

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES COUNTY OFFICE OF
EDUCATION, COMPTON UNIFIED
SCHOOL DISTRICT, AND CALIFORNIA
CHILDRENS' SERVICES.

OAH CASE NO. 2011020489

ORDER DENYING MOTION TO
DISMISS

On May 11, 2011, Student filed a Second Amended Complaint, naming California Children's Services (CCS) as one of the respondents. The Complaint alleged, in pertinent part concerning CCS, that Student had been a CCS client receiving occupational therapy (OT) and physical therapy (PT) services; that CCS had reduced those services without a formal assessment; that Parent requested an OT assessment but that from April 2009 to date none has been performed; that no OT or PT assessment was performed in preparation for Student's April 14, 2011 triennial individualized educational program (IEP) meeting; and that at that April 14, 2011, IEP meeting, CCS representatives informed Parent, without performing any observation or evaluation of Student, that Student cannot benefit from OT or PT. The complaint stated three issues, first alleging that Student's placement and services denied her a free appropriate public education (FAPE), second alleging that she had not been appropriately assessed in all areas of suspected disability including OT and PT, and third alleging other procedural violations.

On May 31, 2011, CCS filed a Motion to Dismiss, arguing that the Office of Administrative Hearings (OAH) does not have jurisdiction over Student's claims raised against it. Specifically, CCS contends that it is only responsible for provision of medically necessary services for Student as defined by statute; that OAH has no jurisdiction to determine what constitutes medically necessary services; that the adequacy of Student's IEP, including the adequacy of OT and PT services, is the responsibility of the District; and that there is another administrative forum where any disputes and/or issues pertaining to CCS' medical necessity determinations are properly litigated. Student filed an opposition to the motion on June 2, 2011, contending that CCS is a public agency as defined by federal and state law, and that state law pertaining to interagency responsibilities mandates that disputes over CCS' assessment and provision of services be adjudicated in this due process proceeding.

APPLICABLE LAW

The Individuals with Disabilities in Education Improvement Act of 2004 (IDEA) applies to state and local educational agencies, and also to any other political subdivisions of the State that are responsible for providing education to children with disabilities. (34 C.F.R. §300.33; Ed. Code §56028.5).

Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) Special education related services, called designated instruction and services in California, include in pertinent part developmental, corrective, and supportive services, such as PT and OT, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(a)(26); Ed. Code, § 56363.)

Pursuant to Chapter 26.5 of Title 1, Division 7 of the Government Code (entitled "Interagency Responsibilities for Related Services" and commonly referred to as AB 3632), it is the joint responsibility of the Superintendent of Public Instruction (Superintendent) and the Secretary of Health and Human Services (Secretary) to ensure maximum utilization of resources to provide a child with a disability with a FAPE. (Gov't. Code, § 7570.) Pursuant to Government Code section 7572, a child shall be assessed in all areas of suspected disability including, in pertinent part, OT and PT (Gov't. Code, § 7572, subd. (a)); the assessor shall be a part of the IEP team (Gov't. Code, § 7572, subd. (d)(1)); and the assessor's recommendation shall be adopted by the IEP team (Gov't. Code, § 7572, subd. (d)(1).) The assessments conducted pursuant to Government Code section 7572 are governed by the assessment procedures contained in Education Code sections 56320 et seq., including: reassessments must not occur more than three years apart; assessors must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; the personnel who assess the student must prepare a written report of the results of each assessment, and provide a copy of the report to the parent. (Ed. Code, §§ 56320, 56327 & 56329.)

Government Code section 7572, subd. (d)(3) specifically provides: "Any disputes between the parent and team members representing the public agencies regarding a recommendation made in accordance with [the assessments provided for by Government Code section 7572] shall be resolved [by due process pursuant to Education Code section 56500 et seq.]"

California Education Code section 56501, subdivision (a), provides that a parent or public education agency may request a due process hearing when there is a proposal or a refusal to initiate or change the identification, assessment, educational placement or the provision of a FAPE to their child, or when there is a disagreement regarding the availability of a program available for the child, including the question of financial responsibility.

Special education due process procedures extend to the parent, under some circumstances to the student, and to the public education agencies involved in decisions regarding the student. (Ed. Code, § 56501, subd. (a); 20 U.S.C. § 1415(a).) A “public education agency” is defined as “a district, special education local plan area, or county office, ...or any other public agency providing special education or related services.” (Ed. Code, § 56500.) Similarly, federal law defines public agencies that are subject to the procedures of the IDEA as all political subdivisions of the State that are involved in the education of children with disabilities, including the State education agency, local education agencies, and other State agencies and schools, and State and local juvenile and adult correctional facilities. (34 C.F.R. § 300.2.)

Government Code section 7575 states, in pertinent part:

(a)(1) Notwithstanding any other provision of law, the State Department of Health Services, or any designated local agency administering the California Children's Services, shall be responsible for the provision of medically necessary occupational therapy and physical therapy, as specified by Article 5 (commencing with Section 123800) of Chapter 3 of Part 2 of Division 106 of the Health and Safety Code, by reason of medical diagnosis and *when contained in the child's individualized education program.*

(2) Related services or designated instruction and services not deemed to be medically necessary by the State Department of Health Services, that the individualized education program team determines are necessary in order to assist a child to benefit from special education, shall be provided by the local education agency by qualified personnel whose employment standards are covered by the Education Code and implementing regulations.

(b) The department shall determine whether a California Children's Services eligible pupil, or a pupil with a private medical referral needs medically necessary occupational therapy or physical therapy. A medical referral shall be based on a written report from a licensed physician and surgeon who has examined the pupil.

[Italics added.]

ANALYSIS

CCS argues that OAH does not have jurisdiction over it. CCS does not analyze its alleged conduct here regarding assessments and IEP team recommendations under Government Code section 7572, but instead relies on Government Code section 7575 which divides responsibility for the actual provision of “medically necessary” versus educationally

necessary OT and PT, assigning the former to CCS and the latter to the local educational agency. CCS argues that it is not responsible, under Government Code section 7575, for the provision of educationally necessary OT and PT that is not also medically necessary. CCS also argues that disputes regarding its medical necessity determinations are governed by an exclusive dispute resolution procedure governed by the California Code of Regulations, and that the Department of Health Care Services also has its own dispute resolution mechanism that is not governed by OAH.

CCS further argues that, if it is in fact obliged to provide OT and PT, but does not do so, the proper procedure is for District to provide it and then pursue CCS through interagency dispute channels. CCS cites to the case of *Nevada County Office of Education v. Superintendent of Public Instruction* (1983) 149 Cal.App.3d 767 (hereafter *Nevada County*), and to an OAH Order in another case applying its reasoning. In *Nevada County*, the Nevada County Office of Education sought to join CCS as a party to a due process hearing after CCS found that a student, who had been referred to it by the County, was not eligible for OT services under CCS criteria. The student then filed a due process complaint alleging that he was not receiving FAPE. The Court of Appeal affirmed the hearing officer's decision, which the trial court had upheld on appeal, which denied the request to join CCS as a party. The court stressed that the federal statutory scheme (then the Education for All Handicapped Children Act, the predecessor to the IDEA) placed primary responsibility for compliance with federal law on the public education agency, the entity federal law designated for insuring that a child receive educational and related services. Which state agency should fund those services, stated the court, was beyond the scope of a due process hearing as contemplated by Education Code section 56000 et seq.

Nevada County, published on December 12, 1983, did not analyze AB 3632, which was first enacted in 1984. Thus the opinion did not parse California's current statutory scheme for interagency responsibilities for related services. Here, Student has alleged that CCS was involved in the assessments and IEP team meetings. Government Code section 7575, subdivision (a) appears to contemplate that an agency like CCS would be responsible for medically necessary services contained in an IEP. Government Code section 7572, subd. (d)(3) specifically provides: "Any disputes between the parent and team members representing the public agencies regarding a recommendation made in accordance with [the assessments] shall be resolved [by due process pursuant to Education Code section 56500 et seq.]" Regardless of who bears the ultimate responsibility to provide medically or educationally necessary OT or PT services under Government Code section 7575, this case presents such a dispute. Although CCS may not ultimately be responsible for the provision of a FAPE after the facts are elicited at hearing, Student's allegations are sufficient to implicate CCS. Therefore, CCS' Motion to Dismiss is denied.

ORDER

CCS' Motion to Dismiss is denied.

Dated: June 9, 2011

/s/

JUNE R LEHRMAN
Administrative Law Judge
Office of Administrative Hearings