

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT AND CALIFORNIA
DEPARTMENT OF EDUCATION

OAH CASE NO. 2011110065

ORDER GRANTING THE
CALIFORNIA DEPARTMENT OF
EDUCATION'S MOTION TO DISMISS

BACKGROUND INFORMATION

On November 1, 2011, Student filed a Due Process Hearing Request (complaint) against the Los Angeles Unified School District (LAUSD) and the California Department of Education (CDE). In his complaint, Student states that he is eligible for special education as a student with behaviors and characteristics consistent with autism. He contends that LAUSD has denied him a free and appropriate public education (FAPE) since December 9, 2010. Student contends that he requires a 24-hour a day residential placement because of his aggressive behaviors and other special needs. He asserts that there is no appropriate placement for him that is presently certified by the CDE but that his parents have located an appropriate residential placement that is not certified and that it is the only appropriate placement for him.

On November 8, 2011, CDE filed a motion to be dismissed as a party to this action, alleging that it is not an educational agency responsible for providing special education and related services to Student. Student filed an opposition to CDE's motion on November 16, 2011. On November 18, 2011, the Office of Administrative Hearings (OAH) received three additional pleadings addressing CDE's motion: CDE's reply to Student's opposition, Student's response to CDE's reply brief, and CDE's supplemental reply brief.

Student makes several arguments in support of his contention that CDE is a proper party. Student first contends that CDE is responsible for the general supervision of special education matters under the IDEA and therefore is ultimately liable under the IDEA for ensuring that a remedy is available to Student. He contends that CDE has fallen short if its duties under the Individuals with Disabilities Education Act (IDEA) with respect to the development and oversight of the special education system in California. Student also contends that CDE has failed to develop policies and procedures to ensure that local educational agencies (LEA's) such as LAUSD can provide appropriate remedies through the provision of an appropriate residential placement for children, such as Student, where no

such placement is presently certified by CDE. Student further contends that CDE is a proper party because CDE may need to take institutional actions, such as granting a waiver to the general provision that residential placements must be certified by CDE, in order to provide Student with access to a residential placement if such a remedy is warranted. Finally, Student contends that changes in state law make it unclear which state agency is ultimately responsible for the provision of FAPE to students requiring mental health services.

For the following reasons, Student's arguments are unpersuasive. CDE's motion to be dismissed as a party is therefore granted.

APPLICABLE LAW

Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) A "public agency" is defined as "a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.)

The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), 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 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 the Office of Administrative Hearings (OAH) is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

There is no right to file for a special education due process hearing absent an existing dispute between the parties. A claim is not ripe for resolution "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (*Scott v. Pasadena Unified School Dist.* (9th Cir. 2002) 306 F.3d 646, 662 [citations omitted].) The basic rationale of the ripeness doctrine is "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148 [87 S.Ct. 1507].)

DISCUSSION

CDE is not a Proper Party Solely Based on its Supervisorial Role

In the complaint, Student alleges that CDE is an appropriate party because of its supervisorial oversight of special education programs as the Statewide Educational Agency (SEA) under the Individuals with Disabilities Education Act (IDEA), as the SEA has the responsibility for the general supervision and implementation of IDEA. (20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a)(2006).) However, Student's complaint raises no claims against CDE that it was involved in Student's IEP process or that it specifically has denied Student a FAPE. The complaint makes no claims that CDE is a public agency involved in the provision of special education services or decisions regarding Student. Although there have been situations where CDE has been found to be an appropriate party to a due process complaint, those cases are not applicable here. For example, in *Orange County Dept. of Educ. v. A.S.* (2008) 567 F.Supp.2d 1165, the issue was which educational agency was responsible for providing special education services to a parentless child when the Orange County Juvenile Court had not appointed a legal guardian or responsible adult. The court found that CDE had responsibility by default under IDEA for providing a free appropriate public education (FAPE) to the parentless child in absence of any California law designating local entity responsible for that education. (*Id.* at p. 1170.)

Student's argument that CDE is an appropriate party because of its supervisorial role over LEA's would be equally applicable to any due process proceedings brought under the IDEA. In this case, Student's complaint indicates that he lives with his parent within the boundaries of LAUSD, that Student previously had been found eligible for special education, and that he has been provided special education and related services under an individualized education plan developed by LAUSD. California law clearly designates the local educational agency as having responsibility for the provision of FAPE. CDE is not Student's LEA; LAUSD is. California's statutory scheme creates school districts which are responsible for providing educational programming to students within their boundaries; CDE, for most purposes, only has supervisorial responsibility for that programming and is not directly responsible for providing the educational programming or services.

Additionally, IDEA defines and limits the hearing officer's jurisdiction in due process proceedings. The issue of CDE's oversight of local education agencies to ensure their compliance with relevant special education law and regulations is outside the scope of OAH's jurisdiction.

CDE is not a Proper Party Due to Changes in State Law Regarding Provision of Mental Health Services to Special Education Students

Student also asserts that there is a confusion regarding which state agency is now responsible for the provision of mental health services to special education students. He asserts that CDE is a proper party because of that confusion.

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).

Subsequently, 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 to assess and provide related mental health services to special education pupils has been suspended, and the statutory responsibilities have been transferred to the LEA's instead. (See Gov. Code § 7573.) Therefore, as of July 1, 2011, the LEA's, including LAUSD in the instant case, have the lead responsibility to provide related mental health care services to its qualifying pupils.

However, even during the period of time between October 8, 2010, and when the former Governor vetoed the budget appropriation for county mental health departments, and July 1, 2011, when the present governor signed into effect the bills modifying AB 3632, there was no confusion as to who ultimately was responsible for provision of mental health services to special education students. Student omits any reference in his pleadings to the fact that IDEA specifically places the responsibility for assessing a student and providing

necessary special education and related services on the student's LEA. The IDEA and its enabling regulations (Code of Federal Regulations, section 300.1, et seq.) specifically state that LEA's are ultimately responsible when a state has assigned responsibility for providing or paying for special education or related services to a non-LEA and the assigned public agency does not meet its obligations. (20 U.S.C. § 1412(a)(12); 34 C.F.R. §§ 300.154(a) and (b).) This is the situation that occurred during the time frame covered in this case. State law, under AB 3632, assigned responsibility to the departments of mental health for assessing Student's mental health needs and for providing him with placements and services deemed necessary through the assessment process. When the former governor vetoed funding for the county mental health departments, responsibility for assessment and provision of services defaulted to the state LEA's such as LAUSD. The responsibility of the LEA's has been clarified by SB 87 and AB 114. There is thus no confusion as to the fact that LAUSD is, and has been, responsible for providing Student with mental health services, including placement at residential treatment center if needed to provide him with a FAPE.

CDE is not a Proper Party Even if the Only Appropriate Placement for Student is not Certified

California educational law requires that LEA's may only place students at non-public schools which have been certified by CDE, unless a waiver is obtained. (Ed. Code, § 56366, subd. (d).) An Administrative Law Judge may not render a decision that results in the placement of a student in a nonpublic, nonsectarian school or that results in services provided by a nonpublic, nonsectarian agency if the school or agency has not been certified under Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).)

In his complaint and opposition to CDE's motion to dismiss, Student asserts that there are no certified residential placements either in California or in other states, which will accept him. He contends that the only appropriate placement is at a school in Ohio called Bellefaire JCB, which has agreed to accept him, but which is not certified by CDE. Therefore, because of the California statutory provisions prohibiting his placement at Bellefaire, Student contends that CDE must be retained as a party so that an appropriate remedy can be awarded to him if he prevails at hearing.

First, Student's argument is based on unproven factual contentions. In order to even arrive at Student's contention that Bellefaire is the only appropriate placement for him, Student must prove the following at hearing: 1. LAUSD denied him a FAPE. 2. The placement(s) proposed by LAUSD do not provide him with a FAPE. 3. Student requires a residential placement. 4. There are no certified residential placements in California that are appropriate for him. 5. There are no certified out-of-state placements that are appropriate for him. 6. Bellefaire is an appropriate placement. It is only upon making the factual finding that LAUSD did not offer Student a FAPE and that there are no certified placements appropriate for him that Student's concerns about the lack of an appropriate remedy would need to be reached. In any case, resolution of these factual issues is not appropriate in the context of a motion to dismiss.

However, even assuming that Student requires a residential placement and that the only appropriate school is not certified, CDE is still not a necessary or appropriate party to this case.

There is very little authority addressing a situation where no certified placement is available for Student. However, OAH has addressed a very similar situation in a previous case. In *Student v. Riverside Unified School Dist, et al.* (2008) Cal.Offc.Admin.Hrngs Case No. N2007090403, the parties stipulated that the only appropriate placement for the student was in an out-of-state residential treatment center that operated on a for-profit basis. Placement at a for-profit basis is prohibited under the requirements of Welfare and Institutions Code sections 11460, subdivisions (c)(2) through (c)(3). OAH found that it was the intent of the California legislature that California special education law did not abrogate any rights provided to special needs students under the IDEA. (Ed. Code, § 56000, subd.(e).) Therefore, if the only appropriate placement for the student was at a for-profit institution, placement there could be directed in order to ensure that the student received a FAPE. The United States District Court for the Central District of California affirmed OAH's decision in an unpublished order dated July 20, 2009, in case No. EDCV 08-0503-SGL (RCx). In neither the OAH proceeding nor in the District Court proceeding was CDE found to be a necessary party in spite of the fact that the LEA was prevented by California statute from placing the student at a for-profit institution.

There is thus no reason in the instant case for finding that CDE is a necessary or appropriate party because of arguments concerning what an appropriate or proper remedy might be should Student prevail at hearing.

CDE's Alleged Failures to Develop Policies and Procedure

Finally, Student contends that CDE is a proper and necessary party because it has fallen short of its duties under the IDEA with respect to the development and oversight of the special education system in California. Student contends that CDE has failed to develop policies and procedures to ensure that the LEA's can provide appropriate remedies to students who may require placement at a non-certified residential treatment center. First, as discussed above, CDE is not a necessary party because OAH can order a remedy contrary to California law as to the LEA if such an order is necessary and appropriate. Additionally, Student's contentions that CDE has failed in its responsibilities with respect to development and oversight of California's special education system is, in effect, an attack on the structure of CDE. Any remedy addressing those allegations would amount to structural and systemic statewide relief, not just relief for Student. Complaints for such structural and systemic relief are beyond the jurisdiction of OAH.

ORDER

CDE's motion to be dismissed as a party is granted. The matter will proceed solely against LAUSD as presently scheduled.

IT IS SO ORDERED.

Dated: November 22, 2011

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings