

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TUOLUMNE COUNTY CALIFORNIA
CHILDREN'S SERVICES.

OAH CASE NO. 2012100238

ORDER (1) DENYING MOTION TO
DISMISS, (2) DENYING MOTION TO
LIMIT ISSUES AT HEARING, AND (3)
GRANTING MOTION TO JOIN
SONORA ELEMENTARY SCHOOL
DISTRICT AND TUOLUMNE
COUNTY OFFICE OF EDUCATION
AS PARTIES

On October 3, 2012, Student filed a due process hearing request (complaint) against Tuolumne County California Children's Services (TCCCS), alleging that TCCCS denied Student a free appropriate public education (FAPE).

On November 19, 2012, CCS filed a motion to dismiss the complaint against it, or alternatively, to limit the issues at hearing or to join the Sonora Elementary School District (District) and/or the Tuolumne County Office of Education (COE) as parties. On November 27, 2012, Student filed an opposition.

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 (2006); 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.)

The IDEA requires a school district to provide a FAPE, or "access to specialized instruction and related services which are individually designed to provide educational

benefit to” a child with special needs. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) Related services needed by a child with a disability to benefit educationally are determined by the child’s IEP team members, at an IEP team meeting, and recorded in the IEP. (34 C.F.R. § 300.22 (2006)). The IEP team must consider, and an IEP must include, among other things, academic and functional goals designed to (i) meet the child’s needs resulting from the child’s disability to enable the child to be involved in and make progress in the general education curriculum, and to (ii) meet the child’s other educational needs that result from the child’s disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2); 34 C.F.R. § 300.320(a)(2)(i) (2006).)

In contrast to providing related services for purposes of implementing the IDEA, California Children’s Services (CCS), administered by the Department of Health Care Services (Department) and designated local agencies like TCCCS, is charged with providing medically necessary OT and PT to pupils with physical disabling conditions who are treated in public schools, under the State of California’s Medical Therapy Program. (Health & Saf. Code, § 123825 and 123950; Cal. Code Regs., tit. 22, § 41450; Gov. Code, § 7575, subd. (b)(i).) Whether, and to what extent, OT and PT services are medically necessary is determined by the pupil’s medical therapy conference members and prescribed by a CCS paneled physician.¹ (Cal. Code Regs., tit. 2, § 60323, subd. (d).) This determination is not controlled by the IEP team, or a part of the IEP process. Medically necessary OT and PT are provided by CCS to ameliorate or improve a pupil’s diagnosed condition, and are focused on medical treatment goals, not access to curriculum. (Cal. Code Regs., tit. 2, § 60323; Gov. Code, § 7575, subd. (b)(3).)

Pursuant to Title 1, Division 7, Chapter 26.5 of the Government Code, entitled “Interagency Responsibilities for Providing Services to Children with Disabilities” (Gov. Code, § 7570, et seq. (Chapter 26.5)), it is the joint responsibility of the Superintendent of Public Instruction (Superintendent) and the Secretary of the Health and Human Services Agency (Secretary) to ensure maximum utilization of resources to provide a child with a disability with a FAPE and related services. (Gov. Code, § 7570.) A child with a disability may need both educational and medical needs addressed during the school day, and the part of Chapter 26.5 that deals expressly with medically necessary OT and PT provided by CCS requires that “[l]ocal education agencies shall provide necessary space and equipment for the provision of [OT] and [PT] in the most efficient and effective manner.” (Gov. Code, § 7575, subd. (d).)

The language of Chapter 26.5 on interagency obligations draws a clear distinction between IDEA related services and medically necessary OT and PT. The statute provides that CCS “shall be responsible for the provision of medically necessary occupational therapy and physical therapy...by reason of medical diagnosis and when contained in the child’s

¹ A CCS physician may also approve a prescription submitted by a pupil’s private physician. (Cal. Code Regs., tit. 2, § 60323, subd. (c).)

[IEP].” (Gov. Code § 7575, subd. (a)(1).) However, “[r]elated services not deemed medically necessary...that the [IEP] team determines are necessary in order to assist a child to benefit from special education, shall be provided by the local education agency....” (Gov. Code § 7575, subd. (a)(2).) Nowhere in the Medical Therapy Program or Chapter 26.5 is CCS required to provide related services not deemed by the Department to be medically necessary. Once the Department determines that OT and PT are no longer medically necessary, if the pupil’s IEP team has determined that OT and PT are related services necessary for a child to benefit from special education, the obligation to provide those services shifts to the local educational agency. (Gov. Code § 7575, subs. (a)(1) and (2).)

Under Chapter 26.5, “[a]ll state departments, and their designated local agencies shall be governed by the procedural safeguards in Section 1415 of Title 20 of the United States Code [IDEA].” (Gov. Code § 7586, subd. (a).) Thus, it appears that even though CCS-provided medically necessary PT and OT were not intended to be provided for purposes of providing a FAPE under IDEA, California has determined that disputes arising about such services when they are listed in the child’s IEP shall be heard in an IDEA due process hearing. Further, all hearing requests that involve multiple services that are the responsibility of more than one state department “shall give rise to one hearing with all responsible state or local agencies joined as parties.” (Govt. Code § 7576, subd. (c).) OAH has jurisdiction to hear due process claims arising under the IDEA and California special education law. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

DISCUSSION

Student’s complaint states one claim, that CCS denied Student, a young girl with cerebral palsy, a FAPE during the 2011-2012 and 2012-2013 school years. Student alleges that CCS did this by failing to provide adequate OT and PT services necessary for her to access the curriculum, failing to implement her IEP, unilaterally reducing her OT and PT services “outside of the IEP team process,” failing to actively participate in the IEP team process, and failing to consider independent evaluations.

TCCCS moves to dismiss the complaint against it, or alternatively, to limit issues at hearing or join District and/or COE as parties, as discussed more fully below. Student opposes, arguing that the underlying facts are in dispute, that TCCCS has misinterpreted the statutes cited, and that CCS was held to be responsible for providing a FAPE to a student in *Student v. California Children’s Services*, OAH case number 2011060589 (2012) (*Student v. CCS*). The analysis in this order is not restricted to the reasoning in *Student v. CCS*, as OAH decisions are not binding precedent. (Cal. Code Regs., tit. 5, § 3085.)

Motion to Dismiss

TCCCS moves to dismiss Student’s complaint against it because TCCCS was not, and is not, responsible for providing Student with a FAPE. Neither the Medical Therapy Program nor Chapter 26.5 require TCCCS to provide Student with non-medically necessary

related services, let alone a FAPE. TCCCS is not statutorily obligated to ensure that Student's OT and PT services were "adequate" to provide Student with educational benefit, or to be a member of Student's IEP team, active or otherwise.² However, whether TCCCS provided OT and PT services to Student pursuant to its statutory mandate, a contract with the local educational agency, or otherwise, is a factual inquiry for determination at hearing.

TCCCS also contends that OAH has no jurisdiction to determine whether, or to what extent, Student's OT and PT services were medically necessary, or to hear interagency disputes. The jurisdiction of OAH is indeed limited to matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to a child. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) However, Government Code section 7586, subdivision (a), as discussed above, contemplates that regardless of whether the duty to provide the service arose under the IDEA, or California law regarding publically financed medical services, so long as the services were stated in a child's IEP, a due process hearing request under IDEA procedures could be requested. Thus, to the extent Student disputes the provision of medically necessary OT and PT that are listed in an IEP, Student is entitled to a hearing under the IDEA procedures. Thus, OAH has jurisdiction under Government Code section 7586, subdivision (a). In sum, because TCCCS's motion is not limited to matters that are facially outside of OAH jurisdiction, but instead seeks a ruling on the merits, the motion to dismiss is denied.

Motion to Limit Issues at Hearing

TCCCS contends that under Government Code, section 815, a public entity cannot be liable for an injury unless a statute or state or federal constitution imposes liability for that injury, or unless the agency is contractually liable, and that therefore the issue at the due process hearing should be limited to its obligations under Chapter 26.5 as the only statutory obligations applicable to this dispute.

The circumstances under which TCCCS was providing OT and PT services to Student, whether or not the services were necessary for Student to benefit from his educational program, which agency was, and is, responsible for providing the services written into Student's IEP, and whether the services provided by TCCCS were improperly terminated, will be areas of factual inquiry at the hearing. Accordingly, TCCCS's motion to limit the issue at hearing to whether or not it complied with Chapter 26.5 is denied.

Motion to Join Educational Agencies as Parties

As set forth above, Chapter 26.5 authorizes a due process hearing under the IDEA and California special education law for disputes involving related services. However, it requires that disputes involving services that are the responsibility of more than one state department

² The language of AB 3632 clearly distinguishes Department personnel from the members of the IEP team. (See Gov. Code § 7572, subs. (b) and (c).)

be decided at one hearing with all responsible state or local agencies joined as parties. (Gov. Code, § 7576, subds. (a) and (c).)

Student's complaint alleges a denial of FAPE, which necessarily implicates the local educational agencies responsible for providing Student with special education and related services. However, Student fails to identify the local education agencies in whose boundaries Student resided or attended school, or who convened Student's IEP team meetings, determined Student's educational needs, drafted the IEP documents, or provided Student with special education related services. Nonetheless, Student's IEPs for the 2011-2012 and 2012-2013 school years, attached to the motion, identify District as Student's "district of residence" and Tuolumne County Special Education, represented by TCCCS to be COE, as Student's "district of service." Student's opposition does not dispute that these are accurate copies of Student's IEP, and these documents indicate that District and COE are local education agencies that may be responsible for providing Student with a FAPE, including the related services in dispute. As Chapter 26.5 mandates that all local agencies responsible for related services be joined as parties to one due process hearing on disputes regarding such services, the motion to join District and COE is granted.

ORDER

1. TCCCS's motion to dismiss is denied.
2. TCCCS's motion to limit issues at hearing is denied.
3. TCCCS's motion to join Sonora Elementary School District (District) and Tuolumne County Office of Education (COE) as parties to this due process proceeding is granted. This matter shall be known as Student v. Tuolumne County California Children's Services, Sonora Elementary School District and Tuolumne County Office of Education.
4. TCCCS shall serve copies of all pleadings, moving papers and orders in this matter on District and COE no later than December 5, 2012. OAH shall serve a copy of this order on District and COE at their addresses of record with OAH.
5. Pursuant to title 20 United States Code section 1415(c)(2)(E)(ii), the applicable timeline for this due process hearing, including the resolution session, recommences as of the date of this order, in order to allow District and COE to participate in a resolution session.

6. All previously scheduled hearing and mediation dates are vacated. A scheduling order with new mediation, prehearing conference and hearing dates shall be forwarded to all parties by OAH.

Dated: December 4, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings