

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MONROVIA UNIFIED SCHOOL DISTRICT.

OAH CASE NO. N 2007110702

DECISION

Administrative Law Judge (ALJ) Clara L. Slifkin, Office of Administrative Hearings (OAH), State of California, heard this matter in Monrovia, California on March 4, 2008 to March 7, 2008, and May 8, 2008 to May 12, 2008.

Student was represented by his Father and Mother. Nancy Finch-Heurman, Esq. represented Respondent Monrovia Unified School District (District). Gail Crotty, Director of Special Education (Ms. Crotty), was present each day of hearing.

Student filed a Due Process Hearing request (complaint) on November 27, 2007. A continuance was granted for good cause on January 14, 2008. At the conclusion of the hearing the parties were granted permission to file written closing briefs on June 4, 2008, and it was agreed that the Decision would be issued on or before June 24, 2008. Briefs were submitted and the record closed on June 4, 2008.

ISSUES

1. Did District fail to offer Student a Free and Appropriate Public Education (FAPE) for the 2006-2007 and 2007-2008 school year, by failing to provide Student with a preschool placement?

2. Did District fail to offer Student a FAPE for the 2006-2007 and 2007-2008 school year, by failing to provide Student with appropriate speech and language services?

FACTUAL FINDINGS

Jurisdiction

1. Student is a four-year-old boy, born on October 17, 2003, who upon his third birthday became eligible for special education under the category of speech and language impairment. At all relevant times, Student lived within the boundaries of the District.

Background

2. In July 2006, Student was diagnosed with Ankyloglossia (tongue tie) and Dr. Sharon Muenchow, a pediatric surgeon, performed a lingual frenectomy on Student. A frenectomy frees the tongue so it can have a greater range of motion. After Student's surgery, Dr. Muenchow recommended speech therapy twice a week for 45-minute sessions.

3. On March 29, 2006, the San Gabriel/Pomona/East L.A. Regional Center Regional Center (Regional Center) consultants JoAnn Poole, speech and language pathologist, and Laura Parra, infant educator, assessed Student administering the Hawaii Early Profile (HELP) and the Preschool Language Scale, Fourth Edition (PLS-4). The consultants found that Student demonstrated moderate delays in his gross motor, fine motor, cognitive, social and self-help areas. They reported that Student presented an 11-month delay in receptive language, a 13-month delay in expressive language and sound production skills were also delayed. Prior to Student's enrollment in the District, Regional Center provided Student with one hour of child development services twice a week; and 45-minutes of individual speech-language therapy twice a week.

4. On August 29, 2006, Student was assessed by Regional Center consultant, Edward G. Frey, Ph.D. (Dr. Frey), a psychologist, who found that Student had an expressive language disorder and average cognitive skills. Regional Center consultant Wanda Averhart-Collins (Ms. Averhart-Collins) provided Student speech and language therapy from August 2006 through October 2006. She summarized Student's therapy objectives and progress in an October 27, 2006 Summary of Speech and Language Intervention (Averhart-Collins report). She reported that Student presented with average receptive language and reduced expressive language due to severe phonological¹ delays and had made fair progress in therapy. She noted that Student's biggest challenge was in the area of phonology and articulation. Dr. Frey and Ms. Averhart-Collins recommended that Student attend preschool because it would be helpful and it would provide Student with a language rich environment. Parents offered Dr. Frey's psychological assessment and Ms. Averhart-Collins' report as

¹ A phonological language disorder involves a failure to use speech sounds that are developmentally appropriate for a child's age and dialect.

evidence. Because the persons who composed these documents did not testify at the hearing, the reports were admitted as administrative hearsay.²

Initial Assessments

5. On October 18, 2006, Karen Jinbo conducted District's psychological assessment. Ms. Jinbo is a school psychologist employed by the District since 2005. She earned a master's degree in education in 2000 from the University of Connecticut and in pupil personnel service and school psychology in 2002 from Azusa Pacific University. She reviewed Student's personal history, health history, educational history and previous testing administered by Regional Center consultants.

6. Ms. Jinbo administered the Developmental Activities Screening Inventory (DASI-II), a test that measures cognitive abilities. DASI-II results show that Student can build a tower of eight to nine blocks, understand concepts of big and little and can match 10 words to corresponding pictures. She found that Student exhibited above age range development in select tasks such as counting to ten, identifying five colors, identifying more than five shapes and completing a square form from two triangles.

7. Ms. Jinbo administered the Scales of Independent Behavior-Revised (SIB-R), a test that measures adaptive behavior for preschool aged children. This test is a rating scale-type questionnaire completed by the parent that looks at adaptive behavior for preschool aged children. Parent fills in a circle to indicate whether a student never, sometimes or always is able or could do a task without help or supervision. Mother reported that Student is able to turn a knob to open a door, count from one through five, and occasionally follows a two-part direction in the correct order. Ms. Jinbo found that based on Mother's reporting, Student's highest level of skills were at approximately the one year, eleven month level. Because age level appropriate independent skills are closely related to language skills, Ms. Jinbo concluded that the SIB-R indicated that Student's language impedes his self-help and independent behavior.

8. Ms. Jinbo administered the Developmental Profile-II (DP-II), a test that measures physical, social, academic, and communication development and self-help skills. The DP-II results are based on parent reporting and answering questions about a student's developmental milestones. A parent draws a circle around the answer "pass" or "fail," indicating whether or not student was able to perform an age appropriate task. Ms. Jinbo reviewed Parent's responses and found Student's development to be within the normal range in physical, self-help, social and academic areas. However, Ms. Jinbo reported that Student's communication development was in the borderline range, at about 26 months.

9. At hearing, Mother testified that Ms. Jinbo's analysis and review of the SIB-R and DP-II were flawed because Mother did not fill in any of the circles on the SIB-R or circle any answers on the DP-II. The ALJ requested that Mother take the opportunity to review a

² Administrative hearsay is hearsay that may be admitted for its truth if corroborated.

copy of the SIB-R and the DP-II during the evening recess to see if she could refresh her recollection. After reviewing the tests, Mother recanted and stated that she had answered all of the questions on the SIB-R except question 22. She indicated that if she had filled in the circle her answer would have been Student does, but not well, turn the knob and open a door. Ms. Jinbo testified Mother's current answer decreased the raw score by only one point and does not affect her findings. Further, Mother testified that on the DP-II there were a number of answers that were incorrectly recorded because she did not answer questions related to physical, social, academic and communication development. However, when called as a rebuttal witness, Ms. Jinbo opined that if she recalculated Student's scores based on Mother's testimony it would result in a statistically insignificant change in differential between Student's developmental and chronological age. Ms. Jinbo asserted that she did not tamper with nor change Mother's answers on the SIB-R and the DP-II. In light of Mother's change in testimony regarding the SIB-R and the statistical insignificance in the DP-II variation, the ALJ finds that Ms. Jinbo's testimony on this issue is credible.

10. Ms. Jinbo also administered the Batelle Developmental Inventory (BDI) and the Revised Denver Prescreening Developmental Questionnaire (R-PDQ). The BDI measures mental abilities and whether a child's cognitive development is age appropriate. Student's cognitive development was age appropriate. The R-PDQ measures developmental age based on parent report about a student's ability to perform simple tasks, such as using a spoon, kicking a ball, throwing a ball, and scribbling spontaneously. A parent draws a circle around the answer "yes" or "no," indicating whether or not student was able to perform these simple tasks. Ms. Jinbo reviewed Parent's responses and found Student's developmental age to be three months less than his chronological age.

11. In reviewing the results of the cognitive development tests that she administered, Ms. Jinbo reported that Student performed within the 36 to 40 month level, suggesting that he functioned within an age-appropriate range of cognitive development. She also reported that Student's motor skills, self help behaviors and social skills were age-appropriate and she had no concerns about his behavior. Because of the communication developmental delay reflected in the DP-II, Ms. Jinbo concluded that Student meets the eligibility requirements of an individual with exceptional needs under the category of speech or language impairment and this impairment adversely affects his educational performance.

12. On October 18, 2006, Special Education teacher Maisie Stanfill (Ms. Stanfill) assessed Student to find out his current level of academic performance. In 1994, she received a master's degree in education from Michigan State University and has a clear credential in early childhood and special education. She has been a special education teacher for seven years and for the past four years has worked for the District. Ms. Stanfill administered the Brigance Inventory of Early Development (BIED) that measures early child development through the assessor's observation and parent interview. Generally, Ms. Stanfill observed that Student had a good attention span, made good eye contact, and followed directions. Parent reported that Student knows his letters; feeds himself with a fork and spoon, removes his shoes and socks but not his coat and pants; likes to explore new places, initiates interaction with other children; takes pleasure in simple tasks; and responds

well to adults and accepts strangers. Based on the BIED, Ms. Stanfill found that Student had age-appropriate general knowledge, comprehension and social emotional development. She reported that Student's fine motor skills and self-help skills were borderline, but still age appropriate. Based on her evaluation of Student's current level of performance, Ms. Stanfill concluded that Student did not have educational needs that require special education services and his needs could be met in a regular classroom.

13. Diane Futrell (Ms. Futrell) conducted Student's speech and language assessment on October 18, 2006. Ms. Futrell is a speech and language pathologist employed by the District since 1997. Ms. Futrell was qualified to conduct the speech and language assessment. She has a bachelor of arts in speech communication pathology/audiology from the University of Illinois and a master of arts in speech pathology/audiology from Howard University. Ms. Futrell possesses a California certificate of clinical competency but does not have a credential to provide speech and language services. Ms. Futrell conducts between 50 and 100 assessments each year of Students with speech and language impairment.

14. Ms. Futrell administered the auditory comprehension and expressive communication portions of the Preschool Language Scale-4 (PLS-4). She found that Student's receptive language skills in the area of attention were severely delayed. Student had difficulty following a two-step related command and his difficulty with quantity concepts, and his responses to verbal stimuli were not always consistent. Ms. Futrell used the expressive language portion to evaluate language skills in the areas of: vocal development; social communication; semantics, structure; and integrative thinking skills. She found his expressive language skills to be moderately delayed. Student scored in the first percentile in auditory comprehension and in the fourth percentile in expressive language. These are significant deficits. She also administered the Rosetti Infant-Toddler Language Scale to evaluate his social skills. The Rosetti measures receptive language, but Ms. Futrell utilized only the social skills portion of the test. She found that Student's social skills are at the 18- to 21-month-old level.

15. Ms. Futrell did not review the initial Regional Center consultants' reports nor Dr. Frey's or Ms. Averhart-Collins' report. Ms. Futrell did not administer the Goldman-Fristoe Test of Articulation (GFTA), which is designed to measure a person's production of sounds in words and sentences. Ms. Futrell testified that Student's sound production skills could not be formally assessed at the time, because he used consonant vowel consonant vowel (CVCV) word combinations, word approximations and sound substitutions. She also stated that Student's articulation was unintelligible. Ms. Futrell performed a cursory oral peripheral exam during the assessment. Student lips and facial structure were observed to be symmetrical. Student was able to blow level one and two horns, but he did not round his lips to hold the horns. He held the horns with his teeth. In addition, Student did not imitate tongue tasks so that Ms. Futrell could assess other oral-motor functions, such as protruding/retracting his tongue and tongue tip up/down intra-orally. Student's failure to hold the horn in his lips and his inability to imitate tongue tasks, should have led the examiner to inquire more fully about Student's limited oral abilities and any physical problems.

16. Based on her assessment, Ms. Futrell concluded that Student has severe delays in receptive language, moderate delays in expressive language, and delays in sound speech production. She recommended speech therapy twice a week for 30-minutes. During her limited exam, Ms. Futrell did not discover Student's frenectomy. The frenectomy contributed to Student's articulation deficits due to poor tongue strength and tone of this muscle. Mother testified that she had told Ms. Futrell about the frenectomy and Ms. Futrell testified that Student's Mother had not given her that information. Student's frenectomy would have had an impact on Ms. Futrell's recommendation of speech and language services.

Student's Initial IEP October 25, 2006

17. An initial IEP meeting for Student was held on October 25, 2006. Attending the IEP were Mother, special education teacher Ms. Stanfill, IEP team administrator Lily B. Nunez (Nunez), school psychologist Ms. Jinbo, and speech and language pathologist Ms. Futrell. At the IEP meeting, the team presented the results of their assessments and recommendations. Mother expressed her concerns about Student's speech, including his inability to answer questions or speak intelligibly and his poor vocabulary. The IEP team determined that Student was eligible for special education under the category of speech or language impairment. Mother agreed with the team's finding of eligibility in this category.

18. Because the IEP team found that Student's cognitive ability, development and performance were within age appropriate levels, the IEP team did not offer Student placement in preschool. In addition, District's preschool special education classrooms would be too restrictive for Student, because these classrooms are reserved for special education students with cognitive impairment. However, based on Ms Futrell's report and recommendation, the IEP team found that Student had severe delay in receptive language, moderate delay in expressive language skills, and speech sound production delay. The IEP team offered Student speech and language group therapy for 30 minutes twice a week.

19. The October 25, 2006 IEP team also discussed and recommended annual instructional goals to address Student's unique needs in speech and language and communication (sound production). The team set an annual goal in language and communication that by October 2007, Student would be able to request an action, object or assistance and answer questions using a two to three word phrase for a period of three weeks in 3 out of 5 trials. Student's speech/language pathologist and Parents would monitor his progress. The team also set an annual goal in sound production that by October 2007, Student would be able to produce age-appropriate sounds, using a two- to three-word phrase, for a period of three weeks with seventy-five percent accuracy.

20. During the IEP meeting, Mother voiced her concerns about the team's failure to offer Student a nonpublic preschool placement and the amount of speech and language therapy. At the end of the IEP meeting, Mother indicated that she would take a copy of the IEP home to discuss with Father prior to signing the IEP and accepting District's offer.

April 26, 2007 IEP

21. District convened an April 26, 2007 IEP at Parents' request to discuss the level of Student's services. The team included: Student's Mother, administrator Ms. Nunez, Student's speech pathologist Maria Dionisio, and school psychologist Ms. Jinbo. The team reviewed Student's progress since the initial IEP. Ms. Dionisio, reported that Student had made some progress and that he is currently receiving speech and language group therapy twice a week for 30 minutes. Ms. Dionisio explained that because Parents requested more services she provided one session on a one-to-one basis and that the group session had only two students. Ms. Dionisio also stated that it was difficult for her to pair Student with other students because he was not in a preschool. Ms. Dionisio indicated because of Student's age and skills, 30-minute sessions were appropriate. Mother disagreed and stated that Student learns quickly and his speech is far below his age level. Mother insisted that Student required more speech to make adequate progress towards his goals. Because the IEP team felt that Student's progress was adequate, the team recommended that Student continue his current services.

22. On the evening of April 26, 2007, Father sent an e-mail to Ms. Crotty outlining his concerns about the IEP meeting: the team's failure to review Student's goals and objectives and failure to listen to Mother's concerns that Student was not making progress in speech. He requested District increase the amount of speech and language therapy to two 45-minute sessions of one-to-one therapy. He also requested an independent educational evaluation (IEE) in speech and language to establish Student's needs and progress. He answered District's concerns about Student being able to tolerate longer speech sessions. He explained that Student had a long attention span and he made progress when his speech therapy through a Regional Center provider had been 45-minute sessions. In response, District asked Ms. Futrell once again to assess Student in speech and language and asked Parents to sign an assessment plan. Parents signed the assessment plan on May 11, 2007.

May 11, 2007 Speech and Language Assessment

23. On May 11, 2007, Ms. Futrell conducted another speech and language assessment of Student. Ms. Futrell reported that no GFTA formal assessment of articulation could be performed due to Student's recent lingual frenectomy. Instead, she administered the Kaufman Speech Praxis Test (KSPT) to measure Student's ability to coordinate the oral movements necessary to produce and combine speech sounds to form syllables and words. In the areas of simple and complex phonemic syllabic level, Student scored in the second percentile. Student was able to produce simple consonants, but he presented with some simple consonant disintegration. Student was able to produce complex consonants but maintaining them in initial and final context was difficult for Student. In the areas of spontaneous length of utterance and complexity, Student continued to show motor speech disintegration. Ms. Futrell conducted an oral peripheral examination and found that Student's tongue tip appeared to be heart shaped from the frenectomy and Student did not

perceive his jaw and tongue as one unit. Thus, Student's tongue movement was not coordinated and it had poor strength, endurance and grading.

24. Ms. Futrell's report concluded that Student had articulation deficits due to poor strength and tone of his tongue muscle and severe speech delays. She continued to recommend group speech therapy twice a week for 30 minutes and added these services for the extended school year.

May 16, 2007 IEP

25. On May 16, 2007, the IEP met to review Ms. Futrell's assessment and Parents concern about the level of speech services provided to Student. The team included: Student's Father, director of special education Ms. Crotty, speech pathologist Ms. Dionisio, and speech pathologist Ms. Futrell. Ms. Futrell presented her evaluation results and continued to recommend 30-minute group speech therapy sessions twice a week. The May 16, 2007 IEP team followed Ms. Futrell's recommendation and added 10 sessions for the extended school year. The team set a new oral-motor goal that by October 2007, Student would be able to tolerate oral area sensorimotor experiences during speech therapy for a three week period, in three out of five trials. Father consented to the IEP amendment.

Student's Independent Speech Assessment

26. In July 2007, Parents contacted Justine Sherman to conduct an independent speech and language evaluation of Student. Ms. Sherman graduated magna cum laude from James Mason University in 1996 earning a bachelor of science in speech and language pathology and psychology. She graduated summa cum laude from George Washington University in 1998, earning a master of arts in speech and language pathology. From 1998 through 2004, she served as a speech and language pathologist for the Ontario-Montclair Unified School District. Since 2004, she has been in private practice and presently is the Director of Justine Sherman & Associates. She evaluated Student on July 23 and July 30, 2007. Mother reported Student's medical and educational history. Ms. Sherman reviewed the Averhart-Collins report. Ms. Sherman interviewed Student's preschool teacher at Arcadia Montessori preschool (Montessori preschool). She spent more than three hours administering the language tests, interviewing Mother and observing Student. Ms. Sherman prepared a written report on August 6, 2007, and sent the report to Student's Parents. Parents paid Ms. Sherman \$300 for administering the speech and language assessments and preparing the August 6, 2007 report.

27. Ms. Sherman administered an oral-peripheral exam to determine if Student's articulators were within functional limits. Ms. Sherman found Student's face to be symmetrical; his lips closed at rest, his lower lip slightly averted and chapped, and his tongue moved with some control. However, Student had difficulty moving his tongue laterally outside his mouth.

28. Ms. Sherman administered the PLS-4 to assess his performance on receptive and expressive language tasks, based on performance in various situations with visual and gestural cues appropriate for his age group. Student's auditory comprehension standard score of 102 was in the 55 percentile. His receptive language equivalent to that of a three year, ten month old child, one month above his chronological age. However, his expressive language score of 68 fell more than three standard deviations below the norm and his percentile rank indicated that two percent of children his age scored below him. Student failed to accurately complete the following expressive language tasks: babble short syllable strings with inflection similar to adults speech; use words more often than gestures to communicate; ask questions; use words for a variety of functions; use different word combinations; use plurals; use verb plus "ing"; use a variety of nouns, verbs, modifiers, and pronouns in spontaneous utterances; produce basic four- to five-word sentences; tell how an object is used; use possessives; answer questions logically; use words that describe a physical state; complete analogies; and answer questions about hypothetical situations.

29. Ms. Sherman also administered the Expressive One-Word Picture Vocabulary Test to assess Student's expressive vocabulary skills by having him label pictures. His standard score of 87 (19th percentile) was equivalent to a two year, eleven month old child. In addition, she administered the Receptive One-Word Picture Vocabulary Test to assess his receptive vocabulary skills by having him point to the targeted word from a field of four pictures. His standard score of 106 (66th percentile) was equivalent to that of a four year, three month old child.

30. Finally, Ms. Sherman administered the GFTA to assess Student's articulation at the single-word level. Student's standard score of 80 (10th percentile) was equivalent to that of a two year, three month old child. Ms. Sherman reported that the GFTA results indicate that Student has a severe phonological disorder that significantly impacted his intelligibility, even at the single-word level. Thus, she opined that as the length and complexity of his utterances increased, the level of his intelligibility would significantly decrease. She also believed that this score of 80 is not representative of his true intelligibility and should be examined closely when determining placement in a speech-language program. Ms. Sherman noted that Student had some typical processes, but he also had many idiosyncratic processes. Idiosyncratic processes are displayed in children with a phonology disorder and are not found in the speech of typically developing children. She noted the following idiosyncratic phonological processes: palatal fronting; stopping and backing; final consonant deletion; gliding; prevocalic voicing; syllable reduction; addition of consonants; gliding of fricatives and stops in conjunction with stopping; devoicing; deaffrication; and addition of "w" following a stop.

31. Ms. Sherman testified that Student has a profound phonological disorder and in her 10 years of practice, Student's phonological problem is the most severe she has observed. Student's language is unintelligible and he will have difficulties interacting and socializing with other children. In comparing articulation and phonological disorders, she testified that articulation disorders are easier to cure because this involves errors in sounds.

32. Ms. Sherman concluded that Student had an expressive language phonological disorder. As a result, he is severely delayed in articulation and expressive language skills. Therefore, she recommended two 60-minute individual speech therapy sessions per week. Ms. Sherman proposed six goals for Student using visual and verbal cues to reduce the occurrence of deleting final consonants, stopping of fricatives, gliding of liquids, addition of consonants, using gestures to communicate, and using short utterances.

33. Ms. Sherman's testimony was honest and forthright. Ms. Sherman found that Student's auditory comprehension (receptive language) improved to the 55 percentile from Ms. Futrell's measure at one percent. When asked about this discrepancy between her assessment results on the PLS-4 and Ms. Futrell's, she explained that Student could have made a significant improvement in auditory comprehension in the ten months between assessments. She stated that Student's decline in his expressive language score could be due to regression or Student's inability to answer as many questions on the day that she administered the PLS-4. She also persuasively explained that Ms. Futrell had not formally tested Student's articulation because she did not administer the GFTA. Neither assessment by Ms. Futrell included the GFTA, an assessment that was crucial to determining Student's articulation abilities particularly in light of his recent lingual frenectomy.

34. Ms. Sherman testified that her assessment results, impressions and proposed interventions were consistent with Ms. Averhart-Collins' results as reflected in her October 27, 2006 report. Ms. Averhart-Collins reported that Student's receptive language was average but his expressive language was delayed. The most challenging area for Student was phonology and articulation. Ms. Averhart-Collins targeted some phonemes in therapy (p, b, m, n, k, g, t, f, d and s) and utilized activities including auditory bombardment, colored drill picture cards, and short stories with the targeted sound embedded in words within the story. Ms. Averhart-Collins also reported that Student had good attending skills and was able to participate in 45-minute therapy sessions.

35. Because Student's Parents felt he had not made progress in his speech and language therapy with Ms. Dionisio, in September 2007 Parents hired Ms. Sherman to give Student weekly speech and language therapy. Student's Parents were impressed with Ms. Sherman's phonologic approach to speech therapy. Ms. Futrell and Ms. Dionisio, District's speech pathologists did not approach Student's speech deficits phonologically. Parents provided invoices for Ms. Sherman's speech pathology services for September 2007 for a total of \$480. However, parents did not provide evidence of other payments for speech therapy services.

District Provides Student with a New Speech Pathologist

36. In September 2007, District speech therapist Vivian Mustain (Ms. Mustain) began working with Student. Ms. Mustain has a master's degree in speech pathology from California State University Los Angeles and has been a speech pathologist for 25 years. She has worked for District for the last 14 years.

37. Ms. Mustain testified Student could not speak in phrases when she started seeing him at the beginning of the semester. She stated that Student's poor articulation made it difficult for others to understand him. Ms. Mustain indicated that she now has an easier time understanding Student because she has learned to follow his speech patterns. She also reported that all of Student's annual goals address utterances because Student has difficulty imitating sounds and even if he uses a sound, it is very difficult to understand him.

October 23, 2007 IEP

38. Student's annual IEP meeting was held on October 23, 2007. Attending the IEP were Parents, special education teacher Ms. Stanfill, IEP team administrator Suzanne Heck, school psychologist Ms. Jinbo, general education teacher Dora Loera and speech and language pathologist Ms. Mustain. Ms. Mustain presented Student's present levels of performance and indicated that Student achieved two out of his three annual goals in language and communication and was making progress towards the third goal. Ms. Mustain reported that Student still had difficulty elevating his tongue independently from his jaw movement and was concerned about Student's frontal articulation. She indicated that he had difficulty with d, t, j, ch, sh, l, th, n, r, v and z sounds in isolation but he could sometimes say these sounds correctly in words. She also reported that Student had made some progress towards speaking in phrases but his unintelligibility still impaired his communication. Student was not able to produce age appropriate sounds, using two- to three-word phrases (sounds in isolation).

39. To address her concerns about Student's progress, Ms. Mustain proposed three annual goals. First, that by October 2008, Student will be able to correctly imitate sounds for all single consonants and consonant digraphs sh, ch, th, wh with 80 percent accuracy over a nine week period. Second, by October 2008, using only verbal cueing, Student would be able to protrude his tongue with 80 percent accuracy in three to five trials over a period of eight weeks. Third, by October 2008, using verbal and visual cueing, Student will be able to increase the length of his utterance to four words with 70 percent intelligibility over a period of six weeks. For each goal, Ms. Mustain proposed three short term objectives in order to systematically track Student's progress and recommended that speech therapy be increased to three 30-minute group sessions a week. Ms. Mustain based her recommendation to increase Student's speech and language services on his lack of progress towards achieving his goals.

40. Parents continued to express their concerns about Student's speech, including his inability to speak intelligibly. Parents provided the team with a copy of Ms. Sherman's August 6, 2007 report. The team offered a total of 90-minutes of group speech therapy per week. However, even though District offered to increase group speech therapy, Parents did not sign Student's IEP and District continued to provide Student with the speech services as outlined in Student's October 2006 IEP: group speech therapy 30 minutes, twice a week. Because Ms. Mustain did not have any students appropriate to pair with Student, he received speech therapy on one-to-one basis. The IEP team offered to increase Student's speech and language therapy as recommended by Ms. Mustain. The IEP team proposed an

accommodation and modification in the area of communication: that Parents and speech pathologist allow “wait time” for Student to verbally respond.

41. Parents requested that District place Student in a preschool class with emphasis in writing, reading and socialization. Parents asserted that in order to offer Student FAPE, District should provide Student with a placement where Student would be able to improve his speech through modeling and socializing. Other members of the IEP team indicated that Student did not require special education supports in the areas of academics or social emotional development, and therefore did not require special education services in a classroom setting. The IEP team again discussed District’s preschool special education classes, but determined that Student was not in need of a special education preschool classroom placement. At the preschool level, District does not and is not required to maintain a regular preschool classroom program. The IEP team declined to offer Student placement in a special education preschool placement because it did not meet Student’s special needs and was not the least restrictive environment.

42. Parents signed the October 23, 2007 IEP to show that they attended, but did not agree with Student’s eligibility, goals, program placement or related services. Because District’s preschool special education classroom was not an appropriate placement and because the District does not have general education preschools, the District’s offer did not include any preschool placement. Student’s speech and language services continued as outlined in the October 2006 IEP: group speech therapy 30 minutes, twice a week.

Preschool Placement

43. Parents testified that because of Student’s unique communication needs, District should place Student in a general education preschool. Parents requested reimbursement for tuition they have paid the Montessori Preschool. Mother testified that both Dr. Frey and Ms. Averhart-Collins recommended that Student attend preschool because it would be helpful and it would provide Student with a language rich environment. However, neither report gave a detailed explanation regarding their recommendation that Student attend preschool.

44. On October 15, 2007, Ms. Cheryl Roberts, Director of the Montessori Preschool, wrote a letter that was presented to the October 23, 2007 IEP team. Ms. Roberts wrote that Student needs improvement in expressing himself, understanding and following directions and fine motor skills. Ms. Roberts testified that Student attended the Montessori Preschool during the 2006-2007 and 2007-2008 school years and has made progress in communication. However, she voiced her concerns regarding how Student’s expressive language delay affected his ability to follow her directions, use language instead of gestures and communicate with his teachers and peers.

45. District does not have any general education preschool classrooms and is not required by law to provide such preschools. The District does have two special education preschool classes designed for students who have cognitive impairment and academic needs.

Nevertheless, because Student's cognitive ability, development and performance were within age appropriate levels, neither of District's two special education preschool classrooms are appropriate for Student.

Reimbursement and Compensatory Education

46. During the 2006-2007 school year, Student received two 30-minute sessions per week of group for a total of 60-minutes per week. Student should have been provided with two 45-minute per week sessions of individual speech therapy for a total of 90-minutes per week. Student should have received this additional 30-minute per week service. Compensatory time would begin to accrue after Student's initial October 25, 2006 IEP through extended school year, excluding winter and spring breaks for a total of 38 weeks. Student also received some individual sessions from District outside of the IEP offer but the evidence as to the number of individual sessions District provided was unclear. Thus, 30 minutes a week for 38 weeks is a total of 19 hours of compensatory individual speech pathology therapy for the 2006-2007 school year.

47. During the 2007-2008 school year, Student received two 30-minute sessions per week of group for a total of 60-minutes per week. Student should have been provided with two 60-minute per week sessions of individual speech therapy for a total of 120-minutes per week. Student should have received this additional 60-minute per week service for 44 weeks. Thus, 60 minutes a week for 44 weeks is a total of 44 hours of compensatory individual speech pathology therapy for the 2007-2008 school year.

LEGAL CONCLUSIONS

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The Student has the burden of persuasion in this matter.

Issue 1: Did District fail to offer Student a FAPE for the 2006-2007 and 2007-2008 school year by failing to provide Student with a preschool placement?

2. Student contends that he was denied a FAPE for the 2006-2007 and 2007-2008 school years, because District failed to offer Student placement in a preschool class. In particular, Student contends that because he was found eligible for special education services as a Student with a speech and language impairment, District should have offered Student placement in a preschool to meet his unique needs in language, communication and social skills. District contends that its offer of FAPE for the 2006-2007 and 2007-2008 school years should not include a preschool placement. District contends that it is only obligated to provide special education preschool classes for children with disabilities when the IEP team determines that a student requires special education services to address cognitive and/ or

academic skill deficits. District further contends that while Student is eligible for special education based on speech or language impairment, he does not require special education services to address cognitive and/or academic skills.

3. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] (*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, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) The Third Circuit has held that an IEP should confer a meaningful educational benefit. (*T.R. ex rel. N.R. v. Kingwood Twp. Bd of Educ.* (3d Cir. 2000) 205 F. 3d 572, 577.) However, the judgment may not be made in hindsight, the rule is to look at the IEP at the time the plan was formulated. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Gregory K., supra*, 811 F.2d at p. 1314.)

4. School districts are not required to provide or fund general preschool classrooms. (Ed. Code, § 8972.) Moreover, districts are not compelled to establish a preschool program for typical children just to provide peer interaction for pupils with special needs. Where districts do not operate regular preschool programs the, Office of Special Education Policy has taken the position that the obligations to provide placement with typical children can be satisfied by considering alternative methods for meeting the child’s unique needs in the least restrictive environment, including: (1) providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies, such as Head Start; (2) placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and (3) locating classes for preschool children with disabilities in regular schools. (*Letter to Neveldine* Office of Special Education Programs (May 28, 1993) 20 IDELR 181 [citing note 34, to 34 C. F. R. § 300.552].)

5. Here, prior to enrolling in the District, the Regional Center had found that Student had average cognitive skills. Prior to Student's October 25, 2006 initial IEP, school psychologist Ms. Jinbo administered a variety of assessment tools to gather relevant developmental and academic information. Ms. Jinbo found Student's development to be within the normal range in physical, self-help, social and academic areas; cognitive development was age appropriate; and behavior to be normal. Based on her evaluation of Student's current level of performance, Ms. Stanfill concluded that Student did not have academic or educational needs that require special education services and his needs could be met in a regular classroom. Student provided no evidence contradicting District's findings that Student has average cognitive abilities. Student's cognitive ability, development and performance were within age appropriate levels. Student's special education needs are in the area of speech and language, but are not such that he requires placement in a special education classroom. Districts are not required to provide or fund general preschool classrooms and are not compelled to establish a preschool program for typical children just to provide peer interaction for pupils with special needs. Since Student did not require preschool placement to make academic progress, District's failure to offer preschool placement was not a violation of FAPE. (Factual Findings 3 through 12, 18, and 43 through 45; Legal Conclusions 3 and 4.)

Issue 2: Did District fail to offer Student a FAPE for the 2006-2007 and 2007-2008 school year by failing to provide Student with appropriate speech and language services?

6. Student contends that he was denied a FAPE for the 2006-2007 and 2007-2008 school years, because the frequency and intensity of speech and language pathology services that District offered in both IEPs was not designed to meet Student's unique needs and did not provide Student with an educational benefit. District contends that its offer of speech and language services constituted FAPE, because it offered Student speech and language therapy designed to meet Student's needs and thus provided Student FAPE for the 2006-2007 and 2007-2008 school years.

7. A child with a disability has the right to FAPE under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) Special education is defined as specially designed instruction provided at no cost to parents, calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); Ed. Code, § 56031.) The educational agency may also be required to provide related services, known as "designated instruction and services" (DIS) in California. These services include developmental, corrective, and supportive services, such as speech therapy, that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(a)(17); *Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.) Speech therapy services are defined to include: speech and language services for the habilitation or prevention of communicative impairments. (34 C.F.R. § 300.34(c)(15).)

8. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school district cannot "be judged exclusively in hindsight"

but instead, “an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

9. In conducting an evaluation, a District must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability, and in determining the contents of an IEP. (20 U.S.C. § 1414(b)(2)(A); Ed. Code, § 56320.) The District may not use any single assessment as the sole criterion for determining eligibility and must use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” (20 U.S.C. § 1414(b)(2)(B), (b)(2)(C); Ed. Code, § 56320.) A district is required to use assessments that provide relevant information that directly assists persons in determining the educational needs of the child. (20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.304(c)(7).)

10. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D. D. C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education ... designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

11. Here, prior to enrolling in the District, the Regional Center had found that Student had significant delays in language that required 45-minutes of individual speech and language therapy twice a week. Prior to Student's October 25, 2006 initial IEP, District's speech and language pathologist Ms. Futrell assessed Student. As contrasted with the Regional Center recommendation, Ms. Futrell recommended that Student receive speech therapy two 30-minute group sessions per week. (Factual Findings 3, 4, 13 through 19; and 19; Legal Conclusions 7 and 9.)

12. Ms. Furtrell administered the PLS-4, which revealed significant delays in auditory comprehension and expressive language, and the Rosetti, which revealed social skill needs, but she failed to administer a formal standardized test of articulation such as the GFTA. Ms. Furtrell's rationale for not administering the GFTA in October 2006 or in May 2007 was not convincing. She did not administer the GFTA due to Student's use of consonant vowel consonant vowel word combinations, word approximations and sound substitutions. This was not convincing, at least by May 2007, because Student's expert, Ms.

Sherman, successfully administered the GFTA in July 2007. (Factual Findings 13 through 20, 23 through 37; Legal Conclusions 3, 7 and 9.)

13. In October 2006, Ms. Furtrell's oral peripheral examination was so cursory that she failed to discover Student's recent frenectomy. This procedure not only affects the shape of the tongue but affects tongue and jaw strength and coordination. Understanding this necessarily impacts appropriate speech and language needs. On the oral examination Ms. Furtrell did perform, Student was unable to round his lips to hold a horn or to imitate tongue tasks such as protruding and retracting his tongue. Ms. Furtrell also did not review the initial Regional Center reports, the Averhart-Collins or the Frey reports. Ms. Furtrell also failed to observe Student in his Montessorri preschool or during group speech sessions to see how he performed with other Students. Ms. Furtrell's reliance on her own clinical observations was insufficient. Ms. Sherman credibly explained that Ms. Furtrell's clinical observations would not provide her with comprehensive information about Student's articulation errors, phonological delays and problems with sentence formation which should have been identified through administering a standardized test such as the GFTA. (Factual Findings 13 through 16, and 26 through 35; and Legal Conclusions 3, 7 and 9.)

14. Ms. Furtrell's failure to gather comprehensive information about Student's speech and language needs and failure to use a variety of assessment tools and other strategies resulted in flawed assessment results which undermined her recommendations regarding the amount and frequency of speech and language services Student required. (Factual Findings 31 through 16, 26 through 35; and Legal Conclusions 3, 7 and 9.)

15. In contrast, Ms. Sherman's July 2007 assessments of Student were based on her observations of Student at his Montessori preschool classroom, information she received information from Student's preschool teacher as well as from parents. Ms. Sherman also used a variety of assessment tools including, most importantly, administering the GFTA to gather relevant functional, developmental information to assist her in properly determining the frequency and intensity of speech pathology services. She testified that Student's expressive language disorder manifested in severe articulation and phonological delays. In her 10 years of practice Student's phonological problem was the most severe she has observed. Her credible testimony and findings were more persuasive than Ms. Futrell's based on her thorough testing and inquiry. Ms. Sherman's recommendation that Student receive 60 minutes of individual speech and language services twice a week was more persuasive. (Factual Findings 26 through 35; Legal Conclusions 3, 7 and 9.)

16. When determining the intensity and frequency of Student's speech and language pathology services, the October 25, 2006 IEP team discounted the intensity of the Regional Center's services. In addition, Ms. Futrell's flawed assessments underestimated Student's significant expressive language deficits, thus the basis of the IEP team's offer of 30 minutes of group speech therapy twice a week was undermined. Therefore, the October 25, 2006 IEP team's offer of 30-minute group speech therapy twice a week was not designed to

meet Student's unique needs in speech and language. (Factual Findings 13 through 20, 26 through 25, and 45 through 47; Legal Conclusions 3, 7 and 9.)

17. An April 26, 2007 IEP team meeting was convened by the District to consider Mother's concern that Student was not making progress and would benefit from a greater amount of speech and language therapy. Parents requested individual speech therapy sessions for 45 minutes, twice a week. Though District asserted Student was making progress on his one goal, the IEP notes indicate otherwise, stating that Student's progress was adequate with his current therapy schedule. The team noted that Student would not be able to concentrate during or benefit from speech and language sessions that lasted more than 30 minutes. However, the evidence supported Student's ability to do well in longer speech sessions in that Student was attentive during the Regional Center 45-minute speech therapy sessions. Thus, the April 26, 2007 IEP team's failure to offer Student increased speech therapy from two 30-minute group sessions to two 45-minute individual speech and language therapy per week was a denial of FAPE. (Factual Findings 22 through 24; Legal Conclusion 3 and 7.)

18. On May 16, 2007, the IEP team met to review Ms. Futrell's speech assessments. Ms. Futrell continued to recommend 30 minute group speech therapy twice a week. The team did add these services for the extended school year and one other speech goal. Even though the team did not recommend increasing the intensity and frequency of speech therapy, the IEP team's offer of ESY and setting another goal for Student indicates that Student was not making progress. The May 16, 2007 IEP team failed to offer Student increased speech and language services to meet Student's unique needs and make educational progress was a denial of FAPE. (Factual Findings 22 through 25; Legal Conclusion 3 and 7.)

19. On October 23, 2007, District convened Student's annual IEP. The IEP team reviewed Ms. Sherman's evaluation but did not follow her recommendations. The IEP team offered to increase Student's speech and language therapy to three, 30-minute sessions a week. However, the IEP team's offer did not include individualized instruction and did not follow Ms. Sherman's credible recommendation that the service be increased to one hour per session. The IEP team's failure to offer an increased amount of speech and language services to one hour individual speech and language therapy sessions twice a week was a denial of FAPE. (Factual Findings 26 through 42; Legal Conclusion 3 and 7.)

20. In sum, the October 26, 2006, April 26, 2007, May 16, 2007 and October 23, 2007 IEP teams failed to grasp that Student required more intense and frequent speech services for him to make progress and benefit from his special education because of his severe delays in his expressive language (delays in his sound production and due to his severe phonological and articulation delays). Thus, because Student should have been provided with 45-minute individual speech and language therapy sessions twice a week for the 2006-2007 school year, and one hour individual therapy sessions twice a week for the 2007-2008 school year, District failed to offer Student FAPE. (Factual Findings 13 through 42, and 45 through 50; Legal Conclusion 3 and 7.)

21. Although Student established that the frequency and amount of the speech services should be increased, he is not entitled to select a service provider. Student presented no evidence that District's speech therapist would be unable to meet Student's needs if the intensity and frequency of therapy were increased. (Legal Conclusions 3, 7, 8, and 11 through 20.)

Remedy

22. Parents contend that they are entitled to reimbursement for Ms. Sherman's evaluation, reimbursement for private speech therapy services provided by Ms. Sherman and compensatory education equivalent to individual speech therapy services one hour, twice a week, for 43 weeks during the 2006-2007 school year (November to July) and for 52 weeks during the 2007-2008 school year (September to July). Parents contend that these services should be provided by Ms. Sherman at the rate of \$120.00 per session. District contends that it does not owe any compensatory education or reimbursement to Parents and that even if it does, it should be limited.

23. Courts have long recognized that equitable considerations are appropriate when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup School*), citing *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996] (*Burlington*); *Lester H. v. K. Gilhool and the Chester Upland School District* (3d Cir. 1990) 916 F.2d 865, 872-873.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup School, supra*, 31 F.3d at p. 1496.) Compensatory education is an equitable remedy; it is not a contractual remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

24. Here, based on Factual Findings 26 through 35, and Legal Conclusions 11 through 21 and 23, District should reimburse Student \$300.00 for Ms. Sherman's speech and language assessment.

25. In addition, based on Factual Findings 26 through 35 and Legal Conclusion 11 through 21 and 23, the evidence supports Student's request for reimbursement for Ms. Sherman's phonological speech pathology services in September 2007. Parents provided invoices for Ms. Sherman's speech pathology services for September 2007 for a total of \$480. Parents did not present sufficient evidence of other payments for speech therapy services. Thus, Parents are entitled to reimbursement for speech therapy services in the amount of \$480.

26. Based on Factual Finding 46 and Legal Conclusions 19, 20, and 23, Student is also entitled to some compensatory education for being underserved in the amount of individual speech therapy during the 2006-2007 school year. Student received two 30-minute sessions per week of group for a total of 60 minutes. Student should have been provided with two 45-minute per week sessions of individual speech therapy for a total of 90 minutes. Student should have received this additional 30-minute per week service for 38 weeks. Thus, 30 minutes a week for 38 weeks is a total of 19 hours of compensatory individual speech pathology therapy for the 2006-2007 school year

27. Based on Factual Finding 47 and Legal Conclusions 19, 20, and 23, Student is also entitled to some compensatory education for being underserved in the amount of individual speech therapy during the 2007-2008 school year. Student received two 30-minute sessions per week of group for a total of 60 minutes. Student should have been provided with two 60-minute per week sessions of individual speech therapy for a total of 120 minutes. Student should have received this additional 60-minute per week service for 44 weeks. Thus, 60 minutes a week for 44 weeks is a total of 44 hours of compensatory individual speech pathology therapy for the 2007-2008 school year.

28. In sum, District is to reimburse Student for Ms. Sherman's assessment in the amount of \$300. District is to reimburse Student for Ms. Sherman's services for September 2007 in the amount of \$480. District is to provide Student with compensatory education for the 2006-2007 school years for a total of 63 hours of individual speech and language therapy to be provided by a District therapist. This compensatory time shall be completed by Student's October 2009 annual IEP.

ORDER

As to Issue One the relief sought by the Student is denied.

As to Issue Two Student's request for relief is granted as follows: District shall reimburse Student for Ms. Sherman's assessment in the amount of \$300; District shall reimburse Student for Ms. Sherman's services in the amount of \$480 and District shall provide Student compensatory education for a total of 63 hours of individual speech and language therapy to be provided by a District therapist.

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. Here, the District prevailed on Issue One and Student prevailed on Issue Two.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: June 24, 2008

A handwritten signature in black ink that reads "Clara L. Slifkin". The signature is written in a cursive style with a large initial 'C'.

CLARA L. SLIFKIN
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE HEARINGS