BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. CALIFORNIA CHILDREN'S SERVICES,	OAH Case No. 2014120903

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on December 17, 2014, naming the Placentia-Yorba Linda Unified School District and California Children's Services. The matter was continued for good cause on January 29, 2015. On April 30, 2015, Student withdrew his complaint against Placentia-Yorba Linda pursuant to a settlement agreement.

Administrative Law Judge Paul H. Kamoroff heard this matter in Santa Ana, California, on April 27 and 28, 2015.

Deborah Pepaj and Alan Keating, Attorneys at Law, appeared on behalf of Student. Student's mother attended each day of the hearing. Student was not present during the hearing. OAH provided Mother a Japanese interpreter during each day of the hearing.

Carolyn Jefferson, Attorney at Law, appeared on behalf of CCS. Harriet Fain-Tvedt, Chief of CCS's Medical Therapy Program for Orange County, attended each day of the hearing.

The record closed on June 3, 2015, upon receipt of written closing briefs from the parties.

ISSUES[1]

1. Whether CCS denied Student a free appropriate public education, arising from an individualized education program meeting held on October 13, 2014, by:

a) Failing to offer Student physical therapy goals; and

b) Failing to offer Student appropriate physical therapy services.

SUMMARY OF DECISION

This case presents a situation where a severely disabled student received physical therapy services from both CCS and the school district. Student sought to combine these services in his IEP, to ensure that CCS was responsible for his IEP based physical therapy services.

CCS averred that it was solely responsible for determining the level of medically necessary physical therapy services, and for providing those services. CCS asserts that it was not responsible for offering IEP based physical therapy, or for delivering IEP services, as those services are deemed educationally necessary and were therefore the school district's responsibility.

CCS is correct that it was exclusively responsible for determining the level of medically necessary physical therapy services, and for providing those services. However, if those services determined by CCS to be medically necessary include services also

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[1] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

found to be educationally necessary in a due process hearing, CCS is obligated to provide them. Here, CCS determined that Student required medically necessary physical therapy, and evidence showed that those services were also educationally necessary.

Consequently, this Decision finds that CCS was obligated to provide Student IEP based physical therapy services that were both medically and educationally necessary, to avoid duplicative services by CCS and the school district.

FACTUAL FINDINGS

THE STUDENT

1. Student was a 7-year-old male who at all relevant times resided with his parents within Placentia-Yorba Linda's boundaries. Student has been and continues to be eligible for special education under the eligibility categories orthopedic impairment, due to Fukuyama muscular dystrophy, and intellectual disability. At the time of the hearing, Student was in the first grade at George Key Elementary, a Placentia-Yorba Linda school.

2. Fukuyama muscular dystrophy is a congenital disorder characterized by hypotonia (low muscle tone), symmetric generalized muscle weakness, central nervous system disturbances, and lissencephaly.[2] Onset typically occurs in early infancy, and affects an individual's contractures of the hips, knees, and interphalangeal joints. Later features include motor and speech delays, intellectual disability, seizures, and visual impairment. Fukuyama muscular dystrophy is a regressive disorder that is managed through physical therapy, treatment of orthopedic complications, and use of assistance

[2] Lissencephaly, or smooth brain, is a rare brain formation disorder resulting in a lack of brain folds and grooves. Children with lissencephaly generally have significant developmental delays.

devices for mobility and orientation (positioning).

3. Student's motor, balance and coordination were severely impacted by the effects of his muscular dystrophy. Student's disability affected his lower and upper-body muscles and extremities. Student was unable to ambulate without assistance. He required an adaptive stroller to assist him with traversing his school campus. While in the classroom, he required an adaptive seat that encouraged an active upright posture to engage his trunk and cervical muscles throughout the day. He was also placed in a classroom prone stander, which also encouraged active trunk and cervical extension, and allowed pressure relief and allowed his hip and knees to be stretched out while bearing weight through his legs. For similar reasons, Student donned a reciprocating gait orthosis[3] and was occasionally placed in a classroom gait trainer with trunk support. This positioning permitted him to be placed at the level of his peers, to better engage during classroom instruction and social interactions. Student required maximum assistance to initiate a weight shift to activate the orthosis mechanism to take steps. He used his adaptive stroller to move around the school campus and the classroom.

4. All aspects of Student's mobility, from holding his head up in class to attend to instruction and to socialize, to ambulating in his classroom and campus, were completely dependent on various adaptive mobility devices. Since moving to California

[3] A reciprocating gait orthosis is a brace used for the ambulatory needs of a child or adult with a severe orthopedic impairment, including paralysis. This assistive device permits hands-free standing and the use of the orthosis counteracts the tendency for hip contractures. With every step, as one leg flexes, the other leg must extend and thereby stretch out the hip. Children can be fitted as early as 18 months of age, giving them a better chance for walking and standing and therefore attaining the physiological, skeletal and psychological benefits of being upright.

from Ohio in August 2013, CCS provided Student the adaptive mobility equipment, and trained Student, his parents, and his teachers, to utilize those devices.

THE MEDICAL THERAPY PLAN

5. Beginning in August 2013, CCS had determined that Student qualified for medically necessary physical therapy. Physical therapy was considered medically necessary if the type, amount, and duration of services outlined in the plan of care increased the likelihood of meeting one or more of the following goals: to improve function, minimize loss of function, or decrease risk of injury and disease. In California, the determination of whether a child required medically necessary physical therapy was left to the sole discretion of CCS. When CCS determined that a patient required medically necessary physical therapy, it stated the type, amount, and duration of the therapy in a medical therapy plan.

6. Kathryn Cole was Student's CCS physical therapist, and charged with devising his medical therapy plan. Ms. Cole had been a licensed physical therapist since 1999, and had worked for CCS since 2002. She had been Student's direct therapy provider since August 2014. Additionally, Ms. Cole evaluated Student over three days in January 2015. Per Ms. Cole's therapy observations and evaluation, Student was identified as requiring maximum assistance and being dependent in every area assessed, including rolling, crawling, sitting, standing, moving across a room, assuming a prone position on his elbows, assuming a quadruped position, supine to sitting, sitting to standing, moving backwards, climbing and descending stairs, and any form of movement. For certain types of movement, care had to be taken to protect Student's shoulders from dislocating. If left alone, Student would roll with his arms tucked, or stuck, under his body. Student also required external support to lift his head.

7. Student's CCS medical plan included six goals. Each goal was expected to increase Student's mobility or orientation, including; increasing his ability to stand; take

steps; extend his knees and hips; increase his balance; shift his weight; and independently roll from a supine to sideling position. In addition to the mobility and positioning goals, Student's medical plan provided orthopedic equipment, including adaptive mobility devices, and the routine monitoring of those devices. CCS found Student eligible for medically necessary physical therapy two times per week, for 45 minutes per session. The CCS plan also provided physical therapy consultation "to the district IEP team."

8. CCS maintained this level of services from August 2013 through March 1, 2015. These services included providing physical therapy training to teachers and staff at the Fullerton School District, which Student attended during the 2013-2014 school years, and at Placentia-Yorba Linda, during the 2014-2015 school year. On March 1, 2015, CCS increased the amount of medically necessary physical therapy to three times per week, at 45 minutes per session, due to a lack of anticipated progress.

THE 2013-2014 SCHOOL YEAR

9. In July 2013, Student began attending school in California, in the Fullerton School District. On July 18, 2013, Fullerton timely held an IEP meeting and found Student eligible for special education under orthopedic impairment and intellectual disability. Fullerton found that Student met the eligibility criteria for orthopedic impairment due to his medical diagnosis of Fukuyama muscular dystrophy. Concurrent with an orthopedic impairment, Student demonstrated seriously impaired adaptive behaviors and cognitive functioning, as well as deficits in expressive and receptive language, and vision impairment.

10. The Fullerton IEP team determined that Student required individual physical therapy as a result of deficits attributable to his disability. Student had difficulty with self-positioning and movement, and could not grasp an item for longer than three seconds. As of the July 18, 2013 IEP meeting, Student had not been able to use a

stander, a physical therapy assistance device. To address the area of movement, Fullerton offered a goal for Student to stand in his stander for 30 minutes while engaged in classroom activity. The team also found that Student's inability to remain upright during class impeded his ability to attend and socialize. To decrease this area of deficit, the IEP offered a goal for Student to increase his ability to maintain a stable, upright position while sitting. To meet Student's individual needs and, in addition to the individual and consultative physical therapy provided by CCS, the Fullerton IEP team offered Student 60 minutes weekly of individual physical therapy. Fullerton also provided Student individual physical therapy during the extended school year to guard against regression.

11. Fullerton held additional IEP team meetings for Student on October 28, 2013, and January 27, 2014. A physical therapist from CCS, Ms. Byers, participated in the development of Student's IEP. Based, in part, upon information provided by Ms. Byers, the IEP team found that Student had progressed on his goals, particularly in his ability to use the stander during class. Physical therapy had also increased his ability to sit upright, which increased Student's ability to attend and to communicate with his teacher and peers.

12. However, Student was still experiencing considerable levels of gross motor difficulty attributable to his disability. During class, Student required an adaptive seat for upright posture, and a classroom prone stander, which permitted cervical extension and allowed pressure relief, and allowed his hip and knees to be stretched out while bearing weight through his legs. Student also required a reciprocating gait orthosis, which permitted him to be placed at the level of his peers, so he could engage during classroom instruction and for social interactions. Outside of class, Student was dependent on a wheel-chair or an adaptive stroller to access the school campus. Student required physical therapy and maximum physical therapy assistance during all

aspects of his school day.

THE OCTOBER 2014 IEP MEETINGS

13. Placentia-Yorba Linda convened its first IEP meeting for Student on October 13, 2014. Student was six years old and in the first grade. This was a transition IEP meeting, held thirty days after Student had transferred to Placentia-Yorba Linda from the Fullerton School District. All necessary IEP team members were in attendance: Mother and father attended with their two attorneys; Patti Linze, special day class teacher; Jennifer Godown, Placentia-Yorba Linda's physical therapist; Jamie Mcleigh, District's speech and language pathologist; Sara Torres, school occupational therapist; Crystal McCune, school psychologist, Debby Siz, principal; Kim Smith, program specialist; District's attorney; a Japanese interpreter; Joel Godby, teacher for the visually impaired; Kathryn Cole; Doris and Kathy Mu, also from CCS; Leslie Kirui, school's adapted physical education therapist; and Shari Dunn, school nurse. The IEP team reconvened on October 27, 2014, to complete the meeting, with similar participants.

14. Similar to past IEP's, Student was eligible for special education under the primary disability category orthopedic impairment, due to his diagnosis of Fukuyama muscular dystrophy, and the secondary category intellectual disability. Student had easily transitioned to his new school district, appeared happy, and was well liked by school staff. Student engaged peers and teachers, listened, followed directions, and imitated sounds to the best of his ability. During class, he continued to require maximum assistance, including hand-over-hand assistance or support at his elbow to participate in classroom activities. Student required varying degrees of adult assistance to access his school curriculum and environment.

15. Ms. Godown was Student's physical therapist at George Key Elementary. Although she had not formally assessed Student, Ms. Godown was familiar with Student as she had provided him individual physical therapy, 60 minutes weekly, beginning in

September 2014. By the October 2014 IEP meeting, Student had shown progress in his motor abilities. He had developed a proper gross motor grasp, and had developed the ability to imitate simple motor movements, such as clapping and waving. He had also progressed in his ability to sit independently for extended periods, and had developed the ability to move bilateral upper and lower extremities for short periods. Areas that could be remediated, such as muscle fatigue, still factored into Student's ability to participate in classroom activities. While in class, Student used an adaptive chair and was placed in a prone stander to change his position during the day. Student was alert and enjoyed being interactive during class, and these devices assisted Student's interaction with his teacher and peers, and allowed him to participate during classroom activities. Student continued to use his adaptive stroller to move around the classroom and school campus.

16. Placentia-Yorba Linda had yet to assess Student in the area of physical therapy, however, school staff had performed an adaptive physical education assessment of Student. On the locomotor portion of testing, which assessed Student's coordination and ability to move, Student was at the seven month age level. On the object control portion, he was unable to perform any test items. Overall, scores were not deemed valid because Student was unable to perform consecutive curriculum items to receive baseline scores.

17. The IEP team determined that, for Student to receive educational benefit, he required 10 goals to address delays in communication, adaptive living, fine motor, gross motor, social/emotional, vision, and academics. Goals included increasing Student's ability to grasp and move objects, increasing his ability to lean on his elbow to communicate using gestures, use his arms to independently gesture, increase his bilateral coordination, and push toys and other items while sitting in the floor.

18. As of the October 2014 IEP meetings, Ms. Cole had already been in contact

with Placentia-Yorba Linda staff, including Ms. Godown and Student's special day class teacher. Ms. Cole had provided school staff consultation and training, and in-office demonstrations, regarding how to utilize the physical therapy assistive equipment, which she referred to as "durable medical equipment." She had also provided consultation to Placentia-Yorba Linda staff regarding how to assist Student's movement and orientation in class, including how to position Student in the equipment while in the classroom. Student required repositioning, or orientation, throughout the school day. He tended to allow his head to drop forward or extended his neck backwards. Ms. Cole observed these, and similar behaviors, while Student was in the classroom and she worked with Student to increase his ability to attend. With CCS consultation, school staff repositioned Student throughout the day. Additionally, the Placentia-Yorba Linda IEP team, working directly with CCS, had tried various standers and determined that a supine stander with a tray was necessary to support Student in the classroom. Ms. Cole believed that additional equipment should also be attempted, such as an adapted wheelchair, to support Student while at school.

19. Ms. Cole informed the IEP team that she was delivering physical therapy services to Student twice weekly, and described the mobility and orientation goals contained in Student's medical plan. Placentia-Yorba Linda IEP team members relied upon this information, and deferred to CCS as Student's physical therapy provider, when it developed Student's educational plan. For example, while the IEP stated that Student "requires maximum assistance with walking," it also stated that CCS was working on "walking goals," and the school should not duplicate these goals. For this reason, Student's IEP failed to offer any mobility goals. Similarly, the October 2014 IEP stated that Student required physical therapy services to "access his educational environment and safely navigate through his school day." Yet, the Placentia-Yorba Linda IEP team failed to offer Student individual physical therapy in the October 2014 IEP. Rather, the

school district relied upon CCS to provide individual physical therapy, and decreased Student's school based physical therapy from 60 minutes per week of individual services, to a consultative service, at 60 minutes per month.

20. The October 2014 IEP notes reflected that Placentia-Yorba Linda would collaborate and consult with CCS with regard to Student's physical therapy needs. The IEP also offered a school district physical therapist to provide Student monthly physical therapy consultation. However, the October 2014 IEP failed to offer a direct physical therapy service, or to designate CCS as a therapy provider.

21. During the IEP meeting, Mother complained that CCS services, in particular the two 45-minute sessions of direct physical therapy outlined in Student's medical therapy plan, should be designated in the IEP document. Parents agreed that the level of services being provided jointly by CCS and Placentia-Yorba Linda was appropriate to meet Student's physical therapy needs. They were also pleased with Student's progress in this area, and the school's willingness to collaborate with CCS to meet Student's needs while at school. However, Parents were contemplating moving outside of California, and were fearful that a receiving state would not implement the direct physical therapy services unless it was described in the IEP document. Student had recently resided in Ohio, and his parents understood that California was unique in its separation of CCS and school district based services.

22. Placentia-Yorba Linda failed to comply with Parents' request to describe the CCS physical therapy services in the October 2014 IEP, or to designate CCS as a service provider for physical therapy. As a result, Parents filed the instant complaint in December 2014, whereby they sought to have the CCS goals and services included in Student's IEP, because these services were both medically and educationally necessary.

23. During hearing, Mother reiterated that she was satisfied with the duration, frequency, and modality of the physical therapy services provided by CCS. She was also

satisfied with the six mobility and orientation goals developed by CCS. However, Mother persuasively testified that CCS provided physical therapy had ubiquitously benefited Student, including his development at home, in the community, and at school. For Student, the line between what was medically necessary physical therapy and what was educationally necessary was so blurred that it was not possible to separate the two. Any form of movement for Student required physical therapy and the use of related devices. The mechanisms needed for Student to ambulate on campus, access his curriculum, to progress and to prevent degeneration of abilities, impacted each element of his life. For these reasons, Parents believed that the CCS provided services overlapped with what was educationally necessary and therefore should be included in the IEP document. This description of services would prevent a gap in physical therapy services from occurring if Student was to move out of state. Otherwise, a receiving IEP team could be confused, or uniformed, regarding the level of physical therapy services, which Student had received while in California.

OVERLAPPING PHYSICAL THERAPY SERVICES

24. Harriet Fain-Tvedt had been the chief therapist of CCS's Orange County Medical Therapy Program since January 2012. She had been a physical therapist specialist, first with the Air Force and later with various rehabilitative clinics, since 1985. Since 2012, she was an administrator for CCS, where she was responsible for the development of service guidelines for CCS therapists and patients.

25. As a therapist and a director of a governmental agency with finite funding, Ms. Fain-Tvedt was concerned that therapy services should not be duplicative. Therapeutically, duplicating services by different providers could diminish the consistency, and therefore the efficacy, of the service. Practically, the duplication of services by separate governmental agencies, such as CCS and a school district, could result in the unnecessary expenditure of resources and costs. For these reasons, CCS had

developed guidelines for avoiding the duplication of CCS and school district services. To further this goal, CCS provided its staff training to ensure that its services were medically necessary to avoid overlapping with education based physical therapy services, which were the responsibility of the school district staff. In the rare instance when medically necessary and educationally necessary physical therapy services overlapped, CCS was obligated to provide those services. In those instances, CCS was included in the individual's IEP as the service provider, to avoid duplication of services by school district and CCS staff.

26. CCS was solely responsible for determining when a patient required medically necessary physical therapy. Although CCS left the determination of whether a student required educationally necessary physical therapy to the discretion of the school district, it regularly attended IEP meetings for each of its patients. In this regard, it was normal for CCS to attend approximately 1000 IEP meetings each year. Ms. Fain-Tvedt recalled that it was uncommon for physical therapy to be determined as both medically and educationally necessary during an IEP meeting, and this scenario arose in just five percent of IEP's, or approximately 50 IEP's, attended by CCS staff each year. An indication that physical therapy services were both medically and educationally necessary, and therefore the responsibility of CCS, was whether the individual required mobility and orientation goals. For Student, each of his CCS goals related to mobility and orientation.

27. A summation of testimony from CCS, in particular from Ms. Fain-Tvedt and Ms. Cole, was that CCS was not responsible for providing Student educationally based physical therapy because Placentia-Yorba Linda, in its October 2014 IEP, did not find that Student required such therapy. However, CCS overlooks that this IEP offered consultative physical therapy services and, indirectly, relied upon CCS to provide individual physical therapy to address Student's unique mobility and orientation deficits.

The Placentia-Yorba Linda IEP team also contemplated collaboration between CCS and school staff regarding Student's individual physical therapy needs and the use of related equipment to assist Student in the classroom. In light of this information and CCS's prior determination that Student required medically necessary physical therapy, CCS was obligated to provide those services that were both medically and educationally necessary. For Student, this included the physical therapy services and goals outlined in his medical therapy plan.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[4]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)[5] et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational

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

[5] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural

protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on all issues.

DELEGATION OF RESPONSIBILITIES TO PUBLIC AGENCIES

5. The IDEA allows states to determine for themselves whether responsibilities for the provision of a FAPE shall be delegated to public agencies other than education agencies and how those agencies shall collaborate to ensure the delivery of a FAPE to eligible pupils. Individual states are allowed to designate that their education agencies, such as the California Department of Education, may enter into interagency agreements with other state agencies, such as CCS, for the provision of related services, such as medically necessary services, that are required to ensure the provision of a FAPE to the state's special education eligible pupils. (20 U.S.C. § 1412(a)(12)(A); 34 C.F.R. § 300.154(c)(1), (2); *Letter to Forer*, 211 IDELR 244, (OSEP33 November 4, 1980).) Specifically, OSEP noted that a "State may assign the burden of funding FAPE to any State agency or, through interagency agreements, to any combination of State agencies. . . " (*Ibid.*)

6. For purposes of special education, California defines "public agency" as a "school district, county office of education, special education local plan area . . . or any other public agency under the auspices of the state or any political subdivisions of the

state providing special education or related services to individuals with exceptional needs." (Ed. Code, § 56028.5.) It includes within the definition of "public agency" all agencies identified in federal law under section 300.33 of title 34 of the Code of Federal Regulations. (*Ibid.*)

INTERAGENCY RESPONSIBILITIES UNDER CHAPTER 26.5

7. The rights and responsibilities of public agencies charged with jointly serving children with special education needs are set out in Chapter 26.5 and related regulations. (Gov. Code, § 7570 *et seq.*; Cal. Code Regs., tit. 2, § 60000 *et seq.*) In enacting Chapter 26.5, the Legislature intended to ensure the "maximum utilization of all state and federal resources" available to provide eligible pupils with a FAPE and related services. (Gov. Code, § 7570.) Provision of occupational therapy and physical therapy as related services is the joint responsibility of the Superintendent of Public Instruction and the California Department of Health Services. (Gov. Code, § 7575.) The Superintendent of Public Instruction has delegated these responsibilities to the LEA's, usually school districts. The California Department of Health Services has similarly delegated these responsibilities to the local CCS agency of each county.

INTERAGENCY AGREEMENTS

8. California Code of Regulations, title 2, section 60310, subdivision (a), requires the local CCS agency and the county Superintendent of Schools or Special Education Local Planning Area director to each assign a liaison and execute an interagency agreement at the county level. Subdivision (c) of California Code of Regulations, title 2, section 60310, requires the interagency agreement to address multiple aspects of the agencies' coordination of responsibilities, including the following: identifying contact persons within each agency; establishing processes to exchange medical and educational records of the pupil; establishing time lines to give

notice of any IEP team meetings and meetings changing CCS recommendations; establishing processes for participation in IEP team meetings; establishing processes for developing or amending therapeutic services indicated in the pupil's IEP; and establishing processes for resolving conflicts between the agencies.

PROCEDURAL SAFEGUARDS AND DUE PROCESS RIGHTS SPECIFIC TO CHAPTER 26.5

9. Chapter 26.5 confers upon an eligible pupil and parents all of the procedural and substantive safeguards of the IDEA and related state special education law. Any disputes between the parents and the IEP team members representing the public agencies regarding the recommendations of CCS or recommendations of an independent assessment shall be resolved pursuant to Education Code sections 56000 et seq . (Gov. Code, § 7572, subd. (c)(3).) All public agencies, as defined by Education Code section 56028.5, and not just LEA's, are required to ensure the procedural and substantive safeguards of state and federal special education law.

10. Government Code section 7586, subdivision (a), states in unequivocal language that "[a]ll state departments, and their designated local agencies" are governed by the procedural safeguards conferred upon a pupil and parent pursuant to title 20 United States Code section 1415. It therefore confers upon OAH jurisdiction to resolve all special education disputes between a parent, or pupil, and the public agencies with respect to any services addressed by Chapter 26.5. (Gov. Code, § 7586, subds. (a) & (c).)

11. California Code of Regulations, title 2, section 60550, further addresses the due process hearing rights with respect to interagency responsibilities for the provision of services to pupils with disabilities. The provisions set forth reaffirm the due process rights discussed above. The regulation states that the parent has the right to challenge any public agency decision with respect to the "proposal or refusal of a public agency to initiate or change the identification, assessment, educational placement, or the provision

of special education and related services to the pupil." (Cal. Code Regs., tit. 2, § 60550, subd. (a); see also Ed. Code, § 56501, subds. (a)(1) & (2).)

12. California Code of Regulations, title 2, section 60550, subdivision (f), states that the hearing decision shall be the final determination "regarding the provision of educational and related services, and is binding on all parties." Within the regulation, all due process rights and proceedings concerning pupils who are eligible for special education and receive related services from CCS, are subordinated to the due process rights granted specifically in Chapter 26.5. (Cal. Code Regs., tit. 2, § 60550, subd. (e).) Therefore, all rights available to Student to challenge decisions by an LEA, as set out in title 20 United States Code section 1415 and Education Code section 56501, and related statutes, are available to Student equally as to CCS.

OAH CANNOT REVIEW CCS'S MEDICAL NECESSITY DETERMINATION

13. California offers health services for children with exceptional needs through the Robert W. Crown Children's Services Act (Crown Act). (Health & Saf. Code, § 123000 et seq.) The intent of the program is to provide, to the extent practicable, for the necessary medical services required by physically handicapped children whose parents are unable to pay for those services. (Health & Saf. Code, § 123805 et seq.)

14. Local educational agencies, in contrast, are responsible for actively and systematically seeking out and assessing children with exceptional needs to insure that they receive an individualized education program that meets their assessed needs. (Ed. Code, §§ 56300, 56302, 56340 & 56344, subd. (b).)

15. In 1984, the Crown Act was amended to specify interagency responsibilities for providing services for handicapped children. (Gov. Code, § 7570 et seq.) The Crown Act specifically deals with the provision of occupational therapy and physical therapy. (Gov. Code, § 7575.) The State Department of Health Services (or the local agency administering California Children's Services) is "responsible for the

provision of 'medically necessary' occupational therapy" for a child by reason of medical diagnosis and when contained in the child's IEP. (Gov. Code, § 7575, subd. (a)(1)). The Department is also charged with determining whether a CCS eligible pupil or a pupil with a private medical referral needs "medically necessary physical therapy." (Gov. Code, § 7575.)

16. CCS is empowered to make the determination of whether a service is "medically necessary" subject only to its regulations providing a means to appeal the Department's determination:

> A CCS applicant or client who disagrees with a decision of the designated CCS agency has the right to appeal that decision.... If the client or person legally authorized to decide for the client disagrees with the CCS physician, the client shall be provided with names of three expert physicians from whom the client will choose one, who will evaluate the child at CCS expense. The opinion of the expert physician shall be final.

(Cal. Code Regs., tit. 22, § 42140; *see also* Health & Saf. Code, § 123929, subd. (a)(3).)

17. Based upon the foregoing authority, the hearing before the ALJ is not for the purpose of reviewing the "medical necessity" needs of a child under the CCS program. The determination of medical necessity was made by CCS pursuant to the authority of California Health & Safety Code sections 123825 and 123929, subdivision (a). In the instant case, CCS unilaterally determined that Student required medically necessary physical therapy, and Student did not contest this determination, or the level of services that CCS deemed medically necessary. Therefore, there is no contention that

CCS failed to provide physical therapy services it determined were medically necessary. Rather, Student's contention is that CCS's determination of medically necessary services consisted of services, which were also educationally necessary. The purpose of the due process hearing is to ensure that special education and related services in a child's IEP are those "necessary for the child to benefit educationally from his or her instructional program." (Gov.Code, § 7573.) When the services determined by CCS to be medically necessary include services also found to be educationally necessary in a due process hearing, CCS is obligated to provide them. (Gov. Code, § 7575, subd. (a)(1).)

ISSUE: STUDENT'S NEED FOR BOTH MEDICALLY NECESSARY AND EDUCATIONALLY NECESSARY PHYSICAL THERAPY GOALS AND SERVICES

18. Student asserts that the CCS goals and services included in his medical therapy plan should have been included in the October 2014 IEP. Student bases his assertion upon his individual needs overlapping between what was medically and educationally necessary.

19. A child's educational needs may be the same or different from the services that CCS has determined to be medically necessary pursuant to the CCS Program. If what has been determined as medically necessary was included in the IEP, CCS must provide those services as that is required by Government Code section 7575, subdivision (a)(1). However, if the services are only educationally necessary, but not medically necessary, section 7575, subdivision (a)(2), requires that they be provided by the school district.

20. For Student, physical therapy was medically and educationally appropriate in view of Student's individual motoric, mobility, and orientation needs. Student's motor, balance and coordination were severely impacted by the effects of his muscular dystrophy. Student's disability affected his lower and upper-body muscles and extremities. All aspects of Student's mobility, from holding his head up in class to attend

to instruction and to socialize, to ambulating in his classroom and campus, were completely dependent on various adaptive mobility devices. While in the classroom, he required an adaptive seat that encouraged an active upright posture to engage his trunk and cervical muscles throughout the day. He was also placed in a classroom prone stander, and donned a reciprocating gait orthosis. This positioning permitted him to be placed at the level of his peers, to better engage during classroom instruction and social interactions. Student required maximum assistance in mobility and orientation throughout the school day. The mobility and orientation devices, and the training of the IEP team how to utilize these mechanisms at school to assist Student to access and benefit from his educational program, had been the responsibility of CCS since August 2013.

21. Beginning in August 2013, CCS had determined that Student qualified for medically necessary physical therapy and developed a medical therapy plan. Per CCS physical therapist Ms. Cole, Student was identified as requiring maximum assistance and being dependent in every area related to physical therapy, including any form of movement or orientation. Accordingly, CCS's medical plan included six goals which were designed to increase Student's mobility or orientation, including: increase his ability to stand; take steps; extend his knees and hips; increase his balance; shift his weight; and independently roll from a supine to sideling position. In addition to the mobility and positioning goals, Student's medical plan provided orthopedic equipment, including adaptive mobility devices, the routine monitoring of those devices, and training to school teachers and staff regarding how to use these devices. CCS found Student eligible for medically necessary physical therapy two times per week, for 45 minutes per session, along with physical therapy consultation "to the district IEP team." CCS continued to find Student eligible for medically necessary physical therapy when the October 2014 IEP occurred, and has provided physical therapy training to teachers and

staff at the Fullerton School District, and at Placentia-Yorba Linda.

22. Beginning in July 2013, the Fullerton IEP team determined that Student required educationally necessary physical therapy as a result of deficits attributable to his disability. Fullerton also determined that Student had received an educational benefit from physical therapy. A physical therapist from CCS, Ms. Byers, had participated in the development of Student's IEP at Fullerton. Ms. Byers and the Fullerton IEP team found that Student had progressed on his physical therapy goals, particularly in his ability to use the stander during class. Physical therapy had also increased his ability to sit upright, which increased Student's ability to attend and to communicate with his teacher and peers.

23. While at Placentia-Yorba Linda during the 2014-2015 school year, school physical therapist Ms. Godown found that Student had shown progress in his motor abilities. He had developed a proper gross motor grasp, and had developed the ability to imitate simple motor movements, such as clapping and waving. He had also progressed in his ability to sit independently for extended periods, and had developed the ability to move bilateral upper and lower extremities for short periods. Areas that could be remediated, such as muscle fatigue, still factored into Student's ability to participate in classroom activities. While in class, Student used an adaptive chair and was placed in a prone stander to change his position during the day. Student was alert and enjoyed being interactive during class, and these devices assisted Student's interaction with his teacher and peers, and allowed him to participate during classroom activities. Related testing determined that Student's coordination and ability to move were still severely impacted due to his disability. Student was at the seven month age level in his gross motor abilities, areas related to physical therapy.

24. As of the October 2014 IEP meetings, CCS had been in contact with Placentia-Yorba Linda, and had provided school staff consultation and training, and in-

office demonstrations, in areas related to physical therapy, to assist Student in accessing and benefiting from his educational program. Ms. Cole informed the IEP team that CCS was delivering physical therapy services to Student twice weekly, and described the mobility and orientation goals contained in Student's medical plan. The Placentia-Yorba Linda IEP team members relied upon this information, and deferred to CCS as Student's physical therapy provider, when it developed Student's educational plan. It is noteworthy that while the IEP stated that Student "requires maximum assistance with walking," it also stated that CCS was working on "walking goals," and the school should not duplicate these goals. The October 2014 IEP also stated that Student required physical therapy services to "access his educational environment and safely navigate through his school day." Yet, the October 2014 IEP opted to eliminate Student's individual physical therapy. Given Student's individual needs for educationally based physical therapy, it is reasonable to determine that Placentia-Yorba Linda relied upon CCS to provide educationally necessary services. Regardless, a preponderance of the evidence shows that Student required educationally based physical therapy to meet his individual needs.

25. Student's individual needs for physical therapy overlapped between what was medically necessary and what was educationally necessary. CCS provided physical therapy had benefited Student at home, in the community, and while at school. For Student, the line between what was medically necessary physical therapy and what was educationally necessary was so blurred that it was not possible to separate the two. Any form of orientation and movement for Student required physical therapy and the use of related devices. The mechanisms needed for Student to ambulate on campus, access his curriculum, to progress and to prevent degeneration of abilities, impacted each element of his life. For therapeutic and economic reasons, CCS director Ms. Fain-Tvedt was concerned that physical therapy services should not be duplicative. Accordingly, CCS

had developed guidelines for determining when physical therapy services were both medically and educationally necessary, and therefore the responsibility of CCS. This scenario arose in just five percent of IEP meetings attended by CCS staff, and occurred when an individual required mobility and orientation goals. Consequently, Student fell within the five percent of IEP's attended by CCS staff: Student required mobility assistance while at school, which merged with his CCS medical plan, as each of his CCS goals related to mobility and orientation.

26. For the foregoing reasons, a preponderance of evidence showed that Student required educationally necessary physical therapy and those services overlapped with the physical therapy which CCS had determined was medically necessary. Accordingly, CCS was obligated to provide both educationally necessary and medically necessary physical therapy services for Student. The October 2014 IEP's failure to include these services denied Student a FAPE.

REMEDIES

27. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

28. Appropriate equitable relief can be awarded in a decision following a due process hearing. (*Burlington*, *supra*, 471 U.S. at p. 374; *Puyallup, supra,* 31 F.3d at p. 1496).) Here, a preponderance of evidence showed that Student required educationally necessary physical therapy to receive a FAPE, and those services overlapped with the physical therapy services deemed medically necessary by CCS. The October 2014 IEP's failure to include these services denied Student a FAPE. It is therefore equitable to order that CCS inform Student's present IEP team that Student's service levels include both medically and educationally necessary services, and request that CCS be the provider of

the educationally necessary services, along with adding needed goals and services, on Student's IEP (Cal. Code Regs., tit. 22, § 60325, subd. (c)), and to participate in any called IEP team meeting. (Cal. Code Regs., tit. 22, § 60325, subd. (b))

ORDER

California Children's Services shall, within two weeks of the date of this Decision, request an IEP meeting for Student for the purpose of adding California Children's Services as an IEP physical therapy service provider, congruent with the goals and services contained in Student's medical therapy plan, and attend such an IEP team meeting.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Student prevailed on each issue presented.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56506, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 2, 2015

_____/s/_____

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings