

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2016110289

ORDER GRANTING REQUEST FOR
RECONSIDERATION AND ORDER
DETERMINING OFFICE OF
ADMINISTRATIVE HEARINGS HAS
JURISDICTION OVER STUDENT'S
REMAINING ISSUES FOR HEARING

On February 16, 2017, Administrative Law Judge Darrell Lepkowsky issued an order that held that the Office of Administrative Hearings has jurisdiction to hear Student's two issues as defined in the December 5, 2016 Order Following Prehearing Conference. On February 22, 2017, Tehachapi Unified School District filed a motion for reconsideration based upon the recent United States Supreme Court decision in *Fry v. Napoleon Community Schools* (February 22, 2017) --- U.S. ----, 2017 WL 685533 (*Fry*). Student has not submitted a response.

APPLICABLE LAW

The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education", 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 OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. § 701 et seq.) or the Americans with Disability Act (ADA) (Title 42 U.S.C. §§ 1201, et seq.).

DISCUSSION

Reconsideration

District alleges new law in support of the request reconsideration, with the Supreme Court's decision as to whether a student needs to exhaust claims under the IDEA when the thrust of the complaint relates to legal claims that do not involve the provision of FAPE. The Supreme Court held that exhaustion of IDEA's administrative procedures is not required when the gravamen of the complaint is something other than the denial of the IDEA's core guarantee of a FAPE. Therefore, District established grounds for reconsideration with *Fry* decision, and reconsideration is granted.

OAH Jurisdiction to Hear Student's Claims

While the Supreme Court sets forth a new standard regarding exhaustion of IDEA claims when a student, such as in this case, files claims allegation violations of Section 504 or the ADA (Title 42 U.S.C. §§ 1201, et seq.), the test set forth by the Supreme Court still finds that OAH has jurisdiction to hear Student's claims. "For that reason, § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA--as when, for example, the plaintiffs in *Smith* [*v. Robinson* (1984) 468 U.S. 992] claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act." (*Fry, supra*, --- U.S. ----, 2017 WL 685533, *10.)

In this case, Student alleges that District's conduct in the individualized educational program team meeting regarding the prescribed applied behavior analysis treatment plan, and failure to include that treatment plan as part of the IEP health plan denied Student. This is in contrast to *Fry* where the complaint only alleged disability discrimination without referring to whether that student received a FAPE. Accordingly, using the test set in *Fry, supra*, --- U.S. ----, 2017 WL 685533, *10-14, Student is entitled to an administrative hearing whether District denied Student a FAPE because Student couches the complaint in terms of FAPE denial, and not merely violations of Section 504 or the ADA, and thus OAH has jurisdiction to hear Student's two claims.

ORDER

1. Motion for Reconsideration is granted.
2. Based on reconsideration, OAH has jurisdiction over Student's two issues as defined in the December 5, 2016 Order Following Prehearing Conference and all dates presently set in this case will remain as calendared.

IT IS SO ORDERED.

DATE: February 23, 2017

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Peter Paul Castillo
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PETER PAUL CASTILLO
Presiding Administrative Law Judge
Office of Administrative Hearings