

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL DISTRICT,

OAH Case No. 2014040312

DECISION

Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings, State of California, on April 3, 2014, naming the Elk Grove Unified School District. On May 23, 2013, OAH granted the parties' joint request for a continuance.

Administrative Law Judge Deidre L. Johnson heard this matter in Elk Grove, California, on August 27, and 28, and September 3, 4, and 5, 2014, and telephonically on September 8, 2014.

Attorney Daniel R. Shaw, of Ruderman & Knox LLP, represented Student and Parents. Mother attended the hearing each day. Father and Student did not appear.

Attorney Cathy S. Holmes, of Best Best & Kreiger, represented Elk Grove. Jennifer Lipsky, a special education program specialist, attended the hearing as Elk Grove's representative.

On September 8, 2014, the ALJ granted the parties' request for a continuance to submit written closing arguments by September 26, 2014. On that date, the closing arguments were timely filed, the record was closed, and the matter was submitted for decision.

ISSUES¹

1. For the 2013-2014 school year, beginning in mid-February 2014, did Elk Grove deny Student a free appropriate public education by failing to conduct a legally compliant assessment in the area of physical therapy?

2. For the 2013-2014 school year and extended school year, beginning in mid-February 2014, did Elk Grove deny Student a FAPE by failing to offer adequate physical therapy services?²

3. For the 2013-2014 school year and extended school year, beginning in mid-February 2014, did Elk Grove deny Student a FAPE by failing to offer appropriate accommodations, modifications, or supports to address Student's safety in the classroom and on the playground?

SUMMARY OF DECISION

Student is eligible for special education under the category of orthopedic impairment due to cerebral palsy. She contends that, for the 2013-2014 school year beginning in February 2014, Elk Grove was required, but failed to conduct a physical therapy assessment of her gross motor needs. In addition, for the 2013-2014 school year and the extended summer school year, Student asserts that Elk Grove failed to offer her appropriate physical therapy services to meet those needs; and appropriate accommodations, modifications, or supports to address her safety in the classroom and on the playground.

Elk Grove contends that its February 2014 multidisciplinary assessment appropriately assessed Student's gross motor needs and that a physical therapy assessment was not required. Elk Grove argues that its February offer for Student's integrated preschool program, and occupational therapy and adapted physical education supports, offered Student appropriate services and supports to address her gross motor needs and that no physical therapy services were required. Elk Grove asserts that its educational program and related

¹ At the outset of the hearing on August 27, 2014, Student withdrew three of her original issues. During the hearing, on August 28, 2014, the ALJ sustained District's objection that Student had not sought to amend her complaint to add matters after the filing of her complaint, including the 2014-2015 school year. Student moved to withdraw most of her other issues and the motion was granted. For purposes of this decision, the remaining three issues have been reframed for clarity. These issues pertain to the 2013-2014 school year through April 3, 2014, when Student filed her complaint. 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 Student's physical therapy goals, or lack of them, are not at issue in this proceeding as she withdrew her issue related to Elk Grove's offered annual goals.

services offered to Student also included appropriate accommodations, modifications, and/or supports to meet her safety needs.

This Decision finds that Elk Grove's February 2014 gross motor assessment of Student was not comprehensive and denied her a FAPE because it did not include a physical therapy assessment to evaluate her need for physical therapy services, including her gait and related balance and walking needs. In addition, the adapted physical education specialist who conducted a gross motor assessment was not qualified to conduct a physical therapy assessment, and did not follow assessment protocols by selecting an assessment tool that had just been used on Student, and scoring incorrectly. Moreover, because Student needed physical therapy, Elk Grove's February 2014 offer of only limited adapted physical education services and supports, along with embedded gross motor activities in the preschool program, was insufficient. Elk Grove's failure to offer any extended summer school services to work on Student's gross motor skills did not deny her a FAPE because Student did not establish that she had limited recoupment capacity upon start of school in the fall, rendering it unlikely that she would attain a level of self-sufficiency and independence that would otherwise be expected. Finally, this Decision determines that Elk Grove's February IEP failed to meet Student's safety needs because it did not offer any accommodations or supports for close adult supervision in the classroom and adult supervision within arm's reach on the playground and at recess.

FACTUAL FINDINGS

Jurisdiction

1. Student is now about three and one-half years old and resides with Parents within the educational boundaries of Elk Grove. Student was born prematurely and presented with significant developmental delays in her gross motor and expressive language skills. Student started walking at around 18 months of age.

2. In August 2013, Student was diagnosed with cerebral palsy, specifically periventricular leukomalacia, referred to as spastic diplegia. In general, cerebral palsy is a chronic neurological condition affecting body movement and muscular coordination, caused by trauma to the brain at birth. Spastic diplegia cerebral palsy involves hypertonia and spasticity in the muscles. For Student, her spastic diplegia cerebral palsy involves abnormal lower body movements and concerns with her gait, toe-turning, pronation or inward turning of her feet, hip problems, and risk of hip dislocation. It also implicates her trunk strength, the gastrointestinal and respiratory systems, and her lower extremities, primarily her hips, pelvis, legs, ankles, and feet, and results in gross motor deficits.

Early Start Intervention and Transition to Public School

3. In January 2012, at the age of 11 months, Student became eligible for the California Early Start Program through the Alta California Regional Center.³ Alta provided Student services in the areas of speech and language, occupational therapy, and physical therapy. Pam Taylor, a licensed physical therapist conducted Alta's initial physical therapy assessment in January 2012, and determined that Student had significant developmental delays and tested in the first percentile for her overall gross motor skills, in the profoundly delayed range.

4. In February 2012, Alta began providing Student with multiple services, including direct physical therapy services once a week for 60 minutes per session based on goals designed to address Student's gross motor needs.

STUDENT'S UNIQUE NEEDS IN THE AREA OF GROSS MOTOR AND PHYSICAL THERAPY

5. In August 2013, Alta conducted a review of Student's progress and Ms. Taylor evaluated Student's progress on her gross motor goals and skills. Ms. Taylor has extensive education and experience in physical therapy and her testimony in this proceeding was informed, detailed, and persuasive.⁴

6. Both of Student's ankles are pronated with weak arches. Student's left leg is somewhat weaker than her right leg, and her left leg involves ankle drop and toe turning. Student's unsteady balance involves decreased proprioception, the knowledge of her body in space. When Student does not know where her foot will step, she tightens up in fear, her spasticity kicks in, and she falls. Student experiences frequent muscle fatigue as her spasticity flares up frequently. In addition, Student's trunk control is poor. She slouches, resulting in her muscles resting on her bones, collapsing her respiratory functions. She generally sits in a "W" with her feet turned out, which presents risks to her hips and joints.

³ Regional Centers operate under authority of the Lanterman Developmental Disabilities Act (Welf. & Inst. Code, § 4500 et seq.), and provide daily living services and supports to persons with developmental disabilities. Alta provides intervention services to enhance the development of infants and toddlers up to three years old who have disabilities, which are known as Early Start services. The legal requirements for special education services are different from those for Early Start services. As a result, Early Start services do not necessarily correspond to those required for provision of a FAPE to children after they turn three years of age.

⁴ Ms. Taylor obtained a master's degree in physical therapy in 1989, and has many years of experience as a physical therapist, is a guest lecturer at California State University Sacramento in the special education department, and was contracted to provide physical therapy services to Elk Grove from 2004 to 2012.

7. Ms. Taylor's services have consisted of direct therapeutic touching and manipulation of Student's body to intervene and correct her movements and to demonstrate how particular movements should be accomplished, along with instruction and prompting during the therapy. In addition, she has trained Parents how to intervene, instruct, and prompt Student, for consistency in the home setting.

8. Ms. Taylor established that, by August 2013, Student was walking independently with a stiff and unsteady gait. She wore short ankle-foot orthotics (braces) during the day which affected her ability to walk and maneuver, and long leg braces at night. Student struggled with balance and coordination activities involving her legs. She was able to maintain a single limb stance only briefly and was unable to alternate her feet on stairs. She was "close" to being able to jump but her lower extremity spasticity impeded her ability to do so. She lacked the ankle flexibility and push off strength required to clear her feet from the floor. Student could walk backwards and sidestep only with bilateral handheld support from an adult and could not do so independently except for a few steps to steady her balance.⁵ Student was able to ambulate the length of a balance beam with single handheld adult support but could only take a few steps independently. Student was able to kick a ball, but not safely, and was working on her hip, knee, and ankle flexion to add power and balance. At this time, Student was about two-and-a-half years old but developmentally was performing at 20 months of age.

9. As Student approached her third birthday, Alta referred Student to Elk Grove to determine her eligibility for special education, placement, and related services. At this time, relying on Ms. Taylor's assessment and persuasive testimony, Student had unique gross motor needs related to her disability in the areas of gross motor skills, gait, balance and coordination, trunk strength, safety, and mobility. These needs continued through the spring of 2014.

OCTOBER 2013 EARLY START TRANSITION PLANNING CONFERENCE

10. On October 30, 2013, Alta held a transition planning conference attended by Mother, Elk Grove's prekindergarten district representative, and Alta's representative. During this meeting, Elk Grove learned that Student had not yet mastered the skills to stand on one foot for more than a few seconds, walk backwards two steps, walk up and down stairs (either with both feet on each step or alternating), run without falling, hop with one foot, or kick a ball safely. Elk Grove learned that stairs were hard for Student, that she banged into walls, had balance concerns, could not jump, and that the cerebral palsy mostly affected her legs. Mother expressed her primary concern that Student frequently falls over and has a high tolerance for pain.

⁵ Student's hypertonia associated with her spastic diplegia cerebral palsy involves exaggerated or abnormally tightened muscle tone in her lower limbs, and her spasticity, or the contraction of her muscles occurs regularly throughout the day.

11. At this time, Elk Grove had knowledge that Student's gross motor skills, as to her functional mobility and gait, were an area of need for Student.

Elk Grove's Initial Assessment of Student

12. Elk Grove determined that Student did not require a physical therapy assessment because her gross motor needs reflected in the Alta documents could adequately be evaluated without such an assessment. The assessment plan provided for an assessment of Student's gross motor development by an occupational therapist and an adapted physical education teacher.

13. Beginning on January 28, 2014, Elk Grove conducted a multidisciplinary assessment of Student in the areas of psychoeducational, speech and language, academics, and motor development.⁶ The multidisciplinary team consisted of Elk Grove's school psychologist Erin Gravert, occupational therapist Sharron Smith, adapted physical education specialist Joy Bryceson, speech and language pathologist Denise Guarnera, and special education teacher Jena Stires. Prior to beginning the assessment, the team reviewed Student's records from Alta.

14. Student contends that Elk Grove failed to assess Student's unique needs related to her disability in the area of physical therapy. Elk Grove asserts that its multidisciplinary assessment included a sufficient assessment of Student's gross motor development needs by its occupational therapist and adapted physical education specialist, and that a physical therapy assessment was therefore not required by law.

15. On January 28, 2014, Ms. Gravert, Ms. Guarnera, and Ms. Stires conducted their assessments of Student in sight of each other, and jointly observed Student during them, including observing her functional mobility. Ms. Gravert administered a psychoeducational assessment, Ms. Stires assessed Student's pre-academic learning skills, and Ms. Guarnera assessed her speech and language skills. The assessors found that Student's orthopedic disability did not adversely affect her cognitive, academic, or speech and language skills.

16. During the January 2014 assessments, Student was able to walk independently into and out of the assessment area, and displayed no balance issues or motor difficulties in doing so. However, Student's ability to sit independently in a standard chair was not evaluated. Student was not assessed in a standard chair but was seated in a special "cube" chair that provided supports for her trunk and posture. This additional support allowed her to remain seated throughout the assessments. In addition, the assessors did not observe Student interact with other children to observe her functional mobility and balance when other children were around, which deprived them of important information about Student's ability to access the campus and participate in school activities.

⁶ The appropriateness of all assessments other than for gross motor development is not at issue in this proceeding.

17. On February 7, 2014, Elk Grove assessed Student's fine and gross motor skills. Ms. Smith did not actually conduct a gross motor assessment. Instead, she observed Student while Ms. Bryceson assessed her. At hearing, Ms. Smith testified that she was qualified by her occupational therapy license to assess and provide services to address Student's gross motor needs. However, Ms. Smith was not a physical therapist, and her opinion was not persuasive because she was not qualified to provide therapeutic services to work on Student's gait, which included her fundamental walking and mobility skills.⁷

18. Ms. Bryceson assessed Student's gross motor skills.⁸ Ms. Bryceson first reviewed Elk Grove's transition documents, and Student's Alta family service plan documents and other records, including Ms. Taylor's August 2013 physical therapy report. Ms. Bryceson considered referring Student to be assessed by a physical therapist instead of assessing Student's gross motor needs herself. However, she believed that Student's gross motor needs in the areas of balance and coordination, stairs, standing on one foot, and ambulating a balance beam were areas within her purview as an adapted physical education specialist. Ms. Bryceson did not contact or consult with Ms. Taylor in making this decision. Ms. Bryceson opined at hearing that any adapted physical education teacher could work on Student's skill levels in these areas, and regularly does so with pupils in the integrated preschool class to improve their coordination and body movement. This opinion was not persuasive because it ignores the fundamental difference between physical therapy and adapted physical education. While Ms. Bryceson was qualified to assess Student's gross motor skills to access physical education activities, she was not qualified to assess Student's needs in the area of physical therapy.

19. To assess Student, Ms. Bryceson conducted two gross motor tests, one of which was the Peabody (Second Edition). The assessment took 35 to 40 minutes in an isolated setting in the gym. Ms. Bryceson determined that Student's stationary skills were in the moderately delayed range. However, the stationary skills included standing on one foot, which Student was only able to do "momentarily." Ms. Bryceson found, incorrectly, that Student's locomotion skills were in the fifth percentile compared to her peers and moderately delayed. On the other test, Student scored at the age equivalency of 1.6 years old for walking and jumping; under two-years of age for hopping; and at a two-year age equivalency for stairs, running, kicking, and the balance beam.

⁷ Ms. Smith holds a California occupational therapy license, and is a nationally registered occupational therapist. She has been employed as an occupational therapist with Elk Grove since July 2005, and oversees occupational therapy services for the pre-kindergarten population.

⁸ In 1984, Ms. Bryceson obtained a California single subject teaching credential in physical education, and a specialist teaching credential in adapted physical education. Since 1987, she has been employed as an adapted physical education specialist and teacher with Elk Grove, and since 1992, has coordinated the adapted physical education program for the district.

20. Ms. Bryceson reported to the multidisciplinary team, and testified at hearing, that Student's stationary and object control skills were slightly delayed, her locomotor skills were moderately delayed, and she did not require physical therapy. However, her testimony regarding Student's physical therapy needs was not persuasive. Ms. Bryceson was not qualified to determine whether Student needed physical therapy, particularly in the areas of fundamental gross mobility and gait, because she was not a physical therapist and her view of Student from the perspective of physical education was limited. In addition, Ms. Bryceson did not observe Student in a classroom setting, playing with other children, or on the playground. She also omitted to disclose, from both her portion of the multidisciplinary report and her testimony, that Student fell on the lip of the gym mat during the assessment, and her failure to disclose Student's fall negatively impacted her credibility.⁹

21. In the multi-disciplinary report, Elk Grove's assessors recommended that Student qualified for special education under the category of orthopedic impairment. The assessors established that Student needed supports for her balance and walking needs, including adult hand-held supports, and needed to be within arm's reach of an adult on the playground. They recommended that Student attend an integrated preschool setting with typical peers and receive consultative adaptive physical education services. The assessors did not recommend physical therapy in the report.

GROSS MOTOR ASSESSMENT ERRORS

22. At the IEP team meeting on February 13, 2014, Ms. Taylor, brought her February 2014 Alta progress report, and Mother shared it with the participants. Ms. Bryceson later determined that she had erred in reporting Student's locomotion scores on the Peabody. Student's locomotion skills were actually in the second percentile, instead of the fifth percentile. Ms. Bryceson testified that the difference in the scores was not significant and did not change her conclusions. However, her testimony was not persuasive. The difference was material and misled the IEP team. The corrected results showed that 98 out of 100 pupils in the normative sample performed better than Student did in the area of locomotion skills. Significantly, Student's locomotion skills were in the profoundly delayed range, not in the moderately delayed range.

STUDENT'S PHYSICAL THERAPY EXPERT

23. In early February 2014, Ms. Taylor reassessed Student. She found that Student's needs had not changed from those documented in the August 2013 progress report. For example, Student still could not alternate her feet on stairs and could only maintain single limb stance briefly. In contrast, the evidence established that typical three-year-olds are able to maneuver stairs alternating their feet with little or no assistance. Ms. Taylor established that Student's gait pattern was stiff and unsteady; she fell frequently, especially with changes in direction, when she was on uneven surfaces or when she transitioned between surfaces; Student's poor ankle

⁹ Ms. Smith also failed to disclose this incident until she admitted on cross-examination that Student fell.

reactions impeded her ability to catch herself when she was off balance; and she continued to struggle with balance and coordination activities, especially those involving her legs.

24. Ms. Taylor determined that, overall, Student had significant delays in gross motor skills. Student scored in the ninth percentile for nonmotor and ball skills, in the second percentile for balance, and in the first percentile, in the profoundly delayed range, for locomotor skills.

25. Ms. Taylor utilized an outdated edition of the Peabody, with her personal and undecipherable scoring chart instead of the publisher's protocols. Therefore, Ms. Taylor's assessment results are also flawed. However, the difference between Ms. Bryceson's corrected test results and Ms. Taylor's results as to Student's locomotor skills is not significant.

26. Ms. Taylor has many years of experience, and has provided Student weekly physical therapy services since January 2012. Ms. Taylor has delivered Student's physical therapy services to her in a variety of settings, including her home, the community, and playgrounds. Her demeanor during the hearing was professional and displayed in-depth knowledge of physical therapy in the educational setting. Ms. Taylor persuasively established, consistent with the law, that only a physical therapist may assess and provide therapeutic services to address a pupil's gait. Overall, her opinion of Student's physical therapy needs is entitled to significant weight, even though she erred in using an outdated assessment tool. In contrast, Ms. Bryceson is not a physical therapist, did not observe Student in any setting other than an isolated gym for 40 minutes or less, and her assessment results contained errors. In addition, while Ms. Bryceson has many years of experience, she did not recognize the limits of her role as a specialized physical education teacher. Therefore, her opinion as to Student's physical therapy needs is not accorded as much weight.

27. The evidence persuasively showed that, at the time of Student's initial special education assessment, Elk Grove was aware that Student had gross motor development needs related to her disability in the areas of her gait and fundamental mobility.

28. Overall, Elk Grove's assessment of Student's gross motor skills was not an appropriate assessment of Student's needs in the areas of gross motor and physical therapy. Ms. Bryceson was qualified to assess Student's gross motor skills with a view toward participation in adapted physical education. However, she was not qualified to assess in the area of foundational functional mobility and the need for physical therapy, including evaluating Student's gait, ability to maneuver, and balance skills. Elk Grove was required to assess Student in the area of physical therapy by a physical therapist.

February 2014 IEP Team Meeting and Offer

29. Student contends that Elk Grove failed to offer her any physical therapy at the February 2014 IEP team meeting. Elk Grove asserts that its February 2014 offer of both

occupational therapy and adapted physical education were sufficient to meet Student's gross motor needs in the context of the integrated preschool program, which included embedded gross motor activities.

30. On February 13, 2014, Elk Grove held Student's initial IEP team meeting to determine eligibility, consider her unique needs, the assessment results and recommendations, and make an offer of educational placement and services. The district members of the IEP team included Ms. Gravert, Ms. Smith, and Ms. Bryceson, among others. Mother attended the IEP team meeting along with Ms. Taylor, and an occupational therapist from Alta.

31. The IEP team found Student eligibility under the category of orthopedic impairment. Ms. Bryceson reported, consistent with her original assessment results, that Student's gross motor skills for stationary and object control were slightly delayed, and moderately delayed for locomotor skills. The District members of the IEP team relied on the recommendations of Ms. Bryceson and Ms. Smith with respect to Student's fine and gross motor needs. They offered Student one annual goal to improve her ability to hold a writing utensil with a functional grasp, and a second annual goal in the area of bilateral coordination to improve her ability to correctly hold scissors and paper. Both of these occupational therapy goals involved Student's fine motor skills and upper body coordination. No gross motor, physical therapy, or other goals were offered.

32. The District offered Student placement in an integrated preschool program with individual and small group instruction twice a week for 120 minutes per session; integrated speech and language services 30 times during the year at 30 minutes per session; integrated occupational therapy services 30 times during the year at 30 minutes per session; and nine sessions of adapted physical education services at 30 minutes per sessions per year.¹⁰ The integrated speech and language and occupational therapy services included "consultation, collaboration, and coaching" with classroom personnel, which included "direct instruction to Student for the purposes listed." The adapted physical education services were offered on a consult basis only. No physical therapy services or supports were offered. In addition, Elk Grove did not offer Student any extended school year services for the summer.

PRESCHOOL MOTOR SKILLS AND ACTIVITIES

33. In addition to the above service and support offers, the integrated preschool program offered to Student included opportunities for practicing gross motor skills. The integrated preschool class was taught by a credentialed special education teacher along with two paraprofessionals. For many of the pupils, the "school day" lasted approximately two hours each weekday morning, including a 10 minute recess. For the 2013-2014 school year, there were about 14 pupils in the integrated preschool class, including seven with IEP's, and

¹⁰ The evidence established that 30 sessions per school year averaged out to about once a week; and nine sessions a year averaged out to about once a month.

seven typically developing peers who only attended two days a week, on the same days offered to Student.

34. Preschool pupils in the integrated program engage in physical activities throughout the day, in class and on the playground, and there is no separate physical education teacher or class. They learn through playing, interacting, taking turns, and sharing to develop their pre-academic skills and prepare for kindergarten. In general, they are not able to stay seated or pay attention to something for more than eight to 10 minutes at a time, and are therefore directed to transition between a variety of activities and locations. Pupils access the activities by traveling to and from different areas of the room. There is circle time, where the children are seated on the floor in a circle; snack and toileting time, art projects, obstacle courses, table time, and music time, involving songs, and sensory and body movements for stretching and transitioning. The evidence established that the preschool had a robust physical education component built into or embedded throughout the two-hour school day. While Student would benefit from the physical activities, it was not a substitute for the physical therapy she required to progress in her foundational mobility skills.

35. Both Ms. Smith and Ms. Bryceson have provided integrated preschool services using the consultation and collaboration model successfully with some pupils in the past. They were confident that they would be able to work collaboratively with each other to oversee Student's gross motor needs as she accessed classroom activities and recess on the playground. Since there is no separate physical education class at the preschool level, the service providers planned to consult with and coach the classroom teacher to ensure Student's access to both. They planned to oversee Student's general access to the classroom via an outdoor ramp, her peer play, and participation in physical activities. However, neither the occupational therapist nor the adapted physical education teacher was qualified to provide physical therapy services, either directly or on a consult, collaboration, or coaching model, to address Student's foundational balance, gait, and walking skills necessary to prepare for kindergarten. In addition, the IEP did not provide for the adapted physical education teacher or the occupational therapist to engage in any collaboration, coaching, or direct therapy regarding Student's physical therapy needs. Therefore, the occupational therapy and adapted physical education supports offered to Student did not meet her physical therapy needs.

PRIVATE PHYSICAL THERAPIST'S RECOMMENDATIONS

36. In her February 2014 physical therapy progress report, Ms. Taylor recommended that Student needed to receive one hour of direct physical therapy each week. That recommendation was made in her capacity as Alta's retained physical therapist in the Early Start Program. Alta's physical therapy goals were based on the Early Start Program's directive to enhance the development of infants and toddlers and to maximize their potential success with family-centered care. Elk Grove was not required to continue Alta's program. It was required to determine Student's gross motor physical therapy needs and how to meet them in order to provide a FAPE. Ms. Taylor was familiar with the integrated preschool class, but was not familiar with Elk Grove's decision to use the collaborative and coaching

model, with only incidental direct instruction or therapy as necessary to determine what Student needed, and demonstrate and model correct movements and body positions. However, Ms. Taylor established that Student's physical therapy involved hands-on manipulations of her body, and direct therapy is therefore a necessary element of Student's physical therapy that cannot be replaced by verbal consultation or coaching. Student required focused weekly practice on foundational mobility skills.

37. Ms. Taylor was persuasive that Student required educationally related physical therapy services to continue her progress on foundational gross motor skills to not only access, but also participate in academic and nonacademic school activities. Since Student's locomotor skills and balance were significantly delayed, including her ability to independently step backwards or to the side, and climb stairs up and down, Student required direct physical therapy interventions to address her needs in these areas. While the adapted physical education specialist could address some of these skills in the context of participation in the school's physical activities, Student required therapeutic interventions to work on the core areas. For example, the fact that Student could walk independently did not negate the need for direct therapy to work on her stiff and unbalanced gait at school. Addressing these issues in a therapeutic program would assist Student to develop a more efficient gait pattern and mobility skills, resulting in decreased risk of injury, less energy expenditure, greater functional independence, and improved muscular balance.

38. Ms. Taylor's opinion that Student required one hour of direct physical therapy services a week was flawed and not persuasive. In particular, she did not provide an objective basis for 60 minutes of therapy as compared to 30 minutes of direct therapy for educationally related services. However, she established that Student required weekly physical therapy in some form given her unique gross motor needs, including at least 30 minutes a week of direct therapy, particularly in light of the school's responsibility to help prepare her for kindergarten and elementary school.

39. Based on the foregoing, Elk Grove's February 2014 IEP failed to offer Student any educationally related services or supports to meet her physical therapy needs related to her disability.

EXTENDED SCHOOL YEAR

40. Ms. Taylor was persuasive that Student required physical therapy services during the extended summer school period to avoid regression of her basic mobility skills. Parents decided not to provide Student with private physical therapy services for about one month, in April 2014. Mother and Ms. Taylor both observed Student regress during that time period in fundamental skills such as her ability to enter and exit her home without falling or catching her toe on the threshold,. In addition, Student required increased assistance to go up and down steps and her ball skills also declined.

41. District's physical therapist, Jayvie Herrera, reviewed Ms. Taylor's physical therapy notes.¹¹ He claimed to find in them that Student's gross motor skills had declined previously during 2013, and therefore her levels of performance in April reflected a preexisting decline. While Mr. Herrera established there were times when Student did not cooperate during Ms. Taylor's physical therapy sessions, his interpretation of Ms. Taylor's notes was incorrect and not afforded any weight.

42. Ms. Taylor credibly established through her testimony, and corroborated in her notes, that Student made progress during her previous sessions and that Student's regression in April 2014 occurred due to her lack of weekly physical therapy during that time. However, Student did not present any evidence that she had difficulty regaining her skill levels upon resuming physical therapy in May 2014, or had a limited capacity for recouping her skills. Rather, Ms. Taylor was able to help Student recoup her skills and continue to make progress in physical therapy.

PRESCHOOL SAFETY

43. Student claims that Elk Grove's February 2014 IEP did not contain any accommodations, modifications or other supplemental supports to meet Student's safety needs because it did not expressly provide for constant adult supervision of Student. Elk Grove contends that its integrated preschool program has sufficient supports embedded within it to meet Student's safety needs.

44. For the 2013-2014 school year, the integrated preschool classroom had a qualified special education teacher and two adult classroom aides. During structured play in class, no more than four pupils were in each group or area in the classroom. Transitions between activities in the classroom were not done with the whole group but with either one child at a time, or in small groups, to avoid confusion and provide safety. Transitions to and from the classroom and playground were accomplished using a "ring rope" with one adult outside monitoring the children already placed holding a ring on the rope, one adult at the door leading a few children out to the rope, and one adult in the classroom selecting the next small group to join the rope. Due to Student's unsteady balance and inability to readily step backwards or to the side, she required close supervision in the classroom. However, given the adult/pupil ratio of about 1:4.6, it was possible for an adult to not be near enough to Student to provide support in the classroom at any given moment, unless close adult supervision was required in her IEP. Given the amount of physical activities in the classroom, the IEP should have provided for this accommodation of close adult supervision in the classroom to ensure its implementation.

¹¹ Mr. Herrera obtained a master's degree in education in the Philippines and in 1995, became licensed as a teacher and physical therapist. He obtained a California physical therapist license in about 2003, and worked in the rehabilitation field. In 2012, Elk Grove hired Mr. Herrera as a physical therapist in the district.

45. The outdoor playground is the kindergarten playground, which is smaller than that for elementary school children, with smaller equipment and safety rails. Elk Grove established that its protocols for the safety of all preschoolers included constant adult supervision and that no preschoolers were left alone or unattended on the playground. Staff planned to be within arm's reach of Student on the playground at all times due to her balance and motor needs, as recommended by Elk Grove's assessors in the multidisciplinary assessment report. The playground contained an enclosed tube slide with built-in stairs and a handrail. In May 2014, Elk Grove's orientation and mobility specialist Chris Peterson conducted an orientation and mobility assessment of Student¹². His assessment lasted about one hour and included observations of Student in the classroom and on the playground. The play structure had rails and was accessible stepping over a low curb. The ground was covered with bark to soften any falling. Mr. Peterson determined there were no safety issues of concern during the assessment. While this assessment occurred about three months after the February 2014 IEP offer, there was no evidence that the recess protocols or the playground itself had changed since February 2014.

46. Student required constant adult supervision within an arm's reach on the playground. Elk Grove's February 2014 IEP contained no express accommodations or supplemental supports requiring this. Although Elk Grove claimed that constant adult supervision was provided by the program, it was required to be in the IEP.

47. Based on the foregoing, Student sustained her burden to establish that the February 2014 IEP failed to contain specific accommodations or supports to address her unique safety needs for close adult supervision in the classroom and close adult supervision within arm's reach on the playground and at recess.¹³ However, the IEP's failure to offer such supports for the extended school year was not necessary because Elk Grove did not offer extended summer school to Student.

¹² The orientation and mobility assessment is not at issue in this proceeding.

¹³ In April 2014, Elk Grove held another IEP team meeting for Student. It then conducted a physical therapy assessment in May and June 2014, and held a subsequent IEP team meeting on June 12, 2014, at which it offered Student physical therapy services. Both parties presented evidence and closing arguments addressing these matters. However, their actions did not result in any amendment of Student's complaint, and the ALJ therefore has no jurisdiction to rule on their contentions. (Ed. Code, § 56502, subd. (e) and (i).)

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*¹⁴

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, et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.)¹⁵ 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 written 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.)

3. “Related services” include 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(a); Ed. Code, § 56363, subd. (a). [In California, related services are also called designated instruction and services.]) Related services include speech and language pathology and audiology services, psychological services, physical and occupational therapy, counseling, and orientation and mobility services, among others. (34 C.F.R. § 300.34(a).) Under the IDEA, supplementary aids, services, and other supports are to be provided not only for the pupil to benefit from instruction but also to enable the pupil to participate in the least restrictive environment with nondisabled children, to the maximum extent possible, in extracurricular activities and nonacademic settings. (34 C.F.R. § 300.42; 300.107(a); 300.117.)

4. 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

¹⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁵ All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

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 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student carries the burden of persuasion.

Issue 1: Assessment of Student’s Gross Motor and Physical Therapy Needs

6. Student contends that, for her initial entry into preschool in February 2014, and thereafter until Student filed her complaint on April 3, 2014, Elk Grove failed to assess her physical therapy needs. Elk Grove asserts that the initial multidisciplinary assessment was sufficient to identify and assess Student’s gross motor needs.

LEGAL REQUIREMENTS FOR ASSESSMENT

7. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil’s educational needs shall be conducted. (Ed. Code, § 56320.)

8. Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56320, subd. (g), 56322.) Assessment tests must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S. C. § 1414(a)(2), (3); Ed. Code § 56320, subds. (a), (b).) The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as

the sole criterion for determining whether the pupil has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subds. (e), (f).)

ELK GROVE FAILED TO ASSESS STUDENT'S PHYSICAL THERAPY NEEDS

9. The law required Elk Grove to assess Student in all areas related to her suspected disability. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (f).) Student's records from Alta, the regional center that had provided physical therapy services to her since she was 11 months old, clearly established that her primary orthopedic deficits were her gross motor deficits in her lower extremities. Elk Grove knew from the August 2013 physical therapy report by Ms. Taylor that Student's spastic diplegia cerebral palsy resulted in significant movement and balance issues that affected her gait and ability to maneuver.

10. The focus of the testimony from the Elk Grove witnesses was their concern for Student's ability to access the various areas of the classroom and playground. However, special education services under the IDEA are not required for mere access, but also to enable Student to obtain educational benefit and to progress from year-to-year, including in the areas of her foundational mobility, gait, and balance.

11. Ms. Taylor's education, training, and experience include instructing college-level special education and physical therapy students, as well as over nine years as a contract physical therapist with Elk Grove. Based on her therapeutic assessments and therapy with Student since she was 11 months old, Ms. Taylor was credible and persuasive in establishing that Student's orthopedic disability primarily manifests itself in her lower limbs and adversely affects her balance, gait pattern, and ability to maneuver. While Student is able to walk forward independently, wearing her braces, her gait is stiff and unsteady; she loses her balance, and falls frequently. Student is not able to stand on one limb for more than a few seconds, cannot step backwards or sideways for more than a step without adult hand-held support, cannot alternate her feet on stairs, and cannot jump.

12. Elk Grove should have conducted a physical therapy assessment as a component of its initial multidisciplinary assessment of Student. The fact that Student could walk, sit, and stand did not entitle the district to avoid a physical therapy assessment. Therefore, the failure to conduct a physical therapy assessment in determining Student's initial eligibility and services in public school denied her a FAPE.

ELK GROVE'S ASSESSMENTS WERE INSUFFICIENT

13. Elk Grove's contention that it did not need to do a physical therapy assessment because it conducted occupational therapy and adapted physical education assessments is not supported by the evidence.

QUALIFICATION REQUIREMENTS

14. The assessments Elk Grove completed in January and February 2014 included observations of Student by all assessors on the multidisciplinary team, and an assessment of Student's gross motor skills by the adapted physical education specialist. Elk Grove's occupational therapist observed the adapted physical education assessment. Neither of these assessments is an adequate substitute for an assessment performed by a physical therapist.

Physical Therapist

15. Physical therapists providing related services in schools must be licensed by the state. (Cal. Code. Regs., tit. 5, § 3051.6, subd. (b)(1).) A physical therapist must be licensed by the Physical Therapy Board of California. (Bus. & Prof. Code, § 2601, subd. (b).) Physical therapy involves physical or corrective rehabilitation and treatment. (Bus. & Prof. Code, § 2620, subd. (a).)

16. The Guidelines for Occupational Therapy and Physical Therapy in California Public Schools, Second Edition (2012), issued by the Special Education Division of the California Department of Education, define and describe the occupational therapy and physical therapy services to be provided as related services in the educational setting consistent with the IDEA. Examples of physical therapy in the educational setting include balance, motor function, muscle performance, posture and postural stability, gait, locomotion, and mobility. As the state educational agency, CDE's Guidelines for the therapists in the school setting are entitled to deference. (See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 U.S. 837, 843-844.) These are precisely the areas of gross motor deficit related to Student's disability that adversely impact her ability to access and participate in the school curriculum.

Occupational Therapist

17. Occupational therapists providing related services in schools are also required to be licensed by the state. (Cal. Code. Regs., tit. 5, § 3051.6, subd. (b)(2).) An occupational therapist must be licensed by the California Board of Occupational Therapy. (Bus. & Prof. Code, § 2570.) Occupational therapy treatment expressly excludes gait training. (Bus. & Prof. Code, § 2570.2, subd. (k).) In addition, a licensed occupational therapist is not authorized to practice physical therapy. (Bus. & Prof. Code, § 2570.2, subd. (c).)

18. The Guidelines provide examples of occupational therapy in the educational setting, including performance skills for completion of written work and organization, and participation in leisure and playground activities, strength, grasp, bilateral coordination, eye-hand coordination, motor planning, balance, postural stability, and ability to initiate, organize, and execute motor plans. With the exceptions of Student's balance and posture, none of these areas are involved in Student's gross motor deficits or needs for physical

therapy. Indeed Elk Grove's occupational therapy for Student focused on her fine motor skills only.

Adapted Physical Education

19. Adapted physical education is a related service for disabled pupils who are precluded from participation in a school's physical education program. (Cal. Code Regs., tit. 5, § 3051.6, subd. (b)(2).) An adapted physical education provider must have a credential from the California Commission on Teacher Credentialing authorizing the person to provide adapted physical education instruction and services. In order to qualify for the specialist certification, the applicant must hold a teaching credential and have completed an adapted physical education program at a qualified college. (Cal. Code Regs., tit. 5, § 80046.1.) An adapted physical education specialist is thus not a therapist but a specialized teacher.

ELK GROVE'S ASSESSORS WERE NOT QUALIFIED TO ASSESS PHYSICAL THERAPY

20. Based on the foregoing, both occupational therapists and physical therapists may generally assess and provide therapy services involving a pupil's foundational balance, postural stability, and motor functions and skills. The domain of the occupational therapist is primarily involved with fine motor skills and activities of daily living. On the other hand, functional mobility, one of Student's areas of need, is placed primarily in the domain of the physical therapist.

21. The Guidelines briefly mention that an adapted physical education teacher is another resource. An adapted physical education teacher's focus is on adapted or specialized instruction to participate in physical education programs. Thus, while these disciplines may share areas of focus, they have different purposes, and educational and training requirements, and are not interchangeable.

22. Elk Grove claims that both Ms. Smith and Ms. Bryceson assessed Student's gross motor skills. Overall, the evidence established that Ms. Smith, the occupational therapist, was qualified to assess Student's functional fine motor and gross motor skills in the general areas of balance, strength, accessing classroom activities, performing playground activities, engaging peers cooperatively, and navigating the school environment. However, Ms. Smith was not qualified to assess Student's fundamental gross motor skills to determine whether she needed physical therapy, and indeed, did not formally assess her gross motor needs in February 2014. Instead, she observed Student and observed Ms. Bryceson's assessment. There is no evidence Ms. Smith participated in evaluating the scoring or interpreting the results of the gross motor assessment. In addition, Ms. Smith was precluded by the limitations of her license from assessing Student's foundational gait, walking, and balance skills related to her functional mobility.

23. The evidence also established that Ms. Bryceson was qualified, on a limited basis, to assess Student's functional gross motor skills in February 2014, in the similar general areas of balance, strength, accessing classroom physical education activities,

performing playground and physical education activities, and navigating the school environment. Since Ms. Bryceson was an educational specialist, and not a therapist, however, she was not qualified to assess Student's foundational gait, walking, and balance skills related to her functional mobility, with a view to whether Student required physical therapy services or not. Ms. Bryceson should have recommended a physical therapy assessment to the multidisciplinary team on seeing Student's poor assessment performance, and did not do so.

24. Only a physical therapist may assess and provide therapeutic treatment interventions regarding a pupil's gait. Gait relates to a person's particular patterns or manner of walking or moving on foot, or a sequence of movements by which one moves. Gait implicates steadiness, balance, and bilateral coordination in the lower extremities, involving movement and placement of the lower limbs, heels, ankles, feet, arches, and toes. While an adapted physical education teacher may also address a pupil's gait, balance, and mobility for functional participation in physical education, the services are instructional, not therapeutic in nature.

25. Although adapted physical education may be employed to augment physical therapy and/or occupational therapy, the skills of an adapted physical education specialist differ from those of an occupational therapist. "By focusing on the underlying neurological basis for movements, a physical therapist works on building the underlying skills that allow a child to perform the gross motor skills taught by adaptive physical education." (*Gulbrandsen v. Conejo Valley Unified School District* (2001) 36 IDELR 126.)

26. For example, a physical therapist and an adapted physical education teacher could view a pupil performing an activity, and see completely different things. An adapted physical education teacher may instruct a pupil with an orthopedic disability on how to run, to enhance the pupil's participation in the school's running games or activities. The specialist may note that she runs with her left toe turned in, and not be concerned, because she is able to participate in the activity. However, the physical therapist is qualified to understand the pupil's unique gait, balance, and muscle deficiencies that affect how the pupil moves her hip, thigh, or ankle muscles, how she moves her foot or toes, and what movements are at risk of developing bad compensating habits or dislocating her hip joint. The therapist may see the stiff and unbalanced running gait, with toe turned in, and be concerned that, without interventions, the movements could cause serious harm in the long run to the pupil's legs, hip, gait, and posture, and impede her ability to improve over time. Consequently, the physical therapist is qualified to assess in these areas, to provide therapeutic intervention treatments or therapies to work consistently on the problems, and to consult with the adapted physical education teacher and classroom teacher to ensure consistency in implementing the interventions during participation in the school's physical activities. Given Student's identified gross motor and physical therapy needs, she should have been assessed by a qualified physical therapist.

27. Based on the foregoing, in February 2014, Elk Grove's adapted physical education specialist may have been qualified to assess Student's gross motor skills with a

functional view toward her ability to participate in the integrated preschool's physical education activities. However, she was not qualified to assess Student's gross motor skills with a focus on whether Student's foundational gait and lower extremity deficits, including her balance, required physical therapy interventions to avoid risk and improve her ability to participate in the school's activities. Consequently, Student should have been assessed in the area of physical therapy and Elk Grove failed to do so. Elk Grove's failure to assess Student's physical therapy needs denied her a FAPE and Student is therefore entitled to a remedy.

ASSESSMENT ERRORS

28. As found above, Ms. Bryceson's assessment of Student utilizing the Peabody gross motor subtest was flawed because she scored the results incorrectly. Ms. Bryceson's testimony that the error was not meaningful, and did not change her opinion that Student's locomotor skills were moderately delayed, was not credible or convincing. Her assessment of Student was brief and in an isolated setting in the school gym, with no observations of Student's ability to maneuver in class or at recess with other children present. During the assessment, Student fell over a gym mat, an incident which Ms. Bryceson omitted from the multidisciplinary report and her testimony. Student's corrected score placed her locomotor skills in the profoundly delayed range.

29. In addition, Ms. Bryceson's use of the Peabody was in error, and not in conformance with the test protocols to use it not less than once every six months. Ms. Taylor had just used the Peabody, albeit a different version, less than a week prior to Ms. Bryceson's evaluation. While Ms. Taylor's assessment was also flawed by use of an outdated version, she placed Student's locomotor skills in the profoundly delayed range as did Ms. Bryceson's corrected scoring. However, the February 2014 IEP team relied on Ms. Bryceson's report of "moderate delay" instead, when they decided not to offer any physical therapy services. Even if the scoring error were deemed to not be material, Ms. Bryceson was not qualified to conduct the assessment as determined above and should have chosen a different assessment tool.

Issue 2: Physical Therapy Services

30. Student contends that, beginning in February 2014, Elk Grove denied her a FAPE for the 2013-2014 school year, and extended school year, by failing to offer her appropriate related services to meet her gross motor and physical therapy needs to the date of filing of her complaint in April 2014. Elk Grove argues that the February 2014 IEP offered her appropriate programs, services, and supports to meet her gross motor needs.

IEP REQUIREMENTS

31. Each local educational agency must have an IEP in effect for each child with a disability within its jurisdiction. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) An IEP is a written document detailing, in relevant part, the pupil's

current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which the goals will be measured, a statement of the special education and related services that are to be provided to the pupil and the date they are to begin, and an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The IEP consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A)(i); Ed. Code, §§ 56032, 56345.)

32. An IEP is to be evaluated in light of information available at the time it was developed and offered, and is not to be evaluated in hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d 1141, at 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” (*Ibid.*) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

EARLY START SERVICES

33. By law, early start intervention services under Part C of the IDEA terminate after the child turns three, and is found eligible for special education services by a local educational agency under Part B. (Ed. Code, § 56505, subd. (d).) Title 34 Code of Federal Regulations part 300.518(c), provides:

If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child has been receiving.

34. Here, Student argues that because she was receiving direct physical therapy services from Alta, Elk Grove was obligated to continue to provide those services. Student is incorrect. Under the above authorities, Parents cannot expect Elk Grove to provide the same physical therapy services Student received in the Early Start program. (See *Huerta v. San Francisco Unified Sch. Dist.* (N.D. Cal., November 14, 2011, No. C 11–04817 CRB) 2011 WL 5521742.) There is no “stay put” provision during this transition. (*Id.*) However, Elk Grove was on notice of Student’s physical therapy needs related to the disability that were identified by the regional center, as determined above.

FEBRUARY 2014 IEP OFFER FOR GROSS MOTOR SKILLS

35. Elk Grove's February 2014 IEP did not offer Student any direct services to meet her gross motor or physical therapy needs. Instead, the IEP offered her placement in the integrated preschool program twice a week with integrated related services called "supplementary aids, services and other supports."

36. Elk Grove offered Student integrated occupational therapy services 30 times during the year at 30 minutes per session, but only offered nine sessions of adapted physical education services at 30 minutes per session per year, averaging out to about once a month. Elk Grove argues that these offers, combined with the preschool program and its embedded physical activities were sufficient to constitute a FAPE. The occupational therapist also planned to monitor Student's gross motor skills.

37. Student's occupational therapy services were primarily to address her ability to functionally grasp a pencil or crayon, and to correctly use scissors in cutting paper. There is no doubt that these are fundamental skills to provide a good foundation to go into kindergarten. Ms. Smith's intention to also monitor Student's gross motor skills was not in Elk Grove's offer, and she was not qualified to, or responsible for providing physical therapy interventions or therapy.

38. The adapted physical education teacher's monthly support was to simply consult with the teacher and aides to ensure Student's physical access to various areas of the classroom, access to the restroom and circle time, and access to the playground. Her focus was not therapeutic and she was not qualified to, and did not plan to provide any direct physical therapy services to Student, or physical therapy consultation, collaboration, or coaching with staff on appropriate physical therapy interventions Student might need on a frequent basis. The adapted physical education teacher was not responsible for providing physical therapy interventions to build Student's foundational gross motor skills.

39. In contrast however, Student's gross motor deficits involved significant delay in Student's fundamental mobility skills, including her stiff and unsteady gait, limited ability to stand on one limb, limited ability to climb up or down stairs, and limited ability to move sideways or backwards without handheld support. Student was entitled to have the opportunity in preschool to work on her fundamental gross motor deficits in order to progress and be able to successfully participate in kindergarten and elementary school in the future. Elk Grove's failure to offer any related services or supports to address Student's physical therapy needs was based on viewing these needs only in terms of access, which ignored Student's right to such services to assist her in benefiting from special education in both the academic and nonacademic curriculum to prepare her for the future.

40. Based on the foregoing, Elk Grove's February 2014 IEP offer did not meet Student's foundational gross motor and physical therapy needs, and denied her a FAPE.

EXTENDED SCHOOL YEAR

41. Extended school year services shall be provided for each pupil with unique and exceptional needs who requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5, § 3043; see also 34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1209-1210.) Pupils to whom extended summer school services must be offered under section 3043:

. . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition."

42. Here, Student's cerebral palsy and orthopedic handicap will continue indefinitely. She demonstrated that without extended school year physical therapy services, it is likely that her gross motor skills may regress over the summer, based on her regression during April 2014, when Student did not have physical therapy. However, Student did not sustain her burden to establish that she had limited capacity for recoupment when school starts in the fall. Ms. Taylor was able to work with Student beginning in May 2014, to help get her back on track. There was no evidence Student had difficulty regaining her progress in physical therapy upon resumption of the services. While the lack of clear evidence of the above factors may not be used to deny a pupil extended school year services if the IEP team offers it, Elk Grove did not offer it in the February 2014 IEP. (Cal. Code Regs., tit. 5, § 3043.) Consequently, there was no denial of FAPE on this basis.

Issue 3: Supports for Student's Safety

43. The February 2014 IEP did not offer Student any express accommodations, modifications, or supports to address her safety in the classroom and on the playground. The evidence established that Elk Grove's integrated preschool placed a high priority on the safety of all pupils, and included close adult supervision at all times. The protocols and strategies in place limit the number of pupils moving from place to place to one at a time, or in small groups closely monitored by the classroom teacher and two aides. The quality of the program is matched by the care given to the playground area, where the equipment is small purposely for preschoolers, and the ring rope is used to ensure a slow pace for everyone.

44. However, the evidence established that Student had unique safety needs for close adult supervision in the classroom, and close adult supervision within arm's reach on the playground, and was entitled to have these safety supports set forth in the IEP. Student therefore sustained her burden to establish that Elk Grove's February 2014 IEP failed to offer necessary supports for her safety. The fact that staff planned to provide close support does not excuse its absence from Student's IEP. However, since Elk Grove was not required to

offer extended summer school services, it was not required to offer safety accommodations and supports for extended summer school in the IEP.

REMEDIES

1. As determined above, Elk Grove denied Student a FAPE by failing to conduct a valid physical therapy assessment for the February 2014 IEP. Elk Grove also denied Student a FAPE by failing to offer physical therapy services and safety accommodations for the regular 2013-2014 school year in the February 2014 IEP.

2. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington, Mass. v. Department of Educ.*, (1985) 471 U.S. 359, 370 (*Burlington*); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

3. A parent may be entitled to reimbursement for placing a pupil in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the pupil in a timely manner prior to the placement, and the private placement was appropriate. (34 C.F.R. § 300.148(a); see also *Burlington, supra*, at 369-370 (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special education service necessary to maximize their child's potential. (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, at 1159.)

4. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Puyallup, supra*, at 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.

5. As a remedy, Student requests reimbursement for Parents' costs of Ms. Taylor's private physical therapy services at her hourly rate of \$100. The evidence established that she provided services in the sum of \$1,500 from March through August 2014. Ms. Taylor continues to provide physical therapy services about once a week and reimbursement is requested on an ongoing basis. In addition, Student requests an order for Elk Grove to convene an IEP team meeting and provide direct physical therapy services once a week for 60 minutes per session. In the alternative, Student proposes that Elk Grove

be ordered to continue to reimburse Parents for private services. Finally, Student requests compensatory education in the form of 30 hours of individual direct physical therapy services.

6. Ms. Taylor is a licensed physical therapist with many years of experience both at the university level, as a contract therapist with Elk Grove for over eight years, and in her own private physical therapy business since 1995. Although her last assessment of Student as a therapist for Alta utilized an outdated version of the assessment, Student is not requesting reimbursement for that assessment. In all other respects, Ms. Taylor was persuasive that she has provided competent physical therapy services. Student is therefore entitled to an order for reimbursement of the cost of her services from March 1, 2014, to June 12, 2014, when Elk Grove held an IEP team meeting and made an offer of physical therapy that is not involved in this case. Had Elk Grove's February 2014 IEP offered Student physical therapy services, Student would have received those services until the June 2014 IEP, when a new offer was made. Hence, that is the appropriate time period for which Student is entitled to relief.

7. Student's request for compensatory education in the form of compensatory physical therapy services is denied. Student did not present any persuasive evidence that Student currently needs compensatory physical therapy services based on Elk Grove's violations prior to the June 2014 IEP team meeting. In addition, since Student's case does not involve prospective placement and services, Student's request for an order directing Elk Grove to hold an IEP team meeting and offer physical therapy services is denied.

ORDER

1. Elk Grove shall reimburse Parents for their costs associated with Ms. Taylor's private physical therapy services to Student from March 1, 2014, to June 12, 2014, in the sum of \$1,100. Elk Grove shall deliver this reimbursement to Parents within 30 days of the date of this decision.

2. All of Student's other requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on all issues for hearing except for the extended school year portions of Issues 2 and 3. Elk Grove prevailed on the extended school year issues.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: October 15, 2014

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings