor mechanism revealed adequate structure and function for speech sound production. In the area of articulation, Student demonstrated age-appropriate speech sound production. In the area of intelligibility, Student was less than 60 percent intelligible in both known and unknown contexts, and in utterances ranging from one to eight words. Student used multiple phonological processes. His final consonant deletion (wha/what, cu/cup, ha/have, and hou/house) was due to a phonological processing issue that was not developmentally appropriate, and significantly impacted his overall level of speech intelligibility. At hearing, Ms. Fragoso explained that Student could articulate the sounds appropriately, but his phonological delay impacted his ability to use those sounds in an appropriate manner when he spoke. She pointed out that she has assessed children with normal hearing who had the same difficulty, or even greater difficulties with phonological processing. In addition, Student performed a few speech sound substitutions that were not developmentally appropriate (kooty/booty). Other speech sound substitutions he made, however, such as p/f and d/th were developmentally appropriate. However, his speech deficiencies would affect his ability to access the curriculum.

21. Ms. Fragoso administered the Preschool Language Scale-5, which is a

standardized test used to identify children from birth through six years, 11 months who might have a language disorder or delay to verify developmentally appropriate language skills and to gain baseline information. Student's standard scores of 95 in Auditory Comprehension, 103 in Expressive Communication, and Total Language standard score of 99 placed him in the average range. These scores did not indicate that Student had any delays in language development, and that he would be able to access the curriculum.

22. Ms. Fragoso did not take a formal language sample, because Student did not produce the minimum 50 utterances for such a sample. She took an informal sample. Student had no word finding difficulties that she noticed, and his grammatical structures in longer sentence forms were developmentally appropriate.

23. Student's voice was mildly hyponasal, but Mother had advised that Student had a runny nose and was congested. His hyponasality did not impact Student's overall level of speech intelligibility, and his volume and pitch appeared typical for Student's age and gender. Student did not demonstrate dysfluency or stuttering.

24. Ms. Fragoso summarized her findings. Student's receptive and expressive language skills, as well as articulation, volume, and fluency, were within age-level developmental norms. She defined his area of need as speech intelligibility, which was no longer developmentally appropriate. She concluded that Students' speech challenges would negatively impact his ability to effectively express his thoughts and ideas in a preschool setting. Based on California regulations, she determined that Student met eligibility criteria for speech and language impairment for his chronological age or developmental level in the area of articulation.⁷

⁷ Parents attempt to fault District for describing Student's speech and language issues as an articulation disorder, contending that such a descriptor does not apply to Student. In fact, this description is specifically based upon the categories contained in

25. On September 11, 2014, Dr. Baumberger performed an audiologic evaluation of Student to update his audiological information, and she wrote a report that same day. She performed the assessment at Mother's request, as specialists at the University of California, Los Angeles, had not been able to adequately perform a behavioral test on him. Behavioral testing involved placing a child into a sound booth and observing how the child reacted to sound.

26. In her report, Dr. Baumberger noted Student's previous diagnosis of mild high-frequency bilateral sensorineural hearing loss;⁸ that his hearing condition was monitored at University of California, Los Angeles; that he had small ear canals and a history of excessive ear wax in both ears; and he refused to wear bilateral hearing aids. Mother advised her that Student went to an ear, nose, and throat specialist

California Code of Regulations, title 5, section 3030, subdivision (c), as that regulation existed at the time of Ms. Fragoso's assessment. Student had to meet the criteria of one or more of those categories to be eligible to obtain speech and language therapy. The categories are: articulation, voice, fluency, and language. A review of the regulatory definitions of those categories reflects that, regardless of how the term "articulation" is commonly used by lay people, the speech and language issues Ms. Fragoso identified in her assessment fell into the *regulatory* category of an articulation disorder.

⁸ In his closing brief, Student accuses Ms. Fragoso of failing to review or of misinterpreting Dr. Baumberger's audiological assessment, which concluded that Student's hearing loss was mild to moderately severe. In fact, Dr. Baumberger's assessment and report were generated on September 11, 2014, *after* Ms. Fragoso's report of September 5, 2014. Thus, Ms. Fragoso's report accurately reflected the District's state of knowledge of Student's hearing ability at the time of Ms. Fragoso's assessment.

approximately every three months to have his ears cleaned.

27. Student was cooperative during the assessment. Dr. Baumberger's behavior audiological testing showed that Student had a mild to moderately-severe hearing loss in both ears, during soundfield testing (without headphones), and testing with headphones. These findings represented a change from his previous diagnosis of a mild hearing loss. He had a possible mixed hearing loss in at least one ear, based on bone-conduction responses. Dr. Baumberger recommended deaf and hard of hearing infant services; continued medical/otology/audiologic follow-up; follow-up with University of California, Los Angeles, for hearing aid check; continued ear wax management; that Student should sit close to the learning activity to maximize visual and auditory cues; that background noise should be minimized; and that Student should wear his hearing aids. In her opinion, Student's hearing had become worse since his previous diagnosis, and therefore she recommended that Student wear his hearing aids. During the assessment, Mother advised Dr. Baumberger that Parents had been trying to get Student to wear his hearing aids, but they were still not having much success.

SEPTEMBER 17, 2014 IEP TEAM MEETING

28. District convened an initial IEP team meeting on September 17, 2014, to transition Student to preschool from District's Early Start deaf and hard of hearing infant program. The IEP team included Parents; Marie Zaferis (District's administrative designee); a special education teacher; a general education teacher; two deaf and hard of hearing specialists, including Caroline Mora, Student's deaf and hard of hearing itinerant teacher; and Ms. Fragoso, the speech and language pathologist.

29. The team considered the results of Dr. Baumberger's audiological assessment report, Ms. Fragoso's speech and language assessment report, and Ms. Mora's language and communication assessment report. With respect to language function, Student's mild to moderately-severe high frequency hearing loss affected his

ability to access some auditory information, especially in a noisy environment. Student might typically have difficulty locating the source of sounds, understanding speech in a background of noise, and sustaining attention and following instructions and discussion, especially if it was noisy. The team found Student eligible for special education and related services under the category of hard of hearing. The team discussed Student's failure to wear his hearing aids. Parents advised the team that Student's ear canals were small, and he had difficulty wearing his hearing aids. At hearing, Ms. Mora expressed that a prerequisite to receiving auditory verbal therapy or listening and spoken language therapy was that Student wear hearing aids. No witness contradicted this testimony.

30. The team developed two annual goals with related short-term objectives. The first goal, an auditory learning goal, required student to follow one-to-two step oral directions at varying distances in a quiet setting with 85 percent accuracy in four out of five trials. This goal addressed Student's difficulty in following directions, which was an identified area of need. The second goal, a speech goal, required Student to produce all age-appropriate sounds in all word positions of four to five word utterances with 80 percent accuracy in four out of five trials. This goal addressed Student's phonological processing problem, which was an identified area of need. The goals were measurable and appropriate.⁹

31. Student's instructional accommodations were to include preferential seating, use of visual aids, directions repeated or rephrased as needed, comprehension

⁹ Student withdrew the issue of the appropriateness of the goals during the prehearing conference of October 16, 2015. Consideration of the goals is a necessary part of the analysis of the issue of whether the IEP of September 17, 2014 offered a FAPE. Therefore, it is discussed in this Decision to a limited extent, for that purpose.

checking, facing Student when speaking, and obtaining attention prior to speaking to Student. District's educational audiologist was to determine whether hearing technology would be needed in Student's classroom. The team did not recommend special education summer school services.

32. The team determined that Student met the eligibility criteria for speech and language impairment in the area of articulation, and that he required speech and language services. The IEP provided that Student would receive one hour of school-based speech and language services weekly, and 60 minutes of direct services monthly from a deaf/hard of hearing itinerant teacher. Ms. Fragoso asserted that there were a variety of methods by which a hard of hearing child could learn to speak, and she asserted that speech and language therapy in the amount that the IEP team offered was appropriate to address Student's phonological speech impairment. In Ms. Mora's opinion, Student's phonological processing speech impairment could be addressed by either speech and language therapy or by auditory verbal therapy, or both. Ms. Mora noted that Student had made progress with the private speech and language therapy Parents provided when Student was in the Early Start program. Nicole Ahdoot, the speech and language pathologist who provided the speech and language services to Student pursuant to the September 17, 2014 IEP, was also of the opinion that Student's speech impairment could be addressed by either speech and language therapy or by auditory verbal therapy.

33. The only parental concern documented in the IEP was that the speech and language services were provided twice per week in 30 minute sessions. There was no discussion at the meeting about auditory verbal therapy. At the time of the meeting, the only information about auditory verbal therapy Parents had was the unread email from their acquaintance. At the IEP team meeting, Father asked a question regarding whether there was a therapist trained to address speech development issues in hard of hearing

children. Student contends that, by virtue of this question, Parents should have been advised about listening and spoken language interventions or auditory verbal therapy, and of the availability of an assessment for same. At hearing, few witnesses were able to recall this question, or whether anybody provided a clear, direct answer to it. Student's contention that this question was equivalent to a request for a hearing and spoken language assessment and for auditory verbal therapy services is not meritorious as Father's question was not a request for a listening and spoken language assessment. Indeed, as discussed below, the evidence at hearing showed that there was speech therapy for hard of hearing children that did not involve auditory verbal therapy, which rendered Father's question particularly vague and ambiguous with respect to whether the IEP team should have discerned that Father was referring to auditory verbal therapy.¹⁰

POST-IEP TEAM MEETING EVENTS

34. Parents were disappointed with the outcome of this IEP team meeting. They again consulted the acquaintance who had sent them the unread email over the summer about auditory verbal therapy, and she recommended auditory verbal therapy. Parents began to research auditory verbal therapy.

35. On September 23, 2014, Parents signed the consent form of the IEP, and included a separate page of comments and concerns. Parents wished District to

¹⁰ In his closing brief, Student contends that the District's failure to intuit the meaning of Father's question and to describe auditory verbal therapy to Parents constituted a deprivation of a FAPE, because it deprived Parents of the opportunity to participate in the development of Student's IEP. This issue was not alleged in the Complaint, and was not among the issues for hearing. Therefore this issue will not be discussed further in this Decision. (Ed. Code, § 56502, sub. (i).)

immediately implement the services in the IEP. They noted that the IEP incorrectly stated that Student had received an assessment by a school psychologist. They noted that the September 12, 2014 behavior test indicated a mild to moderately-severe hearing loss, and that Student had abnormally small ear canals which made use of hearing aids difficult. They requested additional services, subject to further revision after additional consultation with private providers and educators, to include: 120 minutes per week of individual and group speech therapy; 60 minutes per week of auditory learning with an auditory verbal therapist; sound field and personal FM system in the classroom; noise-dampening devices in the classroom; observation and monitoring one time per month for 30 minutes; and special education summer school. They also requested unspecified services to be provided three times per week for one hour each time, with one day off between services, and expanded goals to be performed at an accuracy of an "above average" child of his age with normal hearing. Parents submitted their consent form, their concerns, and their formal request for informal dispute resolution to District on September 24, 2014.

36. On October 8, 2014, Parents contacted Sylvia Rotfleisch, a private certified auditory verbal therapy specialist. Ms. Rotfleisch has been an auditory verbal therapist for 35 years, since before there was a certification program for the discipline. She holds a bachelor's degree in occupational therapy, a bachelor's degree in education, and a master's degrees in science applied in auditory oral habilitation and education of hearing impaired children. All of her degrees are from McGill University. Ms. Rotfleisch is the author of multiple chapters in multiple textbooks, and she has also published journal articles. She has presented in the field internationally for over 25 years. Ms. Rotfleisch advised Parents that Student needed to wear his hearing aids, and advised them about an upcoming symposium in San Diego regarding auditory verbal therapy. Father went to the symposium, and was favorably impressed by the material presented and the people

he met.

37. Ms. Rotfleisch would not assess unless Student wore his hearing aids, and did not provide therapy to children unless they had hearing technology, such as hearing aids or cochlear implants. On October 21, 2014, Student managed to wear his hearing aids and Ms. Rotfleisch assessed him. No written report of this assessment or specific data from this assessment was presented at hearing, and there was no evidence that the results of this assessment were ever presented to District.

38. District convened the informal dispute resolution meeting on October 24, 2014, and denied Parents' requests for additional services and goals. Parents understood District's denial of their request for auditory verbal therapy as due to Student not wearing his hearing aids.¹¹ At some point, a due process specialist also advised Parents that, to obtain auditory verbal therapy, District would need to assess Student, and that Mother should ask for an IEP meeting to obtain an assessment.

39. On October 28, 2014, Student began auditory verbal therapy with Ms. Rotfleisch, one time per week for one hour each time, and she continued to provide services to Student through the time of hearing. Just prior to the time that Student first began receiving therapy from Ms. Rotfleisch, Mother orally informed Julie Rodgers, Student's deaf and hard of hearing itinerant teacher, that Ms. Rotfleisch would be providing auditory verbal therapy to Student. At that time, Parents did not notify District that they would be seeking reimbursement from the District for Ms. Rotfleisch's services.

¹¹ In his closing brief, Student raises issues pertaining to the informal dispute resolution process. Those issues were not raised in the Complaint or at the prehearing conference, and Student provided no authority that OAH has jurisdiction to decide any matters pertaining to informal dispute resolution. These issues are therefore not addressed in this Decision. (Ed. Code, § 56502, subd. (i).)

40. Ms. Rotfleisch testified at hearing. She asserted that speech and language services focused on speech impairment, whereas auditory verbal therapy focused on hearing impairment, and that Student's speech impairment was a result of his hearing impairment. In her opinion, speech and language therapy was not an appropriate technique and not the most efficient or effective technique for a child with hearing loss, compared to auditory verbal therapy, because it was much harder for such a child to learn to speak with speech and language services. She believed that speech and language therapy was not effective to address hearing loss, and that it was appropriate to start auditory verbal therapy at birth. Auditory verbal therapy also involved training parents in techniques and strategies to use, and Mother had a huge learning curve when Student first started therapy with Ms. Rotfleisch. Ms. Rotfleisch asserted that, as of the time of the due process hearing, Student had significantly improved due to her services. He was a listening child. He had an auditory focus, had developed an auditory memory, his speech production was quite clear, and he was as intelligible as his hearing peers. His language was age appropriate or slightly above. However, she was not certain that all of his auditory skills had yet solidified. In her opinion, Student would not have progressed without auditory verbal therapy at the time he started to wear his hearing aids.

41. By email dated November 3, 2014, Mother notified Ms. Zaferis, District's administrative designee at the September 2014 IEP meeting, that Student was wearing his hearing aids during all waking hours, and requested help in scheduling a new IEP to develop new goals in light of this development. An email exchange ensued between Mother and various District personnel over the following week regarding to whom Parents should direct their request that an IEP meeting be held. District ultimately scheduled the IEP meeting for December 16, 2014.

42. In the meantime, Student received speech and language services from District's speech and language pathologist, Nicole Ahdoot, pursuant to the September

17, 2014 IEP. In the opinion of Ms. Ahdoot, Student made progress by reason of his speech services, and his progress could not solely be attributable to the auditory verbal therapy services he was receiving from Ms. Rotfleisch.

DECEMBER 16, 2014 IEP TEAM MEETING

43. On December 16, 2014, District convened an IEP team meeting to amend the September 17, 2014 IEP to address Student's wearing of his hearing aids and to develop new goals. The IEP team included Parents; an administrative designee; a special education teacher; a general education teacher; Theanna Kezios (a District deaf and hard of hearing specialist); Ms. Rodgers (Student's deaf and hard of hearing itinerant teacher); and Ms. Ahdoot (District's speech and language pathologist.) Ms. Ahdoot received her bachelor's degree in communication disorders from California State University, Northridge in 2009, and her master's degree in speech and language pathology from the same institution in 2012. She has been employed by District as a speech and language pathologist since January 2013, and she has, at the same time, been employed as a speech and language pathologist in private practice. She holds a state license, a teaching credential, and a certificate of clinical competence in speech and language pathology from the American Speech-Language-Hearing Association.

44. Student's eligibility category of hard of hearing did not change. The team reviewed Student's progress on his goals. He had not yet met his speech goal or its objectives, as he needed more time. His present level of performance in language was updated by Ms. Ahdoot. His language abilities had not changed and continued to be within normal limits for Student's age and grade level. Ms. Ahdoot also updated Student's present levels of performance in speech. He had made progress. His intelligibility had improved with the increase in speech services and consistent use of his hearing aids. Since he was wearing his hearing aids for the majority of the day, Student had more auditory awareness of the sounds to form an intelligible sentence and was

spontaneously using the correct production of consonants more regularly.

45. The team increased the challenge of the auditory learning goal, focusing on three-step oral directions in a noisy classroom. The team also added goals in the areas of communication, self-advocacy, and auditory feedback. These goals were proposed by Ms. Kezios, a District deaf and hard of hearing auditory verbal educator. The team intended to add other goals after District completed the auditory verbal therapy assessment requested by Parents. Parents also requested a pass-around microphone for the classroom, and an in-service training on hearing loss and hearing technology for the preschool staff. Ms. Ahdoot noted that the speech and language services she was providing were delivered through tactile and visual prompting and cueing, which might be counter-productive to the private auditory verbal therapy that Student was receiving, because he might become confused. Nevertheless, District offered speech services, and left it to Parents to decide whether to access them.

46. The IEP offered an increase in services of a deaf/hard of hearing itinerant teacher to 30 minutes per week, and 60 minutes per week of school-based speech and language services. The classroom accommodations remained the same.

47. Shortly after the IEP meeting, Ms. Ahdoot, Student's speech and language therapist, sent a text message to Mother to ascertain whether Student would be receiving speech and language services that day. Mother responded, in pertinent part: "Yes, no speech. It's so hard to decline a service. As a parent you feel you aren't giving them your all in some weird way. We shall see. It makes sense so I hope the DHH experts are right. Thank you!!"

48. Ms. Ahdoot responded, in pertinent part, "Of course, but I think you're doing the right thing. AVT [auditory verbal therapy] is the most important thing right now and we don't want to confuse [Student]!" She invited Mother to keep her advised

of Student's progress.¹²

LISTENING AND SPOKEN LANGUAGE ASSESSMENT

49. In January 2015, Ms. Kezios assessed Student in the area of listening and spoken language to determine whether auditory verbal therapy was appropriate for Student. She produced a report of the assessment dated January 31, 2015. Ms. Kezios holds a bachelor's degree in English, a master's degree in education, a master's degree in psychology, and a master's degree in educational administration. She holds a single subject teaching credential in English, and a special education credential in communication handicaps. She has been a certified auditory verbal educator since 2010. She has been employed by the District since 1991. Before becoming a program specialist in June 2015, she served as a deaf and hard of hearing itinerant teacher for seven years, and she provided auditory verbal therapy in that capacity after she became

¹² In his closing brief, Student asserted that this text message, and the fact that the IEP left it to Parents as to whether to continue speech and language services in view of Student's receipt of services from Ms. Rotfleisch, meant that District acquiesced in or consented to Student's receipt of services from Ms. Rotfleisch. However, parents always have the right to seek private services for their child at their own expense, and a school district cannot stop them from doing so. (See *School Committee of Burlington v. Dept. of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; 20 U.S.C. § 1412(a)(10)(C)(i).) District is not obligated to pay for such private services merely because parents choose to obtain them. (*Ibid.*) The concepts of acquiescence and consent have no relevance or significance in this context, and Student cited no legal authority that they do. District made no offer of auditory verbal therapy services in the December 16, 2014 IEP. Ms. Ahdoot's informal attempt to reassure Mother in the face of Mother's expressed self-doubt was not a formal District offer.

certified. Before then, she was a special day class teacher in a listening and spoken language program. She has worked with speech and language pathologists at schools which have deaf and hard of hearing programs.

50. Ms. Kezios introduced her report by summarizing Student's audiologic evaluation results. An outside evaluation was completed on November 15, 2014, at Project TALK/Pediatric Hearing Specialists in Encinitas, California, and therefore the District's audiologic resource unit had not recently evaluated Student. District's educational audiologist reported that the test results revealed a moderate to severe hearing loss in the right ear, with a mild to moderate hearing loss in the left ear, and reported speech discrimination and speech reception thresholds for each ear, under aided and unaided conditions. Student had benefited from his classroom accommodations set forth in his IEP, and they should continue to be implemented. He used a personal FM classroom amplification system, including a teacher microphone and two receivers that connected to his hearing aids. Student benefited greatly from this system.

51. The report described Student's history of hearing loss and his history of hearing aid use. With the assistance of Ms. Rotfleish, his preschool classroom teacher, and Parents, Student had been able to wear his hearing aids all waking hours since early November 2014.

52. Ms. Kezios used the following instruments: Teacher interview, classroom observation, Parent interview, Ling 6 Sounds, the Auditory Skills Instructional Planning System, Receptive One-Word Picture Vocabulary Test, Expressive One-Word Picture Vocabulary Test, Test of Auditory Comprehension of Language, and the Cottage Acquisition Scales for Listening, Language, & Speech.

53. Student did not appear to have a hearing problem when using his hearing technology. He could tune out other noises, he was not easily distracted, and he did not

have difficulty hearing over normal noise. He wore his personal hearing aids and the classroom technology consistently. Since wearing his hearing aids consistently, his ability to communicate with teachers and peers has markedly increased, but he still needed modeling support.

54. Ms. Kezios's classroom observation showed that Student talked with his friends; could follow two-step oral directions given by the teacher; could follow classroom routines; was attentive to his teacher; was attentive to speakers, whether the teacher or peers; he orally responded to questions; he made his listening and other needs known; and he engaged appropriately with his peers. Student wore both hearing aids and the classroom technology during the classroom observation.

55. Student also used two hearing aids during the formal assessments Ms. Kezios administered. He was receptive to all activities and engaged well with the assessor and Mother during the assessments.

56. Ms. Kezios reported Student's test results on the Ling Six sound check, which uses six sounds as a listening check to provide information regarding the ability to detect speech sounds that lie within the speech spectrum of hearing. Without visual assistance, aided bilaterally with his personal hearing aids, Student could repeat the six Ling sounds at three feet. He could repeat four of the six Ling sounds under the same conditions, but at five feet.

57. The Auditory Skills Instruction Planning System assessment provides a guide for the normal development of auditory processes for using sound meaningfully. Ms. Kezios reported Student's skills in the areas of Discrimination, Memory Sequencing, Auditory Feedback, and Figure Ground. He had some skills in all areas except figure ground, in that he was unable to perform auditory tasks in the presence of background noise.

58. In the area of Auditory Memory, Student was able to repeat sentences up

to six syllables (three to four words) with some substitutions. On the Receptive One-Word Picture Vocabulary Test, 4th edition, which assessed Student's English hearing vocabulary comprehension, Student received a standard score of 113, which placed him in the above-average range. On the Expressive One-Word Picture Vocabulary Test, 4th edition, which assessed Student's English speaking vocabulary, Student obtained a standard score of 106, which placed him in the average range.

59. Ms. Kezios administered the Test for Auditory Comprehension of Language, Third Edition. This was a measure of receptive spoken vocabulary, grammar, and syntax, which is normed on individuals who do not have a hearing loss. On the Vocabulary subtest, Student obtained a standard score of 13, which was in the above average range. On the Grammatical Morphemes subtest, Student obtained a standard score of 11, which placed him in the average range. Student obtained a standard score of 13 on the Elaborated Phrases and Sentences subtest, which placed him in the above average range. His quotient score on this instrument was 115, which placed him in the above average range.

60. On the Cottage Acquisition Scales for Listening Language, and Speech, Fourth Edition, Student demonstrated a variety of skills, and he spoke in two-to-eight word phrases and sentences.

61. Student functioned in the above-average range as compared to his chronological age in receptive language, and in the average range as compared to his chronological age in expressive language. Ms. Kezios considered Student's language scores on her assessment to be comparable to the scores on the speech and language assessment conducted by Ms. Fragoso in September 2014. Ms. Kezios described his present levels of performance and areas of need in the areas of auditory learning, receptive language, and expressive language. In auditory learning, Student needed to continue to develop his auditory memory skills and his auditory feedback loop to

correct his speech and language production. In the area of receptive language, Student needed to continue to use his hearing aids consistently to continue to develop receptive language skills. In the area of expressive language, Student had difficulty with consistently maintaining the topic and having three-to five conversational exchanges. He did not consistently use the present progressive tense and a few irregular past tense verbs. He did not incorporate the plural ("s" or "es"), or possessives ("'s") in spontaneous productions, and he did not use several pronouns. Overall, Ms. Kezios concluded that Student's bilateral sensorineural hearing loss impaired his development in these areas and impacted his ability to access the core curriculum in the general education setting. She determined that Student was eligible for and needed support from specially designed instruction from a deaf and hard of hearing itinerant teacher qualified and trained in strategies that developed listening and spoken language skills using auditory verbal practices.

62. Ms. Kezios believed that Student's language development was excellent, especially considering that he had not worn his hearing aids for over two years, and that he had benefitted from the services District had provided in his IEP's. However, her assessment identified that Student had "some gaps," that could be addressed by auditory verbal therapy.

63. In Ms. Kezios's opinion, auditory verbal therapy was an appropriate intervention for Student. She also noted that auditory verbal therapy was not the only appropriate intervention for Student. She believed that Student also could have benefitted if he worked with a deaf and hard of hearing itinerant teacher on the goals that were set in the December 16, 2014 IEP. She also noted that she had worked with many children with hearing loss, who consistently wore hearing aids, and who had progressed well with speech and language services instead of auditory verbal therapy.

64. At hearing, Ms. Kezios also explained the factors which signify that a

student should be considered for a listening and hearing assessment, such that District refers them to her or a similar specialist. These included the severity of the hearing loss, a child who does not speak, a child who speaks but has delays in receptive and expressive language, the child's educational placement, a child who has cochlear implants, a child who is transitioning from hearing aids to cochlear implants, and, a child who is almost three who is not wearing amplification. Approximately five times during her testimony, she asserted that, based on those factors and the information that District had at the time, District acted appropriately in not offering a listening and spoken language assessment at the time of Student's initial IEP on September 17, 2014. Student spoke, he was doing "exceptionally well" in language development even without wearing his hearing aids, District had an audiogram that showed Student's hearing loss was in the speech spectrum, and Ms. Fragoso's speech and language assessment showed Student had progressed in his language development without the benefit of hearing aids. At one point during her testimony, she testified that if she had known about Student prior to the September 2014 IEP meeting, it would have been a good idea to have her there, but that Student was not brought to her attention because Student's level of hearing loss and language levels were such that District appropriately felt that they did not need to involve her because Student did not need a hearing and spoken language assessment. A few minutes later, Father asked her a series of leading questions which posited that, had she been at the September 17, 2014 IEP meeting, Student's goals would not have been the two goals in the September 17, 2014 IEP, rather, they would have been the more advanced and numerous goals that she had drafted for the December 16, 2014, IEP. In response to Father's leading questions, and working backward, Ms. Kezios stated that the goals in the December 16, 2014 IEP were not in the September 2014 IEP because she had not been part of the IEP team, and she had not done an assessment for the September 2014 IEP. This line of questioning ended

when Ms. Kezios agreed with Father's conclusion that that the District's failure to conduct a listening and spoken language assessment prior to the September 17, 2014 IEP was District's "mistake."

65. Student makes much of this statement. However, Ms. Kezios's testimony on this point is not as compelling as Student asserts, because it contradicts Ms. Kezios's testimony both before and after she made the statement. Indeed, the entire line of questioning, and Ms. Kezios's answers, failed to include and take into account Ms. Kezios's previous testimony that Ms. Kezios was consulted by District when District was considering whether a student required an assessment to determine whether the student needed auditory verbal therapy services. Further, the line of questioning failed to include and take into account Ms. Kezios's testimony that District had acted appropriately in not considering a listening and spoken language assessment for Student, because Student did not display most of the applicable factors which would put District on notice that Student required such an assessment. Ms. Kezios reiterated this point several times during her testimony, including *after* she had testified regarding the "mistake." In short, Ms. Kezios's testimony that District had made a "mistake" by not assessing Student by the time of the September 17, 2014 IEP meeting is not credible within the context of her entire testimony. To take Ms. Kezios's statement of "mistake" at face value, as Student does, would require one to ignore her repeated testimony that District acted appropriately based upon the information District had at the time, which testimony was given both before and after she testified that District had made a "mistake." Under these circumstances, Ms. Kezios's testimony that the failure of the District to provide an assessment to Student in conjunction with the September 2014 IEP meeting was a "mistake," is not persuasive so as support a finding that the District was obligated to assess Student at any time prior to the time it actually did so.¹³

¹³ In his closing brief, Student contends that, because Ms. Kezios was not at the

FEBRUARY 5, 2015 IEP TEAM MEETING

66. District convened an IEP meeting on February 5, 2015, to consider Ms. Kezios's assessment report. The IEP team included Parents; their advocate; an administrative designee; a general education teacher; a special education teacher Ms. Kezios; Ms. Rodgers; and Patty Klein, the District audiologist.

67. The team did not change Student's eligibility category of hard of hearing, and updated Student's present levels of performance by considering Ms. Kezios's report. The present levels of performance included Ms. Kezios's findings of Student's strengths and needs in the areas of auditory learning, receptive language, and expressive language. The team continued Student's goals in the area of auditory learning, speech, self-advocacy, and auditory feedback, increased the complexity of the communication goal, and added six goals in the areas of listening/spoken language, based upon Ms. Kezios's assessment.

68. Based upon Ms. Kezios's assessment, District offered listening and spoken language intervention for 60 minutes per week, provided by a District deaf and hard of hearing itinerant teacher who was qualified and trained in auditory-verbal practice and strategies. The services would be offered at a District school, and Parents would be responsible for bringing Student to the session and participate in the session. Listening

September 17, 2014 IEP meeting, the IEP team was did not have all required members. This issue was referred to in Student's Complaint, but Student withdrew it at the prehearing conference, without prejudice. It was not one of the issues specified for hearing. Therefore, it will not be further discussed in this Decision, except to the limited extent that the composition of the IEP team is part of the analysis as to whether the District's offer in the September 17, 2014 IEP meeting constituted a substantive FAPE. (Ed. Code, § 56502, subd. (i).)

and spoken language intervention was based on the principles of auditory verbal therapy and practices. Additionally, the team offered 30 minutes per week of deaf and hard of hearing itinerant support, to be provided at Student's school, Encino Presbyterian Preschool. Parents requested collaboration and support for Student's preschool teacher. In response, District offered three in-service trainings for Student's teacher, to be conducted by the listening and spoken language program specialist and the educational audiologist. At Parents' request, the team agreed to provide a pass-around microphone for the classroom. In addition to the services of District's deaf and hard of hearing itinerant teacher trained in listening and spoken language strategies, Parents requested that District provide Student nonpublic agency auditory verbal therapy with his current nonpublic agency provider. District declined this request. Student's deaf and hard of hearing itinerant services would be offered as a push-in model for special education summer school one time per week for 20 minutes, and he would have his classroom hearing technology during that time. The team also offered school-based speech and language services one time per week for 60 minutes.

69. At the hearing, Student played a portion of the recording of the meeting. The recording reflected that, as the meeting drew to a close, the District members of the IEP team considered without question or analysis Parents' information that a District provider (Dr. Baumberger) had suggested that Parents take the hearing aids off, and expressed concern that a deaf and hard of hearing exit assessment had erroneously not been performed when Student exited Early Start. Team members expressed their regret that these perceived errors had occurred, and the parties mentioned that compensation for them would be discussed later. Members of the team also tried to comfort and encourage Mother as she cried at the end of the meeting, and reassured her that Student was doing well and would do well. Father expressed that Student would continue to receive auditory verbal therapy services from Ms. Rotflesich instead of from

a District provider, and members of the team averred that they respected Parents' decision. Student contends that these statements by the District members of the IEP team constituted admissions of liability on the part of District. That is not the case, however, because District members of the IEP team, none of whom were at Student's initial IEP of September 17, 2014, were misinformed. With respect to Dr. Baumberger's statements, District members of the team were informed only of Parents' side of the story. They were not informed that Dr. Baumberger denied that she simply advised Parents to take the hearing aids off; they were not informed that Dr. Baumberger's comments were qualified and circumscribed; they were not informed that Parents did not rely on Dr. Baumberger's statements, but rather continued to try to place Student's hearing aids on Student; they were not advised that Ms. Mora had tried to help Parents encourage Student to wear his hearing aids; and they were not advised that Parents themselves chose not to continue to struggle with the hearing aids, but rather wanted to wait until they could reason with Student regarding wearing the hearing aids.

70. With respect to the deaf and hard of hearing exit assessment, the uncontradicted evidence at hearing established that the language and communication assessment Ms. Mora performed was indeed the correct "deaf and hard of hearing" assessment, as it was the assessment that District routinely administered when a student who was deaf/hard of hearing transitioned from Early Start services to District's preschool special education services. Since the District IEP team members did not have all of the facts regarding events that had happened before any of them were involved with Student, their apologies to Parents lack foundation and are not persuasive as evidence of District liability.

71. The IEP documented Parents' concerns and requests on the consent page of the IEP. There was no documentation that Parents signed the IEP. Parents disagreed with the speech and language assessment findings, on the grounds that Student did not

have an articulation disorder, and stated that Student needed placement with typical peers and needed nonpublic agency auditory verbal therapy with his current provider. Parents requested compensatory auditory verbal therapy services, plus mileage, and placement at a typical preschool. Parents disagreed with school-based speech and language services. Parents did not specifically request reimbursement for Ms. Rotfleisch's services by virtue of this communication, and there was no evidence that, prior to filing the Complaint herein, Parents specifically requested reimbursement for Ms. Rotfleisch's services.

72. In Ms. Kezios's opinion, the services Ms. Rotfleisch had provided to Student were appropriate, and he was progressing. She also explained that Ms. Rotfleisch's services were not the sole reason for Student's progress. She also believed that Student could have made progress with a District provider, as offered in the February 5, 2015, IEP. She noted that children change providers frequently, and they can and must adapt.

73. Ms. Rotfleisch asserted that there were downsides to changing therapists for Student at that point. She did not know that the change would have benefitted him. She did not know who the therapist would be, and she felt it would be difficult for Student to get used to and forge a relationship with a new person. In her opinion, he was so far behind at the time that if he had changed therapists then, he probably would have taken a few steps backward.

74. Student continued to receive auditory verbal therapy services from Ms. Rotfleisch. On May 1, 2015, Student filed his complaint in this matter. Thereafter, on September 15, 2015, District convened Student's annual IEP meeting. At that meeting, District offered, among other services, auditory verbal therapy from a nonpublic agency.¹⁴

¹⁴ At hearing, the parties were ordered not to submit any additional evidence or

75. Parents paid Ms. Rotfleisch the sum of \$4,940 for weekly auditory verbal therapy on a year-round basis, including summer and school holidays, from October 21, 2014, the date Ms. Rotfleisch assessed Student, until September 15, 2015.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹⁵

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement the IDEA and its regulations. (20 U.S.C. §

exhibits with their closing briefs. In his closing brief, Student violated this order. His brief discusses two additional issues “to inform the ALJ” in fashioning a remedy. One of the new issues involve the documentation that District produced to Student at hearing in response to Student’s request for education records under Education Code section 56504. Student was given the opportunity at hearing to raise concerns he had with District’s documentation and document production, and he did not raise the particular issue that he now has raised in his closing brief. Second, Student’s brief discusses an issue regarding payment for Ms. Rotfleisch’s auditory verbal therapy services, based on the offer in the September 15, 2015 IEP. This issue ripened after the hearing concluded. Student attached additional exhibits to his brief in support of these issues, which were not part of the record at hearing. Student did not seek permission from the ALJ in advance to submit these exhibits. The post-hearing issues and exhibits presented by Student have not been considered with respect to this Decision.

¹⁵ Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below.

1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;¹⁶ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v.*

¹⁶ Unless otherwise stated, all references are to the 2006 edition of the Code of Federal Regulations.

Rowley (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to [a child with special needs].” *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the

request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the petitioning party, has the burden of persuasion as to all issues.

ISSUE 1: DENIAL OF A FAPE BY FAILING TO OFFER AUDITORY VERBAL THERAPY SERVICES UNTIL FEBRUARY 5, 2015 IEP

5. Student contends that District failed to offer a FAPE because it should have offered auditory verbal therapy services to Student from the time of the September 17, 2014 IEP team meeting until the February 5, 2014 IEP. District contends that the September 17, 2014 IEP and its amendments offered a FAPE, and that District has the prerogative to select methodology such as auditory verbal therapy.

EDUCATING DEAF AND HARD OF HEARING STUDENTS

6. With respect to deaf and hard of hearing students, the IDEA and California law provide that the IEP team must consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode. (20 U.S.C. § 1414 (d)(3)(B)(iv); Ed. Code § 56345, subd. (8)(d)(1)-(3).)

7. The California Legislature has declared that it is essential that hard of hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of proficiency. (Ed. Code, § 56000.5, subd. (b)(2).) The California Legislature has also

declared that it is essential that hard of hearing and deaf children, like all children, have an education in which the special education personnel and service providers are specifically trained to work with deaf and hard of hearing children, and their special education teachers are proficient in the children's primary language mode. (Ed. Code, § 56000.5, subd. (b)(3).) Further, the California legislature has declared it is essential that hard of hearing and deaf children, like all children, have an education with a sufficient number of language-mode peers with whom they can communicate directly and who are the same, or approximately the same, age and ability level. (Ed. Code, § 56000.5, subd. (b)(4).) Additionally, the California Legislature has declared that it is essential that hard of hearing and deaf children, like all children, have programs in which they have direct and appropriate access to all components of the educational process, including, but not limited to, recess and lunch. (Ed. Code, § 56000.5, subd. (b)(7).) The inclusion in these statutes of the phrase, "hard-of-hearing and deaf children, like all children" reflects that these statutes do not require school districts to provide a higher standard of education to deaf and hard of hearing children. Indeed, California special education law specifically does not set a higher standard of educating students with disabilities than that established by Congress in the IDEA. (Ed. Code, § 56000(e); see also *Poway Unified School District v. Cheng* (S.D. Cal. 2011), 821 F.Supp.2d 1197, 1200.)

8. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Ibid*, citing *Fuhrmann v. East Hanover Bd. of Ed.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid*.) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's

program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

9. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted to determine whether the individual is a child with a disability and to determine his educational needs. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The pupil shall be assessed in all areas related to his or her suspected disability. (20 U.S.C. § 1414 (b)(2); Ed. Code, § 56320, subds. (e) & (f).) Within 60 calendar days of receiving parental consent for the assessments (excluding days of school vacation in excess of five school days), the assessments must be completed and an IEP team meeting held to review the assessments and to develop the IEP, unless the parents agree in writing to an extension. (Ed. Code, § 56043, subd. (d).) The IEP team shall consist of Parents, a regular education teacher if the child is, or may be, participating in general education, a special education teacher, a representative of the local educational agency who is qualified to provide or supervise the provision of specially designed instruction, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the school district; an individual who can interpret the instructional implication of evaluation results, other knowledgeable individuals, at the discretion of the school district or parents, and the student, if appropriate. (20 U.S.C. §1414(d)(1)(B); Ed. Code, §56341, subd. (b).)

10. Auditory verbal therapy is a methodology by which to hearing impaired children learn to speak. (*M.M. v. School Bd. of Miami-Dade County* (11th Cir. 2006) 437 F.3d 1085, 1102-1103. (*M.M.*)) As long as a school district provides an appropriate

education, the choice regarding the methodology to be used to implement the IEP is left to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.*, (1st Cir. 2004) 361 F.3d 80, 83.)

The IEP Team Meeting of September 17, 2014

11. Student did not demonstrate that District deprived him of a FAPE by failing to offer auditory verbal therapy services in the September 17, 2014 IEP and thereafter until the February 5, 2015 IEP. In determining whether District's program constituted a FAPE, the focus must be on the adequacy of the program offered by District. At the September 17, 2014 IEP meeting, and at the December 16, 2014 meeting thereafter, District offered Student services of a deaf and hard of hearing itinerant teacher and speech therapy. District was aware of Parents' preference that Student use language to communicate, and the services it offered were consistent with Parents' preference.

12. Student did not demonstrate that District had reason to suspect, at the time of the September 17, 2014 IEP team meeting, that he needed auditory verbal therapy services, such that he required a listening and spoken language assessment, or that the presence of a listening and spoken language educator was required at the meeting. The evidence was uncontradicted that prior to offering auditory verbal therapy, District conducts a listening and spoken language assessment to determine Student's needs, as required by law.¹⁷ Ms. Kezios, one of District's certified auditory verbal

¹⁷ At the prehearing conference in this matter on October 16, 2015, Student withdrew, without prejudice, the issue that District had not assessed him in all areas of suspected disability. However, an analysis of the issue of whether District deprived

educators, and a well-qualified witness, testified at hearing that, at the time of the September 17, 2014 IEP meeting, Student presented with only one of the several factors that signaled that a child should receive a listening and spoken language assessment: he was three years old and not wearing his hearing aids. There was no evidence that this factor was sufficient to warrant a listening and spoken language assessment, in and of itself. Indeed, Ms. Mora specifically denied that this factor was a "red flag" so as to justify any such assessment. Rather, Ms. Kezios described a constellation of factors that would suggest that a listening and spoken language assessment should be performed, and Student did not meet any of the other criteria she cited for performing such an assessment. Of those that were applicable to Student's situation, Student could speak; he had only a mild-moderate high frequency bi-lateral hearing loss; and his most recent speech and language assessment reflected that his language development was in the average range, even without the benefit of having worn hearing aids. Further, as Ms. Kezios pointed out, District had an audiogram that showed Student was in the speech spectrum, and the speech and language assessment showed that his speech was progressing. In short, there was nothing to indicate that Student had a need for auditory verbal therapy, such that District was obligated to perform an assessment at that time. Ms. Kezios's testimony regarding the factors to consider in conducting an assessment was not contradicted, except to the extent that Ms. Mora noted that auditory verbal therapy was not an appropriate therapy when a child was not wearing hearing technology, such as hearing aids.

Student of a substantive FAPE by failing to offer him auditory verbal therapy prior to the February 5, 2015 IEP necessarily requires an analysis as to whether District should have offered to perform a listening and spoken language assessment in conjunction with the September 17, 2014 IEP or prior to the December 16, 2014 IEP.

13. Student contends he had a need for auditory verbal therapy, and District hindered his access to the therapy and his progress in general through Dr. Baumberger, who had advised Parents that Student need not wear his hearing aids. As was discussed above, the evidence demonstrated that Dr. Baumberger's advice regarding Student's hearing aids was limited to a time period when he was an infant and was constantly held. The evidence also demonstrated that Ms. Mora, Student's Early Start deaf and hard of hearing teacher tried, along with Parents, to get Student to wear hearing aids. In any event, the evidence demonstrated that Parents did not rely upon Dr. Baumberger's advice, as they continued their attempts to get Student to wear his hearing aids. Under these circumstances, Student's contention is unmeritorious.

14. The September 17, 2014 IEP team meeting included all required participants. Based on the speech and language assessment, the language and communication assessment, and the audiological testing performed by Dr. Baumberger, the team identified Student's needs in the areas of auditory learning and language and speech. The team adopted appropriate goals to address these needs. The goals were supported by the offer of speech and language services and the services of a deaf and hard of hearing itinerant teacher, as well as the accommodations agreed to by the IEP team.

15. Further, the September 17, 2014 IEP was reasonably calculated to provide Student some educational benefit. Ms. Ahdoot testified that Student received educational benefit from speech and language services offered in that IEP. Ms. Kezios testified that Student benefitted from the deaf and hard of hearing services in the IEP, and specified that Student benefitted from the accommodations in the September 17, 2014 IEP. The services in the IEP were rendered largely at the same time that Student was receiving auditory verbal therapy services from Ms. Rotfleisch, but Student did not demonstrate that Student's progress in language and communication was due solely to

Ms. Rotfleisch's services. In this regard, both Mother and Ms. Rotfleisch testified that Student only made progress because of auditory verbal therapy, but their testimony was unpersuasive. First, neither of them explained their opinions. Neither of them explained how they could ascertain that Student benefitted from Ms. Rotfleisch's services to the exclusion of the services provided by District. Furthermore, the opinions of Mother and Ms. Rotfleisch did not take into account the impact Student's hearing aids had on his progress in the classroom and in his speech and language abilities. In this regard, Ms. Rotfleisch did not demonstrate that she was aware of the nature of the services District provided, or the classroom accommodations that District provided Student. She assessed Student, but she did not provide an assessment report or any specific data from the assessment to demonstrate that Student's progress in language development was due only to her work.

16. On the other hand, Ms. Kezios, the District's certified auditory verbal educator, attributed Student's progress only partially to Ms. Rotfleisch's therapy. She also attributed his progress to the District's services, including his classroom accommodations, and to the fact that he consistently wore his hearing aids. Ms. Ahdoot, the District speech pathologist who provided services to Student until December 2014, also believed that Student's progress was attributable not only to Ms. Rotfleisch's services, but also due to his the speech and language services she provided to Student, and, in addition, to the fact that he consistently wore his hearing aids. Ms. Ahdoot had personal knowledge of Student's progress in the District program. Furthermore, the text messages Ms. Ahdoot exchanged with Mother after the December 16, 2014 IEP meeting demonstrated that she cared about Student's progress, whether obtained through her efforts or through those of Ms. Rotfleisch. Therefore, her testimony as to Student's progress was credible. Indeed, Mother's uncertainty regarding terminating District's speech and language services, as expressed in that text message exchange, reflects that

Mother also believed that Student was receiving some benefit from Ms. Ahdoot's language and speech services. If those services had been ineffective, there would have been no reason for Mother to express reluctance to relinquish them.

17. A touchstone as to whether District provided a FAPE is whether Student made meaningful progress under the District's program. The weight of the evidence demonstrated that Student made meaningful progress under the District's program. Ms. Rotfleisch's auditory verbal therapy services were only part of the reason why Student made progress. Student produced no credible evidence that Student's progress was attributable only to the auditory verbal therapy services provided by Ms. Rotfleisch, and that Student did not make meaningful progress with the goals, services, and accommodations in the IEP.

18. Applying the "snapshot rule," and focusing on the program District offered, the September 17, 2014 IEP offered Student a FAPE. It was based on Student's present levels of performance and needs, as determined by appropriate assessments, and goals, services and accommodations which addressed those needs. The IEP was reasonably calculated to confer some educational benefit upon Student. There was no evidence that Student had not made meaningful progress with the goals, services, and accommodations in the IEP.

19. Therefore, the issue becomes one of methodology. As discussed above, auditory verbal therapy is a methodology, and the evidence in this case illustrated that point. In Ms. Rotfleisch's opinion, auditory verbal therapy and not speech and language services were appropriate for a child with hearing loss, because it was much more difficult for a child to learn to speak with speech and language services. In her opinion, speech and language services addressed speech impairments, not hearing impairments, and that the speech issues of a hard of hearing child such as Student should be addressed by addressing his hearing impairment. Her testimony was not persuasive.

First, Ms. Fragoso expressed that there were many methods to address the speech issues of a hard of hearing child, including speech and language therapy. Second, Ms. Ahdoot, who provided speech and language therapy to Student both when he was not wearing his hearing aids and when he was, had observed first-hand that he made progress with speech and language therapy services. Third, Ms. Mora and Ms. Kezios, who were deaf and hard of hearing specialists, both testified that speech and language therapy can be appropriate for children who are hard of hearing and wear hearing aids. Under these circumstances, the weight of the evidence demonstrated that there was more than one way to address speech and language difficulties in children who are hard of hearing so that they may access their education, and the role of this tribunal is not to determine the appropriate method, as that determination is left to District.

20. Turning specifically to Student, Student's speech need in the September 17, 2014 IEP was described as a phonological processing deficit, which caused him to delete final consonants and produce a few sound substitutions which were not developmentally appropriate. The weight of the evidence demonstrated that this need could be addressed by either speech and language therapy, or, so long as he wore his hearing aids, by auditory verbal therapy.

21. In Ms. Rotfleisch's opinion, auditory verbal therapy was the best program for Student. Parents preferred auditory verbal therapy. Parents and Ms. Rotfleisch believed that Student had made wonderful progress with auditory verbal therapy. However, as was discussed above, a district need not offer a student the best program, or the program preferred by parents. District is only obligated to offer a FAPE. If the District's program is appropriate, District had discretion to choose the methodology. As was discussed above, the September 17, 2014 IEP offered a substantive FAPE. Consequently, District was under no obligation to offer Student auditory verbal therapy at the September 17, 2014 IEP meeting, and Student was not deprived of a FAPE on this

ground.

The IEP Team Meeting of December 16, 2014

22. Turning to events after the September 17, 2014, meeting, the evidence reflects that District also acted appropriately and did not deprive Student of a FAPE. In late October 2014, District first learned that Student was receiving auditory verbal therapy from Ms. Rotfleisch. Mother's e-mail dated November 3, 2014, notified District that Student was wearing his hearing aids at all waking hours, and that Parents desired to convene another IEP meeting. At this time, District was on notice that Student's IEP needed to be modified to take into account how these events impacted Student's educational performance and program. District scheduled another IEP meeting for December 16, 2014, and invited Ms. Kezios to the meeting to consider new goals for Student. The IEP team included all required participants. At the meeting, Ms. Ahdoot, Student's speech therapist, updated Student's present levels of performance, and documented the progress Student had made in speech and language therapy while noting his consistent use of his hearing aids. The IEP team also updated Student's previous auditory learning goal, and developed new goals in the areas of peer communication, self-advocacy regarding the condition of his hearing technology, and self-monitoring of his speech and language. These goals addressed Student's skills now that he was wearing hearing aids full time. District continued to offer services and accommodations to meet these needs, including speech and language therapy. However, in consideration of Ms. Ahdoot's concern that the speech and language therapy she rendered may be confusing to Student and counter-productive to the auditory verbal therapy Student was receiving from Ms. Rotfleisch, Parents ultimately chose not to continue with District's speech and language therapy. Additionally, District agreed to perform a hearing and spoken language assessment, which would determine whether Student had a need for auditory verbal therapy. District timely convened the

February 5, 2015, meeting to discuss the assessment, which Ms. Kezios had performed, and offered auditory verbal therapy at that meeting.

23. The evidence demonstrated that District acted appropriately in scheduling the December 16, 2014 IEP team meeting upon learning that Student was consistently wearing his hearing aids and was obtaining auditory verbal therapy.¹⁸ Applying the “snapshot rule,” focusing on District’s program, and mindful of the precept that the District has the right to choose methodology, the December 16, 2014 IEP was reasonably calculated to provide Student with some educational benefit. As was demonstrated by Ms. Kezios’s hearing and spoken language assessment, Student continued to make progress through the time of the February 5, 2015 meeting.

24. District did not deprive Student of a FAPE by not offering auditory verbal therapy prior to the February 5, 2015 IEP meeting.

ISSUE 2: FAILURE OF DISTRICT TO OFFER AUDITORY VERBAL THERAPY SERVICES FROM A NONPUBLIC PROVIDER

25. Student contends that the February 5, 2015 IEP deprived him of a FAPE because District offered auditory verbal therapy services by a District provider instead of by Ms. Rotfleisch. Student contends that the IEP did not identify the auditory verbal therapist whom the District would assign to Student, and therefore the District’s offer of auditory verbal therapy was not a “real” offer. Student further contends that, by failing to offer auditory therapy earlier, District had “forfeited” its right to select the individual

¹⁸ There was no evidence as to the manner in which the date for the December 16, 2014 IEP team meeting was set. The issue of whether the IEP meeting was held within statutory timelines was not raised at any time, including in the Complaint or at the prehearing conference, and therefore it will not be addressed in this Decision. (Ed. Code, § 56502, subd. (i).)

who would provide auditory verbal therapy to Student pursuant to the IEP.¹⁹ Student contends that Parents were acting reasonably in rejecting the District's offer and continuing with Ms. Rotfleisch, Student's private provider, whom he trusted and with whom he had a good relationship. District contends that, since it had qualified auditory verbal therapy providers on staff, it was not required to offer auditory verbal therapy services from a nonpublic agency. Furthermore, Student did not demonstrate that he required the services of Ms. Rotfleisch to receive a FAPE.

26. Education Code section 56365, subdivision (a) provides that a school district shall contract with a nonpublic agency for appropriate services required by a special education student, to the extent required to provide a FAPE, if no appropriate public education program is available. In *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. 2007) 2007 WL 216323, the court held that parents are not entitled to choose service providers. Rather, a school district has the right to select a service provider to implement the IEP, as long as the provider is able to meet the student's needs.

27. A school district need not identify a particular teacher or service provider in an IEP. (Office of Special Education Programs and Rehabilitative Services, *Letter to Hall*, January 12, 1994, 21 IDELR 58.; *Alameda Unified School Dist. v. Student* (2007) OAH Case No. 2007100793, at fn. 14.)

28. Student's contentions are unmeritorious. The February 5, 2015 IEP

¹⁹ In his closing brief, Student also contends that District violated 20 U.S.C. § 1415(c)(1) because the offer of District to provide auditory verbal therapy services through District staff was a change in placement under 20 U.S.C. § 1415 (b)(3), and thus District was required to provide prior written notice. This issue was not raised in the Complaint or at the prehearing conference, and therefore it will not be addressed in this Decision. (Ed. Code, § 56502, subd. (i).)

specified that Student's auditory verbal services were to be provided by a qualified individual. The evidence was uncontradicted that District had qualified individuals on staff who could implement Student's IEP. Indeed one of them, Ms. Kezios, testified at hearing. Student presented some evidence that he had a trusting relationship with Ms. Rotfleisch that could be beneficial with respect to his therapy, and Ms. Rotfleisch believed that Student might regress slightly if he changed therapists in February 2015, but the evidence also reflected that young children, such as Student, typically change providers and establish rapport with new providers. The evidence was not sufficient to demonstrate that only Ms. Rotfleisch was capable of providing Student's auditory verbal therapy so that Student could receive a FAPE. Under these circumstances, District was entitled to select a provider to implement the auditory verbal therapy services in Student's IEP. Student presented no legal authority to support his contention that District had "forfeited" that right. Indeed, since Student's legally unsupported "forfeit" argument is based upon the alleged failure of the District to offer Student auditory verbal therapy prior to the February 5, 2014 IEP team meeting, Student's contention with respect to "forfeiture" must fail. As was discussed above, District's failure to offer auditory verbal therapy services until the February 5, 2015 IEP meeting did not deprive Student of a FAPE. Under the circumstances of this case, the law provides that District, not Parents, was entitled to select the service providers to implement Student's IEP.

29. Additionally, Student presented no legal authority to support his contention that District must identify the service provider in Student's IEP. In fact, as was mentioned above, the law is to the contrary.

30. Student did not demonstrate that the February 5, 2015 IEP deprived Student of a FAPE on this ground.

ORDER

All of the relief sought by Student in his Complaint is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: December 11, 2015

_____/s/_____

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings