

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

CALIFORNIA CHILDREN'S SERVICES.<sup>1</sup>

OAH CASE NO. 2012080386

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in San Jose, California, on May 7, 8 and 9, 2013.

Attorney Daniel Shaw represented Student. Parents were present throughout the hearing. Advocate Cathy Stone-Carlson was present during the hearing. Student was not present.

Attorney Derek Backus represented California Children's Service (CCS). Louise Sumpter, chief therapist for the Santa Clara County Health System, CCS Branch, was present throughout the hearing. Dr. Joan Dorfman, medical consultant for the Santa Clara County Health System, CCS Branch, was present during portions of the hearing.

On August 13, 2012, Student filed his request for a due process hearing. Student's amended complaint was deemed filed on November 14, 2012. On December

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<sup>1</sup> CCS is administered by, and is also referred to as the California Department of Health Care Services (DHCS).

27, 2012, OAH reset the timelines to issue a decision.<sup>2</sup> The matter was continued on February 13, 2013. At hearing on May 7, 8 and 9, 2013, oral and documentary evidence was received and the matter continued to June 3, 2013, at the parties' request, to submit written closing briefs. The parties filed their closing briefs on June 3, 2013, and the matter submitted for decision.<sup>3</sup>

## ISSUES<sup>4</sup>

Issue 1: During the 2011-2012 and 2012-2013 school years (SY's),<sup>5</sup> did CCS deny Student a free appropriate public education (FAPE) by failing to:

- a) Adequately assess his physical therapy (PT) and occupational therapy (OT) needs;

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<sup>2</sup> On that date, OAH added the Cupertino Union School District and Santa Clara County Office of Education as parties. They were dismissed as parties on February 12, 2013.

<sup>3</sup> The closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-58 and the District's brief has been marked as Exhibit C-14.

<sup>4</sup> The issues were framed in the April 24, 2013 Order Following Prehearing Conference (PHC), and further clarified at hearing. The ALJ has reorganized the issues for this Decision.

<sup>5</sup> At hearing, Student attempted to argue that the period at issue included SY 2010-2011, which is within the two-year statute of limitations. Student's request to include SY 2010-2011 was denied because the amended complaint and PHC statement did not include SY 2010-2011 within the issues for hearing. (20 U.S.C. §1415(c)(2)(E)(i).)

- b) Ensure that his individual educational program (IEP) contains goals designed to address his unique needs;
- c) Provide Student with adequate PT to meet his unique needs;
- d) Provide Student with adequate OT to meet his unique needs; and
- e) Ensure that Student was provided with adequate equipment to access his educational program, including a motorized wheelchair?

Issue 2: During SY's 2011-2012 and 2012-2013, did CCS violate Parent's and Student's procedural rights, which prevented Parents from meaningfully participating in Student's educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to:

- a) Comply with the requirements for independent assessments;
- b) Convene an IEP team meeting when it made changes to Student's IEP goals or services;
- c) Participate in all IEP team meetings;
- d) Permit other IEP team members to provide input at IEP team meetings; and
- e) Permit Parents to meaningfully participate in the IEP development process?

## REQUESTED REMEDIES

Student asks that CCS provide Student PT and OT services as compensatory education, and reimburse Parents for the cost of independent PT and OT assessments. Student also asks that CCS provide him with two hours a week of both PT and OT services, and a power wheelchair, as well as any other necessary equipment. Student requests that CCS be ordered to participate in all IEP team meetings, and provide a copy of its goals for Student to Parents and his school district during the IEP development process.

## CONTENTIONS OF THE PARTIES

Student asserts that CCS denied him a FAPE because it did not provide him with adequate OT and PT services to meet his educational needs when those services overlapped the medical necessity requirement for CCS services. Student also contends that he requires an electric wheelchair, instead of a manual wheelchair, to conserve his energy while moving around the school campus. Student argues that CCS did not comply with California statutory provisions because it did not send Student's CCS OT or PT provider to attend every IEP team meeting, which was necessary because Student's OT and PT needs seriously impact his ability to access his education. Additionally, CCS did not prepare goals to be incorporated into his IEP, and did not consider Parental input. Finally, Student asserts that CCS did not adequately assess his OT and PT needs because it did not use objective assessment tools.

CCS contends that its services are covered by a statutory scheme that requires that there be a medical necessity for its services that are prescribed by a medical physician, not that these services be determined by an IEP team. Further, CCS staff did attend the required IEP meetings, and provided information as to Student's present levels and the goals they were implementing. As to evaluating Student, CCS followed its own procedures to determine Student's medical needs and to develop goals, and considered Student's need for an electric wheelchair under its own regulations. Finally, if Parents are dissatisfied with the level of services that CCS provides Student, Parents should proceed through CCS' procedures to contest its decisions.

## LEGAL FRAMEWORK

### OVERVIEW OF CCS SERVICES AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

1. The outcome of this case revolves around the interpretation of Chapter 26.5 of the Government Code (Chapter 26.5),<sup>6</sup> and the interplay of CCS' legal obligations pursuant to this statutory scheme, the IDEA, and CCS' own statutory and regulatory scheme for students who receive CCS services and have an IEP. Student asserts that CCS is governed by nearly all the legal requirements that local education agencies (LEA's) must follow in development of an IEP when determining the medically necessary PT and OT services it shall provide. CCS contends that while it must participate in the IEP process, its service level and how it makes this determination is through its own statutory and regulatory scheme based on the medical necessity for the PT or OT services.

2. The answer to this question is not well-defined. The underlying California statutory scheme for CCS' involvement in the IEP process is not clear as to CCS' responsibilities in the area when the medical necessity for PT and OT service overlaps with the student's educational needs. Further, it is not clear how the final decision as to the service level is made. However, OAH and its predecessor hearing office, Special Education Hearing Office (SEHO), have broadly interpreted Chapter 26.5 historically, and included CCS as a responsible public agency if CCS services are listed in a student's IEP. This interpretation effectuates the intent of the Legislature to optimize services to qualified students, and this supports, for the most part, Student's contention as to CCS' legal responsibilities.

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<sup>6</sup> Government Code, sections 7570-7587.

3. CCS is a state and county program administered by the DHCS. It provides medically necessary benefits to persons 21 years of age and younger who have physically disabling conditions and who meet its medical, financial and residential eligibility requirements. Its Medical Therapy Program (MTP) provides physical therapy, occupational therapy and physician consultations to eligible students in schools. Pursuant to state law, MTP provides medically necessary OT and PT to special education students with a medical diagnosis when those services are contained in a students' IEP's. Student meets the requirements for CCS services in the areas of PT and OT, and CCS MTP has provided these services to him since he was six months old. Student's IEP's included the delivery of PT and OT by CCS.

4. In prior legal pleadings, in this case and others, CCS has contended that OAH lacks jurisdiction to hear claims as to whether CCS appropriately determined the level of medically necessary PT or OT service, pursuant to *Nevada County Office of Educ. v. Riles* (1983) 149 Cal.App.3d 767 (*Nevada County Office of Educ.*). In that case, the county office of education, which was responsible for providing special education services to a student, referred him to CCS pursuant to an interagency agreement (IA) between the California Department of Education (CDE) and CCS to determine if he needed medically necessary OT. CDE was authorized to enter into IA's with other state agencies, like CCS, to provide services mandated by the Education for All Handicapped Children Act (EAHCA), the predecessor of the IDEA. CCS evaluated and determined that he was not eligible and the county did not provide him with OT. Student instituted a due process action against the county office for denying him a FAPE under the EAHCA, for failure to provide OT services. The county office attempted to join CCS as a party, contending that CCS was legally required to provide student with OT. The hearing officer denied this request, and the superior court affirmed.

5. While CCS might be responsible for providing the OT pursuant to the IA, the due process hearing regarding provision of a FAPE was not the avenue to determine CCS' responsibility and the county office had to seek other legal means if it sought to recoup money for services CCS should have provided pursuant to the IA. Therefore, the county office had the legal obligation to provide student with OT services, even if medically required, that he needed to receive a FAPE. (*Nevada County Office of Educ. v. Riles, supra*, 149 Cal.App.3d at pp. 774-777.)

6. The California Legislature responded by enacting Assembly Bill 3632, 1983-1984 Regular Session, which created Chapter 26.5. This legislation effectively repealed *Nevada County Office of Educ.* The new statutory scheme imposes upon CCS, and other non-educational state agencies, obligations to deliver related services under IEP's. The first section of Chapter 26.5 provides that, to ensure "maximum utilization" of resources available to disabled children to provide them a FAPE, "the provision of related services, as defined in [the IDEA], and designated instruction and services, as defined in [the Education Code], shall be the joint responsibility of the Superintendent of Public Instruction and the Secretary of the Health and Human Services Agency." (§ 7570.<sup>7</sup>) As a subdivision of DHCS, the successor to the Health and Human Services Agency, CCS now has "responsibility" for "related services" as required by Chapter 26.5. (§ 7570.) In enacting section 7570, the Legislature intended that "specific state and local interagency responsibilities be clarified by this act in order to better serve the educational needs of the state's handicapped children." (Stats.1984, c. 1747, § 1.)<sup>8</sup>

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<sup>7</sup> Unless otherwise stated, all statutory references are to the Government Code.

<sup>8</sup> The delivery of mental health services under Chapter 26.5 underwent major revision in 2011 (see *California School Boards Ass'n v. Brown* (2011) 192 Cal.App.4th

Pursuant to that purpose, the Legislature imposed on CCS, in section 7575, subdivision (a)(1), the duty of providing “medically necessary” OT and PT to special education students “by reason of medical diagnosis and when those services are contained in the child’s individualized education program.”<sup>9</sup>

#### OAH Jurisdiction as to CCS OT and PT Service Levels

7. CCS argues that it is only responsible for the provision of medically necessary services, which OAH does not have jurisdiction to determine because a separate administrative hearing forum exists. (Cal. Code Regs., tit. 22, § 42140.) Further, the adequacy of a student’s IEP, including the adequacy of PT and OT services, is the sole responsibility of the school district. While OAH does not have jurisdiction to determine whether CCS should provide children with medically necessary services, the California Legislature explicitly folded into the existing special education hearing process for special education students who also receive CCS services, the mechanism to dispute the level of CCS service provided in this forum. (§§ 7585 & 7586, (Cal. Code Regs., tit. 2, §§ 60550, subd. (e).))

8. The primary task of statutory construction is to ascertain the intent of the Legislature to effectuate the purpose of the law. (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1226; *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208.) The guiding star of statutory construction is the intention of the Legislature and the statute is to be read in the light of its historical background and evident objective. (*State Compensation Ins.*

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1507), but the revision did not affect the obligations of CCS to provide PT and OT, or OAH’s jurisdiction over disputes concerning these services.

<sup>9</sup> CDE and DHS complied with the Chapter 26.5 requirements by promulgating implementing joint regulations. (Cal. Code Regs., tit. 2, §§ 60000 – 60610.)

*Fund v. Workers' Comp. Appeals Bd.* (1979) 88 Cal.App.3d 43, 53.) Where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305.)

9. Statutes must be construed to give reasonable and commonsense construction consistent with the apparent purpose and intention of the lawmakers, that is practical rather than technical, and that leads to wise policy rather than mischief or absurdity. (*People v. Turner* (1993) 15 Cal.App.4th 1690, 1696.) In addition, where the plain meaning of the words of a statute are not dispositive, the statute's legislative history and the wider historical circumstances of the enactment may be considered in ascertaining legislative intent. (*Int'l Medication Sys. v. Assessment Appeals Bd.* (1997) 57 Cal.App.4th 761, 765.)

10. CCS' jurisdictional argument fails because not only is it responsible for providing medically necessary services to Student, but it is also responsible for providing some of the related services in Student's IEP, which means it is responsible for providing part of Student's FAPE. Chapter 26.5 makes it clear that, in discharging its functions under that Chapter, CCS delivers related services as that term is used in special education law. The responsibility imposed by section 7570 on CCS is "the provision of related services, as defined in Section 1401(26) of Title 20 of the United States Code, and designated instruction and services, as defined in Section 56363 of the Education Code, to a child with a disability . . . ." Related services are an essential component of a FAPE, which is defined by the IDEA as "special education and related services" that meet four

criteria. (20 U.S.C. § 1401(9).)<sup>10</sup> CCS' insistence that it has nothing to do with the provision of a FAPE cannot be reconciled with these statutes.

11. Chapter 26.5 requires that disputes concerning CCS' provision of related services be resolved in special education due process hearings. Section 7586, subdivision (a), provides that "[a]ll state departments, and their designated local agencies, shall be governed by the procedural safeguards required in Section 1415 of Title 20 of the United States Code." That is a reference to the IDEA's requirements for special education due process hearings.

Chapter 26.5 further provides, in section 7586, subdivision (a), that:

A due process hearing arising over a related service or designated instruction and service shall be filed with the Superintendent of Public Instruction. Resolution of all issues shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of

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<sup>10</sup> Section 1401(9) provides that "[t]he term 'free appropriate public education' means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title."

Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter.

The referenced Education Code sections define the scope of special education due process hearings. Education Code, section 56501, subdivision (a), provides that special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to “the public agency involved in any decisions regarding a pupil.” (Ed. Code, § 56501, subd. (a).) A “public agency” is defined as “a school district, county office of education, special education local plan area . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs.” (Ed. Code, § 56028.5.) That latter definition includes CCS, which is involved in decisions regarding Student and provides related services to him. Thus, the same statutory scheme that obliges CCS to deliver related services to Student grants jurisdiction to OAH to resolve disputes over those services in special education due process hearings.<sup>11</sup>

12. Based on this legislative history, the SEHO and OAH have consistently ruled that CCS’ setting of service levels for OT and PT can be the subject of a special education hearing. (*Student v. Capistrano Unified Sch. Dist.* (April 8, 1998) SEHO Case No. SN305-97; *Student v. Fresno Unified Sch. Dist.* (September 22, 1999) SEHO Case No. SN1450-97; *Student v. California Children’s Services* (April 19, 2012)

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<sup>11</sup> OAH conducts special education due process hearings by virtue of an interagency agreement with the California Department of Education as required by Education Code section 56504.5, subdivision (a).

Cal.Ofc.Admin.Hrngs. Case No. 2011060589, pp. 12-15.<sup>12</sup>) All three cases analyzed the underlying the statutory scheme involving Chapter 26.5, and held that CCS was subject to special education due process hearings based on its provision of IEP related services for OT and PT. These cases also confirmed the requirement in California statutes and regulations that CCS attend those recipient students' IEP team meetings to transmit certain information to the IEP team.

13. CCS contends that despite the explicit statutory scheme in Chapter 26.5, OAH only has jurisdiction to determine whether CCS failed to provide a related service specified in a student's IEP. (§ 7585, subd. (a).) However, CCS narrowly reads Chapter 26.5 by side-stepping the provision in section 7586, subdivision (a), that all disputes regarding a related service or designated instruction or service are subject to the special education hearing process. Section 7585, subdivision (a), governs the special situation when a related service is not provided due to a dispute between public agencies and provides that the student shall continue to receive the service during the pendency of the dispute. In addition, section 7585 explicitly states in subdivision (g) that nothing in section 7585 prevents a parent from filing a request for a special education due process hearing pursuant to section 7586 with its broader area concerning any question involving a related service or designated instruction or service.

14. CCS also contends that even if OAH has jurisdiction, its jurisdiction is limited to only determining educationally necessary OT or PT services, not those that are medically necessary. However, as noted in *Student v. California Children's Services*, *supra*, Cal.Ofc.Admin.Hrngs. Case No. 2011060589, the line between medically necessary and educationally necessitated is hard to differentiate. In that case, Student's failure to

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<sup>12</sup> Prior administrative decisions have persuasive value in later cases, although they are not binding precedent. (Cal. Code Regs., tit. 5, § 3085.)

receive OT and PT services prevented him from ambulating around the school due to the pain and exhaustion he suffered because of not receiving OT and PT services. This contrasts with *Student v. Fresno Unified Sch. Dist.*, *supra*, SEHO Case No. SN1450-97, in which the student's receipt of massage services was purely medical to save a limb. When such an overlap exists between medical and educationally necessary services, OAH has jurisdiction to determine the level of OT and/or PT related services a student with an IEP may require.

15. CCS also argues that the funding restrictions it operates under prevent it from considering or providing any educationally related service due to those restrictions. Specifically, CCS contends that the Medi-Cal restrictions it operates under require that its services only be medically necessary services. However, state educational agencies, like CDE, are permitted under the IDEA to enter into IA's with other state agencies, like CCS, to assign responsibility for the provision of a FAPE, including the provision of medically necessary services a student requires to receive a FAPE, which may also be educationally necessary. (*Letter to Forer*, 211 IDELR 244, (OSEP November 4, 1980).) CDE entered into such an agreement with California Department of Health Care Services and the 2007 revised IA specifies the parties' obligations (Revised Interagency Agreement Between California Department of Health Services, CMS Branch and California Department of Education, Special Education Division, January 24, 2007 (2007 IA).) Further, 34 Code of Federal Regulations, section 300.154(b)(1)(ii) provides, "A noneducational public agency described in paragraph (b)(1)(i) of this section may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context."

16. As to financial responsibility for services in a student's IEP, the 2007 IA explicitly provides that a local CCS delivery of services is subject to a due process hearing decision and that a local CCS delivery of service must continue at the levels

specified in a student's IEP during the pendency of a due process action. (2007 IA, p. 11.) Further, the 2007 IA does not prohibit special education hearings involving CCS to determine the appropriate service level for students on an IEP. Such a prohibition does not exist because section 7572, subdivision (c)(3), states that any dispute regarding the IEP OT or PT service level that the CCS assessor recommends for the IEP is subject to a special education due process hearing pursuant to Education Code section 56500, et seq.

17. Therefore, OAH does have jurisdiction to hear Student's dispute as to the CCS service level. OAH's jurisdiction effectuates the intent of the Legislature in enacting Chapter 26.5, and not making any significant changes in nearly 30 years, unlike the changes for mental health services, which is evidence of an intent to secure the cooperation of LEA's and CCS, and to optimize services to eligible children who have an IEP. To that end, the Legislature gave students the rights afforded under IDEA to challenge service level recommendations by CCS for PT and OT services in a student's IEP, and thus OAH may hear Student's challenge to the PT and OT levels.

#### Federal Law Requirements

18. Even if state law were less clear, CCS' interpretation of its duties would be impermissible in light of controlling federal law. In case of conflict, federal law would prevail over state law. (U.S. Const., Art. VI, cl. 2.) However, federal and state special education law are not in conflict, because in crafting California's special education statutes the Legislature intended to give disabled students all the rights to which they are entitled under the IDEA. (Ed. Code, § 56000, subds. (d), (e).)

19. A state may only receive federal funding under the IDEA if it has in effect policies and procedures that ensure, among other things, that a FAPE is available to

every eligible child. (20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.101(a) (2006).<sup>13</sup>) Two conditions of that funding are that a state must ensure an IEP is “developed, reviewed, and revised” according to the procedures of section 1414(d) (20 U.S.C. § 1412(a)(4); 34 C.F.R. § 300.112); and that eligible children and their parents are afforded the procedural safeguards of section 1415. (§ 1412(a)(6); 34 C.F.R. § 300.500.)

20. Under the IDEA, a state educational agency (SEA) must be responsible for the general supervision of the state’s special education programs. (20 U.S.C. § 1412(a)(11)(A).) Otherwise, states are free to assign responsibilities for carrying out the IDEA to “any public agency in the State . . .” (20 U.S.C. § 1412(a)(11)(B).) The term “public agency” includes several specific state agencies “and any other political subdivisions of the State that are responsible for providing education to children with disabilities.” (34 C.F.R. § 300.33.)

21. The IDEA anticipates that states may delegate some IDEA responsibilities to non-educational agencies, and provides that a state may do so by law, regulation, or interagency agreement. (20 U.S.C. § 1412(a)(12)(A); 34 C.F.R. § 300.154(c)(1), (2).) It also anticipates that disputes may arise between state agencies about their responsibilities, and provides a mechanism for ensuring the continuation of IEP services while such a dispute is resolved. A state making such a delegation must have in effect “an interagency agreement or other mechanism for interagency coordination” between the non-educational state agency and the SEA, “to ensure that all services ... that are needed to ensure FAPE are provided, including the provision of such services during the pendency of any dispute under clause (iii).” (20 U.S.C. § 1412(a)(12)(A).) Clause (iii)

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<sup>13</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

requires that the state have in place a procedure for resolving interagency disputes that makes reimbursement available for services rendered. (20 U.S.C. § 1412(a)(12)(A)(iii).)

#### IEP Attendance Challenge

22. Student's complaint alleges that CCS violated Parents' procedural rights because either the CCS PT, OT or both were not in attendance at all IEP team meetings in which Student's PT and OT service levels were discussed, which prevented Parents from meaningfully participating in Student's educational decision-making process. CCS does not dispute its legal obligation to attend IEP team meetings pursuant to section 7572, subdivision (d). However, CCS contends that it attended the required IEP team meetings and that any alleged absence does not give rise to a due process action against CCS for a violation of procedural rights as the LEA has the obligation to ensure that all required persons attend the IEP team meeting.

23. The IDEA sets forth the required members of an IEP team, which must include "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. . . ." (20 U.S.C. § 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6); Ed. Code, § 56341(b)(6).) Federal and state law refer to these invited individuals as members of the IEP team: "The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team." (34 C.F.R. § 300.321(c); Ed. Code, § 56341(b)(6).) Thus, contrary to CCS' argument, there is nothing inconsistent about being an invitee and an IEP team member.

24. Section 7572, subdivision (d), requires CCS attendance for IEP team meetings in which the PT or OT service level is discussed in conjunction with a CCS assessment, and if the CCS representative cannot attend:

then the representative shall provide written information concerning the need for the service pursuant to subdivision (c). Conference calls, together with written recommendations, are acceptable forms of participation. If the responsible public agency representative will not be available to participate in the [IEP] team meeting, the local educational agency shall ensure that a qualified substitute is available to explain and interpret the evaluation pursuant to subdivision (d) of Section 56341 of the Education Code.<sup>14</sup>

This section was analyzed in *Student v. California Children's Services* (April 19, 2012) Cal.Ofc.Admin.Hrngs. Case No. 2011060589, pp. 20-21, which determined that CCS' attendance was mandatory unless a parent excused CCS, CCS attended by conference call, or the LEA had a person attend who was qualified to interpret the CCS PT or OT assessment report and recommendations. CCS' failure to attend is a procedural violation that might be a substantive denial of FAPE if CCS' absence significantly impedes the parent's ability to participate in the educational decision making process or caused student a loss of educational benefit. (*Student v. Capistrano Unified Sch. Dist.* (April 8, 1998) SEHO Case No. SN305-97.) Therefore, OAH has jurisdiction over claims as to CCS' purported failure to attend IEP team meetings.

25. However, CCS' attendance is predicated on knowing that an IEP team meeting will occur as the obligation to notice and convene the IEP team meeting, which includes inviting CCS, belongs to the LEA. (§ 7572, subd. (d).) Student is incorrect in contending that CCS has the authority or legal obligation to convene an IEP team

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<sup>14</sup> See also California Code of Regulations, title 2, section 60325, subdivision (b), which states that CCS shall participate in IEP team meetings.

meeting. CCS' obligation is to notify the LEA and parent of changes made to the service level. (Cal. Code Regs., tit. 2, § 60325, subd (c).) Then the obligation shifts to the LEA to convene the IEP team meeting. Thus, Student's assertion that CCS needed to convene IEP team meetings is without a legal basis.

### Assessment Challenge

26. Student contends that CCS failed to consider the results of independent PT and OT assessments when making its service level recommendations, would not provide an IEE after Parents objected to CCS' PT and OT assessments and that CCS did not properly assess Student pursuant to the Education Code requirements. CCS contends that it followed CCS regulations regarding its assessments and it need not consider information in the IEE's because they did not include all the information required by law for CCS to determine medically necessary services. Finally, CCS asserts that OAH does not have jurisdiction over the adequacy of its assessments or the authority to grant Student an IEE.

27. Section 7572, subdivision (a), states that "[a]ll assessments required or conducted pursuant to this section shall be governed by the assessment procedures contained in Article 2 (commencing with Section 56320) of Chapter 4 of Part 30 of Division 4 of Title 2 of the Education Code." This would include PT or OT assessments conducted by CCS. (§ 7572, subd (b).) Section 7572, subdivision (c)(1), provides for an IEE as "[n]othing in this section shall prevent a parent from obtaining an independent assessment in accordance with subdivision (b) of Section 56329 of the Education Code,"<sup>15</sup>

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<sup>15</sup> "A parent or guardian has the right to obtain, at public expense, an independent educational assessment of the pupil from qualified specialists, as defined by regulations of the board, if the parent or guardian disagrees with an assessment obtained by the public education agency . . . ." (Ed. Code., § 56329, subd. (b).)

which shall be considered by the individualized education program team.” The CCS person who conducted the original assessment at issue shall review the IEE and then make recommendations to the IEP team and the CCS assessor’s recommendations shall be the recommendation of the LEA IEP team members. Finally, any dispute as to the CCS recommendations are subject to a special education due process hearing. (§ 7572, subd. (c)(3).)

28. Accordingly, OAH has jurisdiction to hear Student’s claim whether Parents are entitled to reimbursement from CCS for the private PT and OT assessments they obtained, and whether CCS violated their procedural rights by failing to consider or discuss these private assessments at an IEP team meeting.

#### Goals Challenge

29. Student challenged the goals that CCS developed for Student’s therapy plan (TP), asserting that these were not appropriate to meet his unique PT and OT needs. CCS contended that the goals in the TP were appropriate for treating medically necessary needs. In *Student v. Capistrano Unified Sch. Dist.* (April 8, 1998) SEHO Case No. SN305-97, the hearing officer determined that the goals and objectives that CCS developed for medical services to the student were not subject to the same requirements as educationally required IEP goals, and not subject to IEP team review. While CCS should be involved in the development of educationally related PT and OT goals for the IEP, Student did not establish that the same IEP procedural and substantive requirements exist for goals part of a TP, and therefore OAH does not have jurisdiction over that issue.

#### Durable Medical Equipment Challenge

30. Student also requests that CCS should provide him with a motorized wheelchair so he can more easily get around the school campus. CCS does provide

motorized wheelchairs through its durable medical equipment program. Student did not establish that CCS' durable medical equipment program is subject to the Chapter 26.5 requirements as nothing in the language of sections 7572, 7575, 7585 and 7586 imply that the Legislature intended that the provision of durable medical equipment to be subject to a special education due process hearing.

## FACTUAL FINDINGS

### JURISDICTION AND FACTUAL BACKGROUND

1. Student is a 12-year-old boy who lives with his Parents within the geographical boundaries of the Cupertino Union School District (District) and Santa Clara County. He is severely disabled by cerebral palsy and is visually impaired. He requires extensive supports and services at home and school, and is confined primarily to a wheelchair, although he can use a standing walker. He is eligible for, and has been receiving, special education and related services in the categories of orthopedic and vision impairment since he was three years old.

2. Student is non-verbal and communicates primarily through his augmentative and alternative communication device, or by facial expressions. Student requires assistance in all areas of activities of daily living, such as dressing, grooming, eating, toileting and bathing. According to information presented at hearing, Student has near average cognitive abilities. During all times relevant, Student attended special day classes (SDC) operated by the Santa Clara County Office of Education (SCCOE); his CCS OT has been Linda Bui and his CCS PT Leo Cheng.<sup>16</sup>

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<sup>16</sup> Mr. Cheng, as will be set forth later, has a doctorate and thus will be referred to as Dr. Cheng in the decision.

## START OF SY 2011-2012

### Level of PT and OT Services

3. Student challenged the adequacy of the level of PT and OT service CCS provided at the start of SY 2011-2012, contending that CCS should have known that the level of service was not adequate and should have increased the level of service right after the start of SY 2011-2012. CCS asserted that the level of service it provided was adequate to meet his medically necessary needs and no new information existed that would have required CCS to increase its level of service.

4. Student has received medically necessary PT and OT services from the age of six months to the present by CCS, provided through Santa Clara County Health System.<sup>17</sup> From the start of SY 2011-2012, CCS provided Student with OT once a month individually, 45 minutes a session, pursuant to his April 6, 2011 TP. For PT, service at the start of SY 2011-2012 was twice a month individually, 45 minutes a session, and then increased on March 27, 2012, to once a week for 45 minutes. The level of service documented in his March 8, 2011 IEP, was OT once a month individually, 45 minutes a session and PT twice a month individually, 45 minutes a session based on a prior MTP. Parents did not challenge the level of CCS PT or OT services at the March 8, 2011 IEP team meeting.

5. Student's complaint failed to raise a challenge to the April 2011 PT and OT service levels. Nonetheless, Student attempted to litigate the issue by trying to prove that changes in his condition from April 2011 warranted that CCS convene an IEP team

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<sup>17</sup> Witnesses for both Student and CCS agreed that the services of PT and OT overlap to a great degree generally. The witnesses generally described the distinction between them as, roughly, PT involves treating a person from the waist down, while OT involves treating a person from the waist up.

meeting to change the level of services. The March 8, 2011 IEP does not include any dispute by Parents as to the CCS service levels, and there is no evidence in the record that Parents put CCS on notice, either directly or through the District or SCCOE, that they disputed the CCS service level until right before the March 2012 IEP team meeting. Therefore, to permit Student to challenge the CCS PT and OT service levels is effectively amending the complaint to permit Student to challenge the March 2011 IEP, which was not included as an issue for hearing. Accordingly, Student waived any challenge to the March 2011 IEP and CCS service levels by not challenging the adequacy of these in the complaint.

#### CCS PT and OT Goals

6. The March 8, 2011 IEP did not contain any of the TP goals that CCS developed and worked on with Student at the start of SY 2011-2012. The CCS PT goals included Student descending five steps using a handrail, negotiating a small obstacle course with mechanical assistance, traversing 150 feet with a walker, and wheelchair and bathtub transfer. Student's CCS OT goals included putting on and removing various clothing, bathing, putting spread on bread, and flushing a toilet. As stated above in the Legal Framework section, Paragraph 29, OAH does not have jurisdiction to hear Student's challenge to these goals, or the CCS PT and OT goals developed in 2012 and 2013. Because OAH does not have jurisdiction to hear challenges to CCS medically necessary goals, Student's challenge to subsequent CCS goals also fail for lack of OAH jurisdiction.

#### SY 2011-2012 IEP Team Meetings

7. State law requires that if CCS delivers PT and OT as related services pursuant to an IEP, it must participate in the IEP process. OT and PT may only be added to an IEP after an assessment is conducted by CCS' qualified medical personnel. The

person who conducted the assessment must attend the IEP team meeting if requested. The LEA must invite the OT or PT assessor, who must attend in person, or by conference call, together with written information. If the assessor cannot attend in that fashion, the LEA must ensure that a qualified substitute is available to explain and interpret the evaluation.

#### IEP ATTENDANCE

8. The IEP team meetings that began in March 2012 were much more contentious than the prior year as the District convened IEP team meetings on March 13, April 23, May 2, May 25, and June 13, 2012. SCCOE invited Dr. Cheng and Ms. Bui to the March 13, 2012 IEP team meeting, which Dr. Cheng attended. Ms. Bui could not because she was on medical leave. The District did not invite any CCS representative to the April 23, 2012 IEP team meeting, and Parents requested at that meeting that the District invite the CCS PT and OT providers to subsequent IEP team meetings. The IEP team meeting notices for the May 2 and 25, 2012 IEP team meetings, do not indicate that the District invited CCS. The IEP team meeting notice for June 13, 2012, did not include any CCS representatives, and Parents wrote in Dr. Cheng and Ms. Bui to be invited by SCCOE.

9. As to the March 13, 2012 IEP team meeting, Student contended that CCS violated Parents' procedural rights because Ms. Bui did not attend, and CCS did not have another PT provider attend either in person or by phone to explain her therapy recommendation to maintain the same level of service. However, Dr. Cheng, and his supervisor, Ms. Sumpter<sup>18</sup> were convincing that, although Ms. Bui was not in attendance,

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<sup>18</sup> Ms. Sumpter has known Student since the age of seven months as she was his original CCS OT provider. She also got approval for an outside entity to provide PT to

Dr. Cheng was capable of explaining her TP, which included her proposed goals and service levels, based on them working collaboratively regarding Student. Student did not establish that Ms. Bui's absence significantly impeded Parents' ability to participate in Student's educational decision-making process. Ms. Bui explained her recommendations at the April 6, 2011, and March 27, 2012 Medical Therapy Conference (MTC), Parents had a copy of her report and the doctor's treatment plan, and Dr. Cheng was available to discuss questions regarding the OT service level and any recommendations for the IEP.

10. Additionally, the March 13, 2012 IEP meeting notes do not indicate a that a meaningful discussion as to OT and PT services was to be provided by CCS. It does not appear that SCCOE, which conducted the meeting and directed the team discussion, made sure that CCS service levels were adequately addressed. SCCOE possessed a copy of CCS' proposed service levels and could have introduced the team discussion about this issue, or Parents who attended the MTC, could have asked for that discussion. As to the April 23, May 2, and May 25, 2012 IEP team meetings, it was SCCOE's fault for not inviting CCS. Additionally, CCS has no independent legal obligation to convene an IEP team meeting or to ask SCCOE if a subsequent IEP team meeting was convened. While CCS could have notified the District and SCCOE asking to increase PT services to weekly before the April 23, 2012 IEP team meeting, CCS' legal obligation is only when it decreases or terminates services. Additionally, the IEP team notes do not reflect that Parents ever mentioned the CCS PT service increase to the other members of the IEP team.

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Student at that time due to a CCS PT shortage. Ms. Sumpter worked with Student through her appointment as CCS chief therapist in January 2008.

11. Finally, while CCS did not attend the May 25, 2012 IEP team meeting, Parents consented to the District's IEP, with exceptions to the IEP that do not apply to CCS services. Because Parents consented to the IEP on May 25, 2012, which included CCS service levels, CCS did not have any obligation to attend the June 2012 IEP team meeting. Therefore, Student did not establish why CCS needed to attend the June 2012 IEP team meeting as Parents consented to the District's IEP offer, which included the same CCS levels from the prior year. While the IEP team members discussed communication devices for Student and installation concerns on Student's wheelchair, both Dr. Cheng and Ms. Bui adequately explained that they could have provided consultation to District and SCCOE personnel on this issue and their assistance was not limited to just participating in IEP team meetings.

12. Accordingly, CCS did not violate Parents' procedural rights by not having Ms. Bui attend the March 13, 2012 IEP team meeting, and SCCOE was responsible for CCS' lack of attendance at the April and May 2012 IEP team meetings. Additionally, CCS has no legal obligation to convene an IEP team meeting, and its presence was not required for the June 13, 2012 IEP team meeting.

#### MEETING CONDUCT

13. Student contends that CCS failed to permit other IEP team members to meaningfully participate in the IEP team meetings. However, the evidence established that SCCOE controlled the agenda of the IEP team meeting of March 2012 and any discussion regarding CCS was left to the end of the IEP team meeting. Dr. Cheng was not under any obligation to change the IEP agenda to ensure that enough time was left to discuss issues involving CCS. Student did not present evidence that Dr. Cheng prevented Parents from raising their concerns about the CCS PT and OT service levels and, as discussed above, the obligation to invite CCS to subsequent meetings belonged to the District. Finally, there was no need for CCS to attend the June 2012 IEP team

meeting because of Parents' prior consent to the IEP, and because the meeting was confined to discussion of topics that did not require CCS' participation. Therefore, Student did not establish that CCS' conduct significantly impeded Parents' ability to participate in Student's educational decision-making process.

#### OT Service Level and Assessment

14. Student asserts that the OT therapy level CCS provided Student in his March 20, 2012 IEP, still once a month for 45 minutes, was not adequate to meet his unique needs because CCS failed to consider his needs in school as part of its evaluation. CCS contends that, based on its assessment information and Ms. Bui working with Student, it set the appropriate service level based on medical necessity, and the District and SCCOE had the obligation to provide educationally needed OT.

15. Student challenged the appropriateness of how Ms. Bui<sup>19</sup> evaluated Student to determine the service level because Ms. Bui did not use objective tests and relied on subjective testing. However, Student failed to establish that Ms. Bui's assessment did not meet the legal requirements of the Education Code. Ms. Bui credibly testified why she chose certain evaluation methods, which included observing Student's muscle tone, and the accuracy of the information she obtained, especially from working

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<sup>19</sup> Ms. Bui has a Bachelor of Science degree in psychology with an emphasis on biology (2004), and a master's degree in occupational therapy (2008). While obtaining her master's, Ms. Bui was an OT intern, including the later part of 2008 with CCS. Ms. Bui has worked as a CCS therapist since May 2009, and her duties include providing physically necessary PT, evaluating clients' functional abilities, developing treatment plans, consulting with caregivers (which include parents and school personnel), recommending equipment, and maintaining up-to-date records that record service delivered and client progress.

with Student. Further, Student's expert, Deborah Baumgarten, did not testify that Ms. Bui's assessment was done incorrectly or that the information in her assessment report was incorrect. Instead, she testified that Ms. Bui's recommendation for continuing the same service level and the basis of her opinion was incorrect, as will be further analyzed below. Therefore, Student did not establish that Ms. Bui's assessment was not properly conducted.

16. However, questions do exist as to the analysis Ms. Bui employed in determining the service level. Ms. Bui, Ms. Sumpter and Dr. Dorfman<sup>20</sup> all stated that CCS, when setting a child's service level, uses the same analysis, regardless of whether the child has an IEP. Thus, Ms. Bui's analysis in determining the service level focused on treating Student's medical condition, neuromuscular weakness, for which he is eligible to receive CCS OT services. Ms. Bui worked with Student on fine motor skills related to

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<sup>20</sup> Dr. Dorfman received her medical degree in 1970 and master's in public health in 1983. Her medical specialty is pediatric neurology. From 1976 through 1983, she was a consulting pediatrician for CCS, Santa Clara County, and conducted eligibility assessments, prescribed treatment plans, and provided training. From 1983 through 1988, she was director of San Mateo County's maternal and child health program, which included oversight of its CCS program. In 1995 and 1996, she worked for the State of California overseeing a CCS pilot project. From 2001 through 2005, Dr. Dorfman was the CCS Sacramento regional chief with oversight for 21 Northern California counties. Also from 2001 through 2007, she was the lead medical officer for the CCS San Francisco regional office, which included oversight and consultation for counties in its region. Finally, she has been a medical consultant for Alameda County's CCS program since 2007 and for Santa Clara County since 2012. Her duties include eligibility assessments, case consultation and training.

activities of daily living that focused on dressing, food preparation, and toileting. Ms. Bui worked with Student on improving his muscle control and strength, and consulting with Parents so Student could work on these skills at home through repetition.

17. As to increasing the service level to twice a week as Parents have requested, Ms. Bui opined that any increase in service would not necessarily improve Student's fine motor skills and muscle strength because the real improvement comes with Student practicing these skills at home, which Parents ensured he did. Additionally, Ms. Bui believed that Student was progressing at the rate permitted by his disability and that any increase in service would not increase his rate of progress. Further, she was not required to consider Student's OT progress at school and to include that as part of her analysis.

18. Dr. Dorfman, who reviewed Student's CCS file, corroborated Ms. Bui's opinion as to the OT service level. Dr. Dorfman is familiar with the Chapter 26.5 requirements and the coordination that is to occur between CCS and LEA's. However, in determining a child's service level, Dr. Dorfman used the same medically necessary standard Ms. Bui used, which did not focus on possible overlap as to medically necessary and educationally necessary. Ms. Bui and Dr. Dorfman considered medically necessary services and educationally necessary services as two circles that did not overlap. Therefore, they could be analyzed separately.

19. However, the better analysis was presented by Dr. Kristine Corn<sup>21</sup> regarding the overlap as to medically necessary and educationally necessary OT. Dr.

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<sup>21</sup> Dr. Corn has a bachelor's degree in physical therapy from the University of Southern California, and master's and doctorate degrees in physical therapy from the University of the Pacific. She has a certificate of clinical competence, and is licensed by the state to practice physical therapy. She has worked as a staff therapist for CCS, the United Cerebral Palsy Association, and the Jerd Sullivan Rehabilitation Center. She has

Corn started her career in OT and established that the analysis for OT and PT service levels is the same when analyzing the overlap as to medically necessary and educationally necessary and that one could not determine service level to be delivered by CCS for either OT or PT by viewing medically and educationally necessary separately. Thus, the fine motor skills that Ms. Bui worked on with Student were also educationally necessary because the work to improve his muscle strength and control would improve his ability to perform educationally necessary tasks and improve his independence at school. Examples include removing his jacket by himself when he got to school or opening a container with his school supplies. If CCS did not provide the medically necessary OT services, Student would not be able to perform tasks that were also educationally necessary due to his lack of muscle strength and control.

20. Ms. Baumgarten<sup>22</sup> assessed Student on October 23, 2012, for two hours as to his neuromotor and functional abilities. Ms. Baumgarten obtained Student's  

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extensive experience as a teacher and clinical supervisor of physical therapy, and is at present in private practice, specializing in treating children with brain damage. She has completed more than 500 assessments of children.

<sup>22</sup> Ms. Baumgarten has a bachelor of science degree in OT, and has been providing OT services to children since 1992. Employment relevant to this matter is working as a senior OT from 1996 through 2001. In this capacity she assessed and provided OT services for clients, plus training and consultation to other providers. From 2002 through 2011, she was an OT provider for CCS, Alameda County, with the same job functions and client group as Ms. Bui. Ms. Baumgarten also provided contract services to the Regional Center of the East Bay from 2003 through 2007, and has been a private OT provider from September 2009 through the present, conducting assessments and providing OT services.

treatment history from Mother. While the assessment was seven months after the March 2012 IEP team meeting, the information she obtained was known to CCS as of that IEP team meeting because, according to Ms. Bui, Student has made slow progress during the time she has worked with him. For the assessment, Student's energy level increased as the assessment continued; Student could communicate non-verbally through body language and facial expressions, and had adequate cognitive ability to follow her directions.

21. CCS' challenge to Ms. Baumgarten's assessment was not as to her findings as to OT deficits, low muscle tone and functional abilities, but rather as to her recommendation that Student should receive OT services twice a week, 45 minutes a session for six months, and then his progress and needed service level should be reevaluated. CCS challenges Ms. Baumgarten's recommendations based on the lack of time she spent with Student, and contends that her report did not include all the information that CCS includes in its assessment reports. As to the report format and information contained in the report, CCS could not demonstrate why Ms. Baumgarten could not make an OT service level recommendation, nor did CCS show why any missing information was needed for her to make an appropriate service level recommendation.

22. CCS' better argument was that Ms. Bui was in a better position to make a service level recommendation based on her working with Student since June 2010, and that Ms. Baumgarten only saw Student for two and a half hours. While that is true, CCS' argument ignores the fact that it did not establish that any of the assessment information was incorrect, or that Ms. Baumgarten was not qualified to make a service level recommendation based on her experience as a CCS OT provider. Therefore, the analysis of the service level recommendation focuses on the appropriateness of the analysis used by Ms. Bui and Ms. Baumgarten, and what level Student requires to receive a FAPE.

23. As noted above, Ms. Bui inappropriately focused her analysis of the medically necessary service level by not including in her analysis the impact CCS services have for Student as to his educational needs. On the other hand, Ms. Baumgarten considered the interplay between the two, and demonstrated how improving Student's performance at school could improve Student's muscle strength and control. Additionally, Ms. Bui gave little explanation why she expected Student to continue to make the same, slow level of progress, based on his neuromuscular deficits that she did not expect to improve with additional therapy. Ms. Baumgarten was more convincing that, although more therapy would not correct Student's low muscle tone condition, the present level of CCS service was not adequate to increase his strength to permit him to make meaningful progress.

24. However, although Ms. Baumgarten applied the appropriate analysis as to the appropriate level of CCS service for Student who has an IEP, her recommendation of twice a week for 45 minutes a session was excessive. The recommendation was based on a diagnostic analysis of seeing the level of progress Student would make with two weekly sessions versus what level of OT service would permit him to make meaningful progress. Although Student's progress had increased at a faster pace in the past year than in prior years, indicating that he might not be as disabled as Ms. Bui believed, the level of progress was still de minimis based on what Ms. Bui reported. Therefore, the appropriate level of service is once a week, individual, 45 minutes a session for Student to receive a FAPE.

## PT Service Level and Assessment

25. Dr. Cheng<sup>23</sup> recommended that Student receive PT twice a week for 45 minutes a session. Dr. Cheng has worked with Student since May 2010. At the time of the March 18, 2012 IEP team meeting, Student was receiving PT twice a month, which CCS increased shortly thereafter to once a week, 45 minutes a session. Student attempted to challenge Dr. Cheng's assessment and treatment recommendation based upon the same grounds as his challenge to Ms. Bui's assessment. As with Ms. Bui's assessment, Student's challenge fails to provide adequate evidence that Dr. Cheng's evaluation methods were inadequate and he failed to accurately obtain information as to Student's present levels and progress. Additionally, Dr. Corn did not challenge Dr. Cheng's evaluation and his findings, especially the progress Student was reported to have made, just his service level recommendation.

26. As to CCS' challenge to Dr. Corn's October 5, 2012 assessment, it fails in that CCS did not demonstrate why she needed to conduct the same type of PT assessment that CCS conducts, pursuant to its regulations, for her to accurately assess Student and make a service level recommendation. This is especially true when CCS does not dispute her findings as to his present levels and issues related to his muscle tone, even though she only assessed Student for an hour and a quarter, and saw him briefly before the hearing at her clinic. While Dr. Corn assessed Student in October 2012, as with Ms. Baumgarten's assessment, any change in Student's muscle condition and present levels was not so significant that the information Dr. Corn obtained was not

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<sup>23</sup> Dr. Cheng has a Bachelor of Arts degree in economics and obtained his Ph.D. in PT in 2006. While obtaining his doctorate, Dr. Cheng had several clinical internships. Dr. Cheng has worked as PT provider with CCS since February 2007, and he has had extensive continuing education and training during his employment with CCS.

known to CCS as of the March 2012 IEP team meeting. Therefore the issue becomes the level of PT Student requires to make meaningful progress.

27. Student's PT issue is postural support due to poor muscle tone. This prevents Student from keeping his head held up and shoulders straight and affects his ability to stand upright without support for long periods. Student's walking is not stable and he needs support to ambulate, like a walker or railing. Due to Student's poor neck control, it is hard for him to keep his mouth closed, control his tongue and keep from drooling.

28. As to the medically versus educationally necessary overlap, the example that Dr. Corn gave is good in showing, despite CCS' assertions, they cannot be simply separated. Because of Student's poor neck control his head faces down, which makes it hard for him to take in air, which is a medical concern. The educational concern is that because Student's head is down is that he cannot see his teacher or what is written on the board and lacks energy due to poor air intake. Additionally, Student cannot interact with his peers with his head down, and general education students might not want to interact with him due to his drooling and open mouth. Thus, it is impossible to separate what is medically necessary from what is educationally necessary in regards to Student's PT needs.

29. However, Dr. Corn's recommendation of twice-weekly sessions is excessive because she gave no indication that the analysis she used for her recommendation was the FAPE standard of permitting Student to make meaningful progress, versus a diagnostic recommendation. The record reflects that in the year prior to the March 2012 IEP team meeting, Student's rate of progress on his PT goals had increased as his body matured. Dr. Cheng set Student's PT service levels without considering the impact of medically necessary services as they applied to Student in the school setting, especially those involving head and neck control, and building trunk strength to permit Student to

participate more in his education and be independent. However, the increase to weekly sessions was adequate to permit Student to make meaningful progress based on the information that existed in March 2012. Additionally, Dr. Cheng worked with Student at school, in consultation with his SCCOE OT provider, on educationally related skills, such as mobility around the school, and Student made meaningful progress in this regard.<sup>24</sup> Therefore, based on the information presented by Dr. Cheng, Dr. Corn, the CCS records and Student's IEP's, the appropriate level of PT service by CCS was once a week, individual, for 45 minutes a session.

#### Missed OT and PT Sessions

30. Student missed three OT sessions in February, March and April 2012 while Ms. Bui was on medical leave. CCS' position was that Parents needed to contact CCS to reschedule the missed sessions. However, the obligation to reschedule the missed sessions belonged to CCS, which could have either used another PT service provider in Ms. Bui's absence, or rescheduled the missed sessions on her return. Therefore, CCS denied Student a FAPE by not rescheduling the three missed sessions.

31. Student also attempted to demonstrate that CCS failed to provide PT services in early 2013 when Dr. Cheng worked with Student on motorized wheelchair skills and not on the goals in the CCS MTP. However, Dr. Cheng worked with Student on the motorized wheelchair skills because Parents requested that CCS provide Student with such a wheelchair and CCS procedures for durable medical equipment, over which OAH has no jurisdiction, provide for an evaluation to determine suitability of a child to obtain such a wheelchair. Additionally, Dr. Cheng working with Student on using a

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<sup>24</sup> While Student received some private PT services, he did not contend that the level of progress he made was directly attributable to the private PT service and not the PT Dr. Cheng provided.

motorized wheelchair is also part of the TP to improve Student's orientation and mobility. Therefore, CCS provided the requisite PT therapy sessions as provided in his IEP.

## SY 2012-2013

### IEP Team Meetings

32. Student changed schools when he started SY 2012-2013, and the District was completing various assessments as agreed upon at the end of SY 2011-2012. The District convened an IEP team meeting on November 7, 2012, to discuss the assessment findings and how Student was doing at the new school. The big change for Student at the new school was more mainstreaming time with general education students.

33. Dr. Cheng attended the November 7, 2012 IEP team meeting and Ms. Bui was not available. Parents stated explicitly at the IEP team meeting that they did not excuse CCS for not having a person available, either in person or by telephone, to discuss any information about Student that developed after the March 2012 IEP team meeting, and the CCS PT service level. However, as with the March 13, 2012 IEP team meeting, Student did not demonstrate that Dr. Cheng was not capable of discussing Mrs. Bui's assessment information, service level recommendations or providing input as to proposed IEP goals. Ms. Bui's absence was not a per se violation because Dr. Cheng attended the IEP meeting on behalf of CCS, and based on his education, training, and working collaboratively with Ms. Bui regarding Student, he could provide the IEP team meeting with needed information.

34. At the November 7, 2012 IEP team meeting, Parents brought Dr. Corn's initial PT evaluation report for the IEP team to review. Dr. Cheng reviewed Dr. Corn's report and disagreed with her recommendation of PT twice a week. Student did not present any evidence that Dr. Cheng tried to stifle the IEP team reviewing or discussing

Dr. Corn's report. The IEP team meeting ended early because Parents wanted all IEP team members in attendance, such as Ms. Bui and the SCCOE PT, who were not at the IEP team meeting.

35. The IEP team reconvened on November 26, 2012. In attendance from CCS were Dr. Cheng, Ms. Bui and Ms. Sumpter. Ms. Sumpter decided to attend the November 26, 2012 IEP team meeting because she felt that Parents and their advocate would attempt to intimidate Dr. Cheng and Ms. Bui. The IEP team meeting began soon after the end of the school day. Ms. Sumpter informed the IEP team that she, Dr. Cheng, and Ms. Bui would need to leave the IEP team meeting at 5:30 p.m.. Even after being told of this time limitation, the District, SCCOE and Parents discussed other topic items related to Student's IEP that involved little participation from the CCS attendees. It was not until towards 5:30 p.m. that the discussion began to move to the CCS OT and PT service levels, and the private OT and PT assessment reports.

36. Ms. Sumpter informed the IEP team that CCS would not consider the private assessment reports as they did not include all the information that CCS regulations require for its own reports that it presents to the doctor at the MTC. However, Ms. Sumpter failed to explain why the reports did not include any information that CCS could use in evaluating the service level. CCS' hardline position that it would not consider either Dr. Corn's or Ms. Baumgarten's assessment information violated Parents' procedural rights because it significantly impeded their ability to participate in the decision making process. Nothing prevented CCS from considering the private evaluations and giving them appropriate weight based on the completeness of the private assessments and information developed.

37. As to CCS representatives leaving before the completion of the IEP team meeting and whether this violated Parents' ability to participate in the decision-making process, Parents, along with the District and SCCOE, controlled the IEP team meeting.

The discussion of the CCS service levels should have started much earlier, especially because of the long-standing disagreements between Parents and CCS. The lengthy discussion about other parts of Student's IEP that did not require CCS' participation should have been tabled so that CCS' two and a half hour attendance time could be maximized. Therefore, the CCS representatives leaving before the completion of the IEP team meeting did not violate Parents' procedural rights.<sup>25</sup>

38. After the November 26, 2012 IEP team meeting, Ms. Sumpter informed SCCOE in writing that it would not be sending CCS representatives to any more IEP team meetings that were a continuation of the November 7, 2012 meeting. The basis for Ms. Sumpter's position was that CCS had already presented all the needed information as to why it set the OT and PT service levels as they had, and returning to meeting after meeting for Parents to attempt to sway CCS to change its position was meaningless. Further, CCS was available to consult on OT and PT goals and with school personnel working with Student. While Ms. Sumpter's communication expressed her frustration, her general statement was correct: that Parents were getting close to abusing the IEP process in an attempt to get CCS to submit to a change in service levels. Student did not demonstrate what additional information CCS could present that was not already presented, and why its presence was needed, especially if Parents just wanted CCS to attend so they could keep going over their request for an increase of OT and PT services. Therefore, CCS' failure to attend the November 30, 2012 IEP team meeting did

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<sup>25</sup> Also discussed at the November 26, 2012 IEP team meeting was Student's wheelchair use on campus. The contention that CCS should provide Student with a motorized wheelchair, is not properly before this forum because OAH does not have jurisdiction of CCS' durable medical equipment (Legal Framework 30). Accordingly, no further discussion on Student's need for a wheelchair is required.

not violate Parents' procedural rights, especially since Parents were not listening to any information CCS provided because of their desire for more CCS OT and PT services.

39. Student's triennial meeting was in March 2013 and it took three separate IEP team meetings to complete. Dr. Cheng and Ms. Bui attended the first team meeting on March 6, 2013, but not the other two meetings. Dr. Cheng and Ms. Bui presented information as to Student's progress and answered questions from the IEP team. As to the other two IEP team meetings, Student did not demonstrate why Dr. Cheng's and Ms. Bui's presence was required at the last two meetings. The information they presented on March 6, 2013 was adequate for the IEP team to complete the IEP, especially since the only real issue, for which Parents wanted CCS to attend the subsequent IEP team meetings, involved Parents' request that CCS increase its service levels. Therefore, Student did not establish that CCS' failure to attend either the March 14, 2013, or April 2, 2013 IEP team meetings, significantly impeded Parents right to participate in the IEP decision-making process. Except for discounting the private assessment reports in Factual Finding 36, Student did not establish that CCS failed to take into consideration information from other IEP team participants during SY 2012-2013 IEP team meetings.

#### Independent Educational Evaluation Requests

40. The timeline is not clear, but at some time in the fall of 2012, Parents requested independent PT and OT evaluations from CCS. CCS followed its regulatory process and provided Parents the names of providers who could conduct an independent evaluation. However, Parents wished to retain Dr. Corn and Ms. Baumgarten to conduct these assessments. CCS asserted that the IEE procedures in the IDEA and California special education laws do not apply to it. However, as analyzed in Legal Framework paragraphs 26 through 27, the Educational Code provisions that govern IEE requests govern PT and OT assessments covered by Chapter 26.5. This requirement also governs CCS' obligation to file a due process hearing request to

defend its assessment if a parent disagrees and CCS does not wish to pay for an IEE. Therefore, CCS denied Student a FAPE by preventing Parents from meaningfully participating in Student's educational decision-making process by not approving the request for an IEE at CCS' expense, or filing a hearing request with OAH as to the IEE request.

#### Service Levels and Assessments

41. District and SCCOE IEP team members became aware of the change of CCS PT service levels at the November 7, 2012 IEP team meeting. Because no significant intervening change occurred in Student's medical condition and rate of progress, and the private assessments were done right before the November 2012 IEP team meetings, the prior factual findings as to the appropriate level of CCS OT and PT service are applicable. Therefore, CCS' continuation of its offer of once a month OT services was not adequate as Student should have been receiving weekly OT, 45 minutes a session. As to PT, no new information existed as of November 2012 to warrant changing the service level beyond once a week as Student was making meaningful progress based on information from Dr. Cheng.

#### REMEDIES

42. ALJs have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. The award must 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,” and may be reduced if parents have not cooperated with or obstructed the IEP process.

43. Although no compensatory education is awarded as to PT, Dr. Corn’s testimony on this issue is illustrative of the difficulty in determining the amount of compensatory education for the denial of a FAPE regarding OT. Because CCS failed to comply with the requirements for providing Parents with an independent assessments, and failed to consider information from Dr. Corn’s and Ms. Baumgarten’s assessments, Parents are entitled for reimbursement of \$250 for Dr. Corn’s PT assessment and \$650 for Ms. Baumgarten’s OT assessment.

44. As to the additional OT sessions Student should have received of once a week since March 2012, instead of once a month, the issue becomes how much educational benefit did Student lose by CCS providing too low a level of OT services. Ms. Baumgarten was not clear on the level of loss as her report and testimony implied that the twice a week OT for six months was compensatory in nature as part of her diagnostic treatment recommendation. Accordingly, as compensatory education for CCS’ failure to provide adequate OT services, CCS shall provide Student with an additional weekly OT session, individual for 45 minutes for six months, which shall be in an addition to the weekly OT session he requires.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The Student, as petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

## ELEMENTS OF A FAPE<sup>26</sup>

2. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second,

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<sup>26</sup> While the cases, statutes and regulations mentioned in the Legal Conclusions discuss the obligations of LEA's to provide a FAPE, the duty for CCS to provide Student with a FAPE is the same in those Chapter 26.5 obligations to students on an IEP who receive CCS services that the Legislature has imposed upon CCS.

the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.) 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.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. The IDEA provides that a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

#### REQUIREMENTS FOR ASSESSMENTS

6. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)<sup>27</sup> Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if

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<sup>27</sup> An assessment under California law is equivalent to an evaluation under Federal law. (Ed. Code, § 56303.)

a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

7. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results “that accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure . . . .” (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed “in all areas related to” a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

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.” (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

9. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

10. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

## IEE REQUEST

11. Under certain conditions, a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

12. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent’s reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) Neither federal or California special education laws or regulations set a specific number of days for a school district to file a due process hearing request after a parent requests an IEE.

13. Procedural violations by a school district of the provisions in the IDEA and federal regulations may be, in and of themselves, grounds for requiring the District to pay for an IEE. In *Pajaro Valley Unified School District v. J.S.* the United States Northern District Court ordered the school district to pay for an IEE of the student, stating: “the district’s unexplained and unnecessary delay in filing for a due process hearing waived

its right to contest Student's request for an independent educational evaluation at public expense, and by itself warrants entry of judgment in favor of Student and A.O. in this action." (*Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006, No. C 06-0380 PVT) 2006 WL 3734289.) OAH has also ordered school districts to pay for an IEE when it has found that a district unreasonably delayed filing a request for due process asking OAH to find that the district's prior assessment met all legal requirements. (*Fremont Unified School District v. Student* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2009040633; *Lafayette School District v. Student* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2008120161.<sup>28</sup>)

ISSUE 1A: DURING SY'S 2011-2012 AND 2012-2013, DID CCS DENY STUDENT A FAPE BY FAILING TO ADEQUATELY ASSESS HIS PT AND OT NEEDS?

14. Pursuant to Factual Findings 15, 16 and 25, Legal Framework 26 through 28 and Legal Conclusions 1 through 10, while Dr. Cheng and Ms. Bui failed to consider adequately the overlap between medically necessary and educationally necessary in setting Student's CCS service level, Student failed to establish that the assessments they conducted were not accurate. Neither Dr. Corn nor Ms. Baumgarten challenged Dr. Cheng's and Ms. Bui's findings as to Student's neuromuscular deficits or the skills that he possessed. Additionally, neither Dr. Corn nor Ms. Baumgarten opined that the evaluation method that Dr. Cheng and Ms. Bui employed was not adequate to determine his unique needs as the area of disagreement was just with the final service level recommendations they made. Thus, Student failed to demonstrate that CCS failed to adequately assess his PT and OT needs.

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<sup>28</sup> Upheld on appeal, *M.M. v. Lafayette School Dist.* (9th Cir. 2012) 681 F.3d. 1082.

ISSUE 1B: DURING SY'S 2011-2012 AND 2012-2013, DID CCS DENY STUDENT A FAPE BY FAILING TO ENSURE THAT HIS IEP CONTAINS GOALS DESIGNED TO ADDRESS HIS UNIQUE NEEDS?

15. Pursuant to Factual Findings 6, Legal Framework 29 and Legal Conclusions 1 through 5, OAH does not have jurisdiction to hear challenges to goals that CCS develops as those goals for the TP are by regulation limited to medically necessary goals.

ISSUE 1C: DURING SY'S 2011-2012 AND 2012-2013, DID CCS DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT WITH ADEQUATE PT TO MEET HIS UNIQUE NEEDS?

16. Pursuant to Factual Findings 3 through 5, 16 through 24, 30, 31 and 41, Legal Framework 1 through 21 and Legal Conclusions 1 through 5, Student did not establish that CCS needed to provide him with PT more than once a week for 45 minutes. While Student received PT only twice a month for 45 minutes a session from the start of SY 2011-2012 through April 2012, Student waived any right to challenge the CCS PT service level by failing to challenge the March 2011 IEP in his complaint. After the March 2012 IEP team meeting, CCS increased the PT service level to once a week. While Dr. Corn established that Dr. Cheng failed to consider as medically necessary Student's needs for PT service that occur at school and overlap with medical necessity, she did not establish that he required twice the level of PT CCS offered for him to make meaningful educational progress as the requested service level was more to maximize Student's abilities. Although CCS might not consider this medically necessary, Dr. Cheng worked with Student at school in the satellite CCS treatment unit and on educationally related services, such as wheelchair mobility around the school. Dr. Cheng's work with Student at school did often focus on educationally and medically necessary services, and he established that Student made meaningful progress with the increase of service to

once a week. Therefore, Student did not establish that CCS established a PT service level that was not adequate to meet his unique needs.

ISSUE 1D: DURING SY'S 2011-2012 AND 2012-2013, DID CCS DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT WITH ADEQUATE OT TO MEET HIS UNIQUE NEEDS?

17. Pursuant to Factual Findings 3 through 5, 26 through 31 and 41, Legal Framework 1 through 21 and Legal Conclusions 1 through 5, Student established that CCS failed to offer adequate OT services to meet his unique needs. Like Dr. Cheng, Ms. Bui's analysis of adequate CCS services focused on medically necessary, without considering areas of overlap between educationally and medically necessary services. However, unlike Dr. Cheng, Ms. Bui's services infrequently overlapped with educationally related skills, especially since she focused on skills for Student to accomplish at home and for Parents to work on with Student. Ms. Baumgarten established that the service level of once a month a month was not adequate for him to make meaningful progress. However, Ms. Baumgarten's recommendation that Student receive OT twice a week for 45 minutes a session for six months to analyze if Student would progress faster with more OT is excessive as the record established that quadrupling his present service level to once a week for 45 minutes is adequate to determine progress and for Student to make meaningful progress. Therefore, Student requires CCS OT once a week, individually for 45 minute to receive a FAPE.

ISSUE 1E: DURING SY'S 2011-2012 AND 2012-2013, DID CCS DENY STUDENT A FAPE BY FAILING TO ENSURE THAT STUDENT WAS PROVIDED WITH ADEQUATE EQUIPMENT TO ACCESS HIS EDUCATIONAL PROGRAM, INCLUDING A MOTORIZED WHEELCHAIR?

18. Pursuant to Factual Finding 37, Legal Framework 30 and Legal Conclusions 1 through 5, CCS' provision of durable medical equipment, such as Student's request for

a motorized wheelchair, is not a decision for which OAH has jurisdiction pursuant to Chapter 26.5. Accordingly, Student is not entitled to a hearing as to whether CCS must provide him with a motorized wheelchair for him to receive a FAPE.

ISSUE 2A: DID CCS VIOLATE PARENT'S AND STUDENT'S PROCEDURAL RIGHTS, WHICH PREVENTED PARENTS FROM MEANINGFULLY PARTICIPATING IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS AND DENIED STUDENT AN EDUCATIONAL BENEFIT, WHICH DENIED STUDENT A FAPE, BY FAILING TO COMPLY WITH THE REQUIREMENTS FOR INDEPENDENT ASSESSMENTS?

19. Pursuant to Factual Finding 40, Legal Framework 26 through 28 and Legal Conclusions 1 through 5 and 11 through 13, CCS failed to comply with its legal obligations in Chapter 26.5 regarding independent assessments. Section 7572, subdivision (c)(1), states explicitly that the Education Code sections applicable to assessments, including IEE's, apply to PT and OT assessments that CCS conducts. CCS' refusal to comply with IEE provisions from the Education Code, and instead use its own regulations when Parents' requested independent assessments, violates the supremacy of the IDEA over California regulatory law. The California Legislature determined that for assessments pursuant to the IDEA, the California Education Code provisions, which implement the IDEA, apply. Additionally, CCS' refusal to consider the private assessments of Dr. Corn and Ms. Baumgarten simply because the assessments did not comply with CCS' own regulations significantly impeded Parents' right to participate in the decision making process at the IEP team. CCS should have discussed substantively why it disagreed with the private assessments and not dismissively rejected them. Finally, CCS never requested a due process hearing to defend its assessments after Parents requested an independent assessment. Accordingly, CCS violated Parents' procedural rights by not following the IEE requirements in the Education Code and not considering information presented in the private assessments.

ISSUE 2B: DID CCS VIOLATE PARENT'S AND STUDENT'S PROCEDURAL RIGHTS, WHICH PREVENTED PARENTS FROM MEANINGFULLY PARTICIPATING IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS AND DENIED STUDENT AN EDUCATIONAL BENEFIT, WHICH DENIED STUDENT A FAPE, BY FAILING TO CONVENE AN IEP TEAM MEETING WHEN IT MADE CHANGES TO STUDENT'S IEP GOALS OR SERVICES?

20. Pursuant to Factual Findings 13 and 39, Legal Framework 22 through 25 and Legal Conclusions 1 through 5, CCS was not under an obligation to convene an IEP team meeting. The obligation to convene IEP team meetings belonged to the District and SCCOE. CCS did provide the IEP team with copies of the most recent documents before the IEP team meeting. Although CCS should have notified the District and SCCOE when it increased Student's PT services to weekly in late March 2012, right after the March 13, 2012 IEP team meeting, this failure did not prevent Parents' ability to participate in the IEP process because they were aware of the change as a MTC participant. There was no showing that the District and SCCOE would have made further changes to Student's IEP, other than to document the increase in PT services, had they known of this increase. The District and SCCOE had the obligation to convene IEP team meetings, not CCS. Therefore, Student did not establish that CCS violated Parents' procedural rights by increasing services without informing the District and SCCOE pursuant to California Code of Regulations, title 2, section 60325, subdivision (c), as it was not CCS' duty to convene the IEP team meeting. Additionally, Student did not allege that CCS failed to notify Parents of the increase of service as required by the regulation. Therefore, Student did not establish that CCS' actions significantly impeded Parents' ability to participate in the decision-making process, or denied Student an educational benefit.

ISSUE 2C: DID CCS VIOLATE PARENT'S AND STUDENT'S PROCEDURAL RIGHTS, WHICH PREVENTED PARENTS FROM MEANINGFULLY PARTICIPATING IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS AND DENIED STUDENT AN EDUCATIONAL

BENEFIT, WHICH DENIED STUDENT A FAPE, BY FAILING TO PARTICIPATE IN ALL IEP TEAM MEETINGS?

21. Pursuant to Factual Findings 8 through 12 and 32 through 39, Legal Framework 22 through 25 and Legal Conclusions 1 through 5, while CCS did not attend all IEP team meetings during SY's 2011-2012 and 2012-2013, Student did not establish that this prevented Parents from meaningfully participating in Student's educational decision making process. While Ms. Bui did not attend the March 2012 IEP team meeting while on medical leave, Dr. Cheng was capable to answer any questions that they might have had regarding Ms. Bui's recommendations in her absence. Additionally, the District and SCCOE failed to ask Dr. Cheng many questions regarding Student's IEP and then failed to invite him for the April and May 2012 continued IEP team meetings. Additionally, Student did not demonstrate why CCS was needed by the June IEP team meeting because Parents had consented to the District's offer in April 2012, and the information CCS needed to discuss or present in June 2012 that was presented in March 2012.

22. As to the November 7, 2012, IEP team meeting, although Ms. Bui was not in attendance, Student did not demonstrate that Dr. Cheng could not answer OT questions in her absence. Dr. Cheng, Ms. Bui and Ms. Sumpter all attended the November 26, 2012 IEP team meeting. Unfortunately, most of their time in the IEP team meeting was wasted. Although the CCS participants informed the IEP team of their schedule and the time they needed to leave, the District, SCCOE and Parents engaged in other discussion and did not get to CCS until right before that time. Additionally, Student did not demonstrate why their continued presence was required, other than for Parents to continue to press CCS to increase the PT and OT service levels. While Ms. Sumpter's subsequent correspondence states that CCS would not participate in additional IEP team meetings, it was more a reference to any rescheduled IEP team

meetings related to the assessment reviews that started on November 7, 2012, and not to all future IEP team meetings.

23. As to the March 6, 2013 triennial IEP team meeting, both Dr. Cheng and Ms. Bui were present at the meeting. Parents, District and SCCOE got CCS more involved in this IEP team meeting and Dr. Cheng and Ms. Bui participated in providing needed information for the development of Student's IEP. However, as in the other IEP team meetings, Parents were not satisfied because CCS would not increase Student's PT and OT service levels. As to the next two IEP team meetings to finalize the triennial IEP, Student did not establish that CCS' presence was needed because Student did not demonstrate what additional information CCS would have added in those meetings, other than to listen to Parents request an increase in service levels.

24. Parents, District and SCCOE failed to ensure that CCS topics were discussed when CCS was present, even though the scheduling of IEP team meeting after IEP team meeting happened because Parents did not accept that CCS was not going to increase its services, no matter how IEP team meetings were convened. (*Student v. Capistrano Unified Sch. Dist.* (April 8, 1998) SEHO Case No. SN305-97.) Therefore, Student did not establish that Parents ability to participate in Student's educational decision making process was significantly impeded.

ISSUE 2D: DID CCS VIOLATE PARENT'S AND STUDENT'S PROCEDURAL RIGHTS, WHICH PREVENTED PARENTS FROM MEANINGFULLY PARTICIPATING IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS AND DENIED STUDENT AN EDUCATIONAL BENEFIT, WHICH DENIED STUDENT A FAPE, BY FAILING TO PERMIT OTHER IEP TEAM MEMBERS TO PROVIDE INPUT AT IEP TEAM MEETINGS?

25. Pursuant to Factual Findings 13 and 32 through 39, Legal Framework 25 through 25 and Legal Conclusions 1 through 5, CCS did not prevent other IEP team members from providing input at the IEP team meetings. Parents, District and SCCOE

controlled the IEP team meeting as CCS attended merely as a related service provider. The other parties failed to actively engage CCS at the IEP team meetings that CCS attended. CCS' decision not to attend all IEP team meetings was based on others failing to notify CCS of team meetings and failure of Parents, District and SCCOE to obtain information from CCS when it did attend IEP team meetings. Therefore, Student did not establish that CCS refused to permit other IEP team members parties participate in the IEP process.

ISSUE 2E: DID CCS VIOLATE PARENT'S AND STUDENT'S PROCEDURAL RIGHTS, WHICH PREVENTED PARENTS FROM MEANINGFULLY PARTICIPATING IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS AND DENIED STUDENT AN EDUCATIONAL BENEFIT, WHICH DENIED STUDENT A FAPE, BY FAILING TO PERMIT PARENTS TO MEANINGFULLY PARTICIPATE IN THE IEP DEVELOPMENT PROCESS?

26. Pursuant to Factual Findings 8 through 12 and 32 through 39, Legal Framework 25 through 25 and Legal Conclusions 1 through 5, Student did not establish that CCS prevented Parents from meaningfully participating in the IEP process, except as noted in Issue 2b. For the IEP team meetings that CCS attended, CCS was a mere bystander while Parents, District and SCCOE engaged in lengthy discussions about Student's school of attendance and school-based accommodations, goals and services, including PT and OT. However, team members did not ask CCS questions. CCS is not under any obligation to interject independently into the discussion of non-CCS matters as the District and SCCOE called the IEP team meeting and controlled its agenda, along with Parents. CCS did not prevent Parents from participating or discussing issues related to CCS service levels and District and SCCOE goals and services. Instead, Parents decided not to bring CCS into these discussions, and CCS was only able to discuss CCS service levels at the end of the IEP team meeting. Accordingly, Student did not present

adequate evidence to establish that CCS prevented Parents from meaningfully participating in the IEP process.

### Remedies

27. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) The authority to order such relief extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243, fn. 11 [129 S.Ct. 2484, 2494, fn. 11].)

28. Compensatory education is an equitable remedy and must rely on a fact specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*); *Shaun M. v. Hamamoto* (D. Hawai'i, Oct. 22, 2009 (Civ. No. 09-00075)) 2009 WL 3415308, pp. 8-9 [current needs]; *B.T. v. Department of Educ.* (D. Hawaii 2009) 676 F.Supp.2d 982, 989-990 [same].) The award must 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, supra*, 401 F.3d at p. 524.) Once a significant denial of a FAPE has been established, it is a rare case in which an award of compensatory education is not appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.)

29. Pursuant to Factual Findings 43 and 44, Legal Framework 1 through 21 and Legal Conclusions 1 through 5, 27 and 28, Student is entitled to compensatory education for the three missed OT sessions in February, March and April 2012. As to the additional OT sessions Student should have received of once a week since March 2012, instead of once a month, the issue becomes how much educational benefit Student lost by CCS providing too low of an OT service level. Ms. Baumgarten was not clear on the level of loss as her report and testimony implied that the twice a week OT for six months was compensatory in nature as part of her diagnostic treatment recommendation.

Accordingly, as compensatory education for CCS' failure to provide adequate OT services, CCS shall provide Student with an additional weekly OT session, individual for 45 minutes for six months, which shall be in an addition to the weekly OT session he requires. Additionally, CCS owes Student three sessions OT missed due to Ms. Bui's medical leave in February, March and April 2012.

30. Regarding the independent assessments Parents obtained, they are entitled to full reimbursement for Dr. Corn's PT assessment, in the amount of \$250, and Ms. Baumgarten's OT assessment, in the amount of \$650. Parents are entitled to full reimbursement due to CCS' failure to comply with Section 7572, subdivision (c), regarding assessments, which includes the provision of IEE's if a parent of a student on an IEP disagrees with a CCS assessment.

## ORDER

1. Within 30 days of the date of this decision, CCS shall begin to provide Student with OT, once each week, individually, for 45 minutes a session. CCS shall inform the District and SCCOE of this increase of OT.

2. As compensatory education, CCS shall provide Student with an additional weekly individual session of OT for minutes 45 minutes a session for 26 weeks.

3. Within 180 calendar days of this decision, CCS shall provide Student with three OT sessions as compensatory education for missed sessions due to Ms. Bui's medical leave.

4. Within 45 calendar days of this decision, CCS shall reimburse Parents \$250 for Dr. Corn's assessment and \$650 for Ms. Baumgarten's assessment. Within 10 calendar days of this decision, CCS shall inform Student if further documentation is needed for payment beyond the documents in Student's exhibit binder.

5. 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 Issues 1d and 2a. CCS prevailed on Issues 1a, 1b, 1c, 1e, 2b, 2c, 2d, and 2e.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by 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 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: June 27, 2013

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/s/

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings