

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

EDUCATIONAL REPRESENTATIVE ON  
BEHALF OF STUDENT,

v.

COUNTY OF SACRAMENTO, CHILD  
PROTECTIVE SERVICES.

OAH CASE NO. 2012020586

ORDER GRANTING MOTION TO  
DISMISS

On February 16, 2012, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings (OAH), naming the County of Sacramento, Child Protective Services (CPS). On February 28, 2012, CPS filed a Motion to Dismiss, alleging that it is not a proper party to this action because it is not a responsible public agency under special education laws. On March 1, 2012, Student filed an opposition.

On March 5, 2012, OAH requested that the parties submit additional briefing on whether CPS is a public agency pursuant to Title 34 Code of Federal Regulations, parts 300.33 (2006), and California Education Code, section 56501, subdivision (a), and if the issue of whether CPS is a public agency should be bifurcated for hearing from the issue of whether CPS denied Student a free appropriate public education (FAPE). Student and the District submitted their additional briefing on March 12, 2012, and the Student submitted supplemental briefing on March 14, 2012.

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.)

Title 34, Code of Federal Regulations, parts 300.33 states that a “[p]ublic agency includes the SEA [state educational agency], LEAs [local educational agencies], ESAs [educational service agencies], nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political

subdivisions of the State that are responsible for providing education to children with disabilities.”

Government Code, section 7586, subdivision (a) provides:

All state departments, and their designated local agencies, shall be governed by the procedural safeguards required in Section 1415 of Title 20 of the United States Code. A due process hearing arising over a related service or designated instruction and service shall be filed with the Superintendent of Public Instruction. Resolution of all issues shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter.

Although there is no special education law or regulation that addresses bifurcation of issues, OAH generally looks to civil cases and the California Administrative Procedure Act (APA) for guidance. Government Code section 11507.3 of the APA of states, in part:

(b) The administrative law judge on the judge's own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

Code of Civil Procedure section 598 contains a similar provision for civil trials:

The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue....

## DISCUSSION

### *Motion to Dismiss*

CPS contends that it is not an appropriate party in the matter because it is not responsible for nor does it provide special education services to Student. Student asserts that CPS is an appropriate party because CPS has not permitted the school district to implement his individualized education program (IEP). Specifically, Student contends that CPS has

prevented the school district and his foster parents from implementing the sensory diet developed by his occupational therapy (OT) provider.

According to the complaint and supplemental briefing documents, Student is a five year old foster child and the juvenile court suspended his parents' educational rights and appointed the foster parents as the educational representative to exercise Student's educational rights. Student is eligible for special education services under the categories of autistic-like behaviors and intellectual disabilities. Pursuant to Student's IEP, on May 5, 2011, Isis Health Care Services (Isis), a non-public agency began providing Student with OT services, which included developing a sensory diet to address his sensory processing deficits. On or about September 2011, CPS informed the foster parents that the sensory diet could no longer be implemented. On October 21, 2011, the school district convened an IEP team meeting and CPS informed the school district and foster parents that they could not implement the sensory diet as specified in the IEP. CPS reiterated its position in a subsequent meeting in November 2011. According to the documents provided, the juvenile court is apparently aware of the dispute regarding the sensory diet, but has not issued any order that prohibits CPS's course of conduct.

As to any claims that Student has against CPS for preventing his foster parents from implementing portions of his sensory diet, especially the use of the proprioceptive techniques, such as the use of a weighted vest or wrapping Student in a blanket, to assist in controlling his behavioral excesses, the evidence established that CPS prevented the foster parents from implementing portions of the sensory diet because the California Department of Social Services (CDSS) informed CPS that the foster parents' actions violated licensing regulations. To the extent that CPS's decision regarding the foster parents was based on CDSS' citation of the foster parents pursuant to CDSS' licensing laws and regulations, OAH does not have jurisdiction to hear Student's claim as there is no claim involving the provision of special education services.<sup>1</sup> Therefore, Student's claims that involve whether the foster parents may implement Student's sensory diet as developed by Isis are dismissed.

As to Student's claim that CPS is preventing the school district from implementing the sensory diet, CPS's purported conduct does not involve the provision of special education services by CPS. While CPS may be preventing the school district from implementing the IEP, its authority comes through its authority as vested by the juvenile court to monitor the safety of Student as a foster child. Therefore, any dispute as to CPS's conduct should be raised before the juvenile court as CPS is arguably acting on its behalf. Accordingly, CPS's motion to dismiss is granted as OAH does not have jurisdiction to resolve this dispute that rests within the jurisdiction of the juvenile court.

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<sup>1</sup> The foster parents may contest the citation with CDSS. (See Cal. Code Regs., tit. 20, § 89252.)

*Bifurcation*

As CPS's motion to dismiss is granted, the issue of bifurcation is moot.

ORDER

1. CPS's Motion to Dismiss is granted, and the matter dismissed.
2. CPS shall provide a copy of this order of the Juvenile Court of Sacramento County to be included in Student's case file.

Dated: March 20, 2012

/s/

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PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings