

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2017100838

PARENT ON BEHALF OF STUDENT,

v.

MENIFEE UNION SCHOOL DISTRICT.

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DECISION

Student filed her Due Process Complaint on October 17, 2017. Meniffee Union School District filed its Due Process Complaint on November 15, 2017, and moved to consolidate the cases. Over Student's objection, OAH consolidated the cases, with Student's case designated as the primary case and the case upon which the decision deadline would be calculated. On November 20, 2017, OAH granted District's request for a continuance. On December 5, 2017, District withdrew its case without prejudice and OAH dismissed District's case.

Administrative Law Judge Kara Hatfield heard this matter in Meniffee, California, on December 12, 13, 14, and 18, 2017, and January 17, 2018.

Mother<sup>1</sup> represented Student and attended the hearing on all days. Student did not attend the hearing.

Cynthia Vargas, Attorney at Law, represented Meniffee Union School District. Jodi

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<sup>1</sup> Mother is referred to throughout this Decision as Parent.

Curtis, District's Director of Special Education, attended the hearing on all days, and Jeanette Anderson, District's Special Education Coordinator, attended a portion of the hearing on December 12, 2017, while Ms. Curtis was unavailable.

At the parties' request, OAH continued the hearing to February 12, 2018, for written closing arguments. Closing arguments were timely filed, the record was closed, and the matter was submitted on February 12, 2018.

## ISSUES

Pursuant to the exception to the statute of limitations for a district's withholding of information from the parent that a district was required to provide, did District deny Student a free appropriate public education since 2011 by:

- 1) failing to provide Student specially designed physical education required by title 20 United States Code section 1401(29)(B)<sup>2</sup> and California Education Code sections 51210, subdivision (a)(7), and 51223; and
- 2) substituting the related service of physical therapy in place of physical

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<sup>2</sup> Student's complaint stated this issue as based on title 20 United States Code section 1402(25). District's closing argument noted that title 20 United States Code section 1402 does not relate to physical education. The ALJ notes that there is not currently a subsection/subdivision (25) of section 1402. District noted that title 20 United States Code section 1401(29)(B) is the correct statutory citation regarding the federal definition of "special education" as including "instruction in physical education." District, in fairness, defended the case on the substance of this issue, relating to an alleged failure to provide Student specially designed physical education. District did not contend it should prevail on this issue purely due to Student's citation to the incorrect statute. This issue has been revised to reflect the correct statute the parties litigated.

education, a direct instruction special education service?

## SUMMARY OF DECISION

Student had severe medical conditions that greatly impaired her physical and mental development. Her annual progress was subtle and nuanced, and sometimes she regressed. Looking at her physical, mental, and social progress in shorter increments suggested minimal progress, but taking a longer-term view of her starting points and later abilities revealed Student was capable of making and in fact did make progress in all areas of identified need at a pace that was appropriate in light of her circumstances.

Student did not meet her burden of demonstrating that an exception to the statute of limitations applies in this case. Student's claims are limited to the time period after the November 19, 2015 IEP was offered to Student on November 30, 2015.

Student did not meet her burden of demonstrating that District denied her a FAPE in either of the two ways at issue. As to Student's first issue, District staff incorrectly concluded Student could not participate in any category of physical education available from a credentialed teacher, but Student failed to prove that specially designed physical education was the appropriate category of physical education for her, and failed to prove that she required instruction through specially designed physical education to make progress appropriate in light of her circumstances. As to the second issue, Student did not establish by a preponderance of the evidence that the November 19, 2015 and November 15, 2016 IEPs were not reasonably calculated to enable Student to make progress that was appropriate in light of her circumstances, that District substituted the related service of physical therapy in place of the direct instruction special education service of physical education, or that District's failure to provide physical education denied Student a FAPE. Student failed to prove she was denied a FAPE during the period within the statute of limitations. Student takes no remedy.

## FACTUAL FINDINGS

1. Student turned nine years old during the course of the hearing and was classified as being in the third grade. She resided with Parent within District's boundaries at all relevant times. Student was eligible for special education and related services due to multiple disabilities and orthopedic impairment.

2. Student was born with a genetic abnormality called complete Trisomy 18, also known as Edwards Syndrome. Her treating pediatrician reported Student had "all" of the attendant problems of this chromosomal disease, and specifically mentioned structural heart defects that required several surgeries when she was very young, heart disease, and "severe developmental delay." She required 24 hour a day care and at various times was dependent on oxygen through a nasal cannula. Other reported characteristics of Trisomy 18 included kidney malformations, "mental retardation," growth deficiencies, feeding difficulties, breathing difficulties, and arthrogryposis, a muscle disorder that causes multiple joint contractures (abnormal muscle tightness causing restricted joint mobility) which in Student's case significantly impaired her ability to straighten her legs.

### INITIAL ELIGIBILITY ASSESSMENT AT AGE THREE - 2011

3. Student received in-home Early Start Intervention services from Inland Regional Center due to her diagnosis of Trisomy 18 with related delays, medical problems, and motor impairments. District assessed Student for eligibility for special education and related services shortly before Student turned three years old at the end of 2011.

4. District staff conducted assessments and reported the results in an Initial Multidisciplinary Evaluation Report dated December 15, 2011. District reviewed a progress report from August 2011 by Educational Therapy Assessment and Services for

background data regarding Student's present levels of development, from when Student was 32 months old; her age levels in specific developmental domains were: problem solving – six to eight months; social/emotional – nine months; self-help - six to twelve months; gross motor – six to eight months; fine motor – three to five months; expressive language – six to eight months; and receptive language – six to eight months.

5. District gathered information for its initial assessment in December 2011 by observing Student and interviewing Parent in Student's home due to Student's limited mobility and medically fragile condition. District conducted the assessment by Parent's report and by observing Student. Her age levels in these developmental domains were as follows: fine motor – three to four months; relationship to inanimate objects/nonverbal – three to four months; self-help – four to seven months; relationships to persons – four to five and a half months; emotions and feelings states – five and a half to seven months; coping behavior five and a half to seven months.

6. In the areas of fine motor and relationship to inanimate objects, Student held a rattle actively and showed interest in objects by reaching. She played with her hands and brought her free hand to midline. As to self-help, Student comforted herself by sucking her thumb or fingers and vocalized when she was alone. Socially, she distinguished between family members and gave a social smile. She vocalized in response to social interaction and used smiles and vocalizations to create social contact. In the area of emotions and feeling states, Student showed displeasure at loss of social contact and expressed emotions by laughing or vocalizing pleasure. In the area of coping behavior, she used toys to amuse herself.

7. Based on Parent's responses on the Vineland Adaptive Behavior Scales, Second Edition, Student's developmental/adaptive functioning was overall rated as low, at below the first percentile. Student demonstrated the most concern in the area of motor skills, and her personal strength was in socialization skills. Her age levels in

specific adaptive behaviors were as follows: communication – four to eleven months; daily living – one month; socialization - seven to ten months; motor – four to five months; fine motor – three to five months; expressive language – six to eight months; and receptive language – six to eight months.

8. Parent's responses indicated the following adaptive behaviors. In receptive communication, Student responded to her name and listened to instructions from Parent. She showed interest in a story for about five minutes. In expressive communication, Student smiled when a familiar person smiled at her, and used gestures to get attention from others. She made sounds or gestures to communicate she wanted an activity to keep going or stop. On self-help tasks, Student opened her mouth when offered food. At the time, she was eating pureed foods. Socially, she showed interest in children and imitated simple movements demonstrated by others. She showed affection to familiar people and a preference for certain people such as her father. She played simple interaction games with others. On gross motor tasks, she sat without support for at least one minute when placed in the correct position by a caregiver. She moved across the floor in her "walker" but not yet in a specific direction. As to fine motor skills, she reached for toys and picked up small objects.

9. The speech-language pathologist interviewed Parent and observed Student's speech and language skills. Parent described Student as a happy child who smiled and laughed a lot. She laughed when tickled and smiled to familiar people. She maintained eye gaze with other people and objects of interest. She liked toys that had lights and sound. She liked to watch TV shows on the Sprout channel and redirected her attention when she heard music from her favorite show. The speech-language pathologist observed Student making beginning babbling sounds. According to the American Speech-Language-Hearing Association speech and language developmental language milestones, Student's expressive ability was in the four-to-six-month-old

range, and her receptive language skills were scattered between the seven-month to one-year-old range.

10. A special education teacher assessed Student's academic functioning through observation and Parent's report, along with the Brigance Early Childhood Screen, Second Edition. Student responded to her name when called. Parent reported Student had no aversions to tactile input and enjoyed activities that included rice, beans, and playdough. In contrast to Parent's report to the school psychologist regarding Student's ability to reach for a toy and pick up small objects, Parent reported to the special education teacher that Student attempted to reach for an object but was not yet able to grab the object with her hand. When an object was placed in her hand, she was able to hold it for a brief period of time. When engaged with a caregiver, teacher, or therapist, Student worked for up to 45 minutes at a time. Student had very limited mobility and required adult supervision and adaptive equipment to assist with gross motor movements, including sitting and standing. She enjoyed participating in gross motor activities with adult assistance.

11. The physical therapist who had been working with Student through Inland Regional Center conducted a physical therapy assessment in December 2011 and recommended that due to Student turning three, she be discharged from current physical therapy services as a regional center client, but recommended Student continue physical therapy through available services. Overall, Student's developmental level was "functioning solid through the 6 month level, with scatterings to the 9-10 month level." Parent agreed the assessment reported an accurate picture of Student's abilities at that time.

12. Because Student's gross motor functioning and development is central to the dispute, details regarding Student's functional abilities when she was 35 months old are included here for comparison over the next six years and specifically during the two

years prior to filing of Student's complaint in this case. During the year before the Regional Center's physical therapy assessment, and specifically in the past few months, Student had made "significant improvements in gross motor skills." She met her goal of rolling prone (face down) to supine (face up). She was consistently able to roll from prone to supine independently and purposefully. Rolling supine to prone was observed sporadically; she consistently rolled supine to side lying, but had difficulty freeing her arm to complete the transition to prone. She met her goal of lying prone on her elbows/forearms, and she assisted with extending her arms and maintained the extended arm position for 30 seconds. In transitioning from supine to sitting, Student required moderate assistance, meaning she performed 50 percent of the work, by righting her head appropriately and pushing up with her weight bearing arm, right or left, and an adult performed the other 50 percent of the work. She met her goal of maintaining a sitting position for 30 seconds, and once placed by an adult in a sitting position on the floor, she maintained the position with her weight on propped arms for up to two to three minutes at a time. If she lost her balance, she righted herself 50 percent of the time, as compared to no ability to maintain sitting balance at her initial assessment. Student was beginning to lift an arm to reach without loss of balance.

13. When an adult placed her lying on her side with her arm positioned under her side on her elbow and forearm, a position called a side sit, she maintained the position for up to 60 seconds without losing balance. She met her goal of maintaining a quadruped position. She assisted in transitioning from to an all fours position and was able to maintain the position on extended arms with her legs slightly flexed for up to two minutes. She rocked on all fours maintaining her balance both forward and back and side to side. She maintained her head at 90 degrees throughout. She recently demonstrated the ability to bring her right leg forward when the therapist moved her left arm forward.



14. When her hands were held, she pulled to a stand with minimal assistance, meaning she did approximately 75 percent of the work and the adult provided about 25 percent assistance. She met her goal of improving head control, and she maintained her head in a neutral position when pulling to stand as compared to previous hyperextension. She sometimes maintained standing with stand by assist, meaning she could complete the skill but required an adult standing by to provide assistance when necessary. She was beginning to demonstrate forward protective extension when she lost her balance. She met her goal of ambulating with her hands held, walking up to 30 feet with her hands held, taking reciprocal steps with excellent head control.

15. When placed at a supporting surface and her hands were maintained on the surface, she took steps to the side and was beginning to cruise. She was unable to maintain grasp on a supporting surface. She met her goal of ambulating in an assistive device with stand by assistance. When placed in a gait trainer with truncal support only, Student demonstrated the ability to independently ambulate forward up to 30 feet demonstrating the ability to start ambulation, stop to rest, and restart ambulation independently. She took reciprocal steps with good head control. She demonstrated the ability to take a step backward to reposition herself in the gait trainer so she could maneuver forward.

16. Student participated more in therapy sessions by not having to be "placed" in all positions but assisting in transitions of movements. She demonstrated improved disassociation of extremities and improved rotary components during mobility. Balance reactions and protective extensions were emerging. The physical therapist recommended goals for physical therapy services to facilitate continued improvement in balance, core control, disassociation of extremities, and continued advancement of gross motor skills.

17. District's December 15, 2011 initial assessment report considered

Student's eligibility for special education based on orthopedic impairment as well as other health impairment. Her profile was consistent with criteria as a student with a severe orthopedic impairment. Her present levels of performance in all areas were significantly below age expectancy. She met eligibility requirements for other health impairment because her history of medical issues adversely affected her developmental and/or educational performance.

#### DECEMBER 15, 2011 IEP TEAM MEETING

18. District convened an IEP team meeting on December 15, 2011. Parent attended the meeting and agreed that the meeting notes were accurate after they were read to her at the end of the meeting. District gave Parent a written copy of Parental Rights and Procedural Safeguards. Parent requested occupational therapy and physical therapy assessments. The school psychologist and speech-language pathologist reviewed their assessments and gave summaries. The IEP team discussed the two eligibility categories proposed in the multidisciplinary assessment report. After discussion and consideration of all assessment results and Parent's input, the IEP team determined Student qualified for special education with a primary disability of orthopedic impairment and a secondary disability of other health impairment.

19. Student's physical therapist through the Regional Center then reviewed her December 10, 2011 assessment report and also stated that in the two years she had been providing Student physical therapy, Student had changed significantly in that when she started Student's physical therapy, Student laid and did nothing. Student had made significant improvement in the prior six months. The physical therapist had referred Student to California Children's Services, but she did not meet the eligibility criteria.

20. The special education teacher reviewed the draft IEP, including Student's present levels of performance. The IEP team identified Student's areas of need as fine

motor, gross motor, writing, social/emotional, reading, communication, and math. The IEP team members proposed goals for the upcoming year addressing all of those areas of need, except for gross motor. Parent was satisfied with the goals and the IEP team accepted the goals as appropriate. Parent's concerns for Student's educational progress were documented on the present levels of academic achievement and functional performance page. Parent told the IEP team Student required the support of a teacher, speech therapist, and occupational therapist, and that Student's ability to progress had been dependent on the support of the physical therapist and occupational therapist. Parent wanted the support of a speech therapist to aid in improving Student's communication.

21. In the area of fine motor, Student's baseline was that she reached for a preferred item. Her goal was to pick up five objects out of a bowl, transfer that object to the other hand, and drop the item into a pre-defined container, with adult prompting, with 80 percent accuracy in four out of five trials, as measured by teacher records. This goal was to be worked on by the specialized academic instructor.

22. The December 15, 2011 IEP did not contain a gross motor goal.

23. In the area of writing, Student's baseline was that Parent reported Student had been exposed to holding a crayon adaptively. Her goal was to hold a marker adaptively and make marks on a writing surface using a slant board, with 80 percent accuracy in four out of five trials as measured by teacher records. The specialized academic instructor would work on this goal.

24. In the area of social/emotional, Student's baseline was that she had a preference for certain toys. Her goal was, when presented with five new toys, to engage with new cause and effect toys for five minutes, with adult prompting and modeling during that time, with 80 percent accuracy in four out of five trials as measured by teacher records. The specialized academic instructor would work on this goal.

25. In reading, Student's baseline was that Parent reported Student listened to a story for at least five minutes when read to by a parent or caregiver. Her goal was to engage in a story being read to her by a teacher, including remaining relatively still and directing attention to the reader, for eight minutes with 80 percent accuracy in four out of five trials as measured by teacher records. The specialized academic instructor would work on this goal.

26. As to communication, Student's had baselines in two areas. She made babbling noise with various consonant sounds, but did not directly imitate speech sounds. Her goal was to imitate the phonemes /b/, /p/, and /m/ when given a visual and verbal model with 80 percent accuracy in four out of five trials as measured by teacher records and observation. This goal was to be worked on by the specialized academic instructor, the speech-language pathologist, and Parent. Her other baseline was that she spontaneously produced speech and nonspeech sounds, but did not imitate. She was starting to protrude her tongue. Her goal was to imitate oral motor exercises (protrude tongue, pucker lips, lateralize tongue, blowing, tongue to upper/lower lip) with 80 percent accuracy in four out of five trials as measured by teacher records/data and observation. The specialized academic instructor, speech-language pathologist, and Parent were to work on this goal.

27. With math, Student's baseline was that she manipulated objects of various sizes and shapes. Her goal was, when given three piece inset shape puzzle with knobs, to match shapes by completing the puzzle with 80 percent accuracy in four out of five trials as measured by teacher records. The specialized academic instructor would work on this goal.

28. Parent requested an assistive technology evaluation. District's program specialist stated that students needed to be able to interact with the augmentative communication devices to be assessed for assistive technology and she did not

recommend Student be assessed at that time due to her developmental functioning level. The team referred Student for an occupational therapy and a physical therapy evaluation, and Parent was to be provided with a prior written notice and assessment plan.

29. Student was considered to be medically fragile according to the Regional Center and doctor paperwork. Her immune system was weak and it was dangerous for her to leave the house except for medical appointments. She had received Regional Center services in her home and District conducted its assessments in her home. There was an understanding Student would receive special education and related services from District in her home.

30. The IEP documented on the Special Factors page that Student did not require assistive technology devices and/or other services. Additional comments explained that due to Student's developmental functioning, the IEP team determined the need for assistive technology would be addressed at a later time after Student participated in specialized academic instruction and demonstrated progress on IEP goals. The IEP documented Student required low incidence services, equipment and/or materials to meet educational goals, with the added explanation that she required use of a gait trainer, walker, and stander for mobility. It documented Student was not blind or visually impaired, was not deaf or hard of hearing, and did have an orthopedic impairment. In the category marked Physical Education, the Special Factors page had three check boxes, generated by the computer program SEIS, and automatically included on the Riverside County SELPA IEP form. The check boxes were "Requirement Met," "General," and "Specially Designed." Student's IEP had the "Specially Designed" box checked, with the explanation written in, "[Student] has received Physical Therapy since birth."

31. District offered Student a program to be delivered in Student's home due

to a doctor's instruction for "Home/Hospital" dated August 5, 2011. The IEP team determined Student was "too medically fragile to participate in a public school setting due to her cardiac problems and high chance of severe infection complications." The IEP team further noted that Student would not participate in the general education environment and extracurricular and non-academic activities because her severe orthopedic impairment, including self-help (toileting, feeding), communication, locomotion and motoric functioning, and health and safety issues affected her involvement and participation in preschool activities. District offered Student five sessions per week of specialized academic instruction, 60 minutes each. District did not offer any related services. District offered 15 minutes a week of speech therapist consultation and collaboration with the home hospital teacher and Parent to ensure progress was being made toward IEP goals, and 10 minutes per week of specialized academic instructor consultation and collaboration with Parent and teacher to ensure progress towards IEP goals. The IEP team agreed to discuss extended school year in the spring.

32. Student began receiving services under the December 15, 2011 IEP.

#### APRIL 26, 2012 IEP TEAM MEETING

33. District conducted an occupational therapy assessment in April 2012. The assessment report was dated April 16, 2012. Student was three years and four months old. The assessment was performed in Student's home and based on a review of records, observation of Student, interview of Parent, use of two standardized instruments, and data from Parent and teacher. Student was able to look at objects when placed in her hand; reach for an object; glance from a toy in one hand to another toy in the other hand; bang objects on a table; use a neat pincer grasp; pick up a one-inch cube and independently place it in a container with voluntary release; and make marks on a paper. Her skills were in the very poor range compared to other children her age. She demonstrated skills consistently at the developmental level of six to eight

months, with splinter skills up to 15 months.

34. The occupational therapists recommended that to enable Student to be involved in and progress in the general education curriculum, Student “may benefit” from increased opportunity for play and exploration; multisensory opportunities including opportunities to explore textures, smells, lights, and sounds to help her understand her environment; and the use of a slant board or inclined writing surface when participating in writing/drawing/art activities. They recommended that Student qualified for occupational therapy, and recommended service on a “consult and collaboration model” of 18 times per year for 30 minutes each session, to take place “in the home setting in collaboration with the preschool teacher in order to increase fine motor skills as related to academic skills.”

35. The occupational therapists proposed a goal that Student hold a marker adaptively for 20 seconds and make marks on a writing surface using a slant board, with 80 percent accuracy as measured by student work samples in three out of five trials.

36. In response to Parent’s disagreement with District’s earlier psychological assessment, District conducted another assessment by two different school psychologists. They prepared another Interdisciplinary Evaluation Report dated April 20, 2012. Student’s teacher was Amanda Letchworth. Her responses on the Vineland Adaptive Behavior Scales, Second Edition, were consistent with the responses Parent provided four months earlier. The assessment results showed Student’s age levels in specific adaptive behaviors were: communication – four to eleven months; socialization - eight to eleven months; motor – four to five months.

37. Ms. Letchworth’s responses indicated the following adaptive behaviors. In receptive communication, Student responded to her name and directions given by Parent. Listening to directions given by others was an emerging skill. She was beginning to listen and follow instructions given by her nurse and teacher. In expressive

communication, she made sounds and gestures to discontinue activities she no longer wanted to participate in. Also, when she no longer wanted to participate in an activity, she used gestures to indicate a preferred activity. She smiled when a familiar person smiled at her. Socially, she tried to make social contact and showed an interest in familiar people. She played simple interaction games and loved patty-cake and itsy-bitsy-spider. She showed a preference for certain people and looked to Parent when new people entered the room. On motor tasks, she was able to grasp light objects. She picked up light foam blocks and, with assistance, placed them into a box. She turned pages of books with thick, board pages. She took pegs out of a peg board but needed assistance to place them back in. She was working on pushing a string through a hole and pulling it through without assistance.

38. The school psychologists reviewed the findings of their psychoeducational assessment at the April 26, 2012 IEP team meeting. Student met eligibility criteria for orthopedic impairment and other health impairment. A speech-language pathologist reviewed the findings of a speech and language assessment. Student demonstrated a severe to profound language impairment characterized by decreased volitional speech, and limited verbal expression. The speech-language pathologist recommended Student receive direct speech and language therapy services of at least one 30-minute session each week. The occupational therapist reviewed the findings of the occupational therapy report and recommended 18 sessions of 30 minutes each per year, with one session in-home with the preschool teacher and one session of consultation outside the home with the preschool teacher to increase fine motor skills as they related to Student's education. Parent suggested that District provide direct services to Student twice a month for consistency. The IEP team agreed with Parent's request.

39. In December 2011, District agreed to conduct a physical therapy assessment but had not conducted it by April 26, 2012. District's program specialist



reported a physical therapist had been contacted and, after Parent signed consent to the assessment, would provide a physical therapy evaluation and any physical therapy service deemed appropriate.

40. The IEP team agreed Student was eligible for extended school year services. Based on the discussion at the April 26, 2012 IEP team meeting, the IEP team changed Student's writing goal to the goal proposed by the occupational therapist. The IEP team modified the two communication development goals in the December 15, 2011 IEP based on the assessment findings regarding Student's speech articulation. District's offer of FAPE was home hospital services of specialized academic instruction of five hours a week, occupational therapy of 14 times a year for 30 minutes each session, and speech and language therapy of 30 minutes a week. Parent signed that she agreed to all parts of the IEP.

#### JUNE 22, 2012 IEP TEAM MEETING

41. Mary Mertz, employed by Littlefield Physical Therapy, Inc., conducted a "physical therapy school based assessment" on June 19, 2012. Ms. Mertz had a master's degree in physical therapy, was a California licensed physical therapist, and had additional certificates in vestibular rehabilitation and pediatric vestibular rehabilitation assessment and treatment. Student was almost three and a half years old at the time of Ms. Mertz's assessment. Ms. Mertz's assessment report stated the assessment and recommendations were based on information from three publications: Riverside County SELPA's *Guidelines for Provision of Occupational and/or Physical Therapy* (October 2010); *The Guidelines for OT and PT in California Public Schools* (Sacramento, 1996); and *Providing Physical Therapy Services Under Parts B & C Of IDEA* (American Physical Therapy Association, 2000).

42. The physical therapy assessment noted Student's muscle strength varied in different body areas, and her muscle endurance, motor control, and motor planning

were all impaired. Her sensation appeared within normal limits for pain and light touch, but was impaired for proprioception and vestibular. Her postural alignment was impaired, having kyphotic sitting with forward shoulders. At hearing, Ms. Mertz described kyphotic sitting as a slumped posture with forward trunk lean, such that the upper body curves forward. Student's functional abilities included rolling from prone to supine over her left more than right side; maintaining an all fours position for approximately one minute with manual cues; maintaining right and left side sitting with bilateral upper extremity support with minimum assistance; changing position from floor to standing with maximum assist; bench sitting (described as sitting forward on a chair without the use of the back of the chair for support ) with standby assistance or contact guard assistance (the adult directly touching the child but the child does all the work) for two to three minutes; and propelling her Rifton Pacer mobility assistance device from the kitchen to the living room.

43. Ms. Mertz recommended direct physical therapy services of one hour per week. She proposed three goals: 1) Student will sit in a chair without arm rests and participate in 10 minutes of desk activities with standby assistance and no loss of balance in three out of five trials; 2) Student will "transfer floor <-> stand via right or left ½ kneel and Min[imum] Assist for carpet time"; and 3) Student will ambulate with device or one hand hold assist distances equal to areas surrounding school (i.e. parking lot, playground, school driveway) for safe limited community mobility.

44. The IEP team meeting notes from June 22, 2012, indicated they were sent home to be agreed upon by team member signatures. At the June 22, 2012 IEP team meeting, Ms. Mertz shared the assessment results. Parent asked about the recommendation in Ms. Mertz's report that stated "to help [Student] participate in a school setting"; Student's doctors recommended home hospital and Parent wanted the goals to reflect the home setting. Ms. Mertz shared that the goal would also help

Student in the school and home environments. Ms. Mertz asked about Parent's concerns regarding physical therapy. Parent shared she was concerned about Student being able to move around, stand up, and walk. The IEP team discussed goals for physical therapy and agreed to the goals proposed in Ms. Mertz's report.

45. Parent shared about Student's history in physical therapy and how, despite having been in and out of the hospital, Student continued to progress. Ms. Mertz recommended physical therapy one hour per week during the extended school year and regular school year. Ms. Letchworth, who was providing Student five hours a week of home hospital specialized academic instruction, indicated the physical therapy report sounded appropriate to Student's physical needs. The IEP team meeting notes stated that after considering the physical therapy assessment report and all of the information presented, the IEP team recommended Student receive physical therapy once a week for one hour. There were no FAPE Offer forms attached to the June 22, 2012 IEP. For the regular school year, District offered: specialized academic instruction through home hospital for one hour per day, five days a week; occupational therapy for 30 minutes per session, 14 times per year; speech and language therapy for 30 minutes a week, once per week; and physical therapy once a week for 60 minutes. Parent signed that she agreed to all parts of the IEP on July 2, 2012.

#### DECEMBER 4, 2013 IEP TEAM MEETING

46. District held an IEP team meeting and an IEP was developed on December 12, 2012. That IEP was not in evidence, but progress toward meeting those goals was reported in the December 4, 2013 IEP, when Student was almost five years old. Student had a fine motor goal to hold a marker adaptively for 15 seconds and make marks on a writing surface using a slant board, with 60 percent accuracy in three out of five trials; Student met that goal. She had three gross motor goals. Her sitting goal was, by the end of the 2012-2013 school year, to sit in a chair without arm rests and participate in five

minutes of desk activities with standby assistance and no loss of balance in three out of five trials; Student met that goal. Her transition-off-floor goal was, by the end of the 2012-2013 school year, to transfer floor to stand via right or left half kneel and minimal assist for carpet time; Student partially met that goal. Her walking goal was to ambulate with device or one hand held assist distances equal to areas surrounding school (i.e. parking lot, playground, school driveway) for safe limited community mobility; Student met that goal.

47. Student had a motor task goal to follow a two-step motor task with minimal to moderate visual, verbal, and physical prompting with 80 percent accuracy over a 10 day trial; Student partially met that goal. Student had two communication goals. She had a goal to produce the phonemes /b/, /p/, and /m/ in word approximations for consonant-vowel and consonant-vowel-consonant-vowel words using functionally based communication activities using an approach for sound production in four out of five opportunities across three consecutive trial days as measured by the speech-language pathologist's logs, checklisting, observation, and parent/teacher report; Student partially met that goal. Student also had a goal to produce at least 10 word approximations to label, express wants and needs, refuse, and gain attention during speech therapy sessions when provided maximum support using various techniques either individually or in combination as needed (imitation, initial phoneme production, baby sign, pictures, objects, tactile cues, choral speech – words/sounds said by the therapist at the same time as the student) in three consecutive sessions measured by speech-language pathologist logs, checklisting, observation, and parent/teacher report; Student partially met this goal. Student had a shape recognition goal to, out of a field of two, pick up the requested shape and hand it to an adult with 80 percent accuracy over a 10 day trial; Student met this goal.

48. The December 4, 2013 IEP documented Student's development in many

areas. In reading, Student used adaptive low tech equipment to hold a page for her to turn it independently. She looked at pictures when pointed out by an adult. She required elbow prompts but moved her hands to familiar songs such as "itsy-bitsy spider," "five little monkeys," "ducks and bunnies," and "if you're happy and you know it." She was beginning to engage in back and forth vocalization. In the area of writing, Student was right hand dominant. She required elbow prompts to keep a crayon on the paper; she could hold a crayon and make up and down tapping marks on the paper for up to 35 seconds. In math, Student was beginning to understand different amounts of things; she signed "more" when she wanted more of something. She receptively recognized different shapes out of a field of two, by pointing. She participated in pattern songs, such as clap hands-tap tray. She matched items of similar color.

49. Her communication development was interrupted by a change of service provider, and most information was according to parent and nurse report. Student's most frequent and consistent sounds were and /ai/, /i/, /a/, and /dada/, when she saw her father; no other consonants were noted. She increased motor independence with tracking and touching an icon on the Touch Trainer iPad app; she lifted and purposefully touched the icon to turn on the music. She enjoyed the application. She also imitated motor movements for "celebrating" when she got a correct answer, and motor movements used for singing certain songs and books.

50. In fine motor skills, Student could pick up small one-half to two-inch items of different weight and texture and place them in a container. She took pegs and puzzle pieces out of a frame and placed them on the frame or board, but not in the correct place. She put on stacking rings with elbow prompting, and large beads on a rope with support. Student transferred long objects from one hand to another. She was beginning to use both hands to manipulate objects, using both hands to grasp objects and pull objects apart, or hold an item in one hand and explore with the other. In gross motor

skills, Student transitioned from lying down to sitting with minimal assistance. She was able to right and left side sit with close standby assistance and intermittent contact guard assistance for greater than five minutes, and tailor sit (sitting on the floor in a crossed-leg position) greater than 10 minutes without upper extremity support. Student demonstrated fair protective reactions to the side in sitting, but forward and back protective reactions were emerging. She ambulated in her walker with the seat removed 75 feet with contact guard or standby assistance. She transitioned from right and left side sitting to quadruped with minimum to moderate assistance and maintained the all fours position (quadruped) for greater than one minute. She was trialed on a Rifton Adaptive Tricycle for improving cardiovascular strength and endurance; she pedaled 50 percent of each revolution more than 50 percent of the time over a one- to two-minute period. The physical therapist believed she would benefit from using one on a regular basis.

51. Regarding her social/emotional/behavioral development, Student was aware of familiar people and was slow to warm to new people. She responded to others' expressions of emotions by imitation with smiles and laughs. She expressed when she was all done with an activity by making a crying noise; when the activity stopped, she smiled again. In vocational development, Student worked with teachers and therapists for up to two hours at a time. Her attention to tasks had increased and she was minimally distracted by people coming in and out of her work area. She attended and responded to adult directions. As adaptive daily living skills, she drank from a cup. She required adult assistance for daily living skills including toileting and feeding.

52. Student's areas of unique need were in "gross motor (PT)," communication, math, writing, and literacy.

53. The IEP team meeting notes were read aloud at the end of the meeting and the comments were verified as accurate by all IEP team members. District provided

Parent the Parental Rights and Procedural Safeguards, and offered a verbal review. Team members reviewed Student's progress on goals, present levels of performance, and proposed new goals that were, broadly, similar to the prior goals. The IEP Team accepted Student's goals as appropriate. Parent expressed concern that Student did not have access to the same gross motor equipment that children in school are provided. Physical therapist Ms. Mertz stated she had brought some equipment and was looking into providing more. District's administrator at the IEP team meeting agreed that if the physical therapist (an outside provider with whom District had contracted) needed equipment, she could access the school's motor room to try equipment with Student to determine what would be most effective.

61. The IEP team discussed Student's need for an adaptive tricycle to work on building strength and endurance to meet IEP goals. The IEP team also discussed the need for assistive technology; since all service providers had access to iPads, they could be used with Student to increase her understanding and success with the device. The Special Factors page of the December 4, 2013 IEP documented that Student did not require assistive technology devices and/or other services, with the added explanation that the IEP team agreed Student benefitted from cause and effect devices and that staff would use assistive technology devices with Student during instruction to determine her individual needs. It documented that Student required low incidence services, equipment and/or materials to meet educational goals, with the explanation written in that the IEP team agreed she would benefit from an adaptive tricycle to increase her gross motor skills, posture, body awareness, and endurance. It documented Student was not blind or visually impaired, was not deaf or hard of hearing, and did have an orthopedic impairment; there was a written-in explanation that Student required the use of specialized equipment such as a gait trainer, stander, and Rifton high/low activity chair. In the category marked Physical Education, the Special Factors page had three

check boxes, generated by the computer program SEIS, and automatically included on the Riverside County SELPA IEP form. The check boxes were "Requirement Met," "General," and "Specially Designed." Student's IEP had the "Specially Designed" box checked, with the explanation written in, "[Student] receives Physical Therapy."

62. District offered Student a program to be delivered in Student's home. The IEP team determined Student was "too medically fragile to participate in a public school setting due to her cardiac problems and high chance of severe infection complications." The IEP team further noted that Student would not participate in the general education environment and extracurricular and non-academic activities because her severe orthopedic impairment, including self-help (toileting, feeding), communication, locomotion and motoric functioning, and health and safety issues affected her involvement and participation in preschool activities. District offered Student five sessions per week of specialized academic instruction, 60 minutes each. District offered three related services. District offered occupational therapy in Student's home for 30 minutes each session, six sessions, totaling 180 minutes per trimester, for a total of 18 sessions per year. District offered physical therapy in Student's home for 60 minutes per week. District offered speech therapy in Student's home as three sessions a month at 45 minutes per session, totaling 135 minutes per month. District offered these "supplementary aids, services, and other supports for school personnel, or for student, or on behalf of student": 15 minutes a month of speech therapist consultation and collaboration with the home hospital teacher and Parent "to ensure progress is being made toward IEP goals,"; 10 minutes per week of specialized academic instructor consultation and collaboration "with parent and teacher" to ensure progress towards IEP goals; 15 minutes a month of occupational therapist consultation and collaboration with the home hospital teacher and Parent to ensure progress toward IEP goals; and 15 minutes a month of physical therapist consultation and collaboration with the home



hospital teacher and Parent to ensure progress toward IEP goals. Parent accepted District's offer.

#### DECEMBER 2, 2014 AND JANUARY 20, 2015 TRIENNIAL IEP TEAM MEETING

63. District conducted a triennial reassessment when Student was almost six years old, and classified as being in kindergarten. The IEP team met on December 2, 2014, to review the assessment results. A second IEP team meeting to finish reviewing the assessments occurred on January 20, 2015. The IEP document was dated December 2, 2014. The school psychologist reviewed her assessment results at the beginning of the meeting. She reported Student was eligible for special education and related services under the disability categories of orthopedic impairment and other health impairment; she proposed that the IEP team discuss and consider the eligibility category of multiple disabilities.

64. The December 2, 2014 IEP document included a chart reporting progress toward meeting the annual goals from the December 2013 IEP. Student partially met her gross motor goal to transition from tall kneel to half kneel with minimum assistance and half kneel to stand with contact guard assistance three out of five trial days for improved motor planning and strength. She met her gross motor goal to ambulate with her gait trainer with standby assistance or minimal manual support through her upper extremities only for greater than seven minutes demonstrating improved endurance in three out of five trials. She partially met her gross motor to ascend one flight of stairs with contact guard assistance and descend one flight with minimum assistance for balance in three out of five trials.

65. Student did not meet her communication goal to produce the phonemes /b/, /p/, or /m/ in word approximations for consonant-vowel words during functionally based communication activities using a multimodal approach for sound production as well as using tactile cues (such as a z-vibe) as needed in four out of five opportunities

across three consecutive trial days. She also did not meet her articulation and functional language goal to increase her consistency in production of word approximations by participating in songs, finger plays, preferred tasks and/or routine books and using up to five words during each task spontaneously, "in cloze model," in imitation, in response to part of a task, "etc[.]" in four out of five opportunities when given maximum support to improve her motor planning for speech. The speech-language pathologist reported that Student did not produce any voicing or verbalizing during speech therapy sessions. Parent reported Student made sounds outside of therapy sessions, but these two communication goals were discontinued because Student did not participate with the goals.

66. Student partially met her augmentative alternative communication training and motor development goal to activate a cause and effect button on three different iPad apps for cause and effect with differing buttons and reactions, with minimal to no cueing, at 75 percent accuracy over three consecutive therapy sessions.

67. Student partially met her comprehension goal to identify the verbally presented character from a book by either eye gaze or pointing/touching the picture on the page with moderate cueing in three out of five opportunities over three consecutive therapy sessions.

68. Student did not meet her matching (math) goal to match five colors (red, blue, green, yellow, orange) and shapes (circle, square, triangle, rectangle, oval) to a frame using elbow prompting to initiate arm movement with 60 percent accuracy over a five day trial.

69. Student did not meet her letter recognition goal to, using an elbow prompt, to place letters of her own name in order by matching letters on or within close approximation to a name card with 60 percent accuracy over a five day trial.

70. The December 2, 2014 IEP documented Student's development in many

areas. In reading, Student turned a cardboard book page independently. She looked at pictures of a book. She reached out for objects of a story "(puppets)" or when working pulled off objects, although she sometimes required assistance if the Velcro was too strong. She required occasional elbow prompts but moved her hands to familiar songs such as "itsy-bitsy spider," "five little monkeys," "hello song," "good bye song," and "open/shut them." In the area of writing, Student used a hollow whiffle ball with a slim marker inserted in it to grasp. She required elbow prompts and occasional hand-over-hand, but she made horizontal marks, back and forth. In math, Student still was beginning to understand different amounts of things; she signed "more" when she wanted more of something, and was beginning to sign "all done" when she completed a task. She receptively recognized different shapes out of a field of two, by pointing or reaching, but she tended to pick from her left side. She participated in pattern songs, such as clap hands-tap tray. She matched items of similar color. She was learning to count to five objects, such as puppets and in stories.

71. Student's triennial speech and language assessment determined that her communication skills were in the 12-to-18-month-old range. Student's cognitive abilities were less than 24 months old and it was possible Student was communicating within her cognitive ability at that time. Student was assessed for assistive technology in the summer and it was recommended that she be trialed on and work with switches and eye gaze technology to see if that increased her ability to participate with the curriculum and access communication. She had been working with the speech-language pathologist for 16 months and seemed to enjoy therapy, as evidenced by smiling and readily attending during sessions most of the time, but she did not vocalize or verbalize during treatment sessions. She did best at attending, getting excited, and joining in with hand movements when she was familiar with songs, books, apps, and activities.

72. Student had made progress in fine motor skills, but continued to struggle

to hold onto objects for longer than 10 seconds. She held a marker or pencil on average for three to five seconds and made one to three horizontal marks on a writing surface. She held onto preferred objects for as long as she appeared to be engaged with the object. She could pick up and hold objects related to school such as puzzle pieces, shapes, and other small objects when she was able to focus on the activity. She was able to interact with a variety of textures but some textures and other sensory input were overstimulating and caused Student to shut down. She was able to transfer objects from one hand to the other and was able to transfer objects that were smaller than before. She responded well when prompted at her elbows to engage in an activity. In gross motor skills, Student took independent steps with the use of a gait trainer. She used arm prompts, a chest prompt, and pelvic support on her gait trainer. She ambulated more than seven minutes with use of all support prompts. She stood with support from an adult with moderate to minimal assistance. Student climbed stairs with moderate assistance leading with her left leg, but she did not yet have a stepping pattern for descending stairs. When pulling to stand, Student transitioned from sitting to a tall kneel with moderate assistance, and then transitioned from a half kneel to standing with moderate assistance.

73. Nicole Sanguino, PT, DPT, through Up and Movin' Pediatric Therapy, conducted a triennial reassessment and reported additional details about Student's gross motor development in a November 10, 2014 "School-Based Physical Therapy Evaluation." Because Student's gross motor functioning and development is central to the dispute, details regarding Student's functional abilities when she was five years and 11 months old are included here for comparison over the next three years and specifically during the two years prior to filing of Student's complaint in this case. Ms. Sanguino's assessment report described the role of school-based physical therapy and stated the explanation was adapted in part from *The Guidelines for OT and PT in*

Physical Therapy services function as a “related service” under the IDEA 2004, which are defined as those services “required to assist a child with a disability to benefit from special education.” PT’s support a child’s ability to gain access and make progress in the school curriculum. Physical therapy is not intended to maximize skill level, but rather to develop the foundations necessary for the child to benefit from his/her individualized educational plan. Many issues are considered in assessing the need for physical therapy services and the delivery of services including, but not limited to, function in the classroom, and around the school campus, class placement, functional assessment results, teacher training needs, and other support the child is receiving. Physical therapy services can be provided through a pull-out model, collaboration within the classroom, consultation with related educational staff, or a combination of models, depending on which service model the IEP team deems most appropriate for the child.

74. Ms. Sanguino assessed Student by observing her in her home, Parent interview, IEP team interview, and the standardized assessment Peabody Developmental Motor Scheduled, 2nd Edition. Ms. Sanguino described Student as a sweet girl who was motivated by music and singing. She was always in a cheerful and cooperative mood. Ms. Sanguino was not able to formally test Student’s strength because of her age and “limited understanding of the test.” She was dependent for all classroom/home

transfers. In the area of floor mobility, Student rolled supine to prone and prone to supine. She independently performed a forearm prop and transitioned to quadruped from sitting with maximal assistance. To maintain a quadruped position, she required maximal assistance. She was not yet combat crawling or creeping. When in a tall kneel position without support from a surface, Student required maximal assistance. In the area of object manipulation, when in a sitting position, Student attempted to corral a ball that was rolled to her. She demonstrated some difficulty with her motor coordination. She required moderate assistance to roll the ball to an adult. She was not yet manipulating objects in standing.

75. Student sat on the floor in a long sit position (legs extended in front of her) independently for up to eight minutes according to Parent report. Both of Student's knees were slightly flexed while sitting because of her joint contractures. She independently reached and retrieved objects placed in front of her and manipulated objects. While sitting, she had a slumped posture in her thoracic spine. She was not yet pivoting or scooting while in a sitting position. When transitioning from the floor to sitting, she required maximal assistance. Side sitting was performed with maximal assistance to assume the position and moderate assistance to maintain it. She had side protective reactions but no posterior reaction. Regarding her standing, she was able to stand with support from an adult with moderate to minimal assistance. When in a supported weight bearing position, she had a slight forward trunk lean, hip flexion, and knee flexion. When standing at environmental surfaces, Student's posture had the same characteristics and she required moderate to minimal assistance. Her overall endurance with standing was fair. She required moderate assistance when pulling to stand. She transitioned from sitting to a tall kneel with moderate assistance. She required maximal assistance to transition from the floor to standing.

76. Student took independent steps with the use of a gait trainer. She utilized

arm prompts, a chest prompt, and pelvic support on her gait trainer. She had recently received a new larger gait trainer approximately one month before the assessment and she was getting used to taking steps in this larger and heavier gait trainer. Student was in her gait trainer at the most one and a half hours per day. When navigating stairs, Student required moderate assistance to ascend stairs. She led with her left leg. When descending stairs, she required maximal assistance. A descending stepping pattern had not been established.

77. Student sat in a Rifton activity chair during class-time activities. She was not able to sit independently in a traditional classroom chair. She had a Rifton Pacer gait trainer with a chest prompt, pelvic support, and arm prompts to assist her with her ambulation. Student also had a Rifton adaptive tricycle she used to assist with her cardiovascular endurance and lower extremity strength. She used the tricycle approximately twice a week for 20 minutes. She was able to propel the tricycle independently but at a slow pace. She was dependent for steering the tricycle. She also required assistance and prompting to maintain her hands on the handlebar. Ms. Sanguino discussed with Parent using a rear steering bar on the tricycle.

78. On the Peabody Developmental Scales, at 71 months of age, Student's age equivalent was eight months in stationary abilities, six months in locomotion, and 12 months in object manipulation. Her motor performance was classified as "very poor."

79. Student continued to show gross motor delay, impaired strength, impaired balance/coordination, and fair weight bearing endurance. Ms. Sanguino stated physical therapy in the educational setting was provided when a student's gross motor deficits impacted his or her ability to access and function in the school setting, and could not be appropriately addressed by other educators. Student had deficits in multiple areas of gross motor functioning within the school setting including weight bearing endurance, standing skills, ambulation, and transitions. Ms. Sanguino recommended Student receive

physical therapy service once a week for 60 minutes. She proposed three goals, and identified the treatment plan as addressing dynamic standing balance, lower extremity strengthening, motor planning, motor coordination, and gait training.

80. At the time of the December 2, 2014 IEP team meeting, Student's social/emotional/behavioral development status was that she still was aware of familiar people and was slow to warm to new people. She still responded to others' expressions of emotions by imitation with smiles and laughs. She continued to express when she was all done with an activity by making a crying noise; when the activity stopped, she smiled again. Student was learning to sign "all done" when something was over or when she wanted something to be over, as well as "more" if she wanted a task or activity to continue. In vocational development, all information reported was the same as in December 2013. Student worked with teachers and therapists for up to two hours at a time. Her attention to tasks had increased and she was minimally distracted by people coming in and out of her work area. She attended and responded to adult directions. As adaptive daily living skills, all information reported was the same as in December 2013. Student drank from a cup. She required adult assistance for daily living skills including toileting and feeding.

81. Student's areas of unique need were "gross motor (PT)," communication, math, writing, and literacy.

82. The December 2, 2014 IEP team meeting notes indicate the IEP team meeting notes were not read aloud at the end of the meeting because Parent was audio recording the IEP team meeting, and District recorded it, too. The special education teacher and occupational therapist shared the results of their assessments. Parent asked questions about their assessments. The school psychologist reviewed the results of the Vineland Adaptive Behavior Scale, Second Edition. Student's adaptive behavior score was at 12 months. The speech-language pathologist reviewed her assessment results.



She agreed with previous assessors' comments that Student was impacted by her decreased motor movements. Parent shared that Student's motor impairment was severe. Parent also reported that Student was able to perform some speech skills but not on demand. Student talked through vocal play when Parent and Student were home alone; however, Student treated home hospital instructors as "entertainment" and was less verbally active during home hospital instruction. The augmentative alternative communication/assistive technology specialist shared her assessment report. Access considerations were eye gaze or a switch. Parent stated that eye gaze needed to be taught and the specialist agreed.

83. The IEP team scheduled another session to review the report of a private speech-language pathologist which Parent provided to District that day. The IEP team agreed to proceed with the augmentative alternative communication/assistive technology specialist's recommendations to include trial training until January 31, 2015, for a total of two sessions of four hours in the home setting and an additional assistive technology training for staff to be determined at the continuation IEP team meeting on January 20, 2015.

84. The physical therapist was not able to attend the December 2, 2014 IEP team meeting, but she had shared information from her assessment with Parent in the home the day before.

85. Parent requested a different special education teacher and the IEP team discussed how to coordinate a transition. District's program specialist committed to work with the pupil personnel services department to obtain a different home hospital teacher and to contact Parent when information was determined.

86. District's offer of placement and services was "the same as previous offer in all services with the addition of the 2x4 hours for AAC/AT specialist" until the IEP team meeting reconvened on January 20, 2015.

87. The IEP team met again on January 20, 2015. Parent and District audio recorded the meeting, and the IEP team meeting notes stated that the IEP team notes were read aloud and a draft IEP would be printed for Parent to review. The augmentative alternative communication/assistive technology specialist presented her augmentative communication evaluation. She recommended direct access using eye gaze. The IEP team planned for Student to have a loaner device "through PRC" while District went through the process to purchase a device for Student.

88. Team members reviewed Student's progress on goals, present levels of performance, and proposed new goals. The IEP team accepted Student's goals as appropriate. The IEP team discussed that after an augmentative alternative communication device was secured for Student, the IEP team would draft an amendment form for any necessary goal revisions. The IEP team discussed the Special Factors page of the IEP, specifically regarding assistive technology devices and incorporating the information from the augmentative alternative communication report dated January 20, 2015. In the category marked Physical Education, the Special Factors page still had three check boxes, generated by the computer program SEIS, and automatically included on the Riverside County SELPA IEP form. The check boxes were "Requirement Met," "General," and "Specially Designed." Student's IEP had the "Specially Designed" box checked, with the explanation written in, "[Student] receives Physical Therapy."

89. The IEP team considered a full day in-school program for Student, but supported a home hospital program due to Student's documented medical needs and the home health paperwork District received. The IEP team determined Student was "too medically fragile to participate in a public school setting due to her cardiac problems and high chance of severe infection complications." The IEP noted that Student would not participate in the general education environment and extracurricular and

non-academic activities because her severe orthopedic impairment, including self-help (toileting, feeding), communication, loco-motion and motoric functioning, and health and safety issues affected her involvement and participation in school activities. The IEP team discussed supplementary aides and services, and related services.

90. District offered Student five sessions per week of specialized academic instruction in her home, 60 minutes each. District offered occupational therapy in Student's home for 30 minutes each session, nine sessions, totaling 270 minutes per semester, for a total of 18 sessions per year. Occupational therapy was noted to be provided on a collaborative basis in conjunction with the teacher. District offered physical therapy in Student's home for 60 minutes per week. District offered speech therapy in Student's home for three sessions a month at 45 minutes per session, totaling 135 minutes per month. District offered the services of an orthopedic impairment itinerant from the Riverside County Office of Education for four sessions of 15 minutes each, totaling 60 minutes a year.

91. District offered these "supplementary aids, services, and other supports for school personnel, or for student, or on behalf of student": 15 minutes a month of speech therapist consultation and collaboration with the home hospital teacher and Parent "to ensure progress is being made toward IEP goals"; 10 minutes per week of specialized academic instructor consultation and collaboration "with parent and teacher" to ensure progress towards IEP goals; 15 minutes a month of occupational therapist consultation and collaboration with the home hospital teacher and Parent to ensure progress toward IEP goals; 15 minutes a month of physical therapist consultation and collaboration with the home hospital teacher and Parent to ensure progress toward IEP goals; one to four hours a month of assistive technology specialist consultation for training and language implementation, programming, and adaptation of materials/curriculum on eye gaze device and related assistive technology program supports with staff and Parent; one

hour per month of assistive technology specialist consultation with the specialized academic instruction teacher, speech-language pathologist, occupational therapist, and physical therapist for training and carryover of augmentative alternative communication device; and two hours a month during the extended school year only for assistive technology specialist consultation for training and language implementation, programming, and adaptation of materials/curriculum on eye gaze device and related assistive technology program supports with staff and Parent. Parent accepted District's offer.

92. The December 2, 2014 triennial IEP changed Student's eligibility categories to primary disability of multiple disability, and secondary disability of orthopedic impairment. Her disability affected her involvement and progress in the general curriculum and classroom activities. Her disabilities included severe orthopedic impairment, other health impairment, speech and language impairment, and intellectual disabilities, including self-help (toileting, feeding), communication, loco-motion and motoric functioning, and health and safety issues.

#### NOVEMBER 19 AND 30, 2015 IEP TEAM MEETINGS

93. District held an annual IEP team meeting on November 19, 2015, when Student was almost seven years old, and classified as being in first grade. A second IEP team meeting to finish the discussion occurred on November 30, 2015. The IEP document was dated November 19, 2015. Parent audio recorded the IEP team meeting. Parent began the meeting by stating her concerns and dissatisfaction with delay in Student receiving speech therapy and physical therapy. Parent expressed there was no way to know Student's present levels of performance because she had not had the services. District's program specialist explained the efforts District was making to contract for speech therapy and physical therapy services. She proposed that goal progress for Student's three gross motor goals be noted that there was no data

available due to the lack of services since June. However, Parent shared her observations and those goals were marked as partially met based on Parent's data.

94. The November 19, 2015 IEP document included a chart reporting progress toward meeting the annual goals from the December 2014 IEP. Student partially met her fine motor goal to, with minimal assistance, hold a marker for 20 seconds and make horizontal, vertical, and circular marks on a variety of writing surfaces with 80 percent accuracy in three out of five trials.

95. As noted above, based on Parent's report, Student partially met each of her gross motor goals: to pull to stand via a half kneel at environmental surfaces with minimal assistance on four out of five trials; to ambulate with her gait trainer with standby assistance without the use of the pelvic support for up to 10 minutes on four out of five trials; and to ascend a flight of stairs with minimal assistance, non-reciprocally, and without using the handrail on four out of five trials.

96. Student met her augmentative alternative communication training and motor development goal to activate a cause and effect button with eye gaze, switch, and/or touch screen on three different iPad apps for cause and effect with moderate to minimal cueing, at 75 percent accuracy over three consecutive therapy sessions.

97. Student partially met her assistive technology goal to indicate yes/no with the use of an assistive technology device "(eye gaze, switch, touch screen)" to answer simple, contextual questions with moderate to minimal cueing at 75 percent in three out of five opportunities.

98. Student partially met her comprehension goal to identify the verbally presented character from a book by either eye gaze or pointing/touching the picture on the page with moderate to minimal cueing in three out of five opportunities over three consecutive therapy sessions.

99. Student partially met her matching (math) goal to match six colors (purple,

red, blue, green, yellow, orange) and two-dimensional shapes (circle, square, triangle, rectangle, oval, heart, and star) on or within close approximation to a color or shape card using minimal elbow prompting with 80 percent accuracy over a five day trial.

100. Student partially met her letter recognition goal to, with minimal prompt “and (when appropriate) use of [augmentative alternative communication] device,” to find and select the seven different letters in her name and also M, D, L, and B by matching letters to the corresponding sound of each letter on or within close approximation to a letter card or on an augmentative alternative communication device screen with 70 percent accuracy over a five day trial.

101. The November 19, 2015 IEP documented Student’s development in many areas. In reading, Student displayed reaction to familiar people nearby and looked at the face of the person speaking to her. She focused on objects, pictures, and people. She looked at books and helped turn the pages. She looked at a television, computer, or device screen. She heard and listened and engaged to a story read aloud for five to seven minutes. Student was non-verbal and was an emergent communicator. Within symbolic language, an area of need was for her to request help, ask questions, and to maintain turn-taking beyond three turns. She needed to increase her expressive vocabulary. In the area of writing, Student used a grip that secured the writing implement to her hand and scribbled on a paper or whiteboard with elbow prompting. When given a writing implement to hold that was not attached to her hand, she threw the implement off her tray after one to three seconds and was not independently making horizontal, vertical, or circular marks purposefully. In math, Student participated in songs with numbers such as “five little monkeys,” “five little ducks,” and “ten in the bed.” She participated in color activities where she selected a color and staff presented the label. An area of need for Student was number identification one to five.

102. In the area of communication, Student spontaneously used single- and

two-word utterances using an augmentative alternative communication eye gaze device to request items, activities, reoccurrence, comment, and regulate other individuals' behavior, including but not limited to "want mom, want (item), play, play (item), drink, turn, turn (item), more, play more, want more, go, [and] go more." She required a model plus visual gestures to use descriptors like color and feeling words.

103. Student continued to have difficulty in fine motor skills. She was able to hold onto an object when directed to for up to five seconds consistently, and occasionally up to 10 seconds. She held onto an item longer if she was given a preferred item or she acquired it independently. She did not independently make marks on writing surface. She expanded the variety of textures she tolerated. She picked up school-related manipulatives and held them while focused on the activity. She lost interest in holding the items and discarded them when she was distracted or lost interest in the activity. She responded to verbal and tactile prompts to get items, but only responded appropriately when she was interested in the activity. Student's gross motor skills were not documented in the 2015 summary of development. However, the IEP team meeting notes reflect that Parent reported Student ambulated with a gait trainer and ascended stairs. Parent stated the physical therapist did not bring equipment to push Student to further her abilities.

104. In the area of social/emotional/behavioral development, Student tolerated being touched and cared for. She showed responses to positive and negative stimuli. She reacted and showed awareness to people in her environment. She anticipated pleasurable events like listening to music and watching "Super Why." She showed displeasure. She initiated interactive play. In vocational development, Student tolerated hand-over-hand tasks. She was learning to use her augmentative alternative communication device to select wants and needs. As adaptive daily living skills, all information reported was the same as in December 2013 and December 2014. Student

drank from a cup. She required adult assistance for daily living skills including toileting and feeding.

105. Student's areas of unique need were "gross motor (PT)," communication, math, writing, and literacy.

106. During the November 19, 2015 IEP team meeting, the assistive technology specialist described that Student had been a receptive learner. She was now being presented with engaging and giving information, and it would take time to get her to be more verbal. The specialist stated that with respect to Student's assistive technology goal regarding yes/no answers to simple questions, "yes/no" came at different levels and that language-wise, yes/no questions were not yet appropriate. Student favored her left side and it was possibly a motor planning issue rather than a receptive planning issue. The assistive technology specialist suggested to keep things in the same spot on an augmentative alternative communication device, but to expand them.

107. In the area of fine motor, Student's baseline was that she had decreased in her apparent motivation to hold markers or other writing utensils. She held them for up to five seconds and then discarded them. She did not intentionally make marks on any surface. She continued to develop her skills for picking up items and manipulating items in her hand. However, when requested to do so, she was often non-compliant or picked up an item and discarded it to the side. Her goal was, when given a variety of shapes and textures, such as rough, sticky, soft, or smooth, to pick up an item and maintain it in her hand for up to 10 seconds to demonstrate increased tolerance with a variety of textures with 80 percent accuracy in four out of five trials, as measured by teacher- and therapist-kept records. The teacher and occupational therapy staff were to work on this goal.

108. With gross motor, Student's baselines were written on the goal pages as follows. She transitioned from sitting to tall kneel with moderate assistance, then



transitioned from half kneel to standing with moderate assistance. She took independent steps with the use of a gait trainer, with arm prompts, chest prompts, and a pelvic support on her gait trainer. She ambulated more than seven minutes with the use of all support prompts. She ascended stairs with moderate assistance, leading with her left leg. She had three gross motor goals. She was to pull to stand via a half kneel, at environmental surfaces with minimal assistance on four out of five trials as measured by physical therapist, teacher, and staff observation. Also, she was to ambulate with her gait trainer with standby assistance without the use of the pelvic support, up to 10 minutes, in four out of five trials as measured by the physical therapist, teacher, and staff observation. Additionally, she was to ascend a flight of stairs with minimal assistance, non-reciprocally (getting both feet to the next step before climbing another step) and without using the handrail on four out of five trials as measured by physical therapist, teacher, and staff observation. The physical therapist and teacher were to work on these goals. The baselines as well as the goals were the same as in the December 2014 IEP.

109. All of Student's other present levels of performance and goals incorporated or were in reference to using an augmentative alternative communication device with eye gaze operation. As to expressive language, Student's baselines were that she communicated using facial expressions, body language, and one- to two-word utterances on a voice-output augmentative alternative communication eye-gaze device. She communicated primarily to request items and actions and to command. She had limited types of vocabulary words that she spontaneously used expressively. They were primarily core verbs and nouns like play, doll, want drink, and want mom. The IEP team developed two expressive language goals. One goal was to communicate spontaneously using one- to two-word utterances on a voice-output augmentative alternative communication eye-gaze device for a variety of reasons including requesting items, actions, assistance, comment, to command, and to question in eight out of 10

opportunities as measured by the augmentative alternative communication specialist given processing strategies outlined on the notes page. The other goal was to use spatial prepositions (on, off, in, out), descriptor adjectives (colors: red, yellow, blue; size: big little; interjections: wow, cool; and pronouns: I, you, mine) using a voice-output augmentative alternative communication eye-gaze device in eight out of 10 opportunities. The augmentative alternative communication specialist would work on these goals.

110. For pragmatics, Student's baseline was that she took turns using facial expressions and body movement and single word utterances on her voice-output augmentative alternative communication eye-gaze device while engaged in motivating activities with adults. Her goal was to take turns with a communication partner on a joint topic using a voice-output augmentative alternative communication device when presented with an object that represents a joint reference (book, toy, art project) beyond two turns verbally in eight out of 10 opportunities given processing strategies outlined on the notes page as measured by the augmentative alternative communication specialist and all related staff members. The augmentative alternative communication specialist would work on this goal.

111. In the area of print concepts, Student's baselines were that, given strategies outlined in the notes page, when two enlarged letters that remained in the same location on a voice-output augmentative alternative communication eye-gaze device, Student identified the consonants b, d, p, s, l, m, and r with 80 percent accuracy. Also, she had been exposed to the "at" and "ig" word families. When given both verbal and visual cues and presented on a voice-output augmentative alternative communication eye-gaze device, Student selected an initial consonant followed by a word family (c, f, m, and "at," b, p, d, and "ig"). Student's accuracy varied on a daily basis according to fatigue and motivation. One goal was to identify all upper and lower case

letters when presented with a choice of two letters presented visually and verbally on a voice-output augmentative alternative communication eye-gaze device following processing strategies outlined in the notes page with 70 percent accuracy as measured by the teacher and augmentative alternative communication specialist. The other goal was to select an initial consonant followed by one of the word families "at," "an," "in," "ig" or "ug" on a voice-output eye-gaze communication device when no more than four consonants and one word family was visual with 80 percent accuracy following processing strategies outlined in the notes page as measured by the teacher and augmentative alternative communication specialist. The augmentative alternative communication specialist would work on these goals.

112. Finally, in the area of retelling, Student's baseline was that she used a single-word utterance to retell a story using core vocabulary words such as "go" and "play" when given a visual cue (adapted book-augmentative alternative communication icons above text) and verbal cues. Her goal was to write two-word utterances following the reading of a story to retell story components using a voice-output augmentative alternative communication eye-gaze device in eight out of 10 opportunities following processing strategies outlined in the notes page, as measured by the teacher and augmentative alternative communication specialist. No person was listed as responsible for this goal.

113. Parent shared that she thought it was better if providers worked continuously on one goal throughout the hour of instruction versus smaller lessons throughout that hour. Parent thought progress on goals might not have been accurately reported because there had been changes in and inconsistency with providers; Student did not give everyone her 100 percent because she was sensitive and it took time for her to be comfortable with new people, and she sensed when people thought she did not comprehend. Parent credited Student's progress with prior service providers to their

"unlimited boundaries," their belief that despite Student's medical condition anything was possible. Parent stated that due to Student's compromised immune system, staff should not provide service if they were sick or had been exposed to ill people. Parent asked if time could be made up when providers did not deliver service due to their own illness or exposure to ill people. Parent requested compensatory education in speech therapy because of service delays. Parent discussed compensatory specialized academic instruction services that had been discussed and documented in the January 20, 2015 IEP team meeting but not yet delivered. District reported the 45 hours of instruction owed would be provided through an outside agency, A+ In Home Tutors, contracted through the district office.

114. The IEP team scheduled another session to complete the IEP. Parent audio recorded the meeting, so the IEP team meeting notes were not read aloud. A revised draft IEP was to be given to Parent for review before the follow-up meeting to complete the annual IEP.

115. The IEP team reconvened on November 30, 2015. Parent disagreed with the baseline regarding Student's gross motor goal for ambulating in her gait trainer, stating Student did not utilize arm or chest prompts. She stated she was concerned about Student's gross motor goal for ascending stairs "without the use of the handrails" because that was "an unrealistic goal."

116. The occupational therapist reviewed his proposed goal and stated the physical therapist would reevaluate the goals and introduce new goals if needed, "once on board." The assistive technology specialist reviewed her goals and stated she would also include the speech-language pathologist as a person responsible for the goals. She reviewed the processing issues and strategies to address those issues when engaged in language and academic activities using the augmentative alternative communication eye-gaze device, and they were documented in the IEP team meeting notes.

117. District's program specialist agreed missed physical therapy and speech therapy services would be compensated, including by outside providers if necessary. Physical therapy was calculated as 14 sessions of 60 minutes each; speech therapy was calculated as 42 sessions of 45 minutes each; and home hospital instruction services were going to be computed and reported at the next IEP team meeting. Parent inquired about, due to the ongoing delay in provision of services by District, seeking private providers and paying for them herself, with District reimbursing Parent for those costs. The program specialist committed to follow up with Parent on that option by the end of the week.

118. The November 19, 2015 IEP Special Factors page documented that Student required assistive technology and described her need: the IEP team agreed she benefited from cause and effect devices and required a device that was able to be accessed with eye gaze/eye pointing, voice output, built in language system that allowed Student to generate her own language, ability to be mounted within her environment, ability to grow with her for at least five years, and a large vocabulary. Student also continued to have access to an iPad that was brought by the teacher. The Special Factors page also documented that Student required low incidence services, equipment, and/or materials to meet her educational goals. Her prognosis for the development of functional speech was very poor. Her lack of speech limited her ability to reach her maximum functional potential and gain maximum benefits from her education. She was now at an age when she needed to be able to fully participate in her education and therapies to progress toward her IEP goals. In the category marked Physical Education, the Special Factors page had three check boxes, generated by the computer program SEIS, and automatically included on the Riverside County SELPA IEP form. The check boxes were "Requirement Met," "General," and "Specially Designed." Student's IEP had the "Specially Designed" box checked, with the explanation written in,

"[Student] receives Physical Therapy."

119. The IEP team determined Student was "too medically fragile to participate in a public school setting due to her cardiac problems and high chance of severe infection complications." The IEP further noted that Student would not participate in the general education environment and extracurricular and non-academic activities because her severe orthopedic impairment, including self-help (toileting, feeding), communication, loco-motion and motoric functioning, and health and safety issues affected her involvement and participation in school activities. The IEP team discussed supplementary aides and services, and related services.

120. Students attending District's elementary schools received about 360 minutes, or 6 hours, per day of instruction, for a total of 1,800 minutes per week.

121. District offered Student five sessions per week of specialized academic instruction in her home, 60 minutes each, totaling 300 minutes per week. District offered occupational therapy in Student's home for 30 minutes each session, nine sessions, totaling 270 minutes per semester, for a total of 18 sessions per year. Occupational therapy would be provided on a collaborative basis in conjunction with the teacher. District offered physical therapy in Student's home for 60 minutes per week. Speech therapy was offered in Student's home for 60 minutes per week. District offered consultation services of an orthopedic impairment itinerant from the Riverside County Office of Education for four sessions of 15 minutes each, totaling 60 minutes a year.

122. District offered these "supplementary aids, services, and other supports for school personnel, or for student, or on behalf of student": 15 minutes a month of speech therapist consultation and collaboration with the home hospital teacher and Parent "to ensure progress is being made toward IEP goals"; 10 minutes per week of specialized academic instructor consultation and collaboration "with parent and teacher" to ensure progress towards IEP goals; 15 minutes a month of occupational therapist consultation

and collaboration with the home hospital teacher and Parent to ensure progress toward IEP goals; 15 minutes a month of physical therapist consultation and collaboration with the home hospital teacher and Parent to ensure progress toward IEP goals; and one to four hours per month of assistive technology specialist consultation with the specialized academic instruction teacher, speech-language pathologist, occupational therapist, physical therapist, and Parent or nurse to collaborate for training and carryover of augmentative alternative communication device training for language implementation. On December 10, 2015, Parent accepted District's offer with the exception of the fine motor goal and the pragmatics goal.

#### PHYSICAL THERAPY SERVICE FROM MARY MERTZ RESUMED

123. Mary Mertz had been an employee of Littlefield Physical Therapy, Inc. and through Littlefield provided Student physical therapy beginning in June 2012. Later Littlefield did not renew its contract with District and, without interruption in Ms. Mertz's service to Student, Ms. Mertz obtained a contract with District as Mary Mertz Physical Therapy, P.C. Ms. Mertz continued to provide Student physical therapy through June 2014, when Ms. Mertz did not renew her contract with District. She did not provide Student physical therapy from July 2014 through December 2015. Ms. Mertz regained a contract with District and resumed providing Student physical therapy in January 2016.

124. Ms. Mertz recalled that when Student was three and a half years old and she was providing physical therapy in 2012, Student's gross motor development was at the level of a six-month-old baby. Ms. Mertz provided physical therapy to help Student progress through the primary milestones babies go through, such as rolling over, crawling, transitioning to stand, and walking. Those were the things Ms. Mertz's physical therapy prioritized and worked on. In January 2016, Student had progressed in all of her abilities. Her sitting balance had improved; she still needed standby assist with sitting, but she could sit for longer periods of time without physical assistance to correct her

balance. Student was walking without limitation in her gait trainer, navigating through rooms and out of corners. Student had an augmentative alternative communication eye-gaze device, but did not demonstrate to Ms. Mertz that she could use it, and Student did not use it with Ms. Mertz. Ms. Mertz did not think Student was cognitively aware to the point of being able to participate in shared activities like turn-taking.

125. There was a period of time during which Student did not receive physical therapy from District and later District provided ongoing physical therapy according to Student's IEP as well as compensatory time physical therapy for the hours that had not been provided. Ms. Mertz was, for a while, providing two 60-minute sessions per week, one under the IEP and one as compensatory time. Eventually physical therapy went back to once a week.

126. At the start of the 2016-2017 school year, Ms. Mertz noticed Student was able to engage in ball play. She understood more than a single-step command for familiar tasks. Ms. Mertz could say to Student, "Are you ready? Hold your hands out." And Student brought her hands forward and opened them, palms up, in a position ready to receive the ball. When she received the ball, she pulled it toward her chest to trap it. Then she pushed the ball back to Ms. Mertz so Ms. Mertz could throw it to her again. Also, Student used her gait trainer to chase after a ball. Ms. Mertz put a balloon on the floor and said, "Go get it; bring it to me." Student followed that command by pursuing the balloon. As Student ambulated toward the balloon, she walked into the balloon and made contact with it, and in that way she kicked it. During the September 16, 2016 physical therapy session, Parent told Ms. Mertz she thought Student was really advancing with twice a week physical therapy and asked to go back to twice a week service. Ms. Mertz recognized that Student was still making slow but steady gains towards developmental milestones. But Ms. Mertz thought Student's cognitive awareness was advancing beyond her physical abilities. Student appeared to Ms. Mertz



to understand everything Ms. Mertz said to her. Ms. Mertz heard Student communicated with others with her augmentative alternative communication device even though she did not use it with Ms. Mertz. But Student became excited when Ms. Mertz said, "You want to play ball?" and Student could engage in turn taking of tossing and catching the ball. Ms. Mertz thought physical education would be a good addition to Student's physical activity and suggested to Parent that it be brought up in an IEP team meeting.

#### SEPTEMBER 22 AND OCTOBER 4, 2016 IEP TEAM MEETING

127. Parent requested an IEP team meeting, which District convened on September 22, 2016. However, not all of Student's service providers were present and Parent did not excuse their attendance; she agreed with District to reconvene on October 4, 2016. The IEP Amendments page was dated September 22, 2016, with the meeting date of October 4, 2016, reflected in the meeting notes. Parent and District recorded the October 4, 2016 IEP team meeting, but the notes were read aloud at the end of the meeting, and agreed on by the team.

128. Parent inquired about the recent change of occupational therapist and District's program specialist explained the staffing change. Parent stated Student had not received a FAPE. She calculated District had not provided Student 121 hours of home hospital instruction, 44.7 hours of speech therapy, and two hours of occupational therapy as of September 30, 2016. Parent expressed frustration about District's lack of cooperation. Parent stated the turnover of staff for Student's home hospital instruction was detrimental to Student's receipt of a FAPE. The core of Parent's disagreement regarding lack of coordination of new providers with the assistive technology specialist regarding using Student's augmentative alternative communication device was the subject of another due process hearing in OAH Case No. 2017060872, filed on June 20, 2017, and decided September 19, 2017.

129. At the October 4, 2016 IEP team meeting, Parent also complained about

District's failure to provide the home hospital instruction service and District's contracted provider A+ In Home Tutors was only providing only the owed compensatory time, or the ongoing IEP time, but not both. Parent complained that Student had not received speech therapy and Parent privately procured services from the assistive technology specialist, who was also a speech-language pathologist. Parent thought District should pay that speech therapy invoice. Parent subsequently filed a due process hearing request on January 6, 2017, OAH Case No. 2017010249, alleging failure to implement Student's IEP by failing to provide the required specialized academic instruction, speech therapy, and occupational therapy since August 15, 2016. She also alleged since 2014, District owed Student 170 hours of specialized academic instruction, 54.75 hours of speech therapy, and 1.5 hours of physical therapy. She alleged failure to provide Student access to physical therapy equipment in the home-based school environment, complaining the physical therapist had only brought in two items from the physical therapist's personal inventory and none that belonged to District. Finally, she alleged District reneged on a promise to reimburse Parent for expenses Parent incurred to provide services District was obligated to provide but had not. Parent also filed a Compliance Complaint with the State Department of Education, CDE Case No. S-0129-16/17. That OAH case and the CDE Compliance Complaint were resolved through a settlement Parent/Student and District reached on February 6, 2017.

130. On October 4, 2016, Parent also requested that Student's instructional time increase from 60 minutes to 75 minutes per day. District responded that one hour a day was the pupil personnel services home hospital policy. Parent disagreed, and requested more time based on Student's tolerance level. District documented the request and Parent's comments.

131. Ms. Mertz reported to the IEP team that she used a ballet barre with Student and Ms. Mertz observed Student to grip the barre. Student had grown in her

endurance level. Ms. Mertz recommended that instead of providing additional physical therapy, the IEP team consider an adapted physical education assessment. Parent requested an adapted physical education assessment. The IEP team agreed to the assessment and District informed Parent that an adapted physical education teacher would contact Parent and provide an assessment plan. However, that did not occur. As part of Student's complaint in OAH Case No. 2017060872, Student alleged a denial of FAPE for failure to assess Student for adapted physical therapy. By the OAH Decision dated September 19, 2017, District was ordered to conduct an adapted physical education assessment on an expedited timeline.

#### NOVEMBER 15, 2016 IEP TEAM MEETING

132. District held an annual IEP team meeting on November 15, 2016, when Student was approaching eight years old, and classified as being in second grade. Three additional meetings were held to complete the annual IEP team meeting, on January 24, 2017, January 30, 2017, and February 7, 2017. The IEP document was dated November 15, 2016. On November 15, 2016, the case manager wanted to discuss Student's educational needs and asked Parent what her concerns were. The IEP team meeting devolved into disagreement about many things not directly related to this case and Parent wanted to end the meeting. The IEP team meeting reconvened on January 24, 2017, and Parent and District audio recorded it.

133. The November 15, 2016 IEP document included a chart reporting progress toward meeting the annual goals from the November 2015 IEP. In the IEP team meeting discussion regarding Student's fine motor goal, the occupational therapist reported only observing Student to hold an object for up to five seconds, but the home hospital instructor had observed Student holding objects for longer than 10 seconds. After discussion, everyone agreed that Student had met her goal to hold objects of a variety of shapes and textures for up to 10 seconds with 80 percent accuracy in four out of five

trials.

134. Ms. Mertz reported Student partially met all three gross motor goals, and Parent agreed. However, the IEP document chart reporting progress toward meeting annual goals instead noted that Student had “not met” her goal of ambulating with her gait trainer with standby assistance without use of the pelvic support for up to 10 minutes in four out of five trials. The chart correctly noted that Student partially met her goals to pull to stand via a half kneel at environmental surfaces with minimal assistance on four out of five trials, and to ascend a flight of stairs with minimal assistance, non-reciprocally and without using the handrail on four out of five trials.

135. The assistive technology specialist reported Student partially met her communication goal to communicate spontaneously using one- to two-word utterances on a voice-output augmentative alternative communication eye-gaze device for a variety of reasons including requesting items, actions, assistance, comment, to command, and to question in eight out of 10 opportunities. Parent agreed. Student met her other communication goal, in pragmatics, to take turns with a communication partner on a joint topic using a voice-output augmentative alternative communication device when presented with an object that represents a joint reference (book, toy, art project) beyond two turns verbally in eight out of 10 opportunities.

136. Student partially met her math and communication goal to use spatial prepositions (on, off, in, out), descriptor adjectives (colors: red, yellow, blue; size: big little; interjections: wow, cool; and pronouns: I, you, mine) using a voice-output augmentative alternative communication eye-gaze device in eight out of 10 opportunities. The home hospital teacher requested clarification about the goal and Parent wanted clarification on collaboration with services providers so all team members who worked on the goal were consistent.

137. Regarding Student’s literacy goal, to identify all upper and lower case

letters when presented with a choice of two letters presented visually and verbally on a voice-output augmentative alternative communication eye-gaze device following processing strategies outlined in the notes page with 70 percent accuracy, the assistive technology specialist believed Student had partially met the goal; the home hospital teacher thought Student had not met the goal. Student partially met her other goal to select an initial consonant followed by one of the word families "at," "an," "in," "ig," or "ug" on a voice-output eye-gaze communication device when no more than four consonants and one word family was visual with 80 percent accuracy.

138. Student met what had been called a "retelling" goal, now classified as a "writing" goal, to write two-word utterances following the reading of a story to retell story components using a voice-output augmentative alternative communication eye-gaze device in eight out of 10 opportunities.

139. The IEP team meeting notes stated that the assistive technology specialist reported that an 11th goal was partially met, that Student needed structural support. The November 2015 annual IEP did not have a goal numbered 11, and it cannot be determined to what skill these notes applied.

140. The IEP team reviewed Student's academic and functional skills. The home hospital teacher (who had not been part of the IEP team when teaching Student to hold a writing implement via a whiffle ball was abandoned in favor of a voice-output eye-gaze controlled augmentative alternative communication device) suggested that a whiffle ball be used to hold a writing implement. The November 15, 2016 IEP documented Student's development in many areas. In reading, Student's receptive skills for identifying capital letters were greater than her expressive skills. She matched letters of her name when given a field of two letters to choose from. In the area of writing, Student made scribble marks on a page when given various writing instruments and provided physical prompts such as holding the writing instrument vertically for her.

When given adaptive materials such as a whiffle ball, Student more easily grasped the writing instrument and navigated it with more independence. She attempted to lace large beads using strings or pipe cleaners by pulling the string through the bead after the teacher put the string into the bead. In math, Student receptively identified the colors red, blue, green, and yellow in a field of three. She expressively identified the colors green, blue, and red using her augmentative alternative communication device with minimal prompting. With maximum prompts, she receptively and expressively used her augmentative alternative communication device to identify shapes. She matched items and shapes using large peg puzzles.

141. In communication, Student was socially engaging. She demonstrated good attention to her listener through eye contact and engaged in good turn-taking given that the communication was non-verbal. Verbal turn-taking via the augmentative alternative communication eye gaze communication device improved to two to three turns with a familiar listener, given support. Student communicated a variety of intents including to greet, label, comment, protest, request an object/action, and respond. She shifted easily between her augmentative alternative communication device and her communicative partner (a two-step process not required for individuals who were verbal). Student was more able to use her upper extremities to gesture in recent months. As gesturing could be a more efficient mode of communication, Student at times required cues to use her augmentative alternative communication device to communicate her message. While Student's communication was largely non-verbal, she was able to produce inconsistent vocalizations that were generally two seconds or less. Speech sounds were marked by a neutral oral posture, such as "uh." Receptively, Student could follow one-step commands. Expressively, Student's mean length of utterance was approximately one and a half; however with clinical support and guidance, this was increased to two- to three-word combinations. Student was able to

consistently use her augmentative alternative communication eye gaze communication device to produce the following words: basic concepts (in/out, on/off; big/little); colors (pink, orange, and purple); feelings (happy, thirsty, tired). Additionally, she consistently used "hi" and was beginning to use "mine" and "please." With support and modeling, she had the ability to ask select "what" questions ("what that?", "what put in?", "what color?").

142. In fine motor skills, Student tolerated a variety of shapes and textures. She could bring both hands together at midline and to cross midline when reaching for an object of interest. She adducted her fingers to grasp hold an object of interest for approximately five seconds before discarding it. She did not use a digital grasp pattern or isolate her index finger to point to objects. She exhibited difficulty in motor planning skills, particularly with visual motor coordination. She visually tracked a preferred object for up to three to five seconds, but exhibited difficulty in purposefully reaching and grasping at the preferred object. She did not show an interest in prewriting tools or activities. Parent and service providers had observed that Student had 100 percent accuracy on visual motor coordination; she could select preferred items with familiar providers. Parent did not agree to some information the occupational therapist presented and the occupational therapist and Parent discussed things. The case manager agreed to have the final IEP document reflect Parent's comments and all parties were satisfied.

143. Student's gross motor skills were reported in the November 2016 IEP, but Parent disputed some information and called for an amendment IEP team meeting. Parent spoke to Ms. Mertz regarding her disagreement and via an IEP amendment dated February 24, 2017, some descriptions of the level of assistance Student required for specific activities was changed to reflect a compromise in that from Parent's perspective for two tasks reported in the November 2016 IEP document, Student

required maximum assistance and from Ms. Mertz's original report she required minimum. The amended information is reflected in this factual finding. With the use of her gait trainer, including trunk, hip, and pelvic support, Student ambulated with modified independence. Her standing balance improved to only needing minimal (25 percent) to contact guard (less than 25 percent) assistance of an adult. She required minimum to moderate (25 to 50 percent assistance) manual assistance for balance when ascending stairs. She continued to require moderate to maximum (50 to 75 percent) assistance to descend stairs. She pulled to stand with adult manual assistance primarily, and had begun to pull up from bench sitting while holding a two inch diameter ballet barre, needing minimum to moderate manual assistance. She transitioned from side sitting to a tall kneel with moderate to maximum manual assistance. She transitioned from a tall kneel to half kneel with moderate manual assistance, and then transitioned from half kneel to standing with moderate assistance/manual support at her elbows. Parent was concerned about Student's bilateral knee flexion contractures: while in supine and in her Kidwalk gait trainer, her bilateral knee passive range of motion was 30 degrees bilaterally. She had prescriptions for bilateral articulating "AFOs" and custom knee immobilizers that were received January 2017. Although others had previously reported Student was right-hand dominant, the teacher from A+ In Home Tutors reported that when sitting in a chair, Student had difficulty reaching with her right arm and was left hand dominant. The teacher and physical therapist discussed that.

144. In the area of social/emotional/behavioral development, the information reported was the same as the year before, except Student's preferred television program had changed. Student tolerated being touched and cared for. She showed responses to positive and negative stimuli. She reacted and showed awareness to people in her environment. She anticipated pleasurable events like listening to music and watching "The Cheetah Girls." She showed displeasure. She initiated interactive play. In vocational



development, Student tolerated hand-over-hand tasks. She was learning to use her augmentative alternative communication device to select wants and needs. As adaptive daily living skills, all information reported was the same as in December 2013 and 2014 and in November 2015. Student drank from a cup. She required adult assistance for daily living skills including toileting and feeding.

145. Student's areas of unique need were "gross motor (PT)," fine motor, communication, math, writing, reading, and social skills.

146. The IEP team members discussed new goals during the January 24, 2017 IEP team meeting. Many team members, including Parent, contributed ideas and refinements to the proposed goals. Specifically regarding physical therapy goals, Ms. Mertz proposed two goals, with which Parent agreed. Parent requested two additional goals, one to focus on core strengthening and the other to involve physical therapy equipment. Parent requested that District provide a similar ballet barre "with more durability and stability." Ms. Mertz asked for more time to think about a new core strength goal. All of Student's other new goals were reviewed and Parent agreed to them. The IEP team scheduled to reconvene on January 30, 2017.

147. The IEP team met again on January 30, 2017. When the meeting began, Parent wanted to review all the goals to review the wording before finalizing the discussion. The team reviewed and agreed upon the content and wording of the goals.

148. As to fine motor, Student had three new goals. One was to demonstrate increased visual-motor coordination skills by purposefully reaching and touching a target object on her touchscreen and successfully striking the target in six out of 10 opportunities as measured by observation and logs. This goal was to be worked on by the occupational therapist and the special education teacher. Student also had a baseline of being able to transfer a preferred object from her right hand to her left hand. Another goal was for Student to transfer a preferred object from her right hand to her

left hand and from the left hand to the right hand with adult encouragement in nine out of 10 opportunities to facilitate increased bilateral coordination skills, as measured by teacher and occupational therapist collected data. This goal was to be worked on by the special education teacher and the occupational therapist. Finally, Student had a baseline of holding a marker for three to five seconds and making one to three horizontal marks on a writing surface. Her third goal, labeled as a writing goal, was to, using a slant board and an "easy grip" to secure a writing utensil to her hand, make prewriting strokes "(/, \, +, x, eg . . .)" on paper in two out of three opportunities with moderate (three to five) verbal and physical prompts to promote increased visual-motor and fine motor coordination skills, as measured by teacher/occupational therapist collected data. The special education teacher and the occupational therapist were to work on this goal.

149. In the area of gross motor, Student had three new goals. Regarding transitioning from tall kneel to standing, her new goal was to demonstrate improved quadriceps and gluteal strength by transitioning from tall kneeling to stand with contact guard/minimum (less than 25 percent) manual assistance by supporting her at her elbows; and pull to stand from bench sitting with contact guard manual assistance/stand by assist (less than 10 percent) holding a door frame pull-up bar with padded hand grips in three out of four trial days as measured by logs/records. This goal, written as one although including two discrete tasks, was to be worked on by the physical therapist and special education teacher. Student had a baseline of losing her balance when pulled laterally on a scooter board by a speed greater than one hertz. Student's goal was, when sitting on a scooter board, to maintain sitting balance with or without using her arms while being pulled laterally right and left five feet at a speed of three hertz over three repetitions on four out of five trial days, as measured by observation and records. The physical therapist and special education teacher were to work on this goal. Student's third gross motor goal was to ambulate with her gait trainer

with verbal cues and standby assistance without the use of the pelvic support up to 20 steps on three out of four trials as measured by observation and data logs. The physical therapist and the special education teacher were to work on this goal.

150. All of Student's other present levels of performance and goals incorporated or were in reference to using an augmentative alternative communication device with eye gaze operation. In the area of expressive language, Student's baselines still were that she communicated using facial expressions, body language, and one to two word utterances on a voice-output augmentative alternative communication eye-gaze device. She communicated primarily to request items and actions and to command. Student's expressive language goal was the same as in the November 2015 IEP, to communicate spontaneously using one- to two-word utterances on a voice-output augmentative alternative communication eye-gaze device for a variety of reasons including requesting items, actions, assistance, comment, to command, and to question in eight out of 10 opportunities as measured by observation and record logs. The augmentative alternative communication specialist, speech-language pathologist, and special education teacher would work on this goal.

151. With pragmatics, Student's baseline still was that she took turns using facial expressions and body movement, and single-word utterances on her voice-output augmentative alternative communication eye-gaze device while engaged in motivating activities with adults. Her goal was the same as in the November 2015 IEP, to take turns with a communication partner on a joint topic using a voice-output augmentative alternative communication device when presented with an object that represented a joint reference (book, toy, art project) beyond two turns verbally in eight out of 10 opportunities, as measured by observation and data logs. The augmentative alternative communication specialist, speech-language pathologist, and special education teacher would work on this goal.

152. In the area of social skills, Student's baseline was that two- to three-word combinations were emerging through Student's expressive language. Her goal was, to enhance her social skills and conversational skills, and using her augmentative alternative communication device, to respond to a greeting using one- to two-word greetings such as hello, hi, good morning, or good afternoon to greet familiar people using no more than two prompts in four out of five trial days as measured by teacher collected data. The special education teacher and speech-language pathologist were responsible for this goal.

153. In the area of reading, Student's baseline was that she was working on identifying letters consistently using her augmentative alternative communication device. Her goal was, to improve her reading skills, to expressively identify all 26 upper case letters of the alphabet when presented with a choice of two letters presented visually, such as written on a white board, using Leap Frog letters, or using flash cards, and verbally on a voice-output augmentative alternative communication eye-gaze device following processing strategies outlined in the notes page 22 of the IEP with 22 out of 26<sup>3</sup> accuracy as measured by the teacher records and logs. The special education teacher, assistive technology specialist, and speech-language pathologist would work on this goal.

154. In math, Student had two new goals. One was, to increase her number sense, to expressively identify numbers one through five when presented verbally and visually in four out of five trials per number with 80 percent accuracy and no more than two gestural prompts when presented with no less than eight icons, as measured by teacher collected data. This goal was to be worked on by the special education teacher.

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<sup>3</sup> The IEP goal was for "22 out of 26% accuracy." The factual finding has interpreted the goal to mean 22 out of 26 capital letters of the alphabet.

The other goal was, to enhance her mathematic and descriptive skills, using her augmentative alternative communication device, to expressively identify shapes (circle, square, rectangle, and triangle) using three dimensional objects in four out of five trials with 80 percent accuracy as measured by teacher collected data and observations. The special education teacher would work on this goal.

155. The IEP team then discussed the Special Factors form. It was completed based on the discussion of Student's assistive technology needs – including that she did not require an iPad specifically but any touchscreen device would suffice – and a discussion of the fact that due to Student's orthopedic impairment, Student would require curb-to-curb transportation if she attended a school campus and District would make that available to her "if/when" she returned to a regular school. The IEP team agreed she benefited from cause and effect devices and required a device that could be accessed with eye gaze/eye pointing, voice output, built-in language system that allowed Student to generate her own language, ability to be mounted within her environment, ability to grow with her for at least five years, and a large vocabulary. Student also continued to have access to an iPad that was brought by the teacher. The Special Factors page also documented that Student required low incidence services, equipment, and/or materials to meet her educational goals. Her prognosis for the development of functional speech was very poor. Her lack of speech limited her ability to reach her maximum functional potential and gain maximum benefits from her education. She was now at an age when she needed to be able to fully participate in her education and therapies to progress towards her IEP goals. Student required a pull up bar for physical therapy goals. In the category marked Physical Education, the Special Factors page still had three check boxes, generated by the computer program SEIS, and automatically included on the Riverside County SELPA IEP form. The check boxes were "Requirement Met," "General," and "Specially Designed." Student's IEP had the "Specially

Designed" box checked, with the explanation written in, "[Student] receives Physical Therapy."

156. The IEP team then discussed the need for supplementary aids and services. District's program specialist reviewed the continuum of placement options. The teacher from A+ In Home Tutors requested a communication log at Student's house so all the providers could leave notes for one another. Ms. Mertz reviewed the equipment she would need to work on Student's physical therapy goals. Ms. Mertz agreed to research and recommend a pull up bar, and the team agreed to research the pull up bar to ensure District purchased appropriate equipment. The occupational therapist discussed "soft grip" and other items to be added to the supplementary aids and services list, with the explanation that items would be tried out and continued if there were positive results, and items that were not beneficial to Student's progress would be discontinued. Parent requested additional occupational therapy service, totaling 60 minutes a week; the occupational therapist stated 30 minutes a week was appropriate; District committed to respond to Parent's request within 15 days. District offered the same physical therapy and speech therapy services as before, and Parent agreed. The IEP team determined Student was "medically fragile and [ ] participation in a public school setting due to her cardiac problems and high chance of severe infection complications" supported Student's continued educational placement at home. The IEP further noted that Student would not participate in the general education environment and extracurricular and non-academic activities because her severe orthopedic impairment, including self-help (toileting, feeding), communication, loco-motion and motoric functioning, and health and safety issues affected her involvement and participation in school activities. The meeting adjourned.

157. District held another session of the annual IEP team meeting on February 7, 2017. Parent revoked her consent due to errors on the draft IEP. The team planned to

review the physical therapy present levels of performance, goals and services, and the extended school year services. The gross motor levels were reviewed, and, as noted above, Parent disagreed with the description of the amount of assistance Student required. Parent agreed to the goal regarding using a pull up bar and a pull up bar was added to the list of supplementary aids and services.

158. The IEP team discussed services, and agreed to increase the duration of some services, bringing specialized academic instruction to 75 minutes per session, and occupational therapy to one session of 45 minutes per week. The IEP team agreed to watch Student's tolerance level to see if the increased service level was fatiguing.

159. District offered Student five sessions per week of specialized academic instruction in her home, 75 minutes each. District offered occupational therapy in Student's home for 45 minutes each session, four sessions, totaling 180 minutes per month. District offered physical therapy in Student's home for 60 minutes per week. District offered speech therapy in Student's home for 60 minutes per week. District offered the consultation service of an orthopedic impairment itinerant from the Riverside County Office of Education for four sessions of 15 minutes each, totaling 60 minutes a year. District offered assistive technology service in Student's home for 60 minutes per week.

160. District offered these "supplementary aids, services, and other supports for school personnel, or for student, or on behalf of student": 15 minutes a month of speech therapist consultation and collaboration with the home hospital teacher and Parent "to ensure progress is being made toward IEP goals"; 10 minutes per week of specialized academic instructor consultation and collaboration "with parent and teacher" to ensure progress towards IEP goals; 15 minutes a month of occupational therapist consultation and collaboration with other home service providers and Parent or nurse to ensure progress toward IEP goals; 15 minutes a month of physical therapist consultation and

collaboration with the home hospital teacher, occupational therapist, and Parent or nurse to ensure progress toward IEP goals; one to four hours per quarter of assistive technology specialist consultation with the specialized academic instruction teacher, speech-language pathologist, occupational therapist, physical therapist, and Parent or nurse to collaborate for training and carryover of augmentative alternative communication device training for language implementation; using a slant board for writing activities; a communication log between providers; a scooterboard and access to a platform swing, bolster swing, net swing, and pull up bar; and the following items, each for trial and to continue if positive results – a grip buddy that attaches to a writing utensil, an elastic helper that attaches to a hand and writing utensil, a soft grip, and a built-up pencil with tubing around the pencil. Parent signed that she accepted District's offer,<sup>4</sup> with the exception of the fine motor goal and the pragmatics goal.

#### PROGRESS REPORTS AT THE END OF THE SPRING 2017 SEMESTER

161. The November 15, 2016 IEP was finalized and approved in February 2017. Near the end of the spring 2017 semester, Student's providers documented Student's progress on the goals in the November 15, 2016 IEP. For goals for which multiple providers were responsible, it was not possible to determine who provided the progress report.

162. Student had two fine motor goals. With regard to increasing her visual-motor coordination skills by purposefully reaching and touching a target object on her touchscreen and successfully striking the target, Student made progress. She allowed

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<sup>4</sup> Parent signed consent on February 7, 2017, with the notation that she agreed with the IEP except for page five present levels regarding gross motor. This disagreement was resolved through an IEP Amendment dated February 24, 2017.



the therapist to take her hand to touch the screen. She had reached out her hand to touch the screen, but was not consistent. She required verbal praise and encouragement. She smiled and attempted to move the therapist's hand toward the screen. She recently reached out and clicked and dragged a letter to the correct letter outline independently on the iPad touch screen. She was learning to extend and isolate her index finger while maintaining her wrist in a neutral position. As for transferring objects between hands, when in a sitting position on the mat, Student could transfer objects from one hand to the other, and was more efficient in transferring from the left to the right hand. She transferred three objects from left to right before needing assistance from the therapist. Her performance improved if the activity was in play format. Recently, while side-lying on her left side (weight bearing on her left elbow), she grasped the knob of a puzzle piece, lifted it above a bowl, and released her grasp of five puzzle pieces after demonstration from the therapist. The progress report stated this was significant progress.

163. Student had a writing goal to use a slant board and have a writing implement secured to her hand and make prewriting strokes on paper. Student made progress on this goal. She used her arms and hands with other designated instruction and service providers. She was able to tolerate the easy grip holding a marker to her hand. She had difficulty holding her wrist in a neutral plane. Student allowed the therapist to move her to make marks on the paper. Student tended to use whole arm movements. She made marks on a white board if the therapist held her wrist in a neutral position.

164. In the area of gross motor, Student had some progress on two of her three goals. Regarding transitioning from tall kneel to standing, a pull up bar was brought to her home on April 17, 2017. One month later, after manual assistance to pull to stand from seated on a peanut ball, Student reached for the bar and pulled to stand from

sitting with contact guard assistance and continued holding and standing up to 20 seconds each for three repetitions. On an earlier date, Student had pulled to stand from sitting on a peanut ball with only standby assistance and remained standing for 20 to 75 seconds. When sitting on a scooter board, Student maintained sitting with or without using her arms while being pulled laterally right and left five feet at a speed of three hertz for four to six repetitions of three out of four trial days. However, Ms. Mertz trialed having Student walk in her KidWalk without the seat only once, and Student was not willing to step without manual assistance. Ms. Mertz scheduled the goal to be practiced more frequently during the extended school year.

165. With her expressive language, Student spontaneously used one- or two-word utterances on her voice-output augmentative alternative communication eye-gaze device for requesting items, actions, commend, command, and question. She was not asking for assistance. In the area of pragmatics, Student met her goal to take turns with a communication partner for highly preferred activities, when there was a wait time and a look of expectation for a reply. In the area of social skills, regarding using her augmentative alternative communication device, to respond to a greeting to greet familiar people, Student selected the correct name of a person when all other names had been hidden. The special education teacher selected hello and left only the correct name with a gesture prompt for Student, and then Student made the selection.

166. As to reading, in trying to expressively identify capital letters consistently using her augmentative alternative communication device, Student selected a letter from the screen randomly. She was reinforced by music that played when she made a selection so she was happy to choose any letter whether it was correct or not. She had one day where she chose the correct letter 80 percent of the time.

167. In math, in working to expressively identify numbers one through five when presented verbally and visually, Student randomly selected a number from the

screen with gestural prompts bringing her attention to the screen. In working to expressively identify shapes using three dimensional objects, Student randomly selected answers on the screen even when the special education teacher pointed to the correct selection on the screen and selected it to model which answer Student should choose.

168. On October 10, 2017, one of the special education teachers who worked with Student wrote to the augmentative alternative communication specialist at Parent's request to report information that would be relevant to the upcoming annual IEP. Carly Perez wrote that Student seemed generally uninterested in her device when she worked with her, which was quite different from when Ms. Perez worked with Student two years earlier. Ms. Perez had been unable to get Student to engage with the device, even with multiple verbal and visual prompts. Student used to select from the screen during reading time to turn the page or to answer simple questions about text regarding color or emotion. In all of her recent sessions with Student, Ms. Perez had to clear the screen of all buttons but one and then prompt Student to select the button for three to five minutes, and longer. Ms. Perez reported there seemed to be a big difference between how Student worked with the augmentative alternative communication specialist on the device and how she worked with "the rest of us."

#### DISTRICT'S ADAPTED PHYSICAL EDUCATION ASSESSMENT

169. Dianna Cullen, District's Adapted Physical Education Specialist, conducted an adapted physical education assessment in Student's home on October 19, 2017, in response to OAH's order to District to conduct an adapted physical education assessment on an expedited basis, and after additional repeated delay caused by District backdating documents and including other information on the assessment plan with which Parent disagreed and therefore refused to sign the assessment plan. Ms. Cullen's report was dated October 26, 2017. An IEP team meeting to review the results of the assessment had not yet been held by the time of the due process hearing.

170. Ms. Cullen had a bachelor's degree in kinesiology and a master's degree in special education. She obtained a mild/moderate education specialist credential in Utah when she completed her master's degree online in 2012 through a Utah university, but did not transfer that credential to California. She had a California clear single subject credential in physical education, with a specialization in adapted physical education. She worked as an adapted physical education specialist since 1998 and had been employed by District in that capacity since 2009. For 15 years,<sup>5</sup> she assessed students for delays in gross motor skills, worked with IEP teams to develop appropriate psychomotor and gross motor goals, and developed appropriate activities for students from pre-school through high school/adults with disabilities including developmental delays and orthopedic impairments, among other disabilities. During her testimony, Ms. Cullen demonstrated extensive knowledge in the field of physical education, including adapted physical education. Her responses to open-ended questions were thoughtful and thorough. Her responses to leading questions from District seemed merely compliant and were less convincing, particularly with regard to descriptions/classifications/labels for physical education categories. Overall, her testimony was given significant weight for the portions that were in her own words.

171. Ms. Cullen reviewed Student's records, observed Student, interviewed Parent and physical therapist Ms. Mertz, and conducted a formal gross motor evaluation using the Curriculum, Assessment, Resources, and Evaluation - Revised 2 (CARE-R 2) and the Functional Motor Assessment. Ms. Cullen considered using standardized assessments to determine skills based on peers the same age, but she concluded a standardized assessment was not appropriate due to Student's present levels of

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<sup>5</sup> Ms. Cullen's adapted physical education work spanned 20 years, but she did not work from 2004 through 2009.

performance. Ms. Cullen determined an inventory of Student's skills would provide appropriate information for the assessment and could be used later to determine progress on motor skills.

172. Parent reported to Ms. Cullen that Student had heat and cold sensitivities and allergies that affected her ability to go outside sometimes. Student liked to ride her adaptive tricycle, go on the swing, and go in the swimming pool when weather permitted. Ms. Mertz reported to Ms. Cullen that Student was able to move about her home in her gait trainer. She reached for objects and was working on grasping objects. She was able to sit on the ground with standby support. Ms. Mertz shared that she felt Student was "now able to work on physical education related activities."

173. Ms. Mertz was present during Ms. Cullen's assessment and assisted to encourage Student, by a familiar face, to engage in the requested actions. Also, Ms. Mertz safely positioned and moved Student throughout the assessment. Ms. Cullen used the gross motor and object control skills areas of the CARE-R 2 inventory of skills.

174. Ms. Cullen administered the Functional Motor Assessment to measure Student's ability to perform gross motor skills. Student's mobility/standing skills were that she was able to move independently around her house while in a gait trainer. She required full assistance to transition, including in and out of the gait trainer, activity chair, floor, and other arrangements. Ms. Mertz reported Student could move across a mat on the ground using her arm to pull herself in a modified army crawl, but Ms. Cullen did not observe that herself. With two hands held, Student stood with full support on her legs. Her sitting skills were that she was able to sit independently on the ground with her legs crossed, with standby assist. She could not sit with her legs straight out due to the joint contractures that prevented her legs from fully straightening. While sitting, Student participated in activities such as reaching for a ball, pushing a ball, and reaching and pulling on objects, while maintaining balance. Ms. Cullen observed

Student use her right hand to steady herself when falling to the side. Student required assistance to move from a lying position to a sitting position, however she was beginning to use her left hand to push herself up to a sitting position. Student held a quadruped position with full support at the hips to maintain position. Student sat on a low bench or seat and maintained balance with standby assistance.

175. Student's object control skills were that while standing in her gait trainer and presented with a ball, she reached for the ball with both hands. She pushed/dropped the object forward. Student had difficulty gripping objects and was working on grip with her occupational therapist. While seated on the floor with her legs crossed, Student was able to stop a ball rolled to her lap with her hands and push the ball away from her. When given a balloon, she pushed it away; when a balloon was placed beside her, she reached for it with her hands. She was unable to hold an object and strike a ball hanging in front of her. While standing in her gait trainer, Student kicked a ball with full prompting three times and lifted her foot to make contact with the ball one time.

176. In the area of recreational activities, Parent reported Student rode the adapted tricycle, enjoyed swinging, and enjoyed the swimming pool.

177. Ms. Cullen reported her assessment was a valid and accurate reflection of Student's gross motor skills at the time. Student's overall gross motor skills were in the below average range for girls her age; her gross motor skills in the 10 to 13 month range with partial prompts for some skills, and her object control skills were in the one to two year range independently. Because Student's scores on the gross motor assessment were at least 30 percent below Student's chronological age, she met the criteria for consideration of receiving adapted physical education. Ms. Cullen reported that Student's testing results indicated an educational need for adapted physical education.

178. Ms. Cullen's report did not contain a recommendation for a duration and frequency of adapted physical education, nor did it propose goals. Ms. Cullen testified that in consideration of the third grade model content standards for physical education, which she attached to her report, she had considered two possible goals for discussion with the IEP team during the meeting to review her assessment. One goal was for kicking a ball while Student was in her gait trainer. Ms. Cullen opined this was an achievable goal because during her assessment with Student, she had Student try to kick the ball, and she used prompting assistance by moving Student's leg a few times, and then Student tried to kick on her own. The other goal was for striking, such as a balloon or a suspended ball. Ms. Cullen wanted to discuss with the occupational therapist and the physical therapist whether it was appropriate to include in the goal striking with an implement, such as a paddle or a bat, or only with her hand; she knew the occupational therapist was working with Student on holding an object. Ms. Cullen thought Student could participate in two sessions of 30 minutes each per week; 30 minutes was a good amount of time but not over-tiring to a child. In her experience, a direct service working one-on-one with a child for more than 30 minutes was too much, because the child was working all 30 minutes.

179. Ms. Cullen's testimony provided evidence regarding categories of physical education services, which largely aligned with and supplemented information in publications by the California Department of Education.<sup>6</sup> The following factual findings

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<sup>6</sup> The parties stipulated to the ALJ taking official notice of two documents published by the California Department of Education, Special Education Division: *Adapted Physical Education Guidelines in California Schools Revised* (2012); and *The Guidelines for Occupational Therapy and Physical Therapy in California Public Schools (Second Edition)* (2012).

are made in reliance on the credible portions of Ms. Cullen's testimony. General physical education is instruction according to state content standards, according to grade level, with motor and cognitive skill components. For example, a motor skill component is something like to dribble a ball with two hands, or to throw a ball with correct form; a cognitive skill component is something like to understand the difference between offense and defense, or to define or explain a concept, such as why stretching is important. Modified physical education is physical education within the general education class, with modifications to skills but still working on the same curriculum. For example, a student might get a second opportunity to achieve the standard, when other students would only have one chance. Or, to serve a volleyball over the net, the student might not serve from the back line of the court but from the middle line to be successful. The student would still work on the same curriculum, but with a modification of how it is to be accomplished. The general physical education teacher looks at a student's IEP or Section 504<sup>7</sup> plan to see if it is documented that the student may have modifications. A plan for modifications is based on the student's unique needs, such as if the student has cerebral palsy, is missing a limb, or has other physical and obvious barriers to successfully achieving the grade-level standards without modifications. Sometimes a general physical education teacher does not notice the barriers the student has to achieving the grade-level standards until the teacher starts working on a curriculum unit, or does some testing and the student has difficulties. At that point, the

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<sup>7</sup> A Section 504 plan is an accommodation plan created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a school district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, including learning.



general physical education teacher can look into whether any modifications have been determined or might need to be developed because the activity is something the student cannot do due to a disability, or perhaps the activity is just something the student needs to work on. In general physical education and modified physical education, the student is working on and is expected to be successful at achieving the grade-level content standards.

180. Specially designed physical education involves not just modifications to the activities, but modifications to the curriculum, because a student is not working on the grade-level curriculum. In specially designed physical education, the standards are changed because the student cannot reach or participate in the full standard at his or her grade level. Specially designed physical education is usually provided for more moderately to severely disabled students. A teacher might suspect students need specially designed physical education based on information in their IEPs, because their motor skills levels are behind, or possibly their cognitive levels are behind other students'. They are not able to participate in general physical education because they cannot understand the rules of the class, safety rules, or rules of the game to participate in a full game with the rest of the students. Another example of a reason a student might require specially designed physical education is a physical limitation preventing the student from being in general physical education or modified physical education. One specific example Ms. Cullen offered is heat intolerance, where a student could not be outside if it was above 80 degrees. She opined such a student might require specially designed physical education, away from the general physical education program.

181. There are some nuances to these categories of physical education and a student might need a mixture of the categories based on the student's individual circumstances. While the category of specially designed physical education typically means the student is not working on grade-level standards, there could be a distinction

between the motor skills and cognitive skills level, and while a student receives physical education that is standards-based for the cognitive skills, the motor portion is specially designed physical education because physically, the student cannot participate in the motor portion of the grade-level standards. Also, a student might have some time with general education students and participate in general physical education, and also have some time in specially designed physical education to meet the student's individualized needs as decided by the IEP team.

182. Specially designed physical education is, generally, provided in a group. Ms. Cullen recalled having had one student for whom she provided specially designed physical education individually, on a school campus. Ordinarily, specially designed physical education is taught by a credentialed special education teacher to his or her special education class; specially designed physical education also could be taught by a general education physical education teacher with guidance, possibly from an adapted physical education teacher, or by an adapted physical education teacher. In Ms. Cullen's spontaneous testimony listing who she understood was allowed to teach specially designed physical education, she did not include a physical therapist. When Ms. Cullen read an IEP's Special Factors page and the box was checked for specially designed physical education, it signified to her that the "delivery model" of physical education instruction for the student was by the special education classroom teacher, and that it was different than general physical education with adaptations. She understood the category of specially designed physical education to relate to *where* the student received physical education instruction: within a specially designed program from their classroom teacher.

183. Adapted physical education involves working on specific skills that have been determined as a need for a student. Adapted physical education can only be taught by an adapted physical education teacher. While other teachers might know how

to break down skills or might know about specialized equipment, adapted physical education teachers have been specifically trained to and specialize in deconstructing skills into components, and using unconventional materials to support a student in acquiring a skill. For example, while other students in a class might be working on dribbling a ball, a particular student might not be able to bounce, or drop and catch, a ball. An adapted physical education teacher could work individually with the student and place a round, flat, rubber disk on the ground just in front of the student, to give the student a visual marker of where the ball was supposed to go. The adapted physical education teacher could demonstrate to the student holding the ball, releasing the ball to contact the disk on the ground, and catching the ball when it came back up. Although other physical education teachers are capable of teaching a student to drop and catch, or bounce, a ball this way, they might not have the idea to break down the skills that way or use the visual aid to provide instruction. Adapted physical education teachers have different size balls and bats, and other varieties of equipment to use with students.

184. A student might be able to participate in specially designed physical education for some areas of the physical education curriculum but also need adapted physical education to learn some new skills or work on other skills.

185. Ms. Cullen opined it was possible for a student to be so significantly impaired in his or her motor skills that physical movement and physical activity was not appropriate, and none of the four categories of physical education – general physical education, modified physical education, specially designed physical education, and adapted physical education – were appropriate. Ms. Cullen adopted Steven Hawking as an example of a person who, due to motor skill deficits, would not be appropriate for even adapted physical education in the motor component area. Ms. Cullen stated a student only needed some minimum ability to move, and it needed to be safe for the

student to participate in movement, for the student to be able to participate in adapted physical education. A spontaneous example Ms. Cullen provided was muscular dystrophy, in which case it would be counterproductive to a student to provide physical activity. Ms. Cullen described a statutory process with which she was only vaguely familiar by which a child, through application to and approval of the school board, could be excused from physical education, if it was appropriate to do so.

186. Ms. Cullen also opined there were no lower cognitive limits for a student to participate in some form of physical education, in at least one of the four categories. And she did not think there was some combination of motor impairment and cognitive impairment that would make it inappropriate for a student to participate in, at least, adapted physical education.

187. Regarding any overlap or commonalities between adapted physical education and physical therapy, Ms. Cullen described physical therapists as knowledgeable and more trained on movement, and equipment needs such as how to select a gait trainer and size a student for and place a student in a gait trainer. Ms. Cullen offered the example of a student with cerebral palsy or orthopedic needs, who needs assistance for movement and transfer, and that a physical therapist was more knowledgeable than an adapted physical education teacher and can train the adapted physical education teacher how to appropriately help the student with stretches and work on balance and other things the adapted physical education teacher can work on. Students who receive adapted physical education have goals in the areas of gross motor development, and sometimes the goals overlap between physical therapy and adapted physical education and both the physical therapist and adapted physical education teacher work on the same goal; other times a student has goals the physical therapist focuses on, such as sitting in a particular way, and other goals that are more curriculum-based, standards-based, or "impacting in the standards," which the adapted physical

education teacher focuses on.

188. Ms. Cullen agreed that physical education could not be substituted for physical therapy; they are two different services and if a student required physical therapy, the student had to be provided physical therapy. She also agreed that specially designed physical education could not be substituted for physical therapy for the same reason, that they are two different services and if a student required physical therapy, the student had to be provided physical therapy. She also agreed that adapted physical education could not be substituted for physical therapy, and added that the two services can work together.

189. Ms. Cullen was familiar with and had recently seen CDE's publication *Adapted Physical Education Guidelines in California Schools Revised* (2012). Regarding distinctions and overlaps of types of physical education, specifically as explained and illustrated by that document, Ms. Cullen testified regarding the ways general physical education (without or with accommodations, adaptations, or modifications by the general physical education teacher), specially designed physical education, and adapted physical education were different and could overlap. Ms. Cullen stated a student in general physical education could also receive some adapted physical education service, not only either general physical education or specially designed physical education. There might be things a student with a disability could not "get" in general physical education and that student could use adapted physical education to work on catching ability, bilateral coordination ability, or fitness level. There was no defined line between one category and the others, and they "kind of all work together."

190. Ms. Cullen was aware that general education students in grades one through six were statutorily required to receive 200 minutes every 10 school days of physical education. That broke down to approximately 100 minutes every five school days, or 20 minutes a day. There was not typically a connection between that general

education requirement and the amount of service time of adapted physical education a special education student received, unless Ms. Cullen was providing the entire physical education program for a student, which was not typical. A student received their remaining physical education minutes with their class and from their classroom teacher, which assumed the student was on a school campus. Ms. Cullen had never provided adapted physical education to a student who was on home hospital instruction.

#### ADDITIONAL EVIDENCE FROM THE HEARING

##### Testimony of Physical Therapist Mary Mertz

191. When questioned by District's attorney, Ms. Mertz accepted the suggestion that Student had received "specially designed physical education," in the form of physical therapy. Ms. Mertz, who had an ongoing contract with District to provide physical therapy services and therefore an incentive to cooperate with District and provide testimony that supported District, appeared coached and well-rehearsed in her testimony. She repeatedly adopted the District's attorney's question as the answer, and merely confirmed that the gross motor goals of Student's IEPs, worked on by the physical therapist in physical therapy, constituted "specially designed physical education" for Student. She once added the explanation that what District's attorney said in the question was true because the words "physical education" implied educating in the field of physical activity, and that is what she did.

192. In response to the ALJ's questions, Ms. Mertz stiltedly stated she thought the physical therapy service she provided was physical education because she did physical activity with Student in the effort of teaching her to be able to do more. The ALJ asked Ms. Mertz when she, as a physical therapist, came to think of what she was doing with Student as physical education; she stated it was pointed out to her within the last few months, because of Student's due process hearing request, that the IEP Special

Factors page stated that Student's specially designed physical education was physical therapy. At an additional day of hearing one month later, in response to questioning by Parent, Ms. Mertz stated that no one told her that her physical therapy services were physical education, she just realized it in all the review for the hearing, through discussions with all the staff and District's Director of Special Education Jodi Curtis. But in her original testimony, Ms. Mertz stated that prior to it being pointed out to her, she thought of what she did with Student as physical therapy, not physical education, "but it was physical activity." Ms. Mertz confirmed she believed she was legally allowed to design specialized physical education within the scope of her practice as a licensed physical therapist, "unless I am confused with the definition," because it was under her scope to design goals in the gross motor field. Ms. Mertz testified she thought of specially designed physical education as education on physical activities, which could be done with or without play. She believed that her physical therapy license did not allow her to deliver adapted physical education, "But I can legally design specialized physical education."

193. Ms. Mertz explained that in the school setting, physical therapy is to help students access their school environment, independently if possible. Physical therapy can help a Student transfer, stand, or walk. In Student's case, her home was her school environment, and Ms. Mertz (and at least one other physical therapist during the time Ms. Mertz did not serve Student from July 2014 to December 2015) provided physical therapy to help Student be independent in accessing her school environment. She described the gross motor goals from the November 19, 2015 IEP, which were similar to the gross motor goals in prior as well as subsequent IEPs, as goals directed toward movement that would help Student ultimately access her school environment, which was her home; they encompassed general muscle strength and body coordination but were specifically written to help her access her environment. To help Student work

toward her goals, Ms. Mertz used her “plan of care,” which was manual skills she did with Student with stretches and activities to improve Student’s strength, ability to transfer, and general physical growth.

194. Ms. Mertz described Student’s gross motor goal involving being pulled laterally on a scooterboard, in the November 15, 2016 IEP, as a goal to work on Student’s core strength. It was a modification of a higher level activity other students in general education physical education would do to promote core strength, such as climb a rope or play tug of war. But to promote core strength, what Student could find achievable was to be moved on an unstable surface and work to maintain her balance. Ms. Mertz described Student’s gross motor goal to transition from the floor to standing, in the November 15, 2016 IEP, as being a transfer goal, helping Student become more independent with her transfers, which was needed for her access of her environment throughout her life. Also, the goal worked on muscle strengthening and body coordination, within the scope of physical education, at the level at which Student was functioning.

195. Ms. Mertz testified in January 2018 that in her physical therapy with Student from January 2016 through December 2017, she worked on some perceptual motor skills, with toys they played with and passing a ball back and forth, and in Ms. Mertz making a motion while Student watched her, serving as a model for a motion, and then Student doing that motion. She also worked on physical fitness through repeated activities to increase Student’s breathing rate and promote cardiovascular strengthening. Ms. Mertz explained that it was all tied together, and one could not do a particular thing and say it was only physical fitness, or only perceptual motor, or only any other description of motor skill category. In everyday movement activity, something could fulfill multiple categories of description. When Ms. Mertz worked with Student and focused on her transition skills, such as transitioning from floor to stand by



maintaining one half kneel and holding that position, that activity also worked on motor memory and strengthening, which would eventually assist Student with that transfer.

Ms. Mertz stated she did not work on games and sport, which she thought of as structured games like baseball, soccer, or racketball; however, she worked on ballplay such as passing the ball back and forth between her and Student, and when Student pursued and kicked a ball in her gait trainer, and that could be games of turn-taking. Ms. Mertz sometimes used music during physical therapy sessions; while supporting Student in a standing position, to get Student engaged in whatever action Ms. Mertz wanted her to do, Ms. Mertz said to Student, "Let's dance," and held onto Student and moved her side to side, in a way of dancing. Student nodded her head, raised her arms, and danced. Ms. Mertz did not work on aquatics with Student. Ms. Mertz did not know a definition of visual perception skills, and was not sure what that was, and she therefore did not claim to have worked on visual perception skills with Student. Ms. Mertz worked on social play with Student only at the level of turn-taking, like with a light-up wand toy Student liked, or a ball, and Ms. Mertz did something with it, and then handed the item to Student and she got to move it, and Ms. Mertz and Student took turns with the item back and forth.

196. Parent testified in rebuttal to Ms. Mertz's testimony and stated Ms. Mertz did not work with Student on these areas, and that Ms. Mertz's services specifically were strengthening and balance. Ms. Mertz's testimony regarding activities in the specific motor skill areas the ALJ inquired about heavily depended on the ball play and characterization of ball play activities as addressing more than one discrete motor skill area. Parent denied that Ms. Mertz had worked with Student with a ball at all until after Ms. Cullen conducted an adapted physical education assessment on October 19, 2017. Ms. Mertz had testified in December 2017 that what led to her suggestion in September 2016 of an adapted physical education assessment was Student's increased abilities in

passing a ball back and forth. At the time Ms. Mertz's testimony was completed in December 2017, Parent did not seek to testify in rebuttal. Parent's rebuttal testimony in response to Ms. Mertz's January 2018 testimony was not credible because Parent did not desire to contradict Ms. Mertz's claims of Student's increased abilities, both cognitive and physical, as demonstrated by Student's new ability to engage in ball play in September 2016, when it supported Parent's position that Student could have engaged in and should have received physical education, generically speaking, and adapted physical education specifically. Ms. Mertz's testimony in some respects came across as contrived and coached with respect to defining her physical therapy services as specially designed physical education. But the portions of her testimony that were purely factual about Student's present levels of performance, progress on goals, trajectory of development, and the types and kinds of activities in which she engaged with Student were competent, confident, and credible.

#### Testimony of Special Education Teacher Cassie Lentz

197. Cassie Lentz was a special education teacher who received her moderate/severe preliminary credential and a master's degree in special education in 2016. She was employed by the Riverside County Office of Education as a special education teacher for junior high students, sixth to eighth grade, with autism. She also worked after-hours for A+ In Home Tutors, an agency with which District contracted to provide in-home service to Student. Ms. Lentz began working with Student in February 2016. Sometimes her sessions with Student were considered "tutoring," the compensatory hours of specialized academic instruction from time District had not provided Student under her IEP; sometimes her sessions were considered "home hospital instruction," specialized academic instruction provided under Student's IEP. Ms. Lentz provided the same type of instruction and activities, regardless of how District allocated her time between the two categories of service hours District had contracted

with A+ In Home Tutors to provide.

198. Ms. Lentz described her work with Student as work toward Student's academic goals, and using Student's augmentative alternative communication device. She worked with Student on making exchanges, greetings, math, reading skills, and some fine motor skills like writing and reaching. Student worked best in game settings and having fun, and Ms. Lentz worked on Student's goals without it being a "typical boring lesson." The expectations had grown for the amount of words Ms. Lentz wanted Student to use. In working on Student's goal of using three to five word phrases, Ms. Lentz wanted Student to say, "I want a turn," or "My turn play ball." When reading, Student turned the page or requested to turn the pages. When playing to roll a ball, Ms. Lentz wanted Student to roll the ball, tell Ms. Lentz to roll the ball, and tell Ms. Lentz to stop rolling the ball. Ms. Lentz had Student play the game of "put in," and Student put items in a tub and took items out of a tub. Since Ms. Lentz started working with Student in February 2016, Student was capable of playing those "games." Ms. Lentz described Student as being able to do parallel play, and in December 2017 she was just at the beginning level of exchanging with someone else. The service providers were teaching Student waiting and taking turns. Ms. Mertz described Student's play level, or ability with play, as around two to three years old.

199. Ms. Lentz testified regarding her duties as a special education teacher to teach specially designed physical education to her special education Students. She opined that any teacher with a multiple subject teaching credential or a special education teaching credential could provide and was required to provide physical education instruction to students. She believed as a special education teacher, physical education and specially designed physical education were encompassed in her credential, but she could not teach adapted physical education; that required a different credential she did not have. Her teacher credential training did not provide her clear

instruction regarding the difference between specially designed physical education and adapted physical education, but she knew there was a difference between them and believed adapted physical education was for students who required more direct, individual attention and could not participate in group physical education instruction with the adaptations the special education teacher provided. She explained that all students were required to have physical education, and students could have different modifications and adaptations, but a student's level of cognition did not prevent him or her from getting physical education.

200. Ms. Lentz did not work with Student on her gross motor goals. The gross motor goals in Student's November 19, 2015 IEP stated the physical therapist and the teacher were responsible for the goals. But Ms. Lentz did not work on the goals in the form of specially designed physical education that she was authorized, and by her description was required, to provide under her moderate/severe special education teaching credential, because Student's IEP stated a physical therapist was doing the specially designed physical education.

#### Testimony of Parent

201. Parent was frustrated with Student's gross motor goals, and although she had agreed to them when they were developed, she later thought they were not functional, meaning they were not things Student was going to be able to do. Parent described the goals as not serving a purpose. Parent opined, for example, with Student's goal of pulling herself up from a tall kneel to a stand, the goals emphasized working on gaining physical strength and merely served to put Student in awkward positions and focus on upper body and arm strength to get out of the positions. Parent believed Student was, in December 2017, at the same point she was in December 2013, she was just bigger now. However, Parent explained that Student gained skills and then sometimes lost them and had to regain skills when her body was bigger and she had to

learn how to manage it. One example was that in Student's physical therapy exit assessment by the regional center in 2011, Student was able to walk in her gait trainer with truncal support only, meaning without the pelvic support; but in 2014, and still in 2017, Student required the pelvic support. Parent considered this to be regression, and she was frustrated about it.

202. Parent explained that she advocated for IEP team meeting notes to reflect not just passing by or casual conversation. She stated there were many things said at IEP team meetings that were not documented in the IEP team meeting notes, and she audio recorded the meetings to capture everything. However, she testified that while the initial, annual, and triennial IEPs all had the Special Factors page box regarding physical education checked as "specially designed physical education," the topic of physical education was never discussed during the IEP team meetings.

203. None of the IEP team meeting notes ever documented that any IEP team discussed the topic of physical education, the selection of "specially designed physical education" on the form, or that Student receiving physical therapy had any connection to physical education. That alone does not prove that physical education, "specially designed physical education," and a connection between physical education for Student and her physical therapy service were never discussed; Parent acknowledged not everything discussed during the IEP team meetings was documented in the IEP team meeting notes. Parent specifically denied any of those topics were ever discussed, other witnesses testified they could not remember there being any discussion on those topics, and no witness testified they ever were discussed. Parent's uncontroverted testimony established that the IEP teams never discussed the topic of physical education, "specially designed physical education," or a connection between physical education for Student and her physical therapy service.

204. Parent, understandably, described herself as an expert on and advocate for

Student. Parent testified she attended IEP team meetings and recorded them; she reviewed the IEPs after the meetings; if she needed to, she listened to the recordings to see that everything was in the IEP, regularly lately and more consistently since 2014. Sometimes she reviewed the recording before signing the IEP. She took a few days after an IEP team meeting to review the IEP and address any concerns she had with the program specialist or a service provider.

205. Repeatedly at IEP team meetings, in correspondence to District, and in her testimony, Parent emphasized how Student's genetic abnormality and accompanying medical conditions severely impacted and impaired her functioning and abilities. Letters District received from Student's pediatric cardiologist and infectious disease specialist explained how Student's "multiple complex medical problems" including her genetic abnormality and resulting heart defects and cerebral palsy made her extremely susceptible to even simple viruses, like the common cold and flu, and bacteria, and that due to her cardiopulmonary challenges even a "slight 'chest cold' could easily turn into a life threatening infection." Her doctors recommended that the environments to which she was exposed be "as infection-risk free as possible" and that her caregivers practice strict hygiene and infection control measures, including avoiding close exposures (less than three feet) to prevent accidental exposure from a cough or sneeze, no face-to-face contact, and not allowing ill visitors with respiratory or gastrointestinal symptoms. Student did not have other people come over to play with her, and did not go to other people's homes to play with them. Parent opined that as of December 2017, Student had no protective reflexes, and could not extend her arm stop herself if she fell. She was working on it, but the timing was not there. She had no safety awareness. If she was lying down, she could raise herself up on an elbow, but that was as far as she could go. She could not get herself into a sitting position. She could not get up by herself, and she could not stand by herself. Parent sometimes complained that the goals the IEP team

developed for Student were too ambitious or unrealistic in view of the limitations Student's genetic abnormality and medical conditions created.

#### Publications of California Department of Education

206. The licensure for and practice of physical therapy is regulated by Physical Therapy Board of California. The licensure for and practice of occupational therapy is regulated by the California Board of Occupational Therapy. Teachers are credentialed and regulated by the California Commission on Teacher Credentialing. The California Department of Education is in charge of enforcing education law and regulations.

207. The California Department of Education, Special Education Division, published two documents, of which the parties stipulated the ALJ may take official notice: *Adapted Physical Education Guidelines in California Schools Revised* (2012); and *The Guidelines for Occupational Therapy and Physical Therapy in California Public Schools (Second Edition)* (2012). *The Guidelines for Occupational Therapy and Physical Therapy in California Public Schools* stated it was developed by the Special Education Division. It contains a notice on its first page: "The guidance in *Guidelines for Occupational Therapy and Physical Therapy in California Public Schools (Second Edition)* is not binding on local educational agencies or other entities. Except for the statutes, regulations, and court decisions that are referenced herein, the document is exemplary, and compliance with it is not mandatory. (See *Education Code* Section 33308.5.)" The other publication, *Adapted Physical Education Guidelines in California Schools Revised*, did not contain such a caveat or exclusion. It stated the document's purpose was to identify program guidelines that clarify adapted physical education services, which are provided to individuals with disabilities who require highly specialized services to meet their individual goals for physical education that includes movement education and motor development. The *Adapted Physical Education Guidelines* were organized by groups of key provisions followed by legal requirements, discussion, and best practices

statements to be used when identifying, assessing, planning, and implementing quality physical education programs. The ALJ relied on the following information from *Adapted Physical Education Guidelines* in conjunction with the testimony of adapted physical education teacher Ms. Cullen, and adopted the information when analyzing the other facts in this case.

208. *Adapted Physical Education Guidelines* contains a section regarding “Physical Education Programs and Services.” It advises that when a child is identified as having a disability and is determined by the IEP team to be eligible for special education, “specific physical education services must be identified after considering a full continuum of program options.” *Adapted Physical Education Guidelines* sets forth three delivery options: 1) physical education, with or without accommodations, adaptations, or modifications that can be made by the general physical education teacher; 2) specially designed physical education; and 3) adapted physical education.

209. *Adapted Physical Education Guidelines* then describes physical education as the option that encompasses a full spectrum of game, sport, fitness, and movement activities, including physical and motor fitness, fundamental motor skills and patterns, and skills in aquatics, dance, and individual and group games and sports. This description matches the federal definition of “physical education,” in Legal Conclusions, below. *Adapted Physical Education Guidelines* states the student’s IEP should accurately reflect any accommodations, adaptations, or modifications that are necessary for the student to participate successfully, and safely, “in the general physical education program.”

210. *Adapted Physical Education Guidelines* next describes specially designed physical education as “for a special education class with minimal or limited adaptations, accommodations, or modifications and is provided for the children and taught by the person who normally teaches physical education for this population.”



211. Finally, *Adapted Physical Education Guidelines* describes adapted physical education as “a service provided by a credentialed adapted physical education teacher to individuals who have needs that cannot be adequately satisfied in other physical education programs as indicated by the assessment and IEP process.” In further explanation, *Adapted Physical Education Guidelines* states: “Adapted physical education service may be provided through direct instruction, team teaching, the appropriate use of instructional aides . . . , or collaborative consultation, as long as appropriate goal(s) and objective(s) are indicated and accurately monitored by the adapted physical education teacher. All adapted physical education services should be accurately indicated on the individual’s IEP with appropriate goals and measurable objectives, aligned with physical education curriculum standards, recorded and monitored by the adapted physical education teacher. The frequency and duration of adapted physical education service will be based upon the student’s needs and should be listed on the IEP. The list will indicate the frequency with which the adapted physical education teacher provides service for the student. Collaborative consultation is one method of providing service on behalf of the individuals, to assist the student in participating successfully in the less restrictive settings of general physical education or specially designed physical education.”

212. *Adapted Physical Education Guidelines* comments as a “best practice” that all physical education program options should be available to all students, and the IEP team must determine what combination of services will best meet a student’s needs and will also meet the mandated number of minutes required (“elementary = 200 minutes/10 days,” citing Education Code section 51210, subdivision (g)) for physical education in the least restrictive environment. One example listed is that a student receives 60 minutes per week in adapted physical education, with the remaining mandated physical education minutes being fulfilled in general or specially designed

physical education. *Adapted Physical Education Guidelines* offers the following “[e]xamples of Specially Designed Physical Education” that “do not include direct service by an adapted physical education teacher”: special education students who attend a special day class receive physical education instruction from their special day class teacher; special education students who attend a special day class are scheduled together in one class period to receive physical education instruction from a general physical education teacher; and a special education student who is assigned to a general education classroom attends physical education with other special education students who are assigned to a special day class, and physical education is taught by either the special day class teacher or a general physical education teacher.

213. None of the examples of “specially designed physical education” include physical education from a physical therapist.

214. *Adapted Physical Education Guidelines* includes a Venn diagram showing how a student might receive any one, a combination of two, or a combination of all three types of physical education. It includes the following descriptions of the three types: “General Physical Education: Movement activities are provided by the general PE teacher and may include accommodations, adaptations, or modifications, which are made by the general PE teacher”; “Specially Designed Physical Education: Physical education programming, for a special education class, that requires minimal or limited adaptations, accommodations, or modifications, and is taught by the person, general or special educator, who normally teaches physical education for this population”; and “Adapted Physical Education: Adapted physical education is a physical education program for children with disabilities who have needs that cannot be solely met in general or specially designed physical education. It is taught by a credentialed APE teacher either independently, with or without aides, or in a team teaching situation with either a general or a special educator. Frequency and duration of services, and goals and

objectives[,] which are monitored by the APE teacher, are identified on the IEP.”

215. *Adapted Physical Education Guidelines* also states that “Collaborative Consultation could be identified on the IEP as a service that is provided on behalf of the student and assists the student in participating in the least restrictive environment of general or specially designed PE. If a student is receiving collaborative consultation service from an adapted physical education teacher, the student may be counted on the APE teacher’s caseload if a goal and supporting objectives have been identified on the IEP and are monitored by the APE teacher.”

216. With respect to a student’s IEP including goals and objectives to address a child’s unique needs related to the disability, *Adapted Physical Education Guidelines* contains a “discussion” that includes the following statements: “Some children have disabilities that are moderate to severe. To identify general physical education skills for same age peers as goals for these children may be inappropriate. Some of these children need to attain basic body control for the functional skills of sitting, standing and walking. These skills, commonly referred to as motor milestones, are used daily by most individuals. IDEA requires that annual goals included in a child’s IEP relate to meeting the child’s needs, that result from the child’s disability, so that the child can be involved in and progress in the general education curriculum.”

217. As a “best practice” regarding goals, *Adapted Physical Education Guidelines* advises: “Consider the disability, needs and educational setting/curriculum of the child when determining appropriate goals. Consider identifying functional movement skills, which will enhance interaction and participation at school, as goals for those who have more severe disabilities. Examples of alternative standards that can be used when writing IEP measurable goals for children with a severe disability are found in: SEACO curriculum and the MOVE curriculum, as well as the APE standards in Appendix E of these guidelines. [1] An adapted physical education teacher must use

good judgment when choosing goals. For example, being able to walk around campus and sit in the cafeteria are both functional and appropriate skills for a student. To think that it is appropriate to write a goal for a student to walk on a balance beam, when the student has not learned to step up one step without holding a railing would be an over-interpretation of the intent of the law."

218. Regarding the relationship of adapted physical education, occupational therapy, and physical therapy, *Adapted Physical Education Guidelines* notes that all three services may work on a similar skill or on the same IEP goal, but each serves different functions and may not be substituted one for another. The need for each "designated instruction and service" and "related service" to assist the student in benefiting from the educational program is documented in an IEP. *Adapted Physical Education Guidelines* describes the "similarities and differences" between adapted physical education, occupational therapy, and physical therapy as follows: "The similarities among the three (adapted physical education, occupational therapy, and physical therapy) are many, as these disciplines often work on the same types of skills. For example, in both the physical therapy and adapted physical education settings, a student could work on the skills of transferring, sitting independently, walking, and jumping. In both occupational therapy and adapted physical education, the student could be working on balance, functional manipulative skills and play activities. All three disciplines strive to improve movement performance by improving the motor coordination of skills. They also strive to facilitate a child's ability to access their school environment and keep up with their peers in a school setting. The three disciplines recognize the importance of the underlying neuromuscular systems that are responsible for the execution of movement." The differences among the disciplines are the licensure versus credentialing requirements, and, as relates to students, the methods each discipline uses. What also differentiates the three disciplines is the relationship of each

to the curriculum: “While they all may provide services that assist the student with participation in and progress toward the educational curriculum, the adapted physical education specialist is most concerned with assisting the student to be successful in the physical education curriculum. There is no specific curriculum area for occupational therapy or physical therapy.”

219. *Adapted Physical Education Guidelines* lists 19 areas of motor skills, and notes which of them are typically addressed by adapted physical education, occupational therapy, and physical therapy. Of these 19 areas, as between adapted physical education and physical therapy, there are seven motor skills areas that adapted physical education addresses but physical therapy does not, and three areas that physical therapy addresses but adapted physical education does not. Comparing adapted physical education and occupational therapy, there are six motor skills areas that adapted physical education addresses but occupational therapy does not, and four areas that occupational therapy addresses but adapted physical education does not. As between physical therapy and occupational therapy, there are two motor skills areas that physical therapy addresses but occupational therapy does not, and three areas that occupational therapy addresses but physical therapy does not. Finally, there are four areas of motor skills that adapted physical education addresses but neither physical therapy nor occupational therapy addresses: physical fitness, games and sport, dance, and aquatics.

220. *Adapted Physical Education Guidelines* included a “Position Paper on Physical Education Content Standards for Students with a Disability,” undated, written by the Adapted Physical Education Guidelines for California Schools Committee, and endorsed by the State Council on Adapted Physical Education (SCAPE), California Association for Health, Physical Education, Recreation, and Dance (CAHPERD). The Position Paper noted that many of the Physical Education Model Content Standards will

not be appropriate for those with a severe motor impairment. In situations that require modifications, the Adapted Physical Education Guideline Standards can provide guidance in developing performance standards that can meet the physical education standard for a student with a disability. The Position Paper also described what might be required for teaching a student with a disability: "'Scaffolding' is often needed to teach a standard to a student with a disability. This differentiated instruction will enable the student to progress in the physical education curriculum through the use of unique instructional strategies, supports/prompts, and sequences. Sometimes, students will need to be taught skills that are prerequisite to those identified in a particular standard. In some instances, these skills will be found in a lower grade-level standard or may be a fundamental movement pattern. Additionally, adapted equipment (which can be considered assistive technology) can often be used to make accommodations in physical education that will enable the student to meet the physical education standards, as well as IEP goals and objectives."

#### Lack of Evidence

221. Student did not elicit the testimony of any witness or move into evidence any document setting forth what the consequence was of Student not receiving specially designed physical education, or of receiving physical therapy in place of physical education. Student provided no evidence regarding any difference in her gross motor abilities, or knowledge of physical education curriculum concepts, physical education instruction would have made.

222. District did not provide any evidence regarding whether, for Student, instruction in the home "by a regular classroom teacher, special education teacher, or resource specialist" was or was not "feasible," so as to justify instruction by "the appropriate related service specialist."

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>8</sup>

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)<sup>9</sup> 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 standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "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) [in California, related services are also called designated instruction and

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<sup>8</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>9</sup> All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*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 Supreme Court's recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.\_\_\_\_ [137 S.Ct. 988, 999, 1001, 1002] (*Endrew F.*) reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances; "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end . . . ." (*Id.* at pp. 996 and 999 (and quoting *Rowley*.) Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Id.* at p. 999, citing *Rowley*, 458



U.S. at pp. 206–207.) “*Rowley* had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” (*Endrew F.*, *supra*, at p. 1000.)

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.) 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, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (j).) 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]; 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 case, Student, as the complaining party, bears the burden of proof on all issues remaining in the case.

#### TIME PERIOD AT ISSUE/STATUTE OF LIMITATIONS

5. Student contends she timely filed the claims presented in her October 17,

2017 complaint, seeking recovery back to 2011, based on the exception to the two-year statute of limitations. Specifically, she contends District withheld information from Parent that District was required to provide. Student alleges District was required but failed to ever inform Parent that Student was entitled to either special physical education, specially designed physical education, or adapted physical education.

6. District argues every IEP since Student initially qualified to receive special education and related services in December 2011 addressed specialized physical education. District contends claims relating to more than two years before Student filed the complaint are barred. District also contends none of the statutory exceptions to the statute of limitations apply because at all annual IEP team meetings and at other times as legally required, District provided a copy of her procedural safeguards. District asserts it provided all parental notification required under the IDEA and California Education Code.

#### Legal Authority: Statute of Limitations for Special Education Claims

7. Since 2004, the IDEA has had a two-year statute of limitations period that is codified in two different provisions of the IDEA: title 20 United States Code sections 1415(b)(6)(B) and 1415(f)(3)(C). A due process complaint: “must allege a violation that occurred not more than two years before the date the parent or public agency *knew or should have known about the alleged action* that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law.” (34 C.F.R. § 300.507(a)(2) (emphasis added).) Based upon this authority, states are permitted to adopt their own statute of limitations, and California has done so.

8. California implements the IDEA through its special education implementing statutes. (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 860 (*Miller*).) Similar to the federal statute, Education Code

section 56505, subdivision (i) provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request *knew or had reason to know of the facts underlying* the basis for the request.<sup>10</sup>

9. Consequently, both federal and California law contain a two year statute of limitations for special education administrative actions that requires a finding of when the parent knew of the facts which form the basis of the claim. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (i).)<sup>11</sup> The IDEA's statute of limitations applies a discovery rule, not an occurrence rule, because of the "knew of" language found in the federal statute. (*Avila v. Spokane School Dist.* 81 (9th Cir. 2017) 852 F.3d 986, 939-945 (*Avila*)). *Avila* interpreted the IDEA's statutory provisions; however, California has its own statute of limitations, and its wording is similar, but not identical, to the federal statute. *Avila* relied on the following portion of the IDEA: "within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . ." (20 U.S.C § 1415(f)(3)(C).) California's statute of limitations uses the language "within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, subd. (i).) That minor difference in wording does not support an interpretation that California uses an occurrence rule rather than a discovery rule. An occurrence rule is inconsistent with the IDEA's remedial purpose, and California's special

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<sup>10</sup> California enacted its own statute of limitations in 1998, which was analyzed in *Miller*, formerly Education Code Section 56505, subdivision (j). (Stats.1998, c. 691 (S.B.1686), § 45.)

<sup>11</sup> California amended its statute of limitations for IDEA claims in 2005 in response to the 2004 changes to IDEA. (Stats. 2005, c. 653 (A.B. 1662), § 43.5.)

education implementing statutes must be interpreted as no less protective of the rights of disabled students than their federal counterparts. (Ed. Code, § 56000, subds. (d), (e).)<sup>12</sup>

10. However, California has adopted its own manner of applying the discovery rule. California has held that a claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate; not when the claim actually occurred. (*M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09– 4624, 10– 04223 SI) 2012 WL 398773, \*\* 17 – 19 (*M.M.*), *affd.* in part and *revd.* in part on other grounds by *M.M. v. Lafayette School Dist., et al* (9th Cir. 2014) 767 F.3d 842, 859; see also, *M.D. v. Southington Bd. of Educ.* (2d Cir. 2003) 334 F.3d 217, 221.) In *M.M.*, the District Court made an evidentiary finding that “parents had sufficient knowledge of the educational goings-on inside and outside of the classroom to be put on notice of their underlying claims.” (*M.M.*, *supra*, at \*18) In other words, the statute of limitations begins to run when a party is aware of the underlying facts that would support a legal claim, not when a party learns that the action was wrong. (*M.M. supra*, at \*18; see also *Bell v. Bd. of Educ. of the Albuquerque Pub. Schs.* (D.N.M.2008) 2008 WL 4104070, at \*17.)

11. In California, the “‘knowledge of facts’ requirement does not demand that the [party] know the specific legal theory or even the specific facts of the relevant claim; rather the [party] must have known or reasonably should have known the facts

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<sup>12</sup> The Ninth Circuit is expected to be familiar with prior law and statutes. Yet, *Avila* found that for IDEA complaints, the “knew of” language means the discovery rule is used. *Avila* provides no express exception to that finding for California, or for any state that has adopted its own statutory scheme. Arguably, *Avila* may not be relevant to a state that adopted its own statute of limitations that does not use the “knew of” language.

underlying the supposed learning disability and their IDEA rights." (*Miller, supra*, 318 F.Supp.2d at p. 861 (citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111); *Ashlee R. ex rel. Russell v. Oakland Unified School Dist. Financing Corp.* (N.D. Cal., Aug. 23, 2004, No. C 03-5802 MEJ) 2004 WL 1878214, at \*5 (*Ashlee*).)

12. It does not matter if the parent understood that the inadequacy was a legal claim, what is material is the fact that parents had knowledge of the problem. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Student v. Brea Olinda Unified School Dist.* (2009) OAH Case No. 2009050815, quoting *Alexopoulos v. San Francisco Unified School Dist.* (9th Cir. 1987) 817 F.2d 551, 555.) "[A] cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which is the basis of his action." (*Miller, supra*, 318 F.Supp.2d at p. 861 (quoting *Alexopoulos, supra*, 817 F.2d at p. 554).)

13. In sum, the statute of limitations begins to run when a party is or should have been aware of the facts that would support a legal claim, not earlier, when the act occurred, and not later, when a party learns that it has a legal claim. (*El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039) (discovery rules are designed to "protect those who are ignorant of their cause of action through no fault of their own.") The statute of limitations is triggered when "a plaintiff discovers, or reasonably could have discovered, his claim." (*O'Connor v. Boeing N. Am., Inc.* (9th Cir. 2002) 311 F.3d 1139, 1147.) In the field of special education disputes, California has interpreted that trigger to occur when parents know the education is inadequate, not when parents knew that inadequacy was a legal claim. (*Miller, supra*, 318 F.Supp.2d at p. 861; *Ashlee, supra*, 2004 WL 1878214, at \*5.)

14. Title 20 United States Code section 1415(f)(3)(D) and Education Code

section 56505, subdivision (1), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required under particular special education law to be provided to the parent.

15. The two-year statute of limitations under the IDEA has not been held to be jurisdictional, but only to operate to limit the recovery of the student/parent to claims filed within two years of the date on which the parent knew or should have known of the alleged action that forms the basis of the complaint, unless either of the two statutory exceptions are alleged and proved. (See, e.g., *M.G. v. New York City Dept. of Educ.* (S.D.N.Y. 2014) 15 F.Supp.3d 296, 304; see also *Somoza v. New York City Dept. of Educ.* (2d Cir. 2008) 538 F.3d 106, 111.)

16. While the adequacy of the IEP document is evaluated from the perspective of the IEP team at the time it was written, "the implementation of the educational program is an ongoing, dynamic activity, which obviously must be evaluated as such." (*O'Toole v. Olathe Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702.) Incidents occurring within the statute of limitations for failure to implement an IEP as written, or of notice of the need to reassess or modify an IEP, will support a due process claim. However, a parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document is in effect within the statute of limitations, because special education law does not recognize the doctrine of continuing violations as an exception to the two year statute of limitations. (See *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269.) Several other cases have concluded that the two statutory exceptions to the statute of limitations

operate to prohibit common law equitable tolling, including the continuing violation doctrine. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 248 (*D.K.*); *D.C. and A.C. v. Klein ISD* (S.D.Tex. 2010) 711 F.Supp.2d 739, 746 (and cases cited therein).) The official comments on the regulations implementing the 2004 reauthorization of the IDEA state explicitly that the two exceptions to the limitation period provided in the statute “do not include when a violation is continuing.” (71 Fed.Reg. 46540, 46697 (Aug. 14, 2006).)

17. Invoking the exceptions to the statute of limitations requires a showing that the school district’s misrepresentation or withholding of information caused the failure to file the due process complaint on time. Thus, where the evidence shows that the parents were fully aware of their procedural options, they cannot excuse a late filing by pointing to the school’s failure to formally notify them of those options. (*D.K., supra*, 696 F.3d at pp. 246-247.)

18. To invoke the second exception, a student must show that the parent was prevented from requesting a due process hearing because the school district withheld information from the parent that was required “under this subchapter” (federal law)/“under this part” (California law) to be provided to the parent. The text of title 20 United States Code section 1415(f)(3)(D)(ii) “plainly indicates that only the failure to supply *statutorily mandated* disclosures can toll the statute of limitations. In other words, plaintiffs can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations.” (*D.K., supra*, 696 F.3d at p. 246, emphasis in original.)

#### Analysis

19. Student alleges that, since she was first eligible for special education and related services at age three in 2011, District failed to provide her specially designed physical education and substituted physical therapy for physical education. Student’s

initial, annual, and triennial IEPs after her first IEP in December 2011 have all indicated, on the Special Factors page, that in the area of physical education, Student had not met the requirement, and was not in general physical education, but was designated for something called “specially designed physical education.” The initial IEP stated, under the heading of physical education and after the designation of specially designed physical education, that Student “has received physical therapy since birth”; all subsequent IEPs stated under the physical education heading that Student “receives physical therapy.” Every IEP declared there was a connection between Student’s receipt of physical education and her physical therapy services.

20. Parent attended every IEP team meeting, and reviewed the IEP document developed at each meeting. Parent was an active member of Student’s IEP team and paid close attention to the goals, placement, and services District offered year after year. Parent questioned or challenged District whenever she did not understand why District proposed or failed to propose something or she disagreed with District’s action or inaction. Parent received and reviewed a copy of every IEP.

21. Student received all her special education and related services in her home, with Parent or a nurse present. Parent was intimately aware of what each provider was, and was not, doing on a daily or weekly basis. Parent was aware, in the words of *M.M.*, of all of the educational goings-on inside and outside of the classroom, because the classroom was her house.

22. Parent was informed of the underlying problem for both issues of the complaint well before October 17, 2015, two years before Student filed her complaint. Year after year, the written IEPs documented that District’s program for Student included some connection between physical education and physical therapy, whether physical therapy was partnered with, or a substitute for, physical education. Whether physical therapy equaled specially designed physical education, or whether physical



therapy was going to be provided instead of specially designed physical education, or some other possibility involving physical therapy as it related to physical education generally, it was documented in Student's IEPs since 2011. Parent knew or had reason to know of the fact that District considered the physical education Student was going to receive for the next year to be classified as specially designed physical education, and District was somehow linking that specially designed physical education and physical therapy.

23. The evidence shows that Parent was informed of the goings-on inside and outside of the classroom, and had notice of her underlying claims for many years. It is not necessary for Parent to know that a legal claim exists; instead, Parent must only have knowledge, or reasonably should have had knowledge, of the problem. Parent knew District had designated Student to receive specially designed physical education and somehow connected it with physical therapy since December 2011, and was re-informed of that problem each subsequent year. Therefore, the claims in Student's complaint do not support extending the statute of limitations for this matter past October 17, 2015.

24. Further, because the IDEA does not allow claims that challenge an IEP created prior to the date on which the statute of limitations accrued, Student may not pursue a claim that she was denied FAPE by an IEP created prior to October 17, 2015. Although Student's December 2, 2014 IEP was still the operative IEP on the date the statute of limitations accrued, October 17, 2015, Student's complaint does not contend that IEP was in fact appropriate but not actually implemented during the time period available under the statute of limitations. Student contends the December 2, 2014 IEP was deficient and denied Student a FAPE. Therefore, Student may not pursue claims regarding the December 2, 2014 IEP during the time period from October 17, 2015, through the date of her next annual IEP, November 19, 2015, which actually was not completed until November 30, 2015, and was consented to by Parent in almost all

respects on December 10, 2015. Accordingly, Student's claims are limited to the time period after the November 19, 2015 IEP was offered to Student on November 30, 2015.

25. Student's complaint did not assert that the first exception to the statute of limitations applied. Student only alleged Parent was prevented from timely filing a request for due process under the second exception, due to District's failure to tell Parent that Student was statutorily entitled to physical education, and that this constituted the withholding of information District was required to provide Parent. However, Student did not prove District withheld information from Parent that Student was entitled to physical education, specially designed physical education, or adapted physical education. In fact, every IEP since December 2011, all of which Parent received and testified she reviewed, contained written information that within the topic of physical education, District classified Student as receiving specially designed physical education, and that it had something to do with her receipt of physical therapy. Further, the exception to the statute of limitations requires a parent to prove he or she was prevented from requesting due process due to the school district's withholding of information that was required under the relevant federal statutory "subchapter," or the relevant California statutory "part." As explained above, this requirement has been interpreted to mean "only the failure to supply *statutorily mandated* disclosures can toll the statute of limitations. In other words, plaintiffs can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations." (*D.K., supra*, 696 F.3d at p. 246, emphasis in original.) Student did not prove District failed to provide Parent a written notice, explanation, or form specifically required by the IDEA statutes and regulations. Therefore Student did not prove any exception to the statute of limitations to extend the time period at issue in this case.

#### ISSUE 1: FAILURE TO PROVIDE STUDENT SPECIALLY DESIGNED PHYSICAL

## EDUCATION

26. Student argues that District was required to provide Student physical education at a rate of 200 minutes per 10 school days and that District failed to provide Student any physical education. Student's complaint specifically alleged District denied Student a FAPE by failing to provide Student "special physical education." District contends it provided Student specially designed physical education in the form of physical therapy.

### Legal Authority

27. The IDEA defines "special education" as specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and including instruction in physical education. (20 U.S.C. § 1401(29)(A)&(B); 34 C.F.R. § 300.39(a)(1); see also Ed. Code, § 56031, subd. (a).)

28. "Physical education" is defined by federal regulation as the development of: physical and motor fitness; fundamental motor skills and patterns; and skills in aquatics, dance, and individual and group games and sports; it "includes special physical education, adapted physical education, movement education, and motor development." (34 C.F.R. § 300.39(b)(2).)

29. The term "special physical education" is only used again in the federal regulations as a heading: "Special physical education. If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child must provide services directly or make arrangements for those services to be provided through other public or private programs." (34 C.F.R. § 300.108(c).) In all other places, the term "specially designed physical education" is used, for example, in distinction to "regular physical education": each child with a disability must be afforded

the opportunity to participate in the regular physical education program available to nondisabled children unless the child is enrolled fulltime in a separate facility, "or [ ] the child needs specially designed physical education, as prescribed in the child's IEP." (34 C.F.R. § 300.108(b).)

30. The parties stipulated these were the available federal definitions regarding categories or types of physical education. District also relies on the federal definition of "specially designed instruction," which "means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction" "to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that the child can meet educational standards within the jurisdiction of the public agency that apply to all children." (34 C.F.R. § 300.108(c).)

31. California defines "adapted physical education" only as follows, by referring to other categories of physical education: "Adapted physical education is for individuals with exceptional needs who require developmental or corrective instruction and who are precluded from participation in the activities of the general physical education program, modified general physical education program, or in a specially designed physical education program in a special class. Consultative services may be provided to pupils, parents, teachers, or other school personnel for the purpose of identifying supplementary aids and services or modifications necessary for successful participation in the regular 'D' Physical education program or specially designed physical education programs." (Cal. Code. Regs., tit. 5, § 3051.5(a).) Further, "[a]dapted physical education shall be provided only by personnel who possess a credential issued by the California C[ommission on] T[eacher] C[redentia]ling that authorizes service in adapted physical education." (*Id.*, subd. (b).)

32. Physical education, whether as general physical education, modified

general physical education, specially designed physical education, or adapted physical education, can only be taught by a credentialed teacher. Typically, general and modified general physical education are taught by a teacher with a single subject credential in physical education or a teacher with a multiple subject credential; a credentialed teacher with an adapted physical education authorization might provide consultation or collaboration to assist a general education teacher make accommodations, adaptations, or modifications for a student with a disability. Specially designed physical education is typically taught in the context and structure of a special education classroom/class by a special education credentialed teacher; again, a credentialed teacher with an adapted physical education authorization might provide consultation or collaboration to assist a special education teacher make additional accommodations, adaptations, or modifications for a student's disability that impairs his or her ability to participate in the physical education designed for the special education classroom. A physical therapist does not provide any category of physical education.

33. When a child with an IEP who, by reason of a medical condition documented in a medical report from the attending physician, must be provided special education and related services in the home or hospital, that instruction is required to "be provided by a regular class teacher, the special class teacher or the resource specialist teacher, if the teacher or specialist is competent to provide such instruction and services and if the provision of such instruction and services by the teacher or specialist is feasible. If not, the appropriate related services specialist shall provide such instruction." (Cal. Code. Regs., tit. 5, § 3051.4.)

34. As an example of physical education instruction for a severely disabled student with Trisomy 18, the student was eight years old in *Student v. Los Angeles Unified School Dist.* (California Special Education Hearing Office August 15, 2000) Case No. SN 764-99. As a result of her Trisomy 18, she had global developmental delays and

was eligible for special education as “developmentally impaired.” She had congenital heart disease and congenital absence of one kidney. She was nonverbal and non-ambulatory, used a wheelchair, required diapering, and was fed through a gastronomy tube. She had developmental delays in the motor, self-help, and communication areas and lacked safety awareness. She functioned overall at the six- to twelve-month level.

35. From the time the student was three years old, she attended a school-based special education program at one of the school district’s special education centers, in a special day class for “severely handicapped” students, who were at the lowest functioning level with a mental age of generally not greater than 24 months. The student required straps while sitting in a chair or on the toilet to ensure her safety. She was generally happy and smiling, initiated tactile contact with other students, and enjoyed one-on-one attention. She could not bear weight on her feet but could be upright in a ring walker. She could sit unsupported on the floor for several minutes, but occasionally fell over. She was assessed by an adapted physical education teacher, who, despite the student functioning around the four-month-old level when she was three years old, recommended specially designed physical education. For three years, the student received specially designed physical education as part of her special day class placement. At her triennial reassessment, she was evaluated again by an adapted physical education teacher, who concluded the student required help in all areas of gross motor movement and recommended adapted physical education, which the school district offered and provided in her IEP for the next year.

36. One year later, the student was reassessed. She could sit in a chair or on the floor, unsupported, for 20 to 30 minutes. She was able to support her full weight in a standing position with her hands held for approximately 20 seconds. The adapted physical education teacher recommended specially designed physical education within

the special day class. Due to a dispute that arose after the student's wheelchair tipped over twice on the same day at school, the student did not attend school for approximately six months. She began receiving home instruction around that time while the parent litigated her request for a change of placement from the special education center to the neighborhood school near the student's home. While the student was on home instruction, the school district conducted an occupational therapy assessment in a classroom at the neighborhood school, and concluded that occupational therapy as a related service was not recommended because it would not address the student's needs within the educational environment. The school district also conducted a physical therapy assessment of the student at the neighborhood school, when she was around seven years and eight months old. The student sat for approximately 15 to 30 minutes at a time and sat with a slump posture and with her hands on her sides or in front on the floor because she tended to fall backward or to the side. The student could not stand even with assistance and could not crawl. The physical therapist concluded that school-based physical therapy was not recommended because the student's level was too low for her to benefit effectively from such a service.

37. The student challenged the IEP when she was seven years old, which offered placement in the special day class at a special education center, with specially designed physical education, transportation, and an extended school year program, and without occupational therapy or physical therapy. The hearing officer found that the program and placement the school district offered was designed to meet the student's unique needs and offered the student a FAPE in the least restrictive environment. The case illustrates that a student with extreme motor and cognitive impairments can, and may need to, participate in adapted physical education. The case also illustrates that a student with extreme motor and cognitive impairments can participate in specially designed physical education taught by a credentialed teacher.

38. The California Legislature has prescribed areas of study for grades one through six in many areas, including physical education, "with emphasis upon the physical activities for the pupils that may be conducive to health and vigor of body and mind." (Ed. Code, § 56210, subd. (a)(7).) By statute, students are to study physical education for a total of not less than 200 minutes each 10 school days, exclusive of recesses and the lunch period. (*Ibid.*) This calculates to an average of 100 minutes a week.

39. Education Code section 56210, subdivision (b), paragraph (1), explicitly states a complaint that a school district has not complied with the instructional minute requirements of Education Code section 56210, subdivision (a), paragraph (7), may be filed with the school district pursuant to the Uniform Complaint Procedures under Title 5 of the California Code of Regulations, section 4600 et seq.

40. OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), or other related state and federal civil rights laws. The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education," and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program



appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

41. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) The IDEA does not contemplate that all annual goals will be achieved. It expressly provides that one of the purposes of the annual IEP review is to determine whether annual goals are being achieved and *revise* the IEP to address any lack of expected *progress toward* those goals. (34 C.F.R. § 300.324(b)(1)(ii)(A), emphasis added.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist. No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

#### Analysis

42. Because the term "special physical education" is used in only one federal regulation and otherwise appears only as the heading of section that immediately thereafter uses the term "specially designed physical education," those two terms are synonymous. The term used in other federal and state regulations, "specially designed physical education," is the correct term to use in identifying the specific category of physical education. "Specially designed physical education" describes physical education taught to moderately or severely disabled special education students who require

modifications to the physical education curriculum, because they are not working on the grade-level curriculum due to their motor skills levels being behind, or possibly their cognitive levels being behind other students' levels. While these special education students might also spend some time in general physical education, modified or not, or also receive some adapted physical education, "specially designed physical education" refers to the category of physical education they receive when they are not participating in general physical education, or in adapted physical education. It does not refer to the service of a physical therapist.

43. No IEP team ever discussed physical education for Student. The Special Factors page of the SELPA-created IEP form had a box labelled "specially designed physical education" checked by someone, but not based on or as the result of any conversation among any IEP team. Specifically, for the time period at issue in this case relating to the November 19, 2015, and November 15, 2016 IEPs, someone checked the box for "specially designed physical education" and included the notation that Student received physical therapy, simply because that is how the form had been completed in the prior IEPs since December 2012 and that information was never changed. The IEP teams did not make any explicit decision to not provide Student instruction in the physical education curriculum for first, and then second, grades. The IEP teams did not make any explicit decision to not provide Student physical education because Student received physical therapy to address her gross motor development needs. And the IEP teams did not make any explicit decision to not provide Student physical education because physical therapy was, generically speaking, a form of physical education specially designed for Student. Ms. Mertz provided Student physical therapy over many years and during all that time, she never considered the service she provided Student to be physical education. Ms. Mertz's characterization of her physical therapy service as physical education came about only after Student filed this due process case and,

through the witness preparation process after conversations with, at least, District's Director of Special Education, she was made to see that somehow what she did could be reframed to support her services being described as some form of physical education that had been specially designed for Student.

44. By definition, Student could not receive "specially designed physical education" from a physical therapist. Specially designed physical education is taught by a credentialed teacher, typically a special education teacher. While specially designed physical education is most commonly taught on a school campus to a classroom of special education students, it is not beyond possibility that specially designed physical education would be taught to only one special education student, even in a home/hospital instruction environment. It would depend on the needs of the student, and the student would then receive that specially designed physical education one-on-one, even as part of home/hospital instruction, from a credentialed teacher, not from a physical therapist.

45. District relies on title 5 California Code of Regulations, part 3051.4, for the proposition that a physical therapist could provide home instruction in the area of physical education if it was not feasible for a regular classroom teacher, special education teacher, or resource specialist to provide the instruction, because a physical therapist is the "appropriate related services specialist" for that physical education instruction. District did not offer any evidence that, regarding Student, it was not "feasible" for a regular classroom teacher, special education teacher, or resource specialist to provide physical education instruction. Therefore, District cannot rely on this regulation and argument as an after-the-fact justification of its failure to provide Student instruction in physical education by a credentialed teacher.

46. If an IEP team had specifically considered the category of physical education that was appropriate for Student, the evidence demonstrated it was certain

that the IEP team would not have recommended general physical education or modified general physical education. Her motor and cognitive functioning were far too low to work on grade-level physical education model content standards, regardless of the accommodation, adaptation, or modification. The evidence also demonstrated it was very unlikely she would have been recommended for, or only for, specially designed physical education. The adapted physical education assessment conducted in October 2017 found that she met criteria for adapted physical education because her gross motor functioning was far more than 30 percent below Student's chronological age. Based on information available from the time Student turned three years old until the time of the adapted physical education assessment was completed, that had always been true; Student's gross motor functioning level was always more than 30 percent below her chronological age.

47. District witnesses characterized Student's gross motor skills as impaired to the point that at seven, eight, and nine years old, she was still working on her developmental milestones of sitting, standing, and walking. The evidence reflected that no District staff or contractors who were aware of Student believed her abilities were sufficient to participate in any category of physical education, and they assumed the only service available to support Student's gross motor skills development and physical fitness was physical therapy by a licensed physical therapist. But the testimony of adapted physical education teacher Ms. Cullen established that regardless of a student's cognitive level, a student with any motor ability for whom it was safe to engage in some movement could at least receive adapted physical education. The case of the student with Trisomy 18 in *Student v. Los Angeles Unified School Dist.*, who had similar medical conditions and physical and intellectual disabilities as Student, demonstrates that it is possible for a child with severe motor and cognitive deficits, at least in the context of a school-based moderate/severe special day class, to participate in specially designed

physical education. District incorrectly concluded Student could not participate in any category of physical education available from a credentialed teacher. The evidence demonstrated that since November 30, 2015, Student could have participated in physical education, at least through the category of adapted physical education.

48. Other first through fifth grade students in District who attended school-based programs received 1,800 minutes per week of instruction, of which 100 minutes were required to be physical education. That is five and a half percent of the total instructional time. In the November 19, 2015 IEP, District offered and Parent consented to 300 minutes per week of one-to-one specialized academic instruction in Student's home. In the November 15, 2016 IEP, District offered and Parent consented to 375 minutes per week of one-to-one specialized academic instruction in Student's home. It is unreasonable to expect that out of the 300 or 375 minutes, Student would still receive 100 minutes per week of instruction in physical education, to the disproportionate exclusion of other areas including math concepts, literacy skills of both reading and writing, and using an augmentative alternative communication eye-gaze device to expand expressive communication skills while working on academic areas.

49. To the extent Student wanted to contest District's compliance with the statutory requirement for 200 minutes of physical education instruction per 10 school days, Education Code section 56210, subdivision (b), paragraph (1), explicitly states a complaint that a school district has not complied with the instructional minute requirements of Education Code section 56210, subdivision (a), paragraph (7), may be filed with the school district pursuant to the Uniform Complaint Procedures under Title 5 of the California Code of Regulations, section 4600 et seq. OAH is not the proper venue for what is purely an argument about statutory compliance with curriculum requirements as OAH's jurisdiction is to determine whether Student received a FAPE, not if District complied with a statutory provision applicable to all students.

50. Student's written closing argument asserts District "discriminated against the Student" by not providing her federally mandated physical education. Student asserts "Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and California Government Code Section 11135" prohibit discrimination based on disability, "prohibit unjustified discriminatory impacts on minority students," and require schools to provide "equal opportunity for participation." This argument fails. First, Student did not plead claims under the Americans with Disabilities Act, Section 504, or other federal or state civil rights laws in her request for due process hearing. Student cannot, at this time, raise new claims. Second, such claims are outside OAH's jurisdiction.

51. Even if the idea that Student could have received a proportional share of her instructional minutes in physical education is considered, the actual time would be low. For example, under the November 19, 2015 IEP, Student received 300 minutes a week of instruction and students attending a school-based, group instruction program received 1,800 minutes a week, a proportion of 17 percent. If Student received 17 percent of 100 minutes a week of physical education instruction, that would be 17 minutes a week. Under the November 15, 2016 IEP, Student received 375 minutes a week of instruction and students attending a school-based, group instruction program received 1,800 minutes a week, a proportion of 21 percent. If Student received 21 percent of 100 minutes a week of physical education instruction, that would be 21 minutes a week. Or if like other students, Student received five and half percent of her instructional time in physical education, she would have received 16.5 minutes a week under the November 2015 IEP, and 21 minutes a week under the November 2016 IEP.

52. For Student's claim that District denied her a FAPE by not providing her specially designed physical education, the standard is not proportional minutes in comparison to same-age, typical peers. The standard is what is necessary to provide a

child a FAPE, that is, what is reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. The November 19, 2015 and November 15, 2016 IEPs offered, and Student received, special education and related services specifically in areas of gross motor development, fine motor development, math concepts, literacy skills in both reading and writing, expressive language, and social communication. While her progress since she was three years old had been objectively slow, it was, over time, progress at a pace that was not surprising given the significant medical, physical, and cognitive challenges Student was working through. As of the meetings for the November 15, 2016 IEP, Student met her fine motor goal to pick up and maintain in her hand for 10 seconds items of different shapes and textures. She partially met all three gross motor goals regarding ambulating, pulling to stand, and climbing stairs.

53. Student partially met her communication goal to communicate spontaneously using one to two word utterances on a voice-output augmentative alternative communication eye-gaze device for a variety of reasons including requesting items, actions, assistance, comment, to command, and to question in eight out of 10 opportunities. Student met her other communication goal, in pragmatics, to take turns with a communication partner on a joint topic using a voice-output augmentative alternative communication device when presented with an object that represents a joint reference (book, toy, art project) beyond two turns verbally in eight out of 10 opportunities.

54. Student partially met her math and communication goal to use spatial prepositions (on, off, in, out), descriptor adjectives (colors: red, yellow, blue; size: big little; interjections: wow, cool; and pronouns: I, you, mine) using a voice-output augmentative alternative communication eye-gaze device in eight out of 10 opportunities. Student partially met her literacy goal to identify all upper and lower case

letters when presented with a choice of two letters presented visually and verbally on a voice-output augmentative alternative communication eye-gaze device following processing strategies outlined in the notes page with 70 percent accuracy, and was inconsistent in her use of the voice-output augmentative alternative communication eye-gaze device with different providers. Student partially met her other goal to select an initial consonant followed by one of the word families "at," "an," "in," "ig" or "ug" on a voice-output eye-gaze communication device when no more than four consonants and one word family was visual with 80 percent accuracy.

55. Student met what had been called a "retelling" goal, now classified as a "writing" goal, to write two-word utterances following the reading of a story to retell story components using a voice-output augmentative alternative communication eye-gaze device in eight out of 10 opportunities.

56. Overall, Student demonstrated progress in her areas of unique need and toward her November 19, 2015 annual IEP goals. She specifically made progress in gross motor development and the social interaction of turn-taking, and it was her noticeable improvements in rolling the ball back and forth with the physical therapist that led to Ms. Mertz thinking, in September 2016, of Student participating in adapted physical education. Ms. Mertz suggested an adapted physical education assessment during an IEP team meeting in October 2016.

57. Regarding the annual goals of the November 15, 2016 IEP, Student also was reported to be making progress on most goals and was having more success toward some goals than others. In the area of using her voice-output augmentative alternative communication eye-gaze device, sometimes she randomly selected items from the screen, such as numbers and letters, but one day she chose the correct letter 80 percent of the time. In her gross motor skills goals, Student was making expected progress towards her goal for working on strengthening and stabilizing her core, but



had not had much opportunity to work on ambulating in her KidWalk gait trainer without the pelvic support. As had been shown over the many previous years, Student was making slow, modest, and nuanced progress, but given her genetic abnormality, medical fragility, and resulting severe motor and cognitive deficits, Student was making progress appropriate in light of her circumstances.

58. Student failed to demonstrate that specially designed physical education was the appropriate category of physical education for Student; Student met eligibility criteria for adapted physical education, but Student had limited time available for physical education instruction based on her home instruction program. Student failed to demonstrate that for Student to make progress appropriate in light of her circumstances, she required 16.5 or 17 minutes per week, or any other amount of instruction through specially designed physical education. In the absence of physical education instruction, through the special education and related services of her November 19, 2015 and November 15, 2016 IEPs, Student made progress in gross and fine motor development, as well as all other goal areas, that was appropriate in light of her circumstances.

59. Student failed to prove that District denied Student a FAPE by failing in the November 19, 2015 and November 15, 2016 IEPs to provide Student specially designed physical education.

## ISSUE 2: SUBSTITUTING THE RELATED SERVICE OF PHYSICAL THERAPY IN PLACE OF PHYSICAL EDUCATION

60. Student contends District denied her a FAPE by substituting the related service of physical therapy in place of physical education, a direct instruction special education service.

61. District contends it did not substitute physical therapy for physical education, but that it provided physical therapy as a form of physical education that was

specially designed for Student. District asserts Student was offered and provided a physical education program from the time she enrolled in District, and “[t]hat program was a special PE program, otherwise described as SDPE.” District argues Student received “specially designed physical education” “and those services were provided through her [physical therapy] services.”

### Legal Authority

62. A FAPE, as the IDEA Act defines it, includes both “special education” and “related services.” § 1401(9). “Special education” is “specially designed instruction . . . to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child . . . to benefit from” that instruction. (20 U.S.C. § 1401(26), (29).) A State covered by the IDEA must provide a disabled child with such special education and related services “in conformity with the [child’s] individualized education program.” (20 U.S.C. § 1401(9)(D); *Endrew F.*, *supra*, 580 U.S. \_\_\_\_ [137 S.Ct. at p. 994].)

63. Physical education is included in the federal definition of special education. (20 U.S.C. § 1401(29)(A)&(B); 34 C.F.R. § 300.39(a)(1)(ii); see also Ed. Code, § 56031, subd. (a).) Adapted physical education is included in the definition of physical education and therefore also is special education. (34 C.F.R. § 300.39(b)(2)(ii).)

64. The IDEA defines “related services” as transportation and such developmental, corrective, and other supportive services among a non-exclusive itemized list, which includes physical and occupational therapy, as maybe required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34; see also Ed. Code, § 56363, subd. (a).) The California Education Code uses the term “designated instruction and services” and states that term means “related services” as defined in the IDEA. California’s list of designated instruction and services, like the federal list, includes physical and occupational therapy. (Ed. Code, § 56363, subd.

(b)(6).) California also lists adapted physical education as a related service/designated instruction and services. (Ed. Code, § 56363, subd. (b)(5).) In conformity with the IDEA, California defines "special education" to include physical education, and adapted physical education is therefore both special education and a related service/designated instruction and services.

### Analysis

65. As analyzed in Issue 1, above, District did not offer or provide Student "specially designed physical education." District described physical therapy as a program of physical education that was specially designed for Student, but that does not turn physical therapy into "specially designed physical education" as that term is described in federal statutes and regulations, articulated in practice by credentialed physical education teacher Ms. Cullen, or defined and described by the California Department of Education.

66. At Student's triennial reassessment in fall 2014, District assessed Student for the need for school-based physical therapy to determine if she required physical therapy services and/or equipment in her school/home hospital setting. The licensed physical therapist who conducted the evaluation concluded Student's gross motor deficits impacted her ability to access and function in the school (home) setting and could not be appropriately addressed by other educators. The physical therapist found Student had deficits in multiple areas of gross motor functioning within the school setting including weight bearing endurance, standing skills, ambulation, and transitions. She recommended Student receive physical therapy service once a week for 60 minutes. She proposed three goals, and identified the treatment plan as addressing dynamic standing balance, lower extremity strengthening, motor planning, motor coordination, and gait training. The recommendation for the related service of physical therapy had nothing to do with and was not reported to be considered by the physical therapist as

part of a program of physical education.

67. District offered Student physical therapy in the IEPs in December 2014, and November 2015 and 2016 because she required physical therapy as a developmental, corrective, and supportive service to assist Student, as a child with a disability, to benefit from special education. District did not offer physical therapy as a substitute for something else, or in place of something else, or even as a version of something else that was specially designed for Student. District offered physical therapy in the November 19, 2015 and November 15, 2016 IEPs because the professionals providing physical therapy to Student concluded she met the criteria. The District members of the IEP team determined that Student required physical therapy to benefit from special education.

68. Student received physical therapy, and she did not receive physical education. However, despite the lack of physical education instruction in her home-based program, as explained above regarding Issue 1, Student made progress on her motor goals and improved her motor skills, while also making progress on many of the other goals in her IEPs, commensurate with her abilities and in light of her circumstances.

69. Student did not establish by a preponderance of the evidence that the November 19, 2015 and November 15, 2016 IEPs were not reasonably calculated to enable Student to make progress that was appropriate in light of her circumstances, that District substituted the related service of physical therapy in place of the direct instruction special education service of physical education, or that District's failure to provide physical education denied Student a FAPE.

## ORDER

Student's request for relief is denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, 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: March 21, 2018

/s/

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KARA HATFIELD

Administrative Law Judge

Office of Administrative Hearings