

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Parent on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008030490

DECISION

Christine L. Harwell, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 23, 2008 and July 24, 2008, at the offices of the Los Angeles Unified School District in Los Angeles, California.

Student's mother (Mother) represented petitioner Student (Student). Student was present with Mother on July 23, 2008; however, on July 24, 2008, Mother appeared by telephone.

The Los Angeles Unified School District (District) was represented by Devora Navera, Attorney at Law, of District's Office of General Counsel. Also present to observe from the District was Michelle AhKuoi, Due Process Specialist.

On March 13, 2008, Student filed a request for due process (Complaint). On April 24, 2008, and July 7, 2008, joint requests for continuance were granted.

ISSUE

Whether District's June 13, 2008 Individualized Education Program (IEP) for school year 2008/2009 failed to provide Student a free appropriate public education

(FAPE) by offering Student physical therapy for two hours rather than three hours weekly.¹

FACTUAL FINDINGS

1. Student is a four year, two month old girl who has resided in the District at all relevant times.

2. Student was diagnosed at birth with deletion of chromosome number 17, at risk for neurofibromatosis,² and developmental delay. She also suffered cardiac and kidney failure as an infant. At five months old, Student became a client of Westside Regional Center (WRC). She began receiving physical therapy from WRC for two hours a week at age twelve months old. At eighteen months, physical therapy from WRC was increased to three hours per week. In 2006, when Student was two years old, Student experienced "infantile spasm seizures" due to epilepsy. In April 2007, at age two years,

¹ In addition to increased physical therapy hours, Student's March 13, 2008 Complaint originally also sought additional related services of individualized treatment time for speech and language services and occupational therapy services from District. Those issues were resolved between the parties before hearing and were withdrawn. After the June 13, 2008 IEP, Student and District agreed that Student's remaining issue related solely to District's June 13, 2008 offer of two hours of physical therapy for school year 2008/2009.

² Neurofibromatosis is a rare inherited disorder that results in benign tumors of the nerves and other parts of the body. Symptoms of this disease range from being virtually unnoticeable to causing neurologic problems or bone defects that affect the skull and spine.

eleven months, WRC referred Student to District for assessment for special education to commence at three years old. In July 2007, Student's seizure activity was under control by medication.

3. On April 30, 2007, District's IEP committee deemed Student eligible for special education under the category of multiple disabilities orthopedic (MDO), due to her significantly below average cognitive ability with deficits in adaptive functioning. WRC advised District of Student's significant medical issues, and her orthopedic impairment that adversely affected her educational performance. The IEP team offered Student placement in a preschool intensive class at District's Castle Heights Elementary School (Castle Heights) with, among other things, school-based physical therapy for 60 minutes per week. Seven IEP physical therapy goals were developed for Student: 1) to sit in a typical or adapted seating system to maintain her head in midline, and to attend to tabletop activities; 2) to throw a beanbag at a target; 3) to use a gait trainer to walk; 4) to transition from the floor to a standing position from a one-half kneeling position; 5) to sit on the floor to play with books and toys outside of her base support to improve her trunk/neck strength; 6) to reach for, grasp and drop objects into a container to increase her visual motor and proximal stability; and 7) to press and maintain pressure on a cause and effect toy to increase functional upper extremity use. Mother did not agree to the April 30, 2007 IEP and Student did not attend pre-school for the 2007/2008 school year. Student continued to receive WRC home-based services of physical therapy for three hours weekly, in addition to speech and language, and occupational therapy, from April 30, 2007 through the end of the 2007/2008 school year.

4. On June, 13, 2008, Student's IEP team reconvened for annual review. The team considered a May 1, 2008 bi-annual progress report of WRC physical therapist, Sharon P. Silver (Silver). She reported that Student lacked active use of core muscles and had compensatory abnormal tone and posturing. Silver reported that the focus of

Student's physical therapy through WRC continued to be on independent ambulation, which involved rising to stand from sitting on a cube chair. Student could stand from the floor through half-kneeling while holding a support; once standing she worked on weight shift to attain proper body alignment. Silver reported that she spent a considerable amount of time on facilitated ambulation using various methods, including weight shifting exercises that would lead to placing one foot in front of the other. Student wore ankle supports and improved her walking skill by use of a forward and reverse walker, which she used to take steps when the walker was held for her. Silver reported that Student required assistance to maintain a level position to move the walker forward and, with that assistance, she could walk around her house. Student could also use walking sticks³ if they are held by another person. Silver reported that Student could walk without assistance while holding a railing on her front porch or around the dining room table by moving from one chair to the next. Silver's proposed goals for Student in May, 2008, were that Student maintain independent standing balance momentarily; walk without assistance with the reverse walker; and let herself down with control from standing. Silver's report recommended that Student continue to receive three hours of physical therapy weekly. Silver was present at the June 13, 2008 IEP meeting.

5. Mother also presented the IEP team with a May 2, 2008 report of Shelby Hicklin, MPT (Hicklin), independent physical therapist who was also present at the meeting. Hicklin administered the gross motor section of the Peabody Developmental Scales (Peabody) to Student. The stationary subtest of the Peabody tested Student's ability to control her body within its center of gravity and retain equilibrium. The

³ Walking sticks include canes with hand or wrist supports used similarly to crutches.

Peabody locomotion subtest measured her ability to move from one place to another. Hicklin also administered the manipulation subtest that measured Student's ability to handle balls. Hicklin's assessment found Student had deficits in trunk and extremity strength; sitting balance; standing balance; motor control and coordination; motor planning; and mobility and safety. Those deficits impacted Student's ability to access her educational setting. Based on the Peabody results, Hicklin's assessment found that overall, Student functioned within a delayed eight to twelve month level for gross motor skills. Hicklin's report recommended physical therapy twice a week but did not recommend an amount of time, however, the IEP minutes reflect that Hicklin recommended physical therapy twice a week for two hours total.

6. The June 13, 2008 IEP recited and reviewed thirteen areas of the prior 2007/2008 IEP goals for speech, physical therapy and applied physical education. Three of Student's physical therapy and one occupational therapy goals were met. However, six of the prior year's goals, that included five speech goals and one in motor physical therapy, were not achieved because Student began having seizures that impacted Student's progress. Additionally, other goals were unmet. A motor physical education goal was not met because Student's head was not midline. The prior year's three remaining goals, an applied physical education goal to toss a beanbag; a visual motor occupational goal; and a social-emotional goal, were not met because Student needed more time. For 2008/2009, the District made a new IEP with revised goals that considered Student's improved ability to ambulate. The 2008/2009 IEP's first physical therapy goal was intended to assist Student's participation in the school environment by providing access to all pertinent areas of her classroom and school campus using adapted equipment and additional assistance of classroom staff. The two objectives to reach that goal were that Student be positioned for access to classroom materials using adapted seating and that she use a walker for up to 25 feet. A second goal was to have

Student demonstrate improvement in strength and coordination as shown by her ability to transition from the floor to a low chair. There were incremental objectives to attain the second goal that included transitioning from a low chair to the floor, and then to transition from the floor to a low chair, both with moderate assistance. The physical therapist and special education teacher were to work together on two additional goals: a motor OT goal for Student to demonstrate fine motor/visual motor/visual perception as evidenced by her ability to reach, grasp and drop objects into a container; and to attend and engage in teacher directed tasks to improve organization of behavior/sensory processing. Other physical therapy or applied physical education (APE) goals were identified in the IEP for the special education teacher and classroom aides: a related "school readiness" goal that Student would enter the classroom and engage in activity with intermittent adult support and prompting; and to overhand throw a beanbag while seated. The June 13, 2008 IEP goals were similar to the April 30, 2007 IEP goals, but they were improved upon and changed to address the reports and recommendations of Hicklin and Silver. According to the minutes of the June 13, 2008 IEP, there was also a private physical therapy report dated May 31, 2008, from Judy Kang, OTR/L (Kang) provided by parents. The IEP minutes do not reflect that Kang recommended a specific amount of time for Student's physical therapy by District.⁴

7. Mother testified that Student is only now beginning to gain ability to learn to walk and she believed that District's June 2008 offer does not sufficiently emphasize walking as an IEP goal. In support of her opinion, however, Mother continually referred to the 2007 reports. She explained that Student's pediatric neurologist, Michele Van Hirtum-Das at UCLA, had seen Student for her three-year check up in July 2007 and noted that because medication had just begun to control Student's seizures, and due to

⁴ Kang's report was not introduced at hearing.

Student's age, it was the worst time to reduce Student's physical therapy. Mother also referenced a July 10, 2007 letter by Silver to WRC that related Dr. Van Hirtum-Das's opinion that Student was at a critical development period, such that at that time it may be the last chance for Student to learn to walk. Silver's letter stated that Student desperately needed the intensive therapy from WRC in order to obtain the life altering goal of walking. Mother testified that before July 2007, Student was only crawling or cruising on a limited basis. However, later reports offered by Mother indicate that between July 2007 and July 2008 Student had made progress. As demonstrated by the May 2008 reports of Silver and Hicklin, after a year of physical therapy provided by Silver through WRC, Student now is beginning to ambulate. She uses leg braces, walking sticks, and a walker, which greatly improved Student's walking ability. Since July 2007, medication has controlled her seizures and Student has the energy to improve and focus on standing and walking.

8. Nadine Iba (Iba), District's physical therapist, has been employed as a physical therapist in the special education related services area with District for the last ten years. In 1979 she received both a bachelor and Master of Science degree in physical therapy from UCLA. She is a licensed physical therapist in the state of California and was formerly a licensed physical therapist in the states of Oregon and Washington. She has worked with and performed assessments of special education students in a wide area of disabilities. She looks at the ability of a student to physically access the educational environment including the school yard, playground, campus, classrooms and interaction with the teachers. She makes recommendations regarding the positioning of chairs, tabletop activities, carpet or circle time, lunch benches in the cafeteria and in other matters related to the quality of the environment for students' special needs. Iba explained that there may be some overlap with school environmental needs and home

or community based needs, but the focus of physical therapy as a related service is on whether a student's academic performance is optimized in the school setting.

9. Iba explained that a regional center, such as WRC, has a different mission from District's mission because a regional center treats children up to age three in a home or clinic setting. Children then transfer to preschool for an educational setting. If there are lingering medically-based community or home based needs, either a regional center, or private insurance must provide non-educational services. She also explained that a district may provide home-hospital services if a student is so medically fragile so as not to be able to attend school. Districts require a letter from a physician that explains a student's medically fragile condition before considering that educational option. Iba testified that she had considered the reports of Silver and Hicklin and had discussed the issues of District's limited responsibility for educationally based physical therapy services with Silver and Mother at the IEP meeting on June 13, 2008. Iba noted that the IEP team concluded that Student was healthy enough to attend Castle Heights.

10. Iba explained that based on Student's limitations, she recommended to the IEP team that District offer two hours a week of physical therapy to Student for the 2008/2009 school year to accomplish the physical therapy goals. Iba persuasively explained that Student could achieve her goals and objectives related to being present at school, accessing and participating in the school based activities with the amount of physical therapy offered by District's IEP, particularly when the goals would also be worked on by the special education classroom teacher.

11. The IEP team offered Student placement in the special education center at Castle Heights in a multiple disabilities class and, among other things, 120 minutes (two hours) of school based physical therapy to be administered in segments one to five times per week. Mother testified that she agreed to the District's placement, goals and objectives, but did not agree with the physical therapy offer. She did not agree to the

two-hour weekly amount of physical therapy because Student had been receiving three hours of physical therapy at home from WRC and believed Student should continue to receive three hours per week.

LEGAL CONCLUSIONS

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

2. Student contends that the District's offer of two hours a week of physical therapy is not adequate and that she needs three hours a week of physical therapy. In particular, Student had previously been receiving three hours a week from WRC to further enable Student to walk. Mother argues that the additional hour is required because Student's medication adjustment has relieved her of seizures that had previously inhibited her ability to focus on walking. District contends that the amount of physical therapy is appropriate to assist Student to benefit from special education and that the goals for physical therapy and those for access to the classroom are appropriate. As discussed below, the facts support a finding that the District's offer of placement at Castle Heights Elementary with two hours of physical therapy is an offer of FAPE.

3. A child with a disability aged three or older has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) A FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge, that meet the state's educational standards, and that are provided in conformity with the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a

child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) “Related services” is defined, in pertinent part, as developmental, corrective, and other supportive services, including physical and occupational therapy, as may be required to assist a student with a disability to benefit from special education.” (20 U.S.C. § 1401(29), Ed. Code, § 56363. subd. (a).)

4. If a person under the age of 18 is or becomes developmentally disabled, services and supports may be available through a regional center under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, §§ 4400-4906.) To be qualified, a person must have a condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special services and the existence of significant functional limitations in three or more areas of major life activity, as determined by the regional center and as appropriate to the age of the person. (Welf. & Inst. Code, § 4512(l); Cal. Code Regs., tit. 17, § 54001, subd. (a).) A qualified person with a developmental disability may remain eligible indefinitely. (Welf. & Inst. Code, § 4512(a).) Regional center specialized services or special adaptations of generic services are determined through the individual program planning process (IPP). (Welf. & Inst. Code, § 4215(b).) The major life activity areas encompassed in a regional center IPP are social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement of independent, productive normal lives. (*Id.*) By contrast, an IEP under the IDEA is designed to provide educational benefit to a child in accordance with the child’s unique needs. (*Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) If required services for a person qualified under the Lanterman Act are not educationally related, an IPP team may provide services that are not addressed by a school’s IEP. (Cal. Code Regs., tit. 17, § 52112, subd. (f)(1)(2).)

5. When developing an IEP for a disabled child eligible to enter preschool, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

6. For a school district's offer of special education services to a disabled pupil to constitute a FAPE, the offer must meet the following substantive requirements: (1) be designed to meet the student's unique educational needs; (2) comport with the student's IEP; (3) be reasonably calculated to provide the pupil with some educational benefits, and (4) be in the least restrictive environment. (*Rowley, supra* 458 U.S. 176, 206-207.) A school district is required to provide only a "basic floor of opportunity" consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the child. (*Id.* at p. 201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at p.p. 197- 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

7. Under District's June 13, 2008 IEP, Student would receive individualized physical therapy between one and five times per week for a total of 120 minutes which included the use of a reverse walker and walking sticks at school. Additionally, the IEP charged Student's special education teacher and the aides with the task of having Student enter the classroom and engage in activity with intermittent adult support and prompting; thus, Student's physical therapy goals would also be worked on by classroom personnel. Student presented no evidence that Student's IEP goals were inappropriate. Silver recommended that Student continue to receive three hours of physical therapy per week. The basis for her recommendation was that Student had been receiving this amount at the WRC. The WRC has a different mission than does the District. The District must ensure that Student make educational progress while the WRC

provides services to address a major impairment of cognitive or social functioning that affect a major life activity such as self care, mobility, or capacity for independent living. Student produced no evidence that her unique educational needs would not be met by the IEP goals and related services of two hours per week dedicated to physical therapy with additional time addressed to her independent ambulation goals in the classroom. Mother's report from Kang did not recommend a required amount of physical therapy time. Hicklin's report recommended physical therapy service twice per week but did not specify a time. She did appear at the IEP team meeting, however, and, per the IEP report, Hicklin recommended two hours per week. Based on Hicklin's recommendation, as well that of Iba, who was persuasive in her testimony, District's offer of two hours of physical therapy per week met Student's unique needs and would permit Student to make educational progress.

8. In light of the above, Student failed to establish that the District's offer of 120 minutes (two hours) a week of physical therapy was a denial of FAPE. The two hours of week of physical therapy was designed to meet Student's unique educational needs and is calculated to improve Student's walking ability sufficiently for her to obtain educational benefit. (Factual Findings 1-11; Legal Conclusions 1-7.)

ORDER

All relief sought by Student is DENIED.

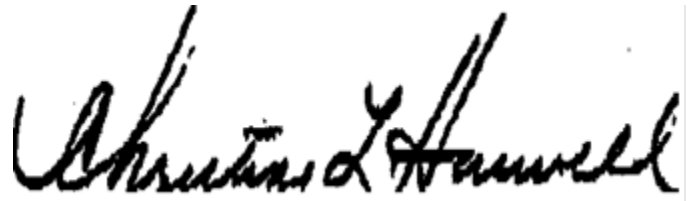
PREVAILING PARTY

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

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: August 14, 2008

A handwritten signature in black ink, reading "Christine L. Harwell". The signature is written in a cursive style with a large initial "C" and "H".

CHRISTINE L. HARWELL

Administrative Law Judge

Office of Administrative Hearings