

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

EAST WHITTIER CITY SCHOOL
DISTRICT,

OAH Case No. 2015050689

EAST WHITTIER CITY SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015020617

DECISION

East Whittier City School District filed a due process hearing request with the Office of Administrative Hearings, case number 2015020617 (District's Case) on February 11, 2015, naming Student. Student filed a due process hearing request with OAH, case number 2015050689 (Student's Case) on May 19, 2015, naming District. On May 21, 2015, District's Case and Student's Case were consolidated and Student's Case designated the primary case for the purposes of establishing the 45-day timeline for decision. On June 22, 2015, OAH granted the parties' joint request to continue the hearing.

Administrative Law Judge Sabrina Kong heard this matter in Whittier, California, on August 25, 26, and 27, 2015.

David Grey, Attorney at Law, represented Student. Parents attended the hearing on the first day, and Mother attended the hearing on the third day of the hearing.

Jeremy Rytky and Darin Barber, Attorneys at Law, represented District. Diana Grant, District's Special Education Director, and Kelli Heise, the Special Education Local Plan Area Program Manager, attended the hearing on all days.

The matter was continued to September 21, 2015, for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

District's Issue:

Is District's Initial Multidisciplinary Developmental Evaluation in academics, health, intellectual development, language and speech communication development, motor development, social/emotional and adaptive behavior, with a report dated December 2, 2014, appropriate such that Student is not entitled to a publicly funded independent evaluation?

Student's Issue:

Did District deprive Student of a free appropriate public education by failing to consider or address Student's deaf and hard of hearing needs at the December 2, 2014 individualized educational program team meeting?

SUMMARY OF DECISION

District demonstrated that its Multidisciplinary Developmental Evaluation was appropriate and that Student is not entitled to a publicly funded independent assessment. Student did not demonstrate that District denied her a FAPE by failing to consider or address her deaf and hard of hearing needs at the December 2, 2014 individualized educational program meeting. District prevailed on all issues. Student is not entitled to any remedy.

FACTUAL FINDINGS

1. Student was a three-year-old girl who resided in the District at all relevant times. Student qualified for special education services through the Regional Center under the hard of hearing eligibility on February 27, 2012.

¹ On the first day of hearing, Student withdrew a number of issues alleged in her complaint. The issues have been rephrased and reorganized for clarity and in light of the issues withdrawn by Student. 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.)

2. Mother enrolled Student in a general education classroom at Shepherd of the Valley Preschool in September 2014. Mother taught preschool at Shepherd of the Valley Preschool, but did not teach Student's class. Student was social and she liked to talk, but her speech was unintelligible at times. Student did not have any difficulty hearing the teachers' instructions in the class. She assimilated well with all the hearing students in the class and became more social throughout the school year. Student attended Shepherd of the Valley Preschool through the date her due process request was filed.

3. District gave Parents an assessment plan on September 22, 2014. The plan included assessments in the areas of academic achievement, intellectual development, language/speech communication development, motor development, social/emotional, adaptive/behavior, and auditory skills, which included observations and records review by District's specialists. Parents signed the assessment plan on October 14, 2014.

District's Academic Assessment

4. Cynthia Gonzalez, District's academic assessor, assessed Student in the area of academics in October 2014. Ms. Gonzalez held a bachelor's degree in child development, a master's degree in deaf education, and a specialist teaching credential in deaf and hard of hearing. Before working for District, she worked at the John Tracy Clinic for four years. The John Tracy Clinic specialized in providing services to parents and students, from birth to preschool age, whose preferred communication mode was spoken language. Ms. Gonzalez also worked at a non-public school for the hearing impaired as a kindergarten, deaf and hard of hearing teacher for one school year. Ms. Gonzalez was also District's auditory-oral special day class teacher from August 2013 until the time of hearing. She taught three to five-year-olds with hearing loss. In the 2014-2015 school year, she had 11 students in a special day class. Her class focused on auditory skills, using hearing aids or cochlear implants, and speech and language development. The class did not focus on visual skills using American Sign Language. Her students were typically beginning listeners and communicators at the early stage of learning to use their hearing aids or cochlear implants. Her students had profound hearing loss and very basic spoken language skills. Ms. Gonzalez first met the family in 2013 when she taught Parents spoken language development skills for home use with Student. She worked with Student for about a year at the John Tracy Clinic.

5. Ms. Gonzalez was qualified to administer the Brigance Inventory of Early Development, Third Edition. She frequently used the Brigance Inventory of Early Development in assessing students' academic performance. She followed protocols when administering the non-culturally discriminatory and normed referenced test based on the general population students of the same age or grade level as Student. The test was administered in English, and Student was only given credit for responses in English. Ms. Gonzalez administered the standardized test in a District classroom with Mother present.

Sarah Carlton, District's Program Specialist, observed the assessment, and Michelle Park, District's speech and language pathologist, took notes. Ms. Carlton and Ms. Park did not interact with Student when Ms. Gonzalez administered the assessment. Ms. Gonzalez obtained information from Parents and observed Student both formally during assessment administration, and informally before the assessment, and determined that Student was attending, communicating, and listening appropriately.

6. The Brigance Inventory of Early Development assessed Student's literacy and math skills. This inventory measured Student's ability to solve problems using intuition, perception, and verbal and nonverbal reasoning. Student performed in the average range in both literacy and math, and demonstrated appropriate academic readiness skills without any academic concerns. Student could listen to a story read aloud and comment appropriately about the story and the characters. When handed a book upside down, she turned it right side up, although she did not understand that the text read from left to right. Ms. Gonzalez concluded that Student demonstrated age appropriate interests in books. In math, Student understood the concept of "just one" and "one more." She had difficulty understanding higher level number concepts of "Give me two, three, five, seven, and nine." Student counted from one to four, consistently skipped five through eight, and ended with nine and ten. Student understood the concept of which number was more, such as five was more than two.

7. Based on Student's academic performance, her observations of Student, and Mother's input, Ms. Gonzalez believed Student's age appropriate academic skill level was unusual for a student with hearing loss. Student showed that she was capable of processing information presented verbally in English with age appropriate academic skills which led Ms. Gonzalez to conclude that Student's hearing loss was not severe, that Student used her hearing aids well, and that Student was not likely to have difficulty listening through background noise in a small class using her hearing aids.

District's Speech and Language Assessment

8. Marcy Fox assessed Student's speech and language development. Ms. Fox held a bachelor's degree in speech pathology and audiology, a master's degree in communicative disorders, and a certificate of clinical competence in speech and language pathology. She was licensed in California by the Speech and Language Pathology and Audiology Board, and certified as a speech and language pathologist by the Hanen Centre. She became a speech and language pathologist in 2004. She also taught preschool for various school districts where she worked with students who had severe language disorders, including receptive, expressive and communicative disorders. Since August 2014, Ms. Fox worked for Whittier Area Cooperative Special Education Program as a speech and language pathologist conducting speech and language assessments. She administered at least 500 speech and language assessments, including assessing students with

hearing impairments. Ms. Fox administered the Preschool Language Scales, Fifth Edition, over 500 times and used the Spanish Edition over 75 times. She administered the Goldman Fristoe Test of Articulation, Second Edition, over several hundred times, and the Khan-Lewis Phonological Analysis, Second Edition, approximately 30 times. She used these testing instruments when she assessed Student.

9. Ms. Fox administered all of the assessments in English except for the Preschool Language Scales, Fifth Edition, which was administered in English first, and when Student was unable to respond correctly in English, then questions were translated to Spanish by the District's Spanish translator/speech and language pathologist assistant, Maricella Flores. The manual for the Preschool Language Scales, Fifth Edition, Spanish Edition, stated that all bilingual students included in the normative sample were administered the items in Spanish then the missed items in English. It was not appropriate to use the Spanish Edition on English-speaking students or students who were primarily English speakers. Best practice in language assessment required testing in both languages to obtain a complete picture of the student's skills, especially for students learning Spanish first as a home language. Proficiency in speaking, reading, and writing in both languages was necessary to administer, score and interpret the Preschool Language Scales, Fifth Edition, Spanish Edition, accurately. Otherwise, collaboration with an interpreter was recommended. Ms. Flores was trained in speech pathology and assisted with assessments and therapy, was proficient in Spanish, her primary language, and hired by the District as a bilingual assistant. Ms. Flores did not participate in scoring the Preschool Language Scales, Fifth Edition. Ms. Fox was qualified to administer all of the tests, and Ms. Flores was qualified to collaborate and provide translation of the Preschool Language Scales, Fifth Edition, from English to Spanish.

10. Student was two years and ten months old when Ms. Fox assessed her. Ms. Fox administered the Preschool Language Scales because it provided an overview of language development for preschoolers by measuring their understanding and use of language. Student's total language score was that of a two years and five month old, within the average range for her age. Student had mild expressive language skill delays. Ms. Fox concluded Student needed to learn to use more words in her sentences.

11. Ms. Fox chose the Goldman Fristoe Test of Articulation, Second Edition, to measure Student's articulation and communication skills. Student performed the age equivalent of a two years and four month old. Student showed difficulty with intelligibility. Some of her errors in articulation were age appropriate in that mastery of certain sounds was not expected until Student was older. For example, Student's production of the "p" sound for the "f" sound was an error, but according to the Goldman Fristoe Test of Articulation students were not expected to produce the "f" sound until age four. Therefore, since Student was two years and ten month old at the time of the assessment, Student's inability to properly produce the "f" sound in words was age and developmentally appropriate. The test showed Student was improperly producing: (i) the "d" sound at the beginning of a word instead of a "j" sound, but that the production of the "j" sound was not expected to be produced until age

five; (ii) the “v” sound at the beginning and end of a word substituting the “d” sound in the beginning of the word and a “b” sound at the end of a word, but that the production of the “v” sound was not expected to be produced until age six; (iii) the “ch” sound at the end of a word substituting a “sh” sound, but that the production of the “ch” sound was not expected to be produced until age six; (iv) the “th” voiced sound at the beginning of a word substituting a “d” sound, but that the production of the “th” voiced sound was not expected to be produced until age seven; (v) the “th” voiceless sound at the beginning and end of a word substituting a “s” sound at the beginning of a word and substituting a “t” sound at the end of the word, but that the production of the “th” voiceless sound was not expected to be produced until age seven; and (vi) the “r” sound at the beginning of a word substituting a “w” sound, but that the production of the “r” sound was not expected to be produced until age eight. While Ms. Fox could not attribute Student’s language errors exclusively to Student’s hearing loss or age/development, she opined that Student presented as a typical hearing child during assessment because she had been wearing her hearing aids for a long time and was capable of accessing sounds and speech well with them.

12. Because of Student’s reduced intelligibility, Ms. Fox also assessed Student using the Khan-Lewis Phonological Analysis, Second Edition, which provided an in-depth analysis of Student’s overall phonological usage. Student scored the equivalent of two years and five months. The test showed that 45 percent of the time Student turned an “f” into a “p” *e.g.* articulating “pibe” for “five”, and 42 percent of the time Student turned an “r” into a “w” *e.g.* articulating “wabbit” for “rabbit”; and that Student deleted final consonant articulating “bi” instead of “bike”. Ms. Fox distinguished the difference between articulation and phonology errors, stating that a child with an articulation issue would not be able to pronounce a “g” sound for “go” or a “d” sound for “doe”, and that a child with a phonology errors could not point to a green light for “go” or an animal for “doe” because the child lacked language abilities. Ms. Fox concluded that Student had deficits in articulation and phonology because during structured portions of the assessment, Ms. Fox could understand Student, but Student’s intelligibility was reduced in spontaneous conversation and when context was removed.

13. Ms. Fox administered all the testing instruments appropriately. The testing instruments were selected and administered in a non-discriminatory manner. They were norm referenced based on the general population of students of the same age or grade level as Student. Test results were accurate, valid, and reliable. She assessed Student in a quiet District classroom with Mother, Ms. Flores, Ms. Carlton, and Rhonda Honeycutt, District’s psychologist, present. Ms. Fox and Ms. Honeycutt alternated assessing Student on the same day and in the same room, both completing their assessments in approximately two hours. None of the test manuals addressed alternating assessments and Ms. Fox’s clinical judgment that such alternating method did not modify the integrity or results of the test was not contradicted.

14. In addition to the formal testing, Ms. Fox interviewed Mother, observed Student in the Leffingwell Infant-Family Program speech and language class with deaf and hard of hearing itinerant support on November 7, 2014, reviewed all of Student's individualized family service plans,² and reviewed a packet of information supplied by Parents. Ms. Fox learned from Student's preschool teacher at Leffingwell Infant-Family Program and from Student's records that Student responded consistently to English directions, understood both English and Spanish and that Student spoke in one to five word sentences, that her receptive and expressive language skills were within normal limits, and that she displayed appropriate engagement with peers and adults.

15. Ms. Fox did not perform a technical hearing aid check. She determined that Student's hearing aids were working properly based Student's ability to follow instructions and interact appropriately. If Student's hearing aids were not operating properly, her test scores would have been lower. Ms. Fox opined that Student presented as a typical hearing child during assessment because she had been wearing her hearing aids for a long time and was capable of accessing sounds and speech well with them.

District's Psychoeducational Assessment

16. Rhonda Honeycutt conducted the psychoeducational assessment. She held a bachelor's degree in communicative disorders, with an emphasis in speech language pathology and audiology, a master's degree in counseling with an emphasis in school psychology, a California educational psychologist credential, and was a certified instructor for behavior intervention case managers, and a behavior intervention case manager. She was employed by the Whittier Area Cooperative Special Education Program as a school psychologist for 11 years, where her duties included conducting psychoeducational assessments. She had conducted over 500 assessments, between 150 and 200 assessments were with deaf and hard of hearing students, and approximately 10 to 15 percent of students she assessed used spoken English as the only communication mode, and 70 percent used both spoken English and signing as communication modes.

17. She assessed Student with the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, which she had administered between 75 to 100 times; the Battelle Developmental Inventory, Second Edition, which she had administered approximately 120 times; the Beery-Buktenica Developmental Test of Visual Motor

² Individualized family service plans are developed by Regional Centers, under authority of the IDEA (20 U.S.C. § 1400 et. seq.). States can receive funding to provide IDEA part C "early start" services to enhance the development of infants and toddlers up to three years old that have disabilities. Regional Centers provide such services, but the "early start" services do not correspond to those required for provision of a FAPE to children older than three.

Integration, Sixth Edition, which she had administered approximately 350 times; the Adaptive Behavior Assessment System, Second Edition, which she had administered approximately 300 times; and the Childhood Behavior Checklist for ages one and a half to five. She assessed Student in English, except for two questions which were translated to Student in Spanish when Student did not give the correct answer in English. Student did not correctly answer the two questions that were translated.

18. The Wechsler Preschool and Primary Scale of Intelligence measured Student's cognitive abilities. Student's full scale intelligent quotient score was in the average range, based on average scores in the verbal comprehension, visual spatial, fluid reasoning, working memory, and processing speed subtests of the Wechsler Preschool and Primary Scale of Intelligence. The only subtest where she scored in the low average range was the visual spatial subtest. The visual spatial subtest required her to recreate block designs from models/pictures and assembling pieces of a puzzle to create a representation of an identified object. She scored higher in the verbal comprehension subtest than the other two nonverbal subtests of the Wechsler Preschool and Primary Scale of Intelligence.

19. The Battelle Developmental Inventory measured cognitive development, and provided another look at Student's cognitive function. Student's full scale intelligent quotient score was in the low average range, specifically one point under the average range, based on her average scores in attention/memory and reasoning/academics subtests. The only area where her scores indicated a mild development delay was the perception/concepts subtest. That subtest showed that, while she physically explored her surroundings, placed a circle and a square on a form board, and matched a circle, square, and triangle, but she could not sort by color or size and could not identify the longer of two plastic strips.

20. The Beery-Buktenica Developmental Test of Visual Motor Integration measured Student's visual motor integration skills and showed how Student coordinated visual processing and motor development in relation to her overall cognitive development. When presented with geometric forms, Student was asked to imitate, and then to independently copy, the shapes. Student's scores were in the average range compared to same age peers, and consistent with her intelligent quotient.

21. The Adaptive Behavior Assessment System was a rating scale Mother completed which measured Student's independent and adaptive functioning. The rating scale addressed how Student's hearing impairment affected daily activities. The Childhood Behavior Checklist for ages one and a half to five measured Student's behavior, social emotional functioning, and areas of internalizing and externalizing behaviors of Student's behaviors at home. Mother completed the Adaptive Behavior Assessment System and the Childhood Behavior Checklist for ages one and a half to five. Mother's responses placed Student in the average range of functioning. Specifically, Student's score in communication was borderline average; her scores in community use and functional academics were below average; and scores in home living, health and safety, leisure, self-care, self-direction, social and motor all ranged from average to superior.

22. Ms. Honeycutt administered all the assessments appropriately, selected and administered them in a non-discriminatory manner, obtained accurate, valid and reliable results which were helpful in forming her opinions. Together these tests presented a comprehensive picture of Student's overall function.

23. Ms. Honeycutt also reviewed Student's health, developmental and functioning history and the individualized family service plan file; interviewed Mother; and observed Student during the assessments. Although Ms. Honeycutt requested permission from Parents to observe Student in the general education setting at Shepherd of the Valley Preschool, and wanted to have the general education teacher at the preschool complete a caregiver ratings form, she was unable to do so because Parents did not consent to either.

24. Ms. Honeycutt concluded: (i) Student had a higher level of cognitive function than visual/spatial reasoning, whereas a deaf and hard of hearing student would typically display strength in the visual/spatial areas of reasoning; (ii) Student's hearing loss did not impair her ability to process linguistic information as demonstrated by her test scores, most of which were in the average range as compared to her typical, non-hearing impaired peers; (iii) her verbal output was inconsistent with that of a deaf and hard of hearing student *e.g.* Student did not display a muffled speech sound.

25. The assessments were reported in a Multi-Disciplinary Developmental Evaluation Report dated December 2, 2014. According to the report, Student was a typically developing child with a mild to moderate sensory-neural hearing loss who consistently benefitted from her bilateral hearing aids since she was three months old. Student exhibited age appropriate functioning in cognition, pre-academic skills, adaptive skills, behavior, and receptive language; displayed mild delays in expressive language skills in her sentence length, with all other areas within normal limits; and displayed articulation deficits which reduced intelligibility. District concluded that Student's hearing loss did not impair her ability to process information through her hearing aids because Student consistently responded to assessor's instructions, to environmental sounds, to her name when called, even with competing auditory stimuli. District found that she had a speech/language disorder in articulation/phonology and expressive language. This impairment significantly interfered with her communication when Student produced single or multiple speech sounds. Student's articulation skills were below her chronological age or developmental level.

Sarah Carlton's Observations of the Assessments

26. Ms. Carlton observed all of Student's initial assessments to determine her ability to access information and whether, as a deaf and hard of hearing student, Student's needs, accommodations, and concerns required further testing. Ms. Carlton held a master's degree in special education for the deaf and hard of hearing with an emphasis on auditory and oral deaf education, and was certified as an auditory-verbal educator by A.G. Bell Academy for Listening and Spoken Language. As a certified auditory-verbal educator, she was trained in auditory-verbal techniques, worked as a classroom teacher, including working with parents, under the supervision of a mentor for three to five years. The only difference

between an auditory-verbal educator and an auditory-verbal therapist was that the educator was trained to work in the classroom, and the therapist was trained to work in therapy. She worked with the Whittier Area Cooperative Special Education Program since 2010 as an auditory-oral deaf and hard of hearing preschool teacher, and became the deaf and hard of hearing program specialist in 2011. Her duties as the program specialist included working with, and supervising, itinerant teachers, and working with the preschool intake team to determine the needs of deaf and hard of hearing students.

27. Ms. Carlton asked Mother to sign the consent form for permission to observe Student at the Shepherd of the Valley preschool when Student was assessed by Ms. Honeycutt and Ms. Fox. Ms. Carlton provided the observation consent form to Mother which was never returned. When Ms. Honeycutt and Ms. Flores called Mother to follow up for consent to observe, Mother reported that Student was not doing well at the preschool and was contemplating disenrolling Student. Ms. Carlton called again two weeks before the IEP team meeting and again requested consent to observe Student, emphasizing that the observation would provide District significant information regarding Student's needs and functions in the general education environment. Ms. Carlton explained that observation in the general education environment would be important to see how Student functioned in a noisy setting, how she applied self-advocacy skills, how well she followed auditory directions as an auditory learner, and how she used her hearing aids to access information. Mother explained that Student was not doing well because the classroom was small, had a large number of students, and was loud, with a noisy and old air conditioner as background noise. Mother shared with Ms. Carlton that Student was not following instructions; not focusing; not participating in class; not engaged in the activities; and not enjoying story time, an activity Student typically enjoyed. Mother informed Ms. Carlton that she disenrolled Student from the preschool. At hearing, Mother explained she did not consent to District's observation because she was concerned that District would not offer a placement if Student was already attending preschool.

28. Ms. Carlton concluded that Student had no difficulty processing linguistic information in the assessment environment, which was quiet and without background noise. Student's assessment results showed that Student's hearing loss was not impacting her education performance, specifically: Student's auditory comprehension receptive language scores were average, her verbal intelligence quotient was higher than her nonverbal intelligence quotient (which was atypical for deaf and hard of hearing students), and her academic testing scores were in the average range, displaying significant strengths in certain areas. She acknowledged that while Student had articulation, phonology, and mild expressive language issues, the errors Student displayed in the assessments could be attributed to both an age appropriate development stage and/or her hearing loss. Regardless

of the cause of these articulation, phonology, and mild expressive language issues, Ms. Carlton recommended that the IEP team develop specific goals for expressive language and phonology to address Student's deaf and hard of hearing needs.

December 2, 2014 IEP Team Meeting

29. The IEP team met on December 2, 2014. District provided Parents with a copy of the procedural rights. Mother, deaf and hard of hearing infant family specialist Katherine Hull³, Ms. Carlton, Ms. Gonzalez, Ms. Fox, and Ms. Honeycutt attended. Ms. Hull and Ms. Carlton had known Student for approximately two years. Both Ms. Gonzalez and Ms. Hull worked with Student at the John Tracy Clinic, and Ms. Carlton attended Student's individualized family service plan meetings since July 2012. Mother consented to the IEP team meeting proceeding without the general education teacher present after District explained that the general education teacher would be of limited benefit since she never met or taught Student. Mother reported that Student was not attending Shepherd of the Valley preschool, and spent the days with her grandmother. Mother shared a November 2014 audiogram with the IEP team and informed the team that Student had not changed or progressed since District assessed her. Ms. Hull reported that Student adapted well to the Leffingwell Infant-Family Program class, had progressed in her communication skills, and consistently wore her hearing aids. Ms. Gonzalez, Ms. Fox, and Ms. Honeycutt all shared their assessment findings, results and recommendations with Mother. Mother did not have any questions regarding the assessment findings and agreed with the assessment results.

30. After discussion, District found Student eligible for special education under the category of speech and language impairment, proposed expressive language and articulation/phonology goals, and offered: (i) placement in a speech class, family learning activity group known as FLAG, with speech and language services in a parent participation/training small group therapy setting once a week for 45 minutes; and (ii) deaf and hard of hearing consultation/itinerant services once a month for twenty minutes. FLAG would have a maximum of six students, mostly of students without hearing loss who would be taught spoken language through listening to sounds and working on articulation strategies employed by the speech and language pathologist and an assistant. The class would start by participating together in a 15 minute group activity such as singing or story time, then separating into three to four small groups (sometimes individually and sometimes with other students) for 30 minutes to work on a specific area of language with the guidance of the speech and language pathologist and the assistant. Parents would participate and be taught speech and language strategies to implement at home and in the community. The deaf and hard of hearing itinerant's services would address Student's deaf and hard of hearing needs,

³ Ms. Hull was also known as Ms. Kirk, her married name, at the time of the hearing, but will be referred to as Ms. Hull because all exhibits refer to her as Ms. Hull.

including monitoring Student's hearing loss, checking that hearing aids worked, and teaching auditory-oral strategies and techniques to the FLAG speech and language pathologist and her assistant. While in December 2014 Student did not need a frequency monitoring system in FLAG, one would be provided upon placement if the need arose.

31. District's proposed expressive language goal was for Student to produce three to four word sentences during structured therapy without cues 80 percent of the time because the majority of Student's utterances were single words and incomplete sentences with grammatical errors. District's proposed articulation/phonology goal was for Student to eliminate deletion of final consonants during structured conversation with one visual cue 80 percent of the time because Student displayed deletion of final consonants in speech. Based on Mother's request, District added a second articulation/phonology goal that Student would pronounce "f" and "s" properly without cues 80 percent of the time because Student mispronounced "p" for "f" 45 percent of the time. Mother agreed with all three goals, and assessments, but disagreed with District's offer of services. Mother indicated that Student needed more services and support because of Student's hearing loss and wanted Student to be placed in District's deaf and hard of hearing, auditory-oral special day class where Student would be with other deaf and hard of hearing students. Mother did not consent to the IEP, but asked to observe Ms. Gonzalez's deaf and hard of hearing special day class. While District agreed to arrange for Mother to observe the deaf and hard of hearing special day class, District explained to Mother that the special day class was inappropriate and too restrictive for Student because of her higher test scores, language skills and functioning level. Ms. Gonzalez shared that the students in the special day class had profound hearing loss and basic spoken language skills and, unlike Student, had little experience communicating using spoken language. Mother did not request auditory-verbal therapy at the IEP team meeting. District's placement determination was based on Student's needs and goals and not her eligibility category. The IEP team did not believe that a general education placement was needed to help Student meet her IEP goals.

32. On January 8, 2015, Parents requested an independent educational evaluation with a certified auditory-verbal therapist and an auditory-oral, deaf and hard of hearing specialist assessment, and indicated for the first time to District that they disagreed with Student's eligibility, present levels of performance, goals, services, placement, meeting notes, and assessments. Mother never observed FLAG, and did not ask to observe FLAG.

33. On January 29, 2015, District sent Parents written notice denying Parents' request for an independent educational evaluation.

34. Parents were invited to attend a follow-up IEP team meeting after District filed for due process on February 11, 2015. Parents declined.

Student's February 2015 Auditory Processing Assessment

35. Jennifer Reeder assessed Student with hearing aids in February 2015 to determine Student's present levels of function because Mother wanted Student to receive auditory-verbal therapy and District did not offer any. Ms. Reeder held a bachelor's degree in exercise science and a master's degree in speech and language pathology with an emphasis in oral and deaf education. She had been in private practice as a certified auditory-verbal therapist and owner of Speech Bananas since 2007, where she worked with hearing loss students who learned through oral and spoken language, and provided direct services to students and various school districts including assessing students. She was a California certified speech and language pathologist, had a certificate of clinical competence in speech and language pathology, and was certified by A.G. Bell Academy for listening and spoken language specialist as an auditory-verbal therapist. She received 1200 training hours, over three years, of parent/child therapy focused on listening and speech with a mentor who observed and critiqued her work, and she passed a rigorous test to become a certified auditory-verbal therapist. She was also certified by the Hanen Centre to work with students with speech and language delays, the PROMPT Institute to work with students with significant speech delay disorders, and the Beckman Oral Motor Assessment and Intervention to work on oral motor and speech skills.

36. Ms. Reeder assessed Student using the Ling Six Sound Test and found Student could identify all six sounds with 100 percent accuracy next to the sound source and in a quiet environment. She assessed Student with the Receptive/ Expressive Emergent Language Test, Third Edition, which was a questionnaire completed by Parents and found that Student performed the age equivalent of a 22 month old in understanding objects, commands and explanations of how things worked, and that Student performed the age equivalent of a 25 month old in language use of words, sentences, and phrases to express herself and her needs. This test was only standardized up to 36 months for students with typical hearing. At the time of testing, Student was 37 months old. Ms. Reeder used 34 months when calculating Student's age performance because Student's listening age was three months less than her chronological age as Student did not use her hearing aids until she was three months old. Therefore, based on Student's 34 months of listening age, Student was 12 months delayed in receptive and nine months delayed in expressive language use.

37. Ms. Reeder assessed Student with the Compass Test of Auditory Discrimination, tested Student's ability to distinguish sounds, and concluded from Student's scoring in the 54 percentile that Student's speech would be fairly unintelligible. Ms. Reeder opined that because Student could not hear the difference between sounds depending on the frequency and placement, it could impact her articulation and speech, causing her to flip her sounds. Ms. Reeder assessed Student with the Children's Home Inventory for Listening Difficulties to determine Student's ability to listen in different environments *e.g.* quiet, noisy, distance, social media. Student scored the highest for listening in a quiet environment, meaning she heard almost all the words, usually understanding everything. She scored the

lowest for listening at a distance, meaning either she was capable of hearing most of the words and understood more than half of what was said, or sometimes she could hear, but understood less than half of what was said. Student's average under all listening conditions showed that she heard almost all of the words, sometimes misunderstanding what was said. Ms. Reeder said a student without hearing loss should score higher, but did not opine how Student's scores related to her cognitive ability or age development.

38. Ms. Reeder assessed Student with the Clinical Evaluation of Language Fundamentals Preschool, Second Edition, and the Sunny Articulation and Phonology Test for an in depth understanding of Student's language skills. Student scored the age equivalent of less than three years old when her chronological age was three years and two months and her hearing age was two years and eight months. Ms. Reeder concluded that Student was able to make the precursor sounds on an age appropriate level. Because Student's overall language scores were lower than her hearing peers and her intelligibility was in the 10 percentile, Ms. Reeder concluded that articulation/speech should be targeted in therapy.

39. Ms. Reeder opined that Student's hearing loss "trumped" Student's speech and language deficits because Student's language delays were directly attributable to Student's inability to hear as would someone without hearing loss, and that Student's speech errors that resulted from her inability to distinguish between speech sounds. She also opined that Student needed a deaf and hard of hearing itinerant to be trained in the auditory-oral communication mode, as opposed to the visual communication mode of American Sign Language. She did not believe District's offer was adequate because: (i) 20 minutes per month of deaf and hard of hearing consultation was inadequate because Student required services to be provided by someone with extensive knowledge and training in teaching students with hearing aids; (ii) she believed individual therapy was better than group therapy for students with hearing loss; (iii) general education classroom placement was important for Student's access to typical hearing student models; and (iv) Student needed a frequency modulation system to help bridge the distance between the teacher and the student and ameliorate background noises by bringing the teacher's voice closer to Student's ear, and that an audiologist should decide which system would best suit Student. Ms. Reeder recommended two hours per week of auditory-verbal therapy for Student in February 2015, but at hearing reduced the recommendation to one hour per week because since February 2015 Student had benefitted from auditory-verbal therapy with Brigitte Klaus.

40. Ms. Reeder reviewed at hearing District's assessment results of the Goldman Fristoe Test of Articulation and the Khan-Lewis Phonological Analysis. She opined that Student's speech and articulation intervention should begin immediately, even though Student was not considered developmentally delayed in making certain sounds, because students were generally most capable of learning between the ages of zero to five, after which it would become harder. Although Ms. Reeder was asked to opine on several other of District's assessments, she had no expertise with the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, the Battelle Developmental Inventory, Second Edition, and

the Adaptive Behavior Assessment System, Second Edition. Therefore, her opinion that these assessment results showed that Student's comprehension and spoken language levels derived from her hearing loss was not as persuasive as District's assessors' opinions regarding these assessments. Ms. Reeder did not observe Student in a classroom, did not speak with any of Student's teachers, and did not review any documents in connection with assessing Student, and was not familiar with FLAG or District's programs.

Student's June 1, 2015 Audiogram

41. On June 1, 2015, Dr. Reynita Sagon-Alcisto performed an unaided audiogram. This was a hearing test where Student did not use hearing aids. Hearing aids amplified sounds coming through the ear by increasing the volume of all sounds. Dr. Sagon-Alcisto held a bachelor's degree in speech, language pathology and audiology; and a doctorate degree in audiology. She had been an audiologist certified by California since 2007. Dr. Sagon-Alcisto worked at the University of California at Los Angeles from 2014 as a pediatric diagnostic audiologist, where her job duties included conducting hearing tests and fitting hearing aids for individuals from infancy to 21 years old.

42. Dr. Sagon-Alcisto was qualified to conduct and interpret the audiogram. In her opinion Student had moderately severe to mild hearing loss on the right ear, and moderate to moderately severe hearing loss on the left ear. Based upon the results of the audiogram, she concluded that Student's speech awareness threshold was 50 decibels in both ears, meaning that was the level where Student could detect speech without her hearing aids. Dr. Sagon-Alcisto opined that, without hearing aids, Student would miss certain conversations below 50 decibels. Missing these conversations could affect her ability to acquire language skills including articulation because she would not hear everything she needed to learn speech sounds and words.

43. Dr. Sagon-Alcisto explained two types of frequency modulation systems used in classrooms. One system was a speaker system where a teacher's voice was transmitted at a louder level for everyone to hear. The other was a personal system where a teacher's voice, spoken through a microphone, was transmitted directly to a student's ears through hearing aids. In her opinion all students, with or without hearing loss, could benefit from a frequency modulation system in dealing with background noise, especially in noisy classrooms. She did not specifically recommend a frequency modulation system for Student.

44. She recommended further testing and observation. In her opinion a speech/language test, testing the level of Student's comprehension, or an aided audiogram, a hearing test with hearing aids, would provide more information on Student's access to sounds. Further observations as to how Student functioned in different environments with different background noise were important because background noise affected what Student heard. She further recommended that Student use hearing aids full time; that Student obtain a

thorough speech and language evaluation, and if speech/language therapy were recommended, that the therapist had experience working with the hearing impaired in spoken communication; and that Student received a hearing test and hearing aid check at least every six to 12 months.

45. Dr. Sagon-Alcisto was not familiar with District's programs or District's offer to Student, and deferred to speech/language testing for therapeutic and educational recommendations for Student.

Student's June-July 2015 Deaf and Hard of Hearing Assessment

46. Ms. Klaus assessed Student with her hearing aids in June 2015, when Student was three years and seven months old. Ms. Klaus held a bachelor's degree in liberal studies, a minor in special education, a master's degree in education with a deaf and hard of hearing credential and an emphasis on oral and deaf education. She had been in private practice as a certified auditory-verbal therapist since 2005, where she worked with hearing loss students who learned through oral and spoken language, and provided direct services to students and collaborated with teachers in various school districts. She was certified by California with a level one education specialist instruction credential and a clear level two education specialist instruction credential, both for deaf and hard of hearing; and was certified by A.G. Bell Academy for listening and spoken language specialist as an auditory-verbal therapist. Certification as an auditory-verbal therapist with the A.G. Bell Academy required training 1200 hours, over three years, of parent/child therapy focused on listening and speech with a mentor who observed and critiqued her work in therapy; passing a rigorous test; and continuing education every two years for updates in all areas of spoken language. She worked at the John Tracy Clinic for five years as a pre-school classroom teacher for four to five year-old students with hearing loss and guided parents in listening, and spoken language development when working with their children. She was also an adjunct professor at the John Tracy Clinic where she taught pre-school curriculum courses to graduate students.

47. Ms. Klaus assessed Student with the following tests: Ling Six Sound Test, Auditory Perception Test for the Hearing Impaired, Revised; Auditory Skills Checklist by Med-El Corporation; Preschool Language Scales, Fifth Edition; and the Phonetic Ling Evaluation. Only the Preschool Language Scales, Fifth Edition, was normed referenced, or compared to the rest of the hearing population of students. Ms. Klaus administered all the tests in English because Student had been enrolled in an English only preschool. Ms. Klaus found that Student was able to identify the Ling Six sounds of "ah, ee, oo,m, sh, and s" from a distance of six feet in a quiet environment; Student had emerging skills in her control of intensity and pitch, but could not imitate varied intensity or pitch; and Student could produce the Ling sounds one at a time in an age appropriate way, but could not always carry over those sounds into her words or sentences, e.g. instead of saying "hamburger", would sometimes say "hamuger", leaving out the "b" affecting her intelligibility. Student scored a

74 percent in the Auditory Perception Test for the Hearing Impaired which showed that she used her hearing aids to listen and learn language. Student had difficulty distinguishing sounds of different loudness and pitch and required instruction to distinguish words such as “bat and rat”. The Auditory Skills Checklist was completed by Ms. Klaus through informal and classroom observation of Student, observation of Student throughout assessment, and input from Mother. Ms. Klaus observed that: Student attended to sound; was capable of distance, *e.g.* Student could perform the Ling six sound test from 10 feet in a quiet setting and could hear her Mother call from another room; could imitate vocal inflection for common utterances, but had difficulty imitating varied pitch and intensity; was able to use hearing to improve speech production; could follow simple directions, but had difficulty with multi-step directions and recalling more than two items from a message; that she learned vocabulary and language structure through specific instruction which could be taught in therapy or in the classroom (as opposed to learning by overhearing conversation); and she had difficulty listening in the presence of background noise at a distance.

48. The Preschool Language Scales tested Student’s auditory comprehension/ receptive and expressive communication language. Student performed the age equivalent of a three-year-old in receptive communication, and performed the age equivalent of a three year and one month old in expressive communication. Student understood basic vocabulary, concepts, early syntax, and could describe objects and express quantity, use prepositions, grammatical markers and sentence structures, but had difficulties with quantitative concepts such as one, some, rest, analogies, and identifying colors used in a sentence. She used words more often than gestures for communication, could use a variety of nouns, verbs, modifiers, and pronouns, spoke in two to six word sentences, could answer “what” questions, but had difficulties with using plurals, answering “where” questions, naming a described object and using possessives. Ms. Klaus opined that Student’s inability to produce the “s” sound was insignificant and did not demonstrate delayed development because a typical child would not be expected to be able to produce the “s” sound until age seven. Student’s overall language score was the age equivalent of a three year and one month old.

49. Ms. Klaus observed Student at the Shepherd of the Valley preschool class on July 9, 2015, because it was important to get an overall view of Student’s function with other children, with noise, in a general education setting, and ability to access the curriculum by listening and using spoken language. Student had a hard time focusing in the noisy classroom with a loud crying child, with music in the background where the teachers were not trained in working with a student with hearing loss as demonstrated by their attempts to get Student’s attention by talking over the background noise instead of removing or controlling the noise. She observed Student responding appropriately to the teacher a few times and engaged in age appropriate solitary and parallel play.

50. Ms. Klaus concluded that Student’s overall performance was that of a three years and four months old, or three months behind her chronological age, and that Student had moderately severe to severe to moderate to mild hearing loss in the right ear and

moderate to moderately severe hearing loss in the left ear. Ms. Klaus concluded that Student's hearing loss affected her access to speech sounds to the extent she could not hear them as a typical student without any hearing loss would. Therefore, she opined that Student's language could not be separated from her hearing loss, that Student should receive auditory-verbal therapy to help her listen and learn to speak, and her Parents should be taught those skills for home reinforcement. She recommended that Student continue full time hearing aid use; use a personal frequency modulation system to help with background noise and distance in a general education class; receive auditory monitoring to check for hearing loss stability; receive hearing aid checks to ensure proper function; receive auditory-verbal therapy with a certified auditory-verbal therapist one hour per week; enroll in a general education preschool for access to her hearing peers; receive services in the preschool from a credentialed teacher of the deaf, trained in auditory skills and spoken language; and receive consultation services with a deaf and hard of hearing teacher so that preschool staff could provide Student auditory access to the curriculum.

51. Ms. Klaus did not speak with anyone from District, did not attend the December 2, 2014 IEP team meeting, and was not familiar with, and did not observe, FLAG or any of District's programs.

52. At hearing, Ms. Carlton opined that Student did not need individualized auditory-verbal therapy for FAPE because Student had no difficulties following conversations, was able to answer questions throughout the assessments without signs of frustration or overexertion, and had experience accessing auditory information with her hearing aids consistently since she was three months old. The auditory-verbal therapy recommended by Ms. Reeder was excessive and beyond Student's function and FAPE needs. District provided auditory-verbal therapy to students with significant language listening delays. The primary component offered in auditory-verbal therapy was to teach parents skills to implement in the home and community, an area in which Parents already excelled. Further, FLAG also incorporated a parent training component for the speech pathologist to teach students and parents strategies to implement in the home and community. Ms. Carlton supervised two itinerant deaf and hard of hearing auditory oral teachers. One of these teachers had an auditory-verbal therapist certification and the other was trained in auditory-verbal therapy techniques, and one of those would have been assigned to Student as her deaf and hard of hearing itinerant consultant. Ms. Carlton also opined that Student would need a frequency modulation system in a larger, general education environment, but that Student did not need one in a small two to three person group. An audiologist would typically determine whether a student required a frequency modulation system, and the type of system needed, based upon an evaluation of how a student functioned in various settings and the attendant background noises. While it would be more difficult for a deaf and hard of hearing student to process information with background noise, Student was not a deaf and hard of hearing student, but one with a mild/moderate hearing loss. Therefore, Ms. Carlton concluded that Student was more capable of processing information in the presence of background noise, and differently, than a typical deaf and hard of hearing student would.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*⁴

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)⁵ 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 and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel 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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 [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.)

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 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].) In this case, District has the burden of proof as to its one issue; and Student has the burden of proof as to her one issue.

District’s Issue - Assessments

5. District contends that it properly assessed Student in all areas of need. Student contends that District did not properly assess her and, therefore, she is entitled to a publicly funded independent auditory-oral and hard of hearing assessment with a certified auditory-verbal therapist.

6. To assess or reassess a student, a school district must obtain parents' written consent. (Ed. Code, § 56321, subd. (a).) Assessments and reassessments shall be administered by qualified personnel who are competent in both the oral or sign language skills and written skills of the individual’s primary language or mode of communication and have a knowledge and understanding of the cultural and ethnic background of the pupil. If it clearly is not feasible to do so, an interpreter must be used, and the assessment report shall document this condition and note that the validity of the assessment may have been affected. (Cal. Code Regs., tit. 5, § 3023.)

7. The assessment must be conducted in a way that: (1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; (2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and (3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

8. The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

9. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent (Ed. Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).)

10. A student may be entitled to an IEE⁶ if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) In response to a request for an IEE, an educational agency must, without unnecessary delay, either: (1) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (2) ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

11. District demonstrated by a preponderance of the evidence that its assessments and the resulting December 2, 2014 Multi-Disciplinary Developmental Evaluation report were appropriate. District obtained Parents' written consent to assessments. Ms. Gonzalez, Ms. Fox, Ms. Carlton, and Ms. Honeycutt were qualified and licensed assessors competent to assess Student's deficits. Three of the four assessors knew Student personally from having worked with her before the assessments. Ms. Honeycutt who had not previously known Student, familiarized herself with Student by reviewing Student's individualized family service plan file. They each used a variety of sound assessment tools and strategies. They each obtained valid and reliable results on all tests. No single measure or assessment was used as the sole criteria for assessment. The assessments were performed to address all of Student's needs to access her education. They informed District that, despite Student's hearing loss, she was capable of processing information with background noise, in a quiet environment with her hearing aids, which she had been using since she was three months old, and which provided her more advanced skills than a typical deaf and hard of hearing student with profound hearing loss and with little experience communicating using spoken language. The assessment results consistently supported that Student was generally in the average range for her age and that she had a speech and language disorder in articulation/phonology and expressive language (with some results below her chronological and developmental age) which significantly interfered with her communication and impacted her intelligibility. All the assessments were technically sound, not biased in any way, administered properly and produced information about Student that was useful for the IEP team to develop a program for Student. District timely provided Parents with a report after the assessments, timely held an IEP team meeting, and filed for due process within a reasonable period after denying Parents' request for an independent evaluation.

⁶ The Federal Code uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning and are used interchangeably in this Decision.

12. Student complained that District did not provide an audiologist to assess Student's needs for an appropriate frequency modulation system. Student was able to access sounds and speech with her hearing aids in a small, quiet classroom environment so an audiologist assessment was not needed. At hearing, both Ms. Carlton and Ms. Gonzalez persuasively opined that Student would not require a frequency modulation system in FLAG because most of the time Student would be in a small group of one to three individuals where the teachers would be close to Student, similar to the assessment environment where Student demonstrated she could access sounds and speech with her hearing aids without a frequency modulation system. Because Student's experts were not familiar with District's program, their opinions on whether Student required a frequency modulation system in FLAG was not persuasive.

13. While Student also complained that District's assessments were flawed because District did not use a certified auditory-verbal therapist to assess and consider Student's deaf and hard of hearing needs, and did not find Student eligible for special education services under a deaf and hard of hearing category, such complaints were not supported by evidence that District's assessments were inappropriately conducted. A certified auditory-verbal therapist was not required by law to conduct any of District's assessments. Ms. Fox, an expert in communicative disorders, and Ms. Gonzalez and Ms. Honeycutt, both qualified and competent in oral and sign language skills, assessed Student in the presence and under the observation of Ms. Carlton, a certified-verbal educator present for assessing and addressing Student's deaf and hard of hearing needs. Ms. Fox, Ms. Gonzalez, and Ms. Honeycutt all followed test instructions and protocols in evaluating Student. Student was properly assessed in English and Spanish because Student's records indicated that while English was Student's instructional language, Spanish was the language spoken at home. The fact that Ms. Fox assessed Student with the Spanish Edition of the Preschool Language Scales, Fifth Edition, by asking Student questions in English first, then Spanish, was inconsequential because the assessment manual did not require, or recommend, a particular translation sequence as "best practice". District demonstrated that Ms. Fox properly collaborated with a properly trained Spanish interpreter (who was also a speech and language pathologist assistant) to translate for Student, and followed the "best practice" recommendation of the assessment manual, which specifically recommended testing students, learning Spanish as a home language, in both English and Spanish to obtain a complete picture of the students' skills.

14. Student did not present evidence that the integrity of the assessments were impacted, or that the assessment manuals did not permit Ms. Carlton's observation of the assessments, or Ms. Fox's and Ms. Honeycutt's method of alternating when assessing Student. Likewise, Ms. Fox's failure to specifically check Student's hearing aids before assessing Student did not impact the integrity of the assessments because the totality of the evidence persuasively supported that if Student's hearing aids had not been operating properly, Student's test scores would have been much lower. Further, Student's contention that District's scores were inflated and the assessments inappropriate because Student's

scores on the Preschool Language Scales, Fifth Edition, were lower when Ms. Klaus administered the test than when Ms. Fox administered the test were unsupported by the evidence. Both Ms. Fox and Ms. Klaus identified the same areas of need for Student, and although the scores were different, they were not significantly different. Student's complaints about eligibility determination were also inconsequential to the appropriateness of the assessments, as District persuasively showed that it was Student's needs and performance, as observed by Ms. Carlton, Ms. Gonzalez, Ms. Fox, and Ms. Honeycutt, and not any special education eligibility category, which District used to assess and determine Student's IEP recommendations. Based on the above, District met its burden of demonstrating that all the assessments were properly conducted such that Student is not entitled to any publicly funded independent evaluation.

Student's Issue - Failure to Consider Deaf and Hard of Hearing Needs at the December 2, 2014 IEP Team Meeting

15. Student contends that District determined and developed the December 2, 2014 IEP without considering and addressing Student's deaf and hard of hearing needs. District contends that the IEP team considered all of Student's needs.

16. In general, when developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) There are also specific considerations required for deaf and hard of hearing students. Deafness means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects a child's educational performance. (Cal. Code Regs., tit. 5, § 3030 subdivision (b)(3).) Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section. (Cal. Code Regs., tit. 5, § 3030 subdivision (b)(5).)

17. The IDEA requires that the IEP team "consider the communication needs" for deaf or hard of hearing students and to consider "opportunities of direct communication with peers and professional personnel" of a child in developing an IEP. (20 U.S.C. § 1414(d)(3)(B)(iv).) Similarly, under California law, when developing an IEP for a deaf and hard of hearing student, the IEP team shall "[c]onsider the communication needs of the pupil" including "the pupil's language and communication mode, academic level, and full range of needs including opportunities for direct instruction in the pupil's language and communication mode." (Ed. Code, § 56341.1, subd. (b)(4).) The IEP team must consider whether the student requires assistive technology devices and services. (Ed. Code, § 56341.1, subd. (b)(5).) The IEP team must discuss the communication needs of the student, consistent with "Deaf Students Education Services Policy Guidance" (57 Fed.Reg. 49274 (October 1992)), including the student's primary language mode which may include spoken language, visual cues, or both; access to peers of similar age, cognitive, and language

abilities; appropriate, direct, and ongoing language access to special education teachers and other specialists; and services necessary to ensure communication-accessible academic instructions. (Ed. Code, § 56345, subd. (d).) Although there are particular provisions of the IDEA and Education Code that are applicable to deaf and hard of hearing students, California law does not set a higher standard for educating students with exceptional needs than that established in the IDEA. (Ed. Code, § 56000, subd. (e); See *K.M. v. Tustin Unified School District* (9th Cir. 2013) 725 F.3d 1088 [A student with profound hearing loss was deemed to hear enough of what teachers and peers say in class to access her curriculum and did not need communication access real-time translation services to receive a FAPE.]

18. A child who demonstrates difficulty understanding or using spoken language, to such an extent that it adversely affects his or her educational performance and such difficulty cannot be corrected without special education services, has a language or speech impairment or disorder that is eligible for special education services. (Ed. Code, § 56333.) The difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that the difficulty results from any of the following disorders: (1) articulation disorders, such that the child's production of speech significantly interferes with communication and attracts adverse attention; (2) abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; (3) fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener; (4) inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the child's language performance level is found to be significantly below the language performance level of his or her peers; and (5) hearing loss which results in a language or speech disorder and significantly affects educational performance. (*Ibid.*)

19. Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

20. Student did not demonstrate by a preponderance of the evidence that District failed to consider or address Student's deaf and hard of hearing needs at the December 2, 2014 IEP team meeting. All but one District personnel who were present at the IEP team meeting were familiar with Student from working with the family and all personnel were aware that: Student was a typically developing child with a mild to moderate sensory-neural hearing loss who consistently benefitted from her bilateral hearing aids since she was three months old; Student was capable of processing information with background noise, in a quiet environment with her hearing aids; Student's instructional language was English; Student's primary communication mode was auditory-oral; Student had a speech and language disorder in articulation/phonology and expressive language which significantly interfered with her communication and impacted her intelligibility as shown by her assessment results.

21. District developed appropriate goals for expressive language and articulation/phonology, added another articulation/phonology goal at Mother's request, and properly offered Student placement in FLAG to work on her articulation and speech weaknesses with a speech and language pathologist. District considered and addressed Student's deaf and hard of hearing needs and offered her a deaf and hard of hearing consultant trained in auditory-oral communication to monitor her hearing loss and hearing aids and help the speech and language pathologist and assistant in FLAG incorporate oral-auditory strategies for teaching Student.

22. Further, the appropriateness of District's FAPE offer was not persuasively contradicted at hearing because none of Student's witnesses had any knowledge of, or familiarity with, District's programs or personnel teaching the classes, including FLAG. In fact, Ms. Sagon-Alcisto recommended a speech/language assessment and deferred to the assessment results for educational and therapeutic recommendations for Student. While Ms. Reeder opined that auditory-verbal therapy was preferred, and Ms. Klaus opined that auditory-verbal therapy would teach Student to listen and learn to speak and teach Parents strategies for home use, Student did not provide evidence that auditory-verbal therapy was required for FAPE. District performed comprehensive assessments, including a speech and language assessment, and recommended the small speech class to address her educational needs. Student had received auditory-verbal therapy since she was four months old, and Mother was well versed with using auditory-verbal communication strategies with Student, so the evidence did not support that more auditory-verbal therapy, while beneficial, was the only way to provide Student a FAPE. If Parents needed speech strategies for home reinforcement, FLAG had a parent education component like that provided in auditory-verbal therapy. Both Ms. Klaus and Ms. Reeder recommended a deaf and hard of hearing specialist trained in the auditory-oral communication mode to work with Student. Both of District's deaf and hard of hearing consultants, one of whom would be assigned to Student based on the FAPE offer, were trained in the auditory-oral communication mode.

23. While Student complained that 20 minutes of consult time from the deaf and hard of hearing itinerant was insufficient, she did not present persuasive evidence specifically addressing why it was insufficient in the context of FLAG, or its personnel. Further, all District's (as well as Ms. Klaus's and Ms. Reeder's) assessment results showed that Student had articulation difficulties and intelligibility needs which District appropriately addressed by placing Student in FLAG. Student's experts' assessment results did not directly contradict District's assessments results. The key difference was that Students' experts, Ms. Klaus and Ms. Reeder, recommended auditory-verbal therapy on the basis that Student's needs were impacted by her hearing loss and she should be classified as a deaf and hard of hearing student.

24. In the analysis of whether District provided a FAPE, Ms. Reeder's conclusion that Student's language delays were attributable to hearing loss, which "trumped" her speech and language deficits, was not as persuasive as Ms. Carlton's conclusion that Student's

articulation, phonology, and mild expressive language deficits could be attributed to both age appropriate development and/or hearing loss. Ms. Carlton's conclusion was based on Student's cognitive and the speech and language testing results, which together provided a more comprehensive picture of Student's educational needs. Student performed higher in cognitive function than visual/spatial reasoning, had a higher verbal than nonverbal intelligence quotient, spoke without a muffled speech sound, and her ability to process linguistic information in a quiet environment with her hearing aids all persuasively supported District's conclusion that Student's hearing loss was not severe, and in the mild/moderate range. Student was unintelligible when context was removed, and her inability to use more words in a sentence as a child her age, both supported that she had articulation difficulties or a speech/language impairment. Whether Student's deficits were attributed to hearing loss or speech and language development, District appropriately tailored Student's goals and services to address all of her educational needs based on information available at the December 2, 2014 IEP team meeting. Therefore, District provided a FAPE despite not offering auditory-verbal therapy and not providing a Parent preferred placement.

25. At the IEP, Mother wanted more hearing loss services and supports for Student and wanted District to consider placement in a deaf and hard of hearing auditory-oral special day class. Yet, at hearing Student contended that placement should have been in a general education classroom with auditory-verbal therapy and an appropriate frequency-modulation system. Both of those placements were considered at the December 2, 2014 IEP and determined inappropriate for Student. While District considered Mother's request and scheduled an observation of the deaf and hard of hearing auditory-oral special day class, it was inappropriate because Student's test scores, language skills, functional level, and her presentation as a typical hearing student, without speaking in a muffled sound that was typical for a deaf and hard of hearing student, rendered her unsuitable for the special day class. Likewise, the facts available to District in the December 2, 2014 IEP team meeting did not support a general education placement. With Student's known articulation, phonology, and mild expressive language deficits, Mother's report that she disenrolled Student because Student was unsuccessful in the general education environment, and District's inability to have trained personnel observe why Student was unsuccessful in the general education environment, all demonstrated that placement in the general education environment was inappropriate in December 2014. As to the need for a frequency modulation system, Ms. Reeder recommended a frequency modulation system to bridge the distance between the teacher and the student and to ameliorate the background noise; Ms. Klaus only recommended one in a general education environment; and Ms. Sagon-Alcisto did not specifically recommend one for Student. Student's experts' recommendations for a frequency modulation system were consistent in that Student could need one in a general education environment to bridge teacher to Student distance and background noise. However, Student was offered FLAG, a primarily individual to small group placement, and therefore, did not need a frequency modulation system in December 2014. Student's experts recommended auditory monitoring of Student and hearing aid monitoring which were also provided by District as part of the deaf and hard of hearing itinerant's duties.

26. District's FAPE offer considered all of Student's educational needs in December 2014. During the IEP team meeting, District properly considered Student's: primary auditory-verbal communication mode; access to hearing peers of similar age, cognitive, and language abilities; appropriate, direct, and ongoing language access to special education teachers and other specialists; services necessary to ensure communication-accessible academic instructions; and assistive technology device needs and services. Therefore, Student did not meet her burden of demonstrating that District determined and developed the December 2, 2014 IEP without considering or addressing Student's deaf and hard of hearing needs.

ORDER

1. District is not required to fund any independent evaluation for Student.
2. District did not deny Student a FAPE by failing to consider or address Student's deaf and hard of hearing needs at the December 2, 2014 IEP team meeting. All of Student's requests for relief are 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 as to all issues.

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: October 22, 2015

/s/

SABRINA KONG
Administrative Law Judge
Office of Administrative Hearings