

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

GLENDORA UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2005110275

DECISION

Administrative Law Judge Clara L. Slifkin (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Glendora, California, on May 25, 2006, May 26, 2006, and June 1, 2006.

John E. Hayashida, Attorney at Law, represented the Glendora Unified School District (District). Ted McNevin, District's Director of Instructional and Student Support Services, was present during the hearing.

Glenna deCamara Eubank, Attorney at Law, represented Respondent Student (Student). Student's Mother and Father were present during the hearing.

On November 7, 2005, District filed a Request for Mediation and Special Education Due Process Hearing. On November 18, 2005, District and Student agreed to take the hearing off-calendar until one of the parties asked to have it re-calendared. On November 28, 2005, the calendar clerk for Special Education Hearing Office (SEHO) issued an Off Calendar Notice. On January 27, 2006, OAH continued the matter to March 15, 2006, for a trial setting conference. The record remained open until June 19, 2006, for submission of written argument. Upon timely receipt of the parties' written arguments, the record was closed and the matter deemed submitted on June 19, 2006.

ISSUES

1. Did District's October 14, 2005 Individualized Education Program (IEP) offer, Student a free and appropriate public education (FAPE) for school year 2005-2006 with its proposal to eliminate physical therapy (PT) services?
2. Did District's October 14, 2005 IEP offer Student a FAPE for school year 2005-2006 with its proposal to reduce occupational therapy (OT) services for Student from two weekly 60-minute sessions to one 50-minute session?

CONTENTIONS OF THE PARTIES

The District contends that it offered Student a FAPE for school year 2005-2006. The proposed IEP eliminated two hours of physical therapy services and reduced occupational therapy services for Student from two weekly 60-minute to one weekly 50-minute session, because these services are no longer necessary to assist Student to benefit from his special education. The District contends that the related services must be related to the Student's current special education placement. The District requests an Order allowing it to proceed with the proposed IEP of October 14, 2005, and the reduction in related services.

Student contends that he was denied a FAPE because the District's proposed IEP of October 14, 2005, for school year 2005-2006, terminated PT services and reduced OT services to one weekly 50-minute session. Student contends that the former level of services is necessary to assist Student to benefit from his special education. Student has not met two of the three PT goals contained in his prior IEP and his deficits in OT necessitate a continuation of OT services for two 60-minute sessions to build his independent writing skills and assist him in completing his school work in a timely manner.¹

FACTUAL FINDINGS

Background Facts

1. Student was born April 21, 1999, and lives with his parents within the District. Student is eligible for special education services under the designations of autism, and

¹ This Request for Due Process Hearing was filed by the District and Student was not entitled to affirmative relief. Nevertheless, during the Due Process Hearing Student requested: reimbursement for a private OT assessment (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd.(b)); placement in the least restrictive environment, a general education class; and because of Student's high IQ, District was required to provide Student with a higher level of related services. For the first time in the closing brief, Student raised the issue that District failed to assess and identify Student's unique needs that require OT services. Because these issues were not addressed in District's Due Process Hearing Request, they were not addressed in this Decision.

language and speech disorder. Student began receiving special education services from the District while in preschool.

2. Since July of 2003, Student has been receiving PT and OT services. In July 2003, Student received PT for 60-minute sessions twice a week based on Student's impaired gait, decreased motor control strength, equilibrium and balance problems. Goals were set for sitting posture for functional tasks without seeking "W" sitting position, negotiating Student's academic environment, and riding a tricycle 50 feet with minimal assistance. Student was fit for and wore foot orthotics. District provided OT services twice a week for 60-minute sessions based on Student's unique needs in tactile defensiveness, joint laxity, vestibular/ocular control and difficulties functioning in novel situations. District set goals for Student's performing wet tactile tasks without distress, holding and coloring with a crayon, and calming himself when upset.

3. On October 20, 2004, District convened an IEP team meeting.² The IEP of October 20, 2004, for school year 2004-2005, offered Student a special day class for autistic students (ARSD) and related services including: (1) adapted physical education (APE) services (small group, pull out, clinic), two weekly for 20-minute sessions, to assist Student in building locomotor and bilateral skills and object control; (2) physical therapy (individual, pull out), two weekly for 60-minute sessions, to assist Student in body control and awareness, correct "W" sitting position, and address impairments in strength and coordination; and, (3) occupational therapy (individual, pull out), two weekly 60-minute sessions to assist Student in areas of fine motor, visual motor, and bilateral coordination.

4. The 2004-2005 IEP contained three goals to address Student's unique needs in gross motor development, gait/mobility, coordination and strength and were addressed through PT, a related service. First, to address Student's slouching, "W" sitting position, so that Student could participate in desk work or circle time, District proposed annual goals for posture. The second goal addressed Student's impaired strength and coordination, to assist Student in participating in school or recess activities. District's annual goal proposed that Student be able to ride a tricycle, including negotiating turns with good posture for 12 minutes. Third, to address Student's unique needs in gait and mobility, so that Student could safely negotiate his school environment, District proposed a goal for Student to negotiate his school campus with stable trunk control, adequate heel to toe sequencing and both arms swinging at his sides, with minimal verbal cues for distances up to 400 feet, 50 percent of the time. By his annual IEP in October 2005, District proposed that Student be able to negotiate his school campus with stable trunk control, adequate heel to toe sequencing and both arms swinging at his sides, with minimal verbal cues for distances up to 800 feet, 75 percent of time. These goals were established so that Student could concentrate on academic tasks, safely access his school environment and increase his body control and body awareness (proprioceptive) when walking distance increased across the school campus.

² This IEP, as well as the 2005 IEP referenced in this Decision, covers many other areas of Student's special education needs. However, the elimination of PT services and the reduction of OT services are the only issues raised in the District's Due Process Hearing Request and only those areas will be addressed.

5. To address Student's unique needs in fine motor and visual motor skills, District provided OT services to address Student's delay in fine motor development. District set an annual goal for Student to be able to use a functional grasp and write his first and last name with minimal verbal prompts, 75 percent of the time. A second annual goal addressed Student's participation in arts and crafts and writing so that Student could participate in a three-part arts and crafts activity, with 75 percent accuracy, 75 percent of the time, with minimal prompts.

2005-2006 Offer of Placement and Services at IEP of October 14, 2005

6. In order to provide a FAPE to Student, the District is required to provide a program to address Student's unique needs and provide Student with some educational benefit. The District is also required to offer related (DIS) services that allow Student to access his educational setting.

7. It is undisputed that Student has high cognitive ability, a nonverbal IQ score of 126 as measured by the Leiter International Performance Scale-Revised. Student has unique needs in all core academic areas (reading, writing and mathematics) particularly in the area of speech/language development. Student has unique needs because of his gross-motor deficits, including difficulty with locomotor skills, object control skills, and bilateral coordination, necessitating PT and APE services. Student's lack of proprioceptive awareness, low muscle tone, impaired gait, and joint laxity also affect his motor and academic performance. Student has unique needs because of his fine-motor deficits necessitating OT services. Student has poor handwriting, scissor skills, self-care skills, tactile defensiveness, and vestibular/occulomotor control. In addition, Student has socialization needs due to his difficulty in functioning when confronted with novel situations.

8. The IEP of October 14, 2005 offers Student an ARSD class with related services including: (1) adapted physical education (APE) services (group pull out), twice weekly for 30-minute sessions, to assist Student in building locomotor and bilateral skills and object control; and (2) occupational therapy (in class), once a week for a 50-minute session to assist Student in areas of fine motor, visual motor, and bilateral coordination goals and objectives. The District's IEP proposal eliminated PT services and reduced occupational therapy services to one hour a week for 50-minute sessions.

Physical Therapy

9. In order to provide a FAPE for 2005-2006 school year, District is required to provide PT services that address Student's unique needs and assist Student to access or benefit from his special education program.

10. District failed to consider Student's unique needs when it proposed to eliminate PT for the 2005-2006 school year. Student has unique needs that include gross-motor deficits, difficulty with locomotor skills, object control and bilateral coordination,

requiring PT services to assist Student in accessing his special education program. Student's lack of proprioceptive awareness, low muscle tone, impaired gait, and joint laxity also affect his motor and academic performance. The IEP team did not set any goals to address these special needs; APE is not a substitute for PT.

11. As discussed above, during the 2004-2005 school year, Student had three major goals and objectives to meet through PT services. District demonstrated that Student met his goals and objectives in sitting and good posture and alignment (avoiding a "W" sitting position) during school tasks such as deskwork or circle time without slouching for ten minutes with no more than one verbal prompt. However, District did not demonstrate that Student met the goals and objectives in strength and coordination, so that Student could participate in school or recess activities. Student was still progressing in the goal of riding a tricycle, including negotiating turns and obstacles with good posture, independently for 12 minutes.

12. It is not contested that District's annual goal and benchmarks for Student in 2004-2005 school year in the area of gait, mobility and safety had not been achieved. Thus, Student could not negotiate his school campus with stable trunk control adequate heel to toe sequencing and both arms swinging at his sides, with minimal verbal cues and facilitation for distances up to 400 feet. The District established these goals and benchmarks, so that Student could safely access his educational environment when walking distances increased. Student's ability to walk across campus without expending a lot of energy is important to his having physical energy and mental stamina to concentrate on academic tasks so he can access his educational setting or receive an educational benefit. Student's gross motor function, strength, bilateral coordination, endurance, balance, safety with mobility did not improve.

13. District's assertions supporting its elimination of PT services are not supported by the evidence. District asserted that Student refused to wear weights of any kind, which would potentially offer him increased proprioceptive (muscle and joint) input and improve his body awareness/control. District contended that Student has not shown any changes or improvements in his gait and mobility and therefore, his gait will not improve. Finally, despite Student's failure to progress through PT services, the District concluded that Student can safely negotiate his educational environment. As discussed below, the District's assertions are without merit.

14. Because of Student's unique needs, the District must provide related services to assist Student so he can access his educational setting or benefit from his education. Due to Student's tactile sensitivity and his inability to adjust well to novel situations, Student was unable to wear weights of any kind to improve his body awareness and gait. The District failed to demonstrate that Student's physical therapists and/or occupational therapist worked with Student to overcome his tactile defensiveness, so that he could adjust to wearing weights. Thus, Student may benefit from continued PT services in order to access his educational setting.

15. Student is not able to safely negotiate his educational environment and this affects his ability to access his special education program. Student's unsteady gait impacted his safety at school and his ability to access his education. Student's mother and Student's occupational therapist expert (Dr. Susan Spitzer) testified that on the playground, Student would lose his balance, trip and fall. During the one hour period of time Dr. Spitzer observed Student, Student fell off a swing and fell when another child bumped into him. Student's mother testified and presented an incident report indicating that Student lost his balance on the balance board, fell to his knees and bruised his right shin on the edge of the board. District mainstreamed Student for recess; Student had difficulty running and keeping up with the children in general education on the playground.

16. PT is an important part of Student's IEP for school year 2005-2006, to enable and assist Student to access his educational setting because his weak muscle tone, inability to traverse campus for 400 feet, problems with balance, unsteady gait are exacerbated because he commenced more academically challenging first grade and encountered older children on the playground. In October 2005, Student was only 6 years 6 months old and still capable of making progress in the mobility, gait and safety area. The District's IEP should have set gross-motor goals and objectives to address Student's unique needs and assist him through PT services. The District failed to establish that elimination of PT services was reasonably calculated to provide Student with some educational benefit or assist him to access his special education. Thus, District failed to establish Student could access his educational environment or benefit from his special education, if it eliminated PT services.

17. The ALJ must evaluate the credibility and the persuasiveness of the expert witnesses who testified. Dorothy Brooks, a physical therapist employed by the Rosemary Johnson and Associates Clinic (Johnson Clinic) and the District, worked with Student and submitted a physical therapy progress report dated September 22, 2005.³ Ms. Brooks received a Master of Science in PT in December 2001 and worked at the Johnson Clinic for two years. She reviewed records and prepared a report of her findings, which was shared at the October 14, 2005 IEP team meeting. Student had been receiving clinic based PT twice a week. Ms Brooks indicated although Student's impairments have not significantly improved with PT intervention, and he has not met any of his goals in gait and mobility, Student can safely access his school environment. She recommended that school funded PT services be discontinued. However, she testified that Student still exhibited impairments in motor

³ This report was discussed and considered by the IEP team. Ms. Serina Yeung, a physical therapist employed by Gallagher Pediatric Therapy Clinic and the District, also observed Student and completed a physical therapy discharge report dated January 16, 2006. Since this report was not considered by the IEP team and lacked detail, it is not persuasive. David Johnson, a pediatric physical therapist, submitted a report dated December 5, 2005, (Student's Exhibit One), supporting Student's educational need for continued PT services. Mr. Johnson was on Student's witness list and designated as an expert witness. Mr. Johnson failed to appear to testify and Student's counsel failed to provide a resume to support Johnson's expertise in physical therapy. After argument on this issue, the ALJ admitted the report as administrative hearsay. However, because the evaluation was not considered by the IEP team and the report lacked detail, it is not persuasive.

control and proprioceptive awareness, continued to exhibit low muscle tone overall and this could affect his safety and increase his propensity to fall.

18. Although Ms. Brooks's testimony is credible her testimony was not persuasive. Ms. Brooks did not work with Student to enable him to wear weights. Ms Brooks based her opinion that PT should be discontinued because Student's autism contributed to his inability to make any progress in his gait and mobility goals. She did not perform any diagnostic tests. She observed Student only in a clinic setting and not on the playground. Ms. Brooks did not explain why APE would be an appropriate replacement for PT services. APE services cannot replace PT services. 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. Ms. Brooks did not consider Student's age and autism; he was only 6 years and 6 months in October 2005. Intensive early intervention can make a critical difference to children with autistic disorders.

19. District did not meet its burden of proof. PT services are required to assist Student, so he can access his educational setting. The IEP of October 14, 2005, offer to eliminate PT services does not address Student's unique needs and assist Student to access or benefit from his special education program. Thus, District's offer denied Student a FAPE for 2005-2006 school year.

Occupational Therapy—Fine Motor Skills

20. In order to provide a FAPE for 2005-2006 school year, District is required to provide OT services, two weekly 60-minute sessions to address Student's unique needs and assist Student to access or benefit from his special education program.

21. District failed to consider Student's unique needs when it proposed to reduce occupational therapy by more than 50 percent, to one weekly 50-minute session for the 2005-2006 school year. Student has unique needs and fine-motor deficits that require continued OT services, two weekly 60-minute sessions, to assist Student to access his educational setting. Student has poor handwriting, scissor skills, self-care skills, and tactile defensiveness, and vestibular/occulomotor control that affect his fine motor and academic performance.

22. The IEP team concluded that Student met his goals from the 2004-2005 IEP in fine motor skills and visual motor skills. Student was able to copy two to five sentences while utilizing a quadruped grasp. Student demonstrated the ability to complete a three step task, such as an arts and craft activity without the need for redirections. However, the IEP team recommended that since Student continued to require moderate assistance for correct zoning, sizing, and spacing during writing tasks, he receive occupational therapy services at a frequency of one time per week for 50-minute session to improve his graphomotor skills.

23. OT is an important part of Student's IEP for school year 2005-2006, to enable and assist Student to access his educational setting or benefit from his special education program. Without this related service, two weekly 60-minute sessions, Student will not be able to make progress towards District's proposed benchmarks to reach goals in fine motor, visual motor and bilateral coordination skills for the 2005-2006 school year. Though Student's hand strength improved slightly and he was able to complete some limited self-care tasks (buttoning, zipping and snapping), he still required verbal prompts to attend to details of each task such as putting the zipper latch down completely. OT is required to assist Student improve self-care skills such as, opening food containers, buttoning his clothes, and opening and closing zippers and snaps. OT is also required to assist Student to access his special education by addressing his fine motor deficit, decreased strength in his hands. Because of this deficit, Student has a weak pencil grip affecting his ability to write legibly and cannot properly hold eating utensils affecting his ability to eat lunch independently at school. For Student to reach the benchmarks set in these varied fine motor tasks, the District's offer of one 50-minute session of OT services will result in Student's inability to make progress towards these goals and to access his special education program. Thus, District failed to establish Student could access his educational environment or benefit from his special education, if it reduced OT services.

24. The ALJ must evaluate the credibility and the persuasiveness of the expert witnesses who testified in this case. Kelley Sawada, an occupational therapist employed by Gallagher Pediatric Therapy and the District, prepared a three page report of her findings, which was shared at the October 14, 2005 IEP team meeting and she testified at the Due Process Hearing. Ms Sawada, licensed in OT, received a Master's Degree in Occupational Science and Therapy from the University of Southern California in May 2004. She has been employed at Gallagher since November 2004. Ms. Sawada did not administer any standardized tests to Student. Though Ms. Sawada's testimony was credible, the Student's expert, Dr. Susan Spitzer's testimony was more persuasive.

25. Dr. Susan Spitzer received a Master of Arts in Occupational Therapy in 1995 and completed her doctoral studies in Occupational Science from University of Southern California in May 2001. She is presently an adjunct professor of clinical occupational therapy at the University of Southern California and is both the originator and instructor for The Comprehensive Program in Sensory Integration. She is presently in private practice and has worked as an occupational therapist for the Los Angeles Unified School District and for Casa Colina where she was the director of autism and adaptive learning. Dr. Spitzer's education, experience, comprehensive administration of standardized tests, school observation, and review of school records contributed to the depth of her 14 page occupational therapy evaluation of Student, dated December 5, 2005. Dr. Spitzer administered the Beery Buktenica Development Test of Visual Motor Integration (VMI), Bruininks-Oseretsky Test of Motor Proficiency (Fine Motor Subtests) and Sensory Integration and Praxis Tests (SIPT). She also interviewed Student's parents and teacher, and

observed Student on November 21, 2005, November 28, 2005 and December 2, 2005.⁴ The report addressed: each test result in detail; Student's disabilities and unique needs; how the disability impacts Student's access to his education; and proposes IEP goals for OT services. Dr. Spitzer also identifies Student's unique needs that include sensory problems, social skill deficits, fine and gross motor deficiencies, muscle weakness, vestibular and proprioceptive deficiencies.

26. An expert's credibility may be evaluated by examining the reasons and factual data upon which the expert's opinions are based. Dr. Spitzer's testimony was very credible. She was very well prepared and very knowledgeable about Student, autism and occupational therapy. Dr. Spitzer recommended OT services twice a week for 60-minute sessions to assist Student so that he can access his educational setting or benefit from his special education. Both her report and her testimony were persuasive.

27. District did not meet its burden of proof. OT services twice a week for 60-minute sessions are required to assist Student, so he can access his educational setting. The IEP of October 14, 2005, offer to reduce OT services does not address Student's unique needs and assist Student to access or benefit from his special education program. Thus, District's offer denied Student a FAPE for 2005-2006 school year.

LEGAL CONCLUSIONS

Applicable Law

1. The District has the burden of proof as to the issue designated in this Decision. (*Schaffer v. Weast* (2005) 546 U.S. 1145[126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 5600.)⁵ FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8) (IDEA 1997); 20 U.S.C. § 1402(9) (IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25) (IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

⁴ Though Dr. Spitzer's report was not considered by the IEP team, her observations and testing of Student commenced a month after the IEP. Her education, experience in OT, administration of standardized tests, her thoughtful testimony, demeanor and careful analysis added to the credibility and persuasiveness of her testimony.

⁵ All statutory citations to the Education Code are to the California law, unless otherwise noted.

3. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22) (IDEA 1997); 20 U.S.C. § 1402(26) (IDEIA 2004).) Similarly, California Education Code section 56363, subdivision (a), provides that designated instruction and services (DIS), California’s term for related services, shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.”

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S.176, 200, 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

5. However, that basic opportunity must be more than a de minimus benefit in order that the door of public education is opened for the disabled child in a meaningful way. This is not done if an IEP only affords the opportunity for trivial advancement. (*Walczak v. Florida Union Free School Dist.* (2d Cir.1998) 142 F.3d 119, 130.) An appropriate public education under IDEA is one that is likely to produce progress, not regression. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (3rd Cir. 1997) 118 F.3d 245, 248, cert. den. (1998) 522 U.S. 1047 [118 S.Ct 690, 139 L.Ed.2d 636].) The standard for measuring educational benefit under the IDEA is not merely whether the placement is reasonably calculated to provide a student with educational benefits, but whether the child makes progress toward the goals set in their IEP. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93F.3d 1458; *Bowell v. Lemahieu* (D. Hawaii 2000) 127 F.Supp.2d 1117.)

6. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of each district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir.1987) 811 F.2d 1314.) If the district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide student some educational benefit, and comported with student’s IEP, then the district provided a FAPE, even if student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit.

7. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals and short-term objectives/benchmarks, of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

8. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁶ It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at 1314.)

9. The educational agency may be required to provide "related services, denominated as "designated instruction and services" (DIS) in California. This includes developmental, corrective, and supportive services, such as occupational therapy, that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(26); Ed. Code, § 56363; *Taylor By and Through Taylor v. Honig* (9th Cir. 1990) 91 F.2d 627, 629.) As defined by the Code of Federal Regulations, Occupational Therapy is designed to enhance a student's ability to *function* in an educational program, not just to access it. OT services are defined to include "improving, developing, or restoring functions impaired or lost through illness, or deprivation" and "improving ability to perform tasks for independent functioning if functions are impaired or lost" as well as, "preventing, through early intervention, initial or further impairment or loss of function." (34 C.F.R. § 300.24(b)(5).)

10. Curriculum includes recess time, lunch time, and a wealth of other activities that occur at school that are not specific to pure academic learning. Using the restroom and eating with one's peers are aspects of a child's school curriculum. For example, training a student to toilet properly has been determined to be part of her education at school. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) Although APE may be employed to augment PT and/or OT, the skills of an APE 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

⁶ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

gross motor skills taught by adaptive physical education.” (*Gulbrandsen v. Conejo Valley Unified School District* (2001) 36 IDELR 126.)

11. An expert’s credibility may be evaluated by examining the reasons and factual data upon which the expert’s opinions are based. (*Griffith v. County of Los Angeles* (1967) 267 Cal.App.2d 837, 847.)

Determination of Issues

Issue 1: Did District’s October 14, 2005 Individualized Education Program (IEP) offer Student a free and appropriate public education (FAPE) for school year 2005-2006 with its proposal to eliminate physical therapy (PT) services?

12. As discussed in Legal Conclusions 3 and 9, the District was required to provide related services, denominated as "designated instruction and services" (DIS) in California. This includes developmental, corrective, and supportive services, such as physical therapy, that may be required in order to assist the student who has a disability to access, or benefit from, his education. As determined in Factual Findings 7-19, the District failed to provide PT services that were required to assist Student to access or benefit from his special education program.

13. As discussed in Legal Conclusions 2 and 6 an IEP is a FAPE only if it (1) is designed to meet a child’s unique needs; (2) is reasonably calculated to provide some educational benefit, and (3) is the LRE for the child. As discussed in Legal Conclusion 5, the standard for measuring educational benefit under the IDEA is not merely whether the placement is reasonably calculated to provide a student with educational benefits, but whether the child makes progress toward the goals in set in their IEP. As determined in Factual Findings 7-19, District did not offer Student a FAPE when it offered to eliminate PT services.

Issue 2: Did District’s October 14, 2005 IEP offer Student a FAPE for school year 2005-2006 with its proposal to reduce occupational therapy (OT) services for Student from two weekly 60-minute sessions to one 50-minute session?

14. As discussed in Legal Conclusions 3 and 9, the District was required to provide related services, denominated as "designated instruction and services" (DIS) in California. This includes developmental, corrective, and supportive services, such as occupational therapy, that may be required in order to assist the student who has a disability to access, or benefit from, his education. As determined in Factual Findings 7-8, and 20-27, the District failed to provide adequate OT services that were required to assist Student to access or benefit from his special education program.

15. As discussed in Legal Conclusions 2 and 6 an IEP is a FAPE only if it (1) is designed to meet a child’s unique needs; (2) is reasonably calculated to provide some educational benefit, and (3) is the LRE for the child. As discussed in Legal Conclusion 5, the

standard for measuring educational benefit under the IDEA is not merely whether the placement is reasonably calculated to provide a student with educational benefits, but whether the child makes progress toward the goals in set in their IEP. As determined in Factual Findings 7-8, and 20-27, District did not offer Student a FAPE when it offered to reduce OT services.

ORDER

1. The District's offer which eliminated physical therapy services for Student is not an offer of FAPE.

2. The District's offer which reduced occupational therapy services for Student from two weekly 60-minute sessions to one 50-minute session is not an offer of FAPE.

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. The following findings are made in accordance with this statute:

The Student prevailed on Issue No. 1 and Issue No. 2.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: September 21, 2006.



CLARA L. SLIFKIN

Administrative Law Judge
Office of Administrative Hearings
Special Education Division