

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015010862

DECISION

The Riverside Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 27, 2014, in OAH case number 2014100962, naming Student's parents on behalf of Student. Student's parents on behalf of Student filed a complaint on January 23, 2015, in OAH case number 2015010862, naming Riverside.

On February 2, 2015, the two cases were consolidated, and the Student-filed case, OAH case number 2015010862, was designated as the primary case. The consolidated matter was continued for good cause on March 10, 2015.

Administrative Law Judge Susan Ruff heard this matter in Riverside, California, on May 5 and 6, 2015.¹

Richard Isaacs, Attorney at Law, represented Student. Student's mother attended the hearing. Student did not attend.

Jack Clarke, Jr., Attorney at Law, represented Riverside. Timothy Walker, Executive Director of Pupil Services, and Cynthia Hartshorn, Program Specialist, attended the hearing on behalf of Riverside.

¹ At the start of the hearing, Riverside withdrew its portion of the consolidated case and its complaint is therefore dismissed. This decision only determined matters raised in Student's complaint.

A continuance was granted for the parties to file written closing arguments and reply briefs, and the record remained open until May 20, 2015. Upon timely receipt of the written closing arguments and reply briefs, the record was closed and the matter was submitted for decision.²

ISSUES³

1. Did Riverside deny Student a free appropriate public education from January 2013 to the end of the 2013 – 2014 school year, including extended school year 2014 by failing to offer appropriate levels, nature, and types of services to meet Student’s speech and language needs?

2. Did Riverside deny Student a FAPE during the 2014 – 2015 school year, by failing to offer appropriate levels, nature, and types of services to meet Student’s speech and language needs?

SUMMARY OF DECISION

The dispute in this case involves Student’s speech and language services. Student contends that he has an articulation disorder due to childhood apraxia of speech (apraxia) and

² The parties were given a limit of 15 pages maximum for their written closing argument and five pages maximum for their reply brief. Contrary to the ALJ’s order, Riverside submitted a 10-page reply brief. Everything in Riverside’s reply after page five was neither read, nor relied upon by the ALJ. The first five pages of Riverside’s reply brief also quoted from documents that were not exhibits in the case, nor was a request for official notice of those documents made. The ALJ did not rely upon the references to those documents.

³ The issues have been rephrased for clarity. 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.) Riverside stipulated on the record that it would reimburse Student’s parents \$4,500 (the amount Student’s parents paid for Dr. Davidson’s independent educational evaluation) within 30 days. Based on that stipulation, Student withdrew his third issue, leaving only the two issues listed above to be tried in this matter.

In his written closing argument, Student raised a concern that Riverside had not yet reimbursed Student’s parents. Student requested that this Decision order Riverside to make the reimbursement as stipulated. Because Riverside withdrew its issues for hearing and Student withdrew his third issue, the issue of payment is not before OAH. However, Student retains all legal rights to enforce that stipulated settlement agreement.

that Riverside failed to provide him with sufficient speech and language services to address his apraxia. Student contends that he has failed to gain meaningful educational benefit in the area of speech and language as a result of Riverside's failure to address his needs.

Riverside contends that Student's speech issues arise from a phonological processing disorder related to his autism, not from apraxia. Riverside contends that the speech and language services along with the other services in Student's various individualized education program offers were reasonably calculated to enable him to gain educational benefit at the time those offers were made. Riverside contends that Student has, in fact, made progress based on the program and services in his IEP's.

This decision finds that Student's IEP's were reasonably calculated to meet his unique needs and provide him with meaningful educational benefit, both in general and in the area of speech and language. Student has made meaningful educational progress during the times at issue in this case, including progress in the area of speech and language. There was no denial of FAPE by Riverside, and Student's claims are dismissed.

FACTUAL FINDINGS

1. Student is an 11-year-old boy who has resided within the jurisdiction of the Riverside Unified School District at all times relevant to this case. He is currently eligible for special education under the categories of autism and speech or language impairment. Student's autism is in the moderate to severe range, and he receives specialized instruction and related services in a number of areas.

2. The time period at issue in this proceeding began on January 23, 2013. Any events prior to that date occurred outside the two-year statute of limitations, and any Factual Findings regarding those earlier events are made solely as they relate to the later events. As of January 23, 2013, Student was in the second grade.

3. Student had been assessed by Riverside in the area of speech and language multiple times before the time period at issue in this case. In September 2012, Kimberly Camba assessed Student as part of Student's triennial assessment. Ms. Camba received her bachelor of arts degree in communication sciences and disorders from St. Louis University in 2010, and her master of science in speech-language pathology from the University of Redlands in May 2012. She began working for Riverside as a speech-language pathologist in 2012.

4. At the time of her assessment, Ms. Camba was in her clinical fellowship year, and was supervised by Christina Boyd. As part of her assessment, Ms. Camba observed Student, obtained input from Student's teacher, and conducted the Evaluating Acquired Skills in Communication – Revised, a criterion referenced measure to assess a child's functional use of communication.

5. As a result of her assessment, Ms. Camba determined that Student was eligible for special education and related services under the category of speech or language impairment.

6. During the IEP team meeting at which Ms. Camba's assessment was reviewed, Student's mother expressed concerns about Student's articulation problems. The IEP team directed Ms. Camba to conduct a follow-up assessment to investigate that area. As part of her assessment, Ms. Camba considered whether Student might have apraxia.

7. Apraxia is neurological disorder that has to do with motor planning and the production of speech sounds. It is characterized by problems with prosody (intonation and stress of speech), inconsistent errors in saying words, and simplification of words. Children with apraxia tend to have limited vowel inventories and problems producing vowel sounds.

8. Ms. Camba conducted her follow-up assessment in October 2012. She administered the Goldman-Fristoe Test of Articulation (Goldman Test) and the Kaufman Speech Praxis Test (Kaufman Test). The latter was designed for younger children, and is not normed for a child of Student's age. Therefore, Ms. Camba was unable to derive any standardized scores from that test. However, it is considered a good test for evaluating if a child has apraxia, so Ms. Camba used it despite the age limitations. She also conducted an oral mechanism examination to evaluate Student's ability to imitate oral motor movements.

9. As a result of her assessment, Ms. Camba determined that Student did not have apraxia. Instead, in her opinion, Student exhibited a phonological disorder. She explained that children with a disorder in phonological processes tend to exhibit predictable patterns of speech errors. In Student's case, for example, one of Student's consistent errors involved omitting the final consonant of a word.

10. Ms. Camba found that Student did not exhibit the characteristics of apraxia, such as vowel distortions, inconsistent speech production errors, or oral groping for words (searching or making awkward movements when trying to speak) during imitative tasks. Student exhibited infrequent and sporadic groping for words, but in Ms. Camba's opinion, that was not enough to show apraxia. One of the key indications of apraxia is the child's use of inappropriate stress patterns in speech (for example, placing the stress on the wrong syllable of the word). Student did not exhibit any problems with stress patterns. Ms. Camba explained that it is possible for a child to exhibit both apraxia and a disorder of phonological processes, but based on the consistency of Student's errors and his lack of problems with stress patterns, Ms. Camba concluded that Student did not exhibit both.

11. Student's IEP team met in the fall of 2012 to discuss the assessments and develop an IEP. Under the terms of that 2012 IEP, Student was eligible for special education under the category of autistic-like behaviors. The IEP placed Student in a structured autism program for the majority of his day, and a non-categorical special day class for two hours a day. Student received the following related services: 1) behavioral aide services at school;

2) behavior intervention services in his home for five hours per week, with up to nine hours per month of program supervision; 3) individual occupational therapy services and consultation; 4) assistive technology, including an iPod equipped with vocalization software; and 5) speech and language services. The IEP also found Student eligible for extended school year services in the summer and five hours of intensive behavior instruction during the winter break.

12. The speech-language services called for in the IEP included two individual weekly sessions of 20 minutes each and one weekly group session lasting 20 minutes.

13. Student's mother signed her agreement to that IEP on December 10, 2012. That IEP was still in effect on January 23, 2013, when the time period at issue in the instant case began.

The March 2013 Independent Speech Assessment and the April 2013 IEP

14. Student's parents disagreed with Ms. Camba's assessments and requested that Riverside fund an independent educational evaluation of Student. Riverside agreed to do so.

15. Judy Segal conducted that independent assessment in March 2013. Ms. Segal has been licensed as a speech-language pathologist in California since 1984. She received her bachelor of arts degree in speech therapy in 1968 and her master of arts degree in speech pathology in 1982. She also completed coursework toward a doctoral degree. She received her Certificate of Clinical Competence from the American Speech-Language Hearing Association (ASHA) in 1983. Over the years, she has worked as a speech pathologist, as a professor at various universities, and as a consultant to school districts and speech-language pathologists.

16. As part of her assessment, Ms. Segal reviewed Student's records, including Ms. Camba's assessments, observed Student in school, interviewed Student's teacher and parent, and administered various tests, including the Peabody Picture Vocabulary Test, the Expressive Vocabulary Test – Second Edition, the Sequenced Inventory of Communication Development – Revised, and the Kaufman Test. She also conducted an oral peripheral examination, and attempted to obtain a spontaneous language sample. However, due to Student's "severely unintelligible speech production and limited spontaneous oral language production," Ms. Segal was unable to collect or analyze a spontaneous language sample.

17. Ms. Segal concluded that Student exhibited "a severe communication disorder characterized by atypical development of both receptive and expressive language, impaired auditory language processing, deficits in pragmatic skills, and impaired articulation skills secondary to an oral apraxia and an apraxia of speech." She recommended, among other things, that Student receive speech-language therapy five times a week, consisting of three 30-minute sessions in the school setting, along with two weekly, individual, one-hour therapy sessions after school by a licensed speech-language pathologist with experience treating children with autism and apraxia. In her report, she referred to the ASHA standards

for apraxia, which noted “emerging research support for the need to provide three to five individual sessions per week for child with apraxia as compared to the traditional, less intensive, one to two sessions per week.”

18. Student’s IEP team met again on April 24, 2013, after Ms. Segal had completed her assessment. Student’s mother and Ms. Segal participated in the meeting. The team agreed to change Student’s placement from the autism-specific class to a non-categorical special day class. The team also added speech or language disorder as a secondary eligibility category.

19. The team agreed to add 11 sessions of individual speech-language therapy between the date of the meeting and Student’s next annual IEP in September 2013. The team also added new or modified goals in the areas of communication, including goals for: 1) using two-word phrases to describe a picture or object; 2) receptively and expressively labeling prepositions to respond to 20 location commands (using words, gestures, signs or Student’s iPod); 3) improving the use of final consonants in consonant-vowel-consonant words; 4) increasing intelligibility by producing consonant-vowel-consonant words and consonant-vowel-consonant-vowel words; 5) responding to “where” questions by using two-word utterances (verbally or using picture symbols); and 6) a pragmatic goal requiring him to initiate greetings or make requests for desired objects. Some of these new or modified IEP goals were based on Ms. Segal’s input.

The 2013 – 2014 School Year (Student’s Third Grade Year)

20. On September 24, 2013, Student’s IEP team met for his annual IEP review. Student was in third grade at the time. Student’s mother signed her consent to the IEP on September 30, 2013, with the exception of some of the IEP language regarding the behavioral aide. The IEP continued Student’s eligibility for special education under the primary eligibility category of autistic-like behaviors and the secondary eligibility category of speech or language disorder.

21. At the time of the meeting, Student had met his academic goals in the areas of reading, math, and spelling and had made partial progress on his writing goal and motor skills development goals. He also met all of his behavioral goals, except for his goal regarding his toileting routine in which he made partial progress. Some of the behavioral goals he met involved communications.

22. With respect to the speech-language goals described in Factual Finding 19 above, he met three of his goals: 1) using two word phrases to describe the picture or object; 2) the goal which required him to produce consonant-vowel-consonant and consonant-vowel-consonant-vowel words; and 3) the goal which required him to answer “where” questions with two-word utterances. He made partial progress on two of his language goals: 1) the goal requiring him to say his final consonant sounds in consonant-vowel-consonant words; 2) and his pragmatic communication goal which required him to respond to greetings and request high interest objects.

23. Although he did not meet the goal related to labeling prepositions, he made substantial progress on that goal. During the year before the September 2013 IEP team meeting, Student had not understood prepositions. By the time of the September 2013 IEP team meeting he could recognize prepositions such as in, on, and under. The goal called for Student to have 80 percent accuracy in the area, but he was only at 60 percent accuracy as of the meeting, so technically he had not met the goal, despite his significant progress.

24. The new IEP included goals in the areas of academics (reading, writing, spelling, and math), motor skills, behavior (responding to questions in class, visually referencing peers when those peers were talking, asking information-seeking questions, answering “who, what, or where” questions either verbally or with an assistive technology device, and participating in playground games).

25. The speech-language goals included: 1) use of two-word phrases, either verbally or with an assistive technology device, to describe a picture or object, given no more than two visual or verbal cues; 2) labeling locations of objects for prepositions when asked “where” questions, verbally or with his assistive technology device; 3) properly saying the final consonants in consonant-vowel-consonant words with 80 percent accuracy, given no more than two visual or verbal cues; 4) initiating greetings or making requests or comments during a game, either verbally or with his assistive technology device, given no more than two visual or verbal cues; 5) use of pronouns (correctly pointing to pictures of boys and girls when given the pronoun labels “he” or “she”); and 6) correctly saying two-syllable words with 80 percent accuracy, given no more than two visual or verbal cues.

26. The IEP continued Student’s placement in the non-categorical, moderate-severe special day class, with designated instruction and services including: 1) occupational therapy; 2) intensive behavior services both at school and at home; 3) assistive technology services; 4) specialized academic instruction; 5) extended school year services; and 6) speech-language services. The speech-language services Student received were increased from his prior year’s annual IEP to three weekly individual sessions for 20 minutes per session, and one weekly group session for 20 minutes per session.

The 2014 – 2015 School Year (Student’s Fourth Grade Year)

27. Student’s IEP team met in the fall of 2014 for his next annual IEP review, at the beginning of Student’s fourth grade year. The first meeting was on September 24, 2014, followed by several additional meetings. The IEP was finalized in December 2014. The IEP continued Student’s eligibility under the category of autism, with the secondary eligibility of speech or language impairment.

28. At the time of the IEP meeting, Student had met his goals in the area of reading, spelling, writing two words about a picture, and cutting simple pictures. He made substantial progress on his academic goals related to writing or typing his first and last name, house number and street name independently, and on his math goal regarding choosing appropriate strategies. He either met or made progress on his motor skills goals.

29. With respect to his speech-language goals listed in Factual Finding 25 above, he met five of the goals and made progress on the goal relating to initiating greetings or making requests or comments during a game. He either met or made progress on his behavioral goals related to communications described in Factual Finding 24 above.

30. The IEP proposed academic goals in the areas of reading, writing, spelling, and math, fine motor skills, self-care skills, and behavioral goals. It contained speech-language goals including: 1) describing pictures, verbally or with assistive technology, using two or more words by attribute, category or object function; 2) stating final consonants sounds with 60 percent accuracy without printed cues; 3) initiating greetings, using social pleasantries and making requests, either verbally or with his assistive technology, during a structured activity with no more than one visual or verbal cue; 4) saying multisyllabic words given no more than two visual or verbal cues; 5) correctly answering yes or no questions and simple “wh” (what, where, when, who) questions about preferences, routines or pictures; 6) using subjective pronouns, verbs and nouns to describe pictures; and 7) following three-step related sequence directions. Some of his other IEP goals also involved communication, such as a behavioral goal that dealt with Student appropriately gaining the attention of peers and adults in the classroom when making a request.

31. The IEP called for Student to be educated in a non-categorical special day class, with occupational therapy services, specialized academic instruction, behavior intervention services, consultation between the various professionals, and extended school year services. The speech and language services consisted of three 20-minute individual speech sessions per week and one 20-minute group session per week.

32. At the time of the hearing in May 2015, Student’s special day class consisted of approximately 12 children, a teacher, classroom aides, and the behaviorist who worked directly with Student. Student continued to receive his other IEP services, including occupational therapy and the behavioral services in his home.

33. In March 2015, about a month and a half before the hearing, Ms. Segal assessed Student again, this time at the request of Student’s parents. She reviewed records, interviewed Student’s mother, and conducted testing, including the Kaufman Test, the Goldman Test and an oral peripheral examination. During the hearing, she explained that her assessment was intended to be a motor-speech evaluation. She did not conduct a general language evaluation.

34. Once again, Ms. Segal concluded that Student had apraxia. She believed that the results of the oral peripheral examination were consistent with apraxia. She noted that Student’s attempts to imitate facial gestures “were characterized by a limited range of movement, some groping, and the inability to isolate one movement from another.” In her opinion, the results of the Kaufman Test and Goldman Test also indicated apraxia. She was unable to assess his prosody (intonation and stress) and fluency because of his limited spontaneous oral production. From the limited samples she heard, she found that Student had no problems with vocal pitch and quality.

35. Ms. Segal recommended five speech and language sessions a week, consisting of three 30-minute speech sessions at school, and two one-hour-long sessions after school. During the hearing, she explained that repetition of motor skills is very important for treating apraxia, and a therapist should get “40 hits” a session with a child when working on a particular area of speech. In other words, the child should correctly respond to each target sound 40 times each session for the session to be considered therapeutic. In her opinion, Student was not getting this intensity of motor-skills practice during his weekly speech-language sessions with Riverside.

36. For purposes of this case, Student does not dispute that he gained meaningful educational benefit in all other areas besides communication. The evidence also supported this progress. In addition to the IEP’s, which showed that Student consistently met or made progress on his academic and behavioral goals, the testimony of the Riverside witnesses was unanimous that Student made progress. Student’s classroom teacher Kirsten Carlson testified to the progress Student made in academic subjects. In her opinion, Student has made progress in every area.

37. Heidi Glesne, the Executive Clinical Director of Autism Behavior Consultants, the company which provided Student’s behavioral aide, testified to Student’s improvements in behavior and functional communication (such as making eye contact with a speaker). Cynthia Hartshorn, a Program Specialist who attended some of Student’s IEP meetings, also testified to the steady progress he has made.

38. Even Ms. Segal agreed that Student made some progress, although she did not believe he made as much progress as he would have with a proper speech program.

The Disagreement Among the Witnesses Regarding Student’s Communications Needs, Progress, and Recommended Program

39. The main dispute in this case arises in the area of speech and language. Student’s mother raised concerns during the hearing that Student does not have a functional means of communication. He cannot tell his mother his basic wants and needs. She does not believe he is making appropriate progress in the area of speech and language in his public school program. She is concerned because Student did not have a goal to address every area of deficit in speech and language. In Student’s written closing argument, Student raised concerns that, despite all the years of therapy, Student is still below the two-year-old level on the Kaufman Test, and has never been able to say the word, “yes.” His IEP is currently trying to get him to use the word “ok” instead.

40. During the hearing, the parties’ experts disagreed on Student’s diagnosis, the appropriate services for Student in light of his diagnosis, and on whether Student has gained meaningful educational benefit in the area of speech and language.

DOES STUDENT SUFFER FROM APRAXIA OF SPEECH IN ADDITION TO AUTISM?

41. The first disagreement between the experts involves whether Student has apraxia of speech in addition to his communications problems related to his autism. While Ms. Segal and Ms. Camba both acknowledged that inconsistency in speech errors is one of the hallmarks of apraxia, they disagreed as to whether the speech errors exhibited by Student were consistent or inconsistent.

42. Ms. Segal testified that inconsistent speech errors can occur when a child is able to produce a sound in isolation, but cannot do so when that same sound appears at the middle or the end of a word. She found that Student made inconsistent errors of this type. For example, she noted that in Ms. Camba's testing, Student substituted "m" for "h" in isolation, but did not do so consistently when using an "h" sound in words.

43. Ms. Camba, on the other hand, opined that the types of articulation errors made by Student were consistent – for example, Student would consistently omit the final consonant from words. In her opinion, even the results of Ms. Segal's testing showed a pattern of consistent errors. The consistency of the errors indicated a phonological processing disorder related to his autism, not apraxia in addition to his autism.

44. The two experts also disagreed on the extent that Student groped for words. Ms. Segal reported that she observed frequent groping behaviors by Student, while Ms. Camba noted some groping behavior but not enough to indicate apraxia.

45. Ms. Segal criticized Ms. Camba's 2012 assessment because Ms. Camba did not record all of Student's responses to stimulus items and incorrectly gave Student credit when he did not properly produce the required phoneme. She was also critical of Ms. Camba for failing to determine raw scores or age-equivalent scores for the tests she gave. In her opinion, Ms. Camba found inconsistent articulation errors that are an indication of apraxia. Ms. Segal opined that she could account for all of Student's errors through a diagnosis of apraxia, but not a phonological processing disorder. In her opinion, Student's lack of intelligible speech interfered with his educational program.

46. Ms. Camba disagreed with Ms. Segal's characterization of Ms. Camba's report. She testified that Ms. Segal did not properly read her handwriting, so Ms. Segal thought some notations were errors when they were actually correct. Ms. Camba explained that she was not required to provide scores (such as age-equivalent scores) on the Kaufman test, because it was not normed for children of Student's age and she was just using it for information. She disagreed with Ms. Segal's opinion that her assessment found inconsistent errors and opined that Ms. Segal's assessment showed consistent errors by Student (such as omitting the final consonant of words) that were indicative of a phonological processing disorder, not apraxia. Ms. Camba noted that Ms. Segal reported Student had a rapid rate of speech, but a child with apraxia would typically speak too slowly, not too quickly.

47. Ms. Camba also felt it was significant that Ms. Segal did not make any findings regarding Student's prosody, although prosody problems are one of the characteristic behaviors for a child with apraxia. Ms. Segal, however, opined that a child did not have to exhibit all the characteristic behaviors to be diagnosed with apraxia.

48. In addition to Ms. Camba, Riverside also relied on the testimony of Jennifer Ferber. Ms. Ferber is the Riverside speech-language pathologist who currently provides speech-language services to Student at school. She has been providing those services to Student in accordance with his IEP for over a year. She also consults with Student's classroom teacher regarding Student's speech and language needs.

49. Ms. Ferber has been a speech-language pathologist for approximately eight years, is a member of ASHA, holds a Certificate of Clinical Competence, and has the appropriate credentials to provide speech-language services in schools. She has worked with individuals with apraxia in both a clinical setting and in a school setting.

50. Ms. Ferber assessed Student in 2010, but had not formally assessed him during the time period at issue in this case. She based her testimony on her review of the assessments and her knowledge of Student's needs based on the time she has worked with him. In Ms. Ferber's opinion, Student does not present with apraxia. She believes that Student has an impaired ability to communicate due to his autism. She testified that a child with apraxia cannot consistently produce appropriate vowel sounds, but Student is able to do so. She also believes the speech errors that Student makes tend to be consistent.

51. Ms. Ferber did not agree with Ms. Segal's findings that Student's inability to imitate oral motor tasks indicated apraxia. Instead, she believed it is difficult to accurately assess Student's ability to imitate motor tasks because of Student's autism. In order to imitate a motor task, the child has to be focused on the task. Student's autism interferes with his ability to focus and stay on task.

52. Both sides present strong evidence on this issue. Student's position is supported by the qualifications of his expert. Ms. Segal was a highly experienced expert witness with many years of practice in the field of speech and language. Her testimony was sincere that she believed Student suffers from apraxia in addition to autism. Ms. Camba was a fairly new speech-language pathologist at the time she did her 2012 assessment. Ms. Ferber was more experienced, but there was no evidence that she had formally assessed Student since 2010.

53. However, despite Ms. Segal's qualifications, the more persuasive evidence supports Riverside's position. There were weaknesses in Ms. Segal's opinion regarding Student's diagnosis that make it less persuasive. Student did not exhibit the types of behaviors that would indicate apraxia. For example, he was able to produce vowel sounds consistently, and his speech errors tended to fall into consistent patterns, such as the deletion of the final consonant of words.

54. One of the key characteristics of apraxia involves problems with prosody (stress and intonation). No expert found that Student exhibited any problems in these areas. While all the experts noted that Student's limited vocalizations made this characteristic of apraxia difficult to assess, there was still no evidence of those problems whatsoever in the limited speech Student produced. Ms. Segal acknowledged this, but diagnosed apraxia despite the lack of prosody problems.

55. Even Ms. Segal's findings regarding Student's inability to imitate oral motor skills were not persuasive on the issue of apraxia. Ms. Ferber was persuasive in her testimony that Student's limited attention and focus due to his autism would have affected his ability to imitate those skills.

56. Ms. Ferber worked with Student individually three times a week and consulted constantly with his classroom teacher. She was well aware of Student's abilities and his limitations. Her practical knowledge of Student gave her a perspective that Ms. Segal did not have. Ms. Segal had only her limited knowledge based on her testing sessions.

57. The weight of the evidence supported Riverside's position that Student did not demonstrate apraxia of speech in addition to his communication problems due to his autism.

DID RIVERSIDE OFFER STUDENT AN APPROPRIATE PROGRAM TO ADDRESS HIS NEEDS AND ENABLE HIM TO GAIN MEANINGFUL EDUCATIONAL BENEFIT?

58. The parties' experts also disagreed on the appropriate type and duration of services necessary to address Student's speech and language needs. Ms. Segal believed that the way to remediate apraxia was through constant repetition to address the muscle-based aspects of speech-language production. She explained that a child must have "40 hits" per targeted sound during each therapy session in order for the treatment to be considered therapeutic. She testified that ASHA recommends that type of intensive program.

59. Ms. Segal opined that the "40 hit" program she recommended for Student would be appropriate. Based on her experience with him during her testing, she felt that Student could tolerate the intensive, five-times-a-week speech program, with hour-long sessions. She explained that he was able to complete 20-minute testing sessions with a break in between.

60. Ms. Ferber disagreed with Ms. Segal's recommendation for hour-long sessions and the recommendation that Student obtain "40 hits" a session. Ms. Ferber felt that an hour-long session would be too long for Student. Even with the 20-minute sessions, Student needed frequent breaks and got out of his chair when he was frustrated. Ms. Ferber did not work on anything for longer than five minutes at a time with him during her 20-minute speech sessions. They tended to work on three to five activities during each session. In her experience, when Student was asked to perform a task repetitively, he got frustrated. Once Student learned a skill, he got easily frustrated and distracted when forced to repeat that skill multiple times. When he was frustrated, Student's behaviors could include dropping to the

floor, banging his head, leaving his chair, and similar conduct. In Ms. Ferber's opinion, Student would not receive educational benefit if the methodology used by his speech pathologist required him to obtain "40 hits" in an hour. During her testimony, she used the term "drill and kill" to describe the effect of that type of program on Student.

61. In Ms. Ferber's opinion, the speech-language services and supports in Student's IEP's were sufficient to meet Student's needs.

62. Ms. Ferber's testimony was highly persuasive on this issue. She works with Student on an almost daily basis and knows his needs very well.

63. Even if Ms. Segal was correct that Student had apraxia, a FAPE must still be based on the child's unique, individual needs. Despite Ms. Segal's excellent qualifications, it appears that she may have made a recommendation based on Student's *diagnosis* rather than his *individual needs*. She testified to the recommendations made by ASHA for treating children with apraxia and how she followed those recommendations. The evidence demonstrated that Student would not have tolerated the intensive "40-hit" methodology that ASHA recommends to treat apraxia. That methodology would be of little use to Student, if he got frustrated after the first few hits and began engaging in problem behaviors.

64. The Riverside program, on the other hand, was designed with Student's unique needs and abilities in mind. Ms. Ferber's testimony in this regard was persuasive. The IEP speech-language services were reasonably calculated to provide Student with educational benefit at the time the IEP offers were made.

DID STUDENT MAKE PROGRESS IN SPEECH AND LANGUAGE IN HIS RIVERSIDE PROGRAM?

65. The experts also disagreed as to whether Student made meaningful progress in the area of speech and language. When Ms. Segal conducted her follow-up testing in 2015, she concluded that Student's test results in the Kaufman Test remained below the two-year-old level, just as they had been when she tested Student in 2013. She also found that Student exhibited similar problems with oral motor skills as he had in 2013.

66. During her testimony, Ms. Segal admitted that Student had made some progress in the area of speech and language. For example, she testified that when she tested Student in 2015, Student knew more words and was attempting to say more complex sounds than in her testing two years before. When Ms. Segal administered the Kaufman Test to Student in 2013, she was unable to administer the third part of the test because of Student's severe language problems. In 2015, Student's language skills had improved enough so she could administer that third part of the test to Student and obtain a raw score. Student's raw score on the second part of the Kaufman Test also improved – it went from 28 to 37. However, that was not the rate of progress she would have expected for Student.

67. Ms. Segal opined that, if Student had received all the speech and language services she recommended, he would have developed at least some degree of functional oral language. In her opinion, Student needs 250 hours of speech language services per year for two years to make up for the speech services he did not receive. She also believes that he requires the full one-hour speech-language sessions that ASHA recommends, and that he should have five one-hour or half-hour sessions each week, just as ASHA recommends.

68. Ms. Ferber disagreed with Ms. Segal. In her opinion, given Student's needs and abilities, she believes Student has made good progress and that the services called for in the IEP's will enable him to continue that progress. In the time she has been working with Student, his intelligibility has improved. He also has increased his ability to add final sounds to words.

69. Ms. Ferber explained that Student receives other assistance regarding language in addition to his formal speech-language services. His special day class is a language-rich environment in which the pupils work on vocabulary growth and pronunciation of words. Student also receives language support from his behavioral specialist.

70. Student's classroom teacher Ms. Carlson also testified to Student's progress in the area of speech-language. She said he understands more words receptively and will use his iPod for expressive language when prompted. In her experience, Student's iPod is his functional mode of communication. When asked on cross-examination whether she thought Student used the iPod because people did not understand his speech, she stated that she did not think so. She explained that Student did not try to speak first – he just used his iPod to give an answer.

71. Ms. Camba also believes that Student is making progress in the area of speech and language with his current services provided by Riverside.

72. In his written closing argument, Student states that given Ms. Segal's "recommended program, [Student] has a strong likelihood of becoming fully verbal." However, Ms. Segal's opinion was not that sweeping. Her report noted that Student did not have a functional communication system and that he required intensive speech-language services to develop one. She testified that, if Student was given the recommended program, she expected Student to develop some degree of functional oral language. She anticipated that Student's intelligibility would improve from 25 percent (his current level) to approximately 50 percent. However, his other speech problems associated with his autism, such as his pragmatic problems with speech and failure to initiate conversations, would remain.

73. Ms. Ferber disagreed with Ms. Segal's opinion that Student did not have a functional system of communication. She explained that Student could use single word phrases and had an iPod with vocalization software, which he used when prompted. He never initiated communication, even with the iPod. While she agreed that helping his

articulation would assist with his speech, in her opinion he had a functional communication system at school when working with people who knew him.

74. In Ms. Ferber's opinion, whether or not Student has apraxia, he still made adequate progress on his IEP goals. She also believes that his goals addressed all the areas of deficit where he needs to build further skills.

75. The testimony of the Riverside witnesses was persuasive on this issue – the weight of the evidence supported Riverside's contention that Student gained meaningful educational benefit in the area of speech and language during the times at issue in this case. Although he still has significant communications problems due to his autism, he has been making gradual progress in all academic and behavioral areas, including the area of speech and language.⁴

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.; 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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

⁴ In his written closing argument, Student challenged his IEP goals, because many of the communication goals permitted Student to use his assistive technology device (iPod) for communication, instead of requiring Student to vocalize his words. Student's complaint originally alleged issues challenging the goals, but Student later narrowed the issues in the case and excluded the issues regarding goals. Even if those issues were still part of the case, Student did not bring in sufficient evidence to show the goals were improper. As Ms. Ferber testified, Student's functional method of communication was his iPod, so it was appropriate for the goals to permit that type of communication as an alternative to using his voice. In addition, Student admits that at least two of the goals require Student to use his voice.

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 California, related services are also called designated instruction and services].) 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 that 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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*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 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 (*Mercer Island*) [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. 951, fn. 10.)⁵

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) & (f); 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

⁵ Student's discussion of the *Rowley* standard in Student's opening brief is incorrect, in that Student states the “meaningful benefit” standard is a “more exacting form of review” than the “some benefit” standard. The Ninth Circuit has made it clear that those terms refer to the same standard. (*Mercer Island, supra*, 592 F.3d at p. 951, fn. 10.) There is no heightened standard created by the words “meaningful benefit.”

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); Ed. Code, § 56505, subd. (l).) 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. 49, 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].)

Riverside Offered Student Appropriate Speech and Language Services

5. Speech-language pathology and audiology services are included as related services under the law. (See Ed. Code, § 56363, subd. (a), (b)(1).) Those services are necessary “as may be required to assist an individual with exceptional needs to benefit from special education. . . .” (Ed. Code, § 56363, subd. (a).)

6. 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. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) 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.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).)⁶ The Ninth Circuit has endorsed the “snapshot rule,” explaining that an IEP “is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

7. At all times within the statute of limitations period in the instant case, Riverside has provided Student with speech-language services. The question is whether those services were sufficient to address Student’s needs in the area of speech and language. For purposes of the instant case, Student does not dispute that he gained meaningful educational benefit in academic and behavioral areas. The evidence supported this – he consistently met most of his academic and behavioral goals. In addition, his teachers and service providers testified to the consistent progress he made.

8. The evidence also showed that he made meaningful progress in the area of speech and language. Even Ms. Segal noted some progress by the time of her 2015 assessment. However, Student contends that such progress was not meaningful progress

⁶ Student’s recitation of the law erroneously cites *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, for the proposition that “the reasonableness of an IEP need not be determined solely based on facts available to the school at the time the IEP was formulated.” To the contrary, the *Adams* case cautions that a school district’s actions should not be judged in hindsight, but instead based on what was objectively reasonable at the time the offer was made. (*Id.* at p. 1149.)

under the law. Student contends that his speech remains unintelligible and below the two-year-old level. Student still exhibits final consonant deletion and has not learned to say the word “yes.” Student contends that Student’s lack of progress has occurred because Riverside has not been providing Student with the intense speech-language services necessary to address his apraxia.

9. As stated above in the Factual Findings, Student failed to meet his burden to show that he suffers from apraxia. While Ms. Segal was unquestionably qualified, her testing did not produce sufficient findings to prove that Student suffered from apraxia in addition to his autism as the source of Student’s speech and language deficits. Student did not exhibit any problems with prosody, one of characteristics of apraxia. Ms. Ferber and Ms. Camba were persuasive in their testimony that Student’s failure to imitate oral motor movements was the result of Student’s lack of attention and focus related to his autism, rather than an inability to produce the oral-motor movements. Ms. Segal’s test findings indicated consistent types of errors, such as a failure to state the final consonant of a word, not the inconsistent errors that are the hallmark of apraxia.

10. In addition, even if Ms. Segal was correct that Student had apraxia in addition to his autism, Student still failed to prove his case from a legal point of view. Under the *Rowley* standard, a school district is only required to provide a program that will enable a special education pupil to gain educational benefit in light of the child’s abilities and needs. (See *T.R. v. Kingwood Township Board of Education* (3rd Cir. 2000) 205 F.3d 572, 578.) The evidence showed that Student gained meaningful educational benefit in light of his severe autism. He consistently met his academic and behavioral goals. He met or made progress on his communications goals. Even Ms. Segal recognized that Student made progress in the two years between her assessments.

11. The weight of the evidence showed that Riverside’s IEP’s were reasonably calculated to provide Student with meaningful educational benefit at the time they were offered. Student did, in fact, gain meaningful educational benefit from his program so there was no need to change the amount of speech-language services in his IEP to the intensive program Ms. Segal recommended. Student failed to show a denial of FAPE in this regard. As long as a child is gaining meaningful educational benefit, a school district is not required to maximize the child’s education or provide a program preferred by a parent. (*Gregory K., supra*, 811 F.2d at p. 1314.)

12. Moreover, in the instant case, it was clear from Ms. Ferber’s testimony that Student could not have tolerated the intensive, highly repetitive program that Ms. Segal recommended. Instead of helping him gain greater benefit, Ms. Segal’s proposed program could have increased Student’s frustration and problem behaviors. Ms. Segal had not worked with Student on a day-to-day basis. She had only her limited contact with Student during her testing on which to base her opinion.

13. Riverside's program, on the other hand, was designed to meet Student's unique needs, was reasonably calculated to provide Student with meaningful educational benefit, and Student benefitted from that program. There was no denial of FAPE.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party on all issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: June 12, 2015

/s/
SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings