

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT and LOS ANGELES COUNTY
DEPARTMENT OF MENTAL HEALTH.

OAH CASE NO. 2011080612

ORDER DENYING LOS ANGELES
COUNTY DEPARTMENT OF
MENTAL HEALTH'S MOTION TO BE
DISMISSED AS A PARTY

BACKGROUND INFORMATION

On August 15, 2011, Student's mother (Mother) filed a due process complaint on behalf of Student, naming the Los Angeles Unified School District (District) and the Los Angeles County Department of Mental Health (DMH) as respondents. In the complaint, Student explains that he was placed through the individualized education program (IEP) process at a residential treatment center in Texas. Student, through Mother, contends that he no longer requires the level of care he is now receiving but rather only needs a lower level of care, which is available in the state of California.

On October 18, 2011, DMH filed a motion to add Student's father (Father) as a party to this matter. DMH alleged that the District had referred Student to DMH for a mental health assessment and that its recommendation for a residential treatment center placement for Student was adopted by Student's IEP team, including Father, on April 7, 2011. Mother, was not at the IEP meeting and did not participate in the IEP placement process. Student was thereafter placed, pursuant to his IEP, at the Devereaux School in Texas. DMH asserted that since Father had agreed to the placement, he was a necessary party to this due process proceeding, which had only been filed by Mother. The Office of Administrative Hearings (OAH) denied DMH's motion on October 26, 2011.

On November 8, 2011, DMH filed a motion to be dismissed as a party to this matter. DMH contends that the issues in Student's complaint amount to a dispute between Mother and Father regarding custody issues pertaining to Student. DMH contends that because Mother and Father have joint legal custody of Student but dispute what is the appropriate educational placement is for him, the resolution of that issue is a custody matter to be resolved by the family court. DMH also contends that under Assembly Bill 114, effective July 1, 2011, the District is solely responsible for Student's special education needs, including any mental health needs impacting Student's education.

For the following reasons, the motion by DMH to be dismissed as a party is denied.

DISCUSSION

Motion to Dismiss Based Upon Potential Custody Dispute

DMH's first contention is that the family court pre-empts OAH consideration of the issues pertaining to Student's IEP's and education because there is a dispute between Mother and Father as to what constitutes the appropriate placement for Student. DMH offers no legal authority, other than the OAH determination that Father is not a necessary party to this action, for its contention. The argument DMH makes is not persuasive. As OAH previously observed in its Order denying DMH's motion to join Father as a party, a parent, 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 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].)

Mother is Student's parent, and, according to DMH's motion and the exhibits attached to it, has joint legal custody of Student. Assuming that her joint custody also gives her joint educational rights over Student – and DMH does not assert to the contrary – Mother is entitled to file due process requests with OAH concerning Student's education. OAH is the agency charged with determining whether the IEP at issue offered Student a free appropriate public education. Until and unless a court removes joint custody from Mother, she is a proper petitioner in a due process proceeding and OAH has authority to hear the matter. A determination by OAH as to Student's appropriate placement will have no effect on custody issues pertaining to Student. Rather, the determination will only clarify if Mother's position regarding Student's placement should be adopted or whether the position of Student's IEP team, which included Father, should be adopted. Therefore, DMH's motion to dismiss based upon actual or potential custody issues between Student's parents is denied.

Motion to Dismiss Due to Passage of AB 114

Special education due process hearing procedures extend to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a); emphasis added.) In California, the determination of which agency is responsible to provide education to a particular pupil is, in most instances, governed by residency requirements as set forth in sections 48200 and 48204 of the Education Code. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57; *Orange County Dept. of Educ. v. A.S.* (C.D. Cal. 2008) 567 F.Supp.2d 1165, 1167.) A local educational agency (LEA) is generally

responsible for providing a free appropriate public education to pupils with disabilities who reside within the LEA's jurisdiction. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 48200.)

DMH contends that Assembly Bill 114, effective July 1, 2011, makes the school district solely responsible for Student's education, including issues concerning his mental health. DMH basically argues that it is no longer one of the public agencies responsible for any portion of Student's education, including related services addressing Student's mental health needs.

For purposes of special education, Education Code section 56028.5 provides that:

"Public Agency" means a school district, county office of education, special education local plan area, a nonprofit public charter school ...[as specified]..., or any other public agency under the auspices of the state or any political subdivision of the state *providing special education or related services to individuals with exceptional needs*. For purposes of this part, "public agency," means all of the public agencies listed in Section 300.33 of Title 34 of the Code of Federal Regulations. [Emphasis added.]

Section 300.33 of Title 34 of the United States Code of Regulations provides in part that "public agency" includes "any other political subdivisions of the State that are responsible for providing education to children with disabilities."

Prior to July 1, 2011, mental health services related to a student's education were provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code. (Gov. Code §7570, et seq., often referred to by its Assembly Bill name, AB 3632 [Chapter 26.5].) A student who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the student's parent had consented, be referred to a community mental health service, such as DMH, in accordance with Government Code section 7576. The student had to meet the criteria for referral specified in California Code of Regulations, title 2, section 60040; and the school district, in accordance with specific requirements, had to prepare a referral package and provide it to the community mental health service. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 14, § 60040, subd. (a); Gov. Code § 7576 et seq.)

On October 8, 2010, the California Legislature sent to former Governor Arnold Schwarzenegger, its 2010-11 Budget Act (Ch. 712, Stats. 2010), which, in item 8885-295-0001, provided full funding for Chapter 26.5 mental health services. The funding was in the form of reimbursement to community mental health agencies which had already performed Chapter 26.5 services. On that same day, the Governor signed the Budget Act after exercising his line-item veto authority. One of the items he vetoed was the appropriation for Chapter 26.5 mental health services by county mental health agencies. In his veto message the Governor stated: "This mandate is suspended." (Sen. Bill 870 [SB 870], 2010-11 (Reg. Sess.) (Chaptered), at p. 12.)

On February 25, 2011, the California Court of Appeal for the Second Appellate District affirmed that the Governor had authority to veto the funding for the statutory mandate. (*Cal. Sch. Bds. Ass'n v. Edmund G. Brown Jr., Gov.* (2011) 192 Cal.App.4th 1507, review denied June 8, 2011) (*CSBA v. Brown*.) In doing so, the court distinguished between a gubernatorial action “suspending” the Chapter 26.5 mandate, which would have been an unconstitutional substantive change to the law in violation of the single-subject rule, and the Governor’s veto to eliminate a funding appropriation. The court held the latter action was constitutional and resulted in freeing the local agencies from the legal duty to implement the statutory mandate. Thus, even though the Governor characterized his action as “suspending” the statutory Chapter 26.5 mandate, the Court of Appeal upheld his action as a veto of the funding appropriation for Chapter 26.5 services, which by operation of law freed DMH from the legal duty to implement the mandate but did not substantively change the law.

As a consequence of the Court’s determination that the Governor’s exercise of his line-item veto was constitutional, DMH’s obligation to provide mental health services was relieved at least as of October 8, 2010. However, in spite of the Court’s finding, DMH acknowledges in its pleadings in this case that the District sent DMH a referral to assess Student’s mental health needs sometime just before April 7, 2011, and that DMH accepted the referral and assessed Student. DMH also acknowledges that it recommended a residential placement for Student, that the recommendation was adopted by Student’s IEP team, including Father, and that Student was subsequently placed at Devereaux in Texas. DMH offers no explanation for why it acceded to the referral process in spite of not being legally required to do so, or under what auspices, such as a contract with the District to assess and place Student, the referral and placement process for Student was accomplished. However, based upon the information presently before OAH, DMH somehow accepted responsibility for assessing Student and meeting his mental health needs, at least until July 1, 2011, even though DMH’s implementation of the statutory mandate to assess and provide mental health services was not legally required.

On June 30, 2011, present California Governor Jerry Brown signed into law a new Budget Bill (SB 87) for the 2011-2012 fiscal year, and a trailer bill affecting educational funding (AB 114). Together the two bills did not repeal Chapter 26.5 of the Government Code in its entirety, but made substantial changes to it and related laws, particularly with respect to mental health services. Sections repealed were suspended effective July 1, 2011, and will be repealed by operation of law on January 1, 2012, unless amended in the meantime. In significant part, the obligation of the State Department of Mental Health, and its county designees, including DMH, to assess and provide related mental health services to special education pupils has been suspended, and the statutory responsibilities have been transferred to the LEAs instead. (See Gov. Code § 7573.) Henceforth, as of July 1, 2011, the LEAs, including District in the instant case, have the lead responsibility to provide related mental health care services to its qualifying pupils.

The new budget (SB 87) allocates approximately \$221.8 million dollars to LEAs to fund mental health services. Significantly, the new budget makes a one-time appropriation from the State general fund of another \$80 million dollars to county mental health agencies

to partially backfill county mental health expenditures under Chapter 26.5 for the 2010-2011 fiscal year. (*Ibid.*) In addition, another \$98.6 million from the Proposition 63 Mental Health Services Act is diverted by the new budget for county mental health agencies to fund nonsupplanting IEP/mental health care services for the 2011-2012 fiscal year. The law provides that an LEA may develop a contract with its county mental health agency setting forth the details of the two agencies' respective responsibilities, in order to access those funds. (SB 87, item 4440-295-3085.)

Therefore, as of July 1, 2011, Chapter 26.5 has been fundamentally changed and significant statutory provisions for related mental health services have been suspended, subject to repeal. DMH is no longer statutorily obligated to assess and provide mental health services to qualifying special education pupils under Chapter 26.5, including Student. However, DMH appears to have taken responsibility for Student from sometime prior to April 7, 2011, to at least July 1, 2011. Since Mother has placed at issue Student's placement at Devereaux as of April 7, 2011, DMH is a proper party at least for the time period prior to July 1, 2011, covered by the instant due process complaint.

Additionally, DMH has provided no information regarding what relationship it has, if any, to the District with regard to the mental health assessment of Student, or the provision of mental health services to him, for the period subsequent to July 1, 2011. There is no information as to whether DMH contracted with the District to provide services to Student or if it voluntarily assumed responsibility for Student's mental health needs through some other format. There is thus basis for making a determination as to whether DMH is a proper party to this case for the time period subsequent to July 1. DMH has therefore failed to meet its burden to demonstrate that it is not a proper party to this action.

ORDER

DMH's motion to be dismissed as a party is denied.

Dated: November 17, 2011

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings