BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. TEHACHAPI UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016110289 ORDER DETERMINING OAH HAS JURISDICTION OVER STUDENT'S REMAINING ISSUES FOR HEARING

PROCEDURAL HISTORY

Student filed a request for due process hearing on October 20, 2016, alleging violations of Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. § 701 et seq.), the Americans with Disability Act (ADA) (Title 42 U.S.C. §§ 1201, et seq.), the Individuals with Disabilities Education Act, and undefined California state statutes, by Tehachapi Unified School District. The basis of all three issues was District's alleged failure to permit Student's parent the opportunity to participate in the process of developing her individualized education program. Student alleged District prohibited Parent from discussing the inclusion of a health plan in Student's IEP that would permit Student's private applied behavior analysis therapist to provide services to Student at school pursuant to a medical prescription for the services from one of Student's treating physicians. Student also alleged that the failure to include a health plan for the services in her IEP discriminated against Student in violation of her rights under the ADA and Section 504, as well as denied Student a free appropriate public education. The Office of Administrative Hearings dismissed Student's ADA and Section 504 claims at the prehearing conference held on December 5, 2016, as being beyond OAH's jurisdiction.

OAH convened the due process hearing on December 19, 2016. After Student's opening statement, the parties made a joint request to continue the matter to brief the extent of the issues raised by Student in her due process complaint, and the extent of OAH's jurisdiction over the issues. OAH granted the parties' request. The parties timely filed their briefs pursuant to OAH's December 19, 2016 order.

APPLICABLE LAW AND DISCUSSION

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, the ADA, or the California Unruh Civil Rights Act (Civ. Code, § 51)].

Student's issues for hearing, as clarified at the December 5, 2016 prehearing conference, are:

A. Did District deny Student a FAPE by interfering with her parents' right to participate in the individualized education program process when it did not allow Student to receive applied behavioral analysis treatment at school as prescribed by Student's doctor?

B. Did District deny Student a FAPE by failing to include a health plan in Student's IEP allowing for the provision of applied behavioral analysis treatment at school as prescribed by Student's doctor?

Student contended that one of her physicians wrote her a prescription for 40 hours per week of applied behavior analysis therapy as medically necessary for Student. Student contended that her medical insurance agreed to fund the prescribed therapy services but that to receive the entire 40 hours per week, it was necessary for the services to be delivered, at least in part, at Student's school, by the therapist funded through her insurance. Student contended that her parent attempted to discuss creation of a health plan for provision of the services at school outside of the IEP process, but that District insisted that it would only discuss the issue at an IEP meeting. Student contended that District convened an IEP meeting on September 9, 2016, but then refused to permit Parent to discuss the creation of a health plan and refused to create a health plan as part of Student's IEP to implement the prescribed therapy.

In her opening statement at the beginning of the hearing on December 19, 2016, Student conflated her issues alleging a denial of FAPE with her allegations, dismissed by OAH as beyond its jurisdiction, that District violated her rights under Section 504 and the

ADA. It was Student's mingling of the legal bases of her issues that precipitated OAH's order granting the parties' request to brief the issue of OAH jurisdiction over Student's due process case.

Student's opening and reply briefs on jurisdiction fail to clarify the issue of jurisdiction. Rather than distinguishing her FAPE issues from her ADA and Section 504 issues, or acknowledging that her intent was not to allege a denial of FAPE, Student again argued that her prime concern was her allegation that District denied her access to services required under Section 504 and/or the ADA, but then again alleged that District denied her a FAPE by its refusal to allow her parent to discuss developing a health plan to include in Student's IEP and by District's failure develop a health plan that included her medically prescribe therapy.

Student cites first to Section 504 of the Rehabilitation Act and then to the ADA for the proposition that those acts are broader and may create more rights than does the IDEA. Student cites to *K.M.* v. *Tustin* (9th Cir. 2013) 725 F.3d 1088, in which the Ninth Circuit found that a school district's compliance with its obligations to a disabled child under the IDEA does not necessarily establish compliance with its obligations to the child under the ADA. *K.M.* therefore stands for the proposition that while a district's action or lack of action may not deprive a child of an educational benefit, the district may deny the child equal access to education under other federal statutes. *K.M.* is not relevant to Student's case because it was not decided based on IDEA claims.

In any case, after starting with a fairly in-depth discussion of why her issues are covered by the ADA and Section 504, implying that it is those two federal statutes which govern her contentions that District was required to permit her to receive therapy through her private provider at school, Student then contradicts herself throughout her opening brief by contending that District's actions denied her a FAPE. For example, Student specifically states at page 6 of her opening brief that her argument that she be permitted to receive therapy at school is a medical issue that does not allege any deprivation of the sort addressed in an IDEA proceeding. Student then conversely states that she seeks a ruling 1) as to whether her September 9, 2016 IEP team meeting met legal requirements of permitting her parent to participate in the IEP regarding the issue of including Student's prescription for ABA therapy in a health plan attachment to her IEP and 2) whether her IEP was required to include a health plan for how her prescribed ABA therapy would be administered at school.

District, in its response brief, points to Student's emphasis on alleged violations of her rights under the ADA and Section 504, as well as the inconsistencies in Student's brief, to support its contention that OAH does not have jurisdiction over Student's issues. District cites to *Parent on Behalf of Student* v. *Cypress School District* (OAH Dec. 6, 2010) OAH Case No. 2010110572 (*Cypress I*) and *C.C.* v. *Cypress School District* (C.D.Cal. 2011) 56 IDELR 295 (*Cypress II*), for the proposition that OAH does not have jurisdiction over issues solely alleging that a school district has denied a student a requested accommodation required under the ADA or Section 504. District contends that such requests for

accommodation raise issues of equal access to education, which are not cognizable under the IDEA, and therefore not within OAH's jurisdiction.

In *Cypress I*, the student contended that his rights under the ADA, Section 504, and various California anti-discrimination statutes, were violated by the school district's refusal to permit him to bring his service dog to school. OAH dismissed Student's due process case because the student's complaint made absolutely clear that the student was not alleging any violation of IDEA. In his complaint the student specifically conceded that he was receiving a FAPE and was therefore was not challenging his current IEP. Student brought his due process case solely for the purpose of exhausting all administrative remedies available to him. Since Student conceded he was not alleging a denial of FAPE, OAH dismissed his due process case for lack of jurisdiction. Student thereafter filed a complaint in federal court, alleging the same six causes of action raised in his due process request. Student also filed for an injunction mandating his school district to permit his service dog on campus. In *Cypress II* the court granted the injunction, finding that the student was likely to succeed on his ADA claim. The court did not address whether the student required the service dog in order to receive a FAPE, because the student did not make a denial of FAPE allegation in his complaint before OAH or in his complaint filed in district court.

Since the student in *Cypress I and II* specifically stated that he was not alleging a denial of FAPE as a basis for his claim that his school district was required to permit him to bring his service dog to school, neither *Cypress* case is relevant to the instant matter. Here, despite Student's contradictory statements and inconsistent legal theories, the fact remains that Student continues to contend that her parent's opportunity to engage in the IEP process was significantly impeded by District's alleged failure to discuss developing a health plan to address Student's medically prescribed therapy, and that Student was substantively denied a FAPE by District's alleged failure to develop the health plan. Both issues specifically allege a denial of FAPE, and both are therefore properly brought in a due process hearing filed under the IDEA and comparable state education statutes.

The issues as presently stated by Student raise cognizable claims of alleged denials of FAPE under the IDEA and pertinent state law. As such, OAH has jurisdiction over the issues as presently plead, as well as jurisdiction to hear District's affirmative defenses.

ORDER

1. OAH has jurisdiction over Student's two issues as defined in the December 5, 2016 Order Following Prehearing Conference.

2. All dates presently set in this case will remain as calendared.

3. The telephonic prehearing conference will be held on February 27, 2017, at 3:00 p.m. The parties should be prepared to discuss the witnesses they intend to call and how many hearing days they require to present their respective cases.

4. The due process hearing will be held on March 7 - 9, 2017, at the OAH offices located at 15350 Sherman Way, Suite 300, Van Nuys, California 91406, and continuing day-to-day thereafter at the discretion of the administrative law judge. The hearing will begin at 9:30 a.m. on the first day of hearing and at 9:00 a.m. all subsequent days, unless otherwise ordered.

DATE: February 16, 2017

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Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings