

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010050752

DECISION

June R. Lehrman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 9, 10 and 11, 2010, in Los Angeles, California.

Student was represented by Tania Whiteleather, Attorney at Law. Student's Mother attended the hearing on August 9 and 10, 2010. Mother did not attend on August 11, 2010. She authorized Ms. Whiteleather to proceed in her absence.

Susan Winkelman, Attorney at Law, represented Los Angeles Unified School District (District). Due Process Specialist Sharon Snider attended the hearing on August 9, 2010. Due Process Specialist Michelle Ahkuoi attended the hearing on August 10 and 11, 2010.

Parent filed the Due Process Hearing Request (complaint) on May 20, 2010. On July 7, 2010, OAH ordered the hearing continued for good cause. Sworn testimony and documentary evidence were received at the hearing. At hearing, the parties were granted a continuance to file written closing arguments by August 23, 2010. The parties each timely filed their closing briefs by that date. Upon receipt of the written closing arguments, the record was closed and the matter was submitted.

ISSUES¹

- 1) Did District deny Student a free appropriate public education (FAPE) by failing to hold an individualized education program (IEP) team meeting within 30 days of Student's enrollment in the District?
- 2) For the 2009-2010 school year, did District deny Student a FAPE by failing to implement placement of Student at a residential treatment center?

FACTUAL FINDINGS

1. Student is 14 years old. Student was eligible for special education during the 2009-2010 school year and continues to be eligible for such services.
2. Student was arrested for sexual misconduct in December 2009.
3. From December 2009 up to March 23, 2010, Student resided at either Las Padrinos Juvenile Hall or Eastlake Juvenile Hall. During his residence at Juvenile Hall, the local educational agency (LEA) responsible for his education was Los Angeles County Office of Education (LACOE).
4. In or around January 2010, Student was referred to Los Angeles County Department of Mental Health (DMH) for a mental health assessment. On or around February 8, 2010, DMH assessed Student. The assessment report recommended as follows: "Treatment should include: Individual therapy, at least 60 minutes, up to 120 minutes per week; Family therapy, at least 120 minutes, up to 240 minutes per month; Group therapy, up to 300 minutes per week; Medication support, monthly or as deemed appropriate by attending psychiatrist; Case management as needed."
5. The assessment report also stated that Student was "in need of a 24-hour highly supervised and intensive therapeutic residential program," and that "DMH will implement such a plan if the Court orders [Student] to be on "Home of Parent" status or dismisses the court case. If the Court determines that [Student] is (*sic*) remain on a "Suitable Placement" order, the placement possibility resides with the Probation Department."
6. Kathryn Stroup is a supervising psychiatrist who works in DMH's AB 3632 residential placement unit.

¹ At the pre-hearing conference conducted on August 4, 2010, Student withdrew Issue Number 3 of the complaint.

7. Ms. Stroup explained at hearing that the assessment's delineation of responsibility between DMH and the Probation Department was in accordance with DMH's normal practices. DMH is normally not involved in "suitable placement" orders for students who are on probation. DMH normally provides residential placements only for students who are under a juvenile court disposition if the court case has been dismissed, the Student has been released to home, or there is otherwise a court order that approves a DMH placement. According to Ms. Stroup, there are regulatory regimes other than AB 3632 that govern residential placements for students, such as probation or the Department of Child and Family Services, with which DMH is not normally involved. In such cases, the procedures under AB 3632 are not followed. In general, under AB 3632, if DMH conducted a mental health assessment recommending residential placement, the LEA would normally invite DMH to an IEP meeting. DMH would then look for residential placements that would accept the student, starting locally and moving out of state if necessary. Then, if parents consent, DMH and the LEA would implement that placement. When a student is about to be released from Juvenile Hall because the court case has been dismissed or the Student has been released to home, DMH normally waits for a LEA to partner with to implement a residential placement recommendation. DMH is "on hold" until they learn who is the LEA responsible for Student's education. Usually DMH learns who the new LEA is from the parent or LACOE.

8. DMH does not charge parents for placements under AB 3632. However, some LEAs do not reimburse parents for their transportation to family therapy at the residential facility. Each LEA has a different policy on such costs.

9. LACOE held an IEP meeting for Student on February 23, 2010, while he was residing at Juvenile Hall. At that IEP, DMH presented the results of its assessment. The IEP notes reiterated DMH's conditions for proceeding with residential placement: "DMH reported Student qualifies for mental health services. Student . . . will need from the court an order to release on home (*sic*) in order to be recommended for residential placement."

10. At the time of the February 23, 2010, LACOE IEP, there was confusion about Student's eligibility category. Although prior to his entry into Juvenile Hall, his prior LEA had qualified him for special education under emotional disturbance (ED), the February 23, 2010, LACOE IEP labeled him as having a "Specific Learning Disability" with a secondary eligibility category of "Speech and Language Impaired." The IEP notes stated that the DMH residential placement recommendation would require Student to be reclassified under ED.

11. The February 23, 2010, LACOE IEP offered Student placement in a modified regular education classroom with specially designed instruction, 100 minutes of Resource Specialist Program (RSP) five times per week, designated instruction and services (DIS) remedial language/speech instruction for 30 minutes one time per week, DIS counseling for 30 minutes one time per week, and a behavior management assistant for 15 minutes three times per month.

12. LACOE held an addendum IEP meeting on March 15, 2010, which clarified that Student was eligible under the ED category, and continued the discussions with DMH about

residential placement. Student was still residing at Juvenile Hall. The IEP notes stated: “AB 3632 findings indicate that [Student] is in need of residential services. DMH will implement such plan if the Court [o]rders [Student] to be on ‘Home of Parent Status’ or dismisses the court case. If the Court determines that [Student] is to [r]emain on a ‘Suitable Placement’ order, the placement responsibility resides with the Probation Department. In the event [t]hat [Student] is placed by the Probation Department, DMH recommends that he receive mental health services to support [t]he [s]pecial [e]ducation to be provided in such a placement.”

13. The March 15, 2010, IEP notes stated that the team agreed with the recommendation for residential placement. However, the DMH representative stated that DMH “will need to partner with an educational partner in order for placement to occur. No LEA has assumed responsibility at this time.” Pending the determination as to which LEA would be responsible to partner with DMH to accomplish the placement, DMH agreed to proceed with the search for an available residential placement.

14. DMH was unable to find any local residential placements, but by the end of March/beginning of April 2010 had located two out-of-state facilities. DMH informed these potential placements of the nature of Student’s offense. Both placements had sexual offender programs and accepted Student into them.

15. On March 16, 2010, the Los Angeles County Juvenile Court entered an order (hereafter Order) declaring Student a ward of the court pursuant to Welfare and Institutions Code section 602.² The Order took custody of Student from Parents, placed Student in the care, custody and control of the probation officer, and ordered Student to be suitably placed by the probation officer. Orders for “suitable placement” require the Probation Department to place the minor in a placement suitable to the particular offense involved. The Order did not deprive Parents of educational rights regarding Student’s education.

16. The Order stated “County will pay any costs in connection with the placement or transportation of said minor pursuant to Sections . . . 900-914 WIC.” The Order further stated: “Minor to be placed in a placement that provides sexual offender counseling. The court will review a 778 WIC³ petition if funding for residential AB 3632 placement comes

² Welfare and Institutions Code section 602 provides, in relevant part that: “any person who is under the age of 18 years when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining a crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.”

³ Welfare and Institutions Code section 778 provides that any parent of a child who is a ward of the juvenile court may, upon grounds of change of circumstance or new evidence, petition the court for a hearing to change, modify, or set aside any order of court previously made, or to terminate the jurisdiction of the court.

through. If the AB 3632 placement is found the court will terminate suitable placement order and place minor on DEJ.”

17. The Order’s alternatives to “suitable placement” never transpired. Funding for residential AB 3632 placement never came through. Parents never pursued a petition pursuant to Welfare and Institutions Code section 778. The court never terminated the suitable placement order.

18. DMH’s Kathryn Stroup received the Order on or around March 25, 2010. In Ms. Stroup’s experience, the language of the Order was unusual. She testified at hearing that juvenile court orders usually choose clearly between one of two courses of action. In the first, probation with a suitable placement order, a student is under the custody of the Probation Department and DMH is normally not involved. In the other, a student’s court case is dismissed or the student is placed on “Home on Probation,” in which case the district of residence is student’s LEA, and DMH proceeds normally through the IEP process. Ms. Stroup had never seen an order with language like this. She believed the Order permitted DMH to proceed with exploring potential placements, which they did, but would then have required Parents to ask the juvenile court for permission to place Student there.

19. Ms. Stroup discussed the availability of the two out-of-state placements with Student’s probation officer, with Parents, and with Parents’ educational advocate in the March/April 2010 time frame during which Student was moved out of Juvenile Hall. Thereafter, DMH was never informed of who Student’s new LEA was. DMH was not invited to any subsequent IEP meetings held by District in 2010. DMH was not notified of any subsequent juvenile court proceedings pertaining to Student’s placement. DMH therefore did not proceed with implementation of the two potential placements. Ms. Stroup did not give a copy of the Order to District.

20. On or around March 23, 2010, Student’s probation officer placed him at Rancho San Anton (RSA), a private non-profit group home that provides residential therapeutic treatment services for delinquent offenders. RSA is a licensed children’s institution within the meaning of Education Code section 56155.5 and a licensed community care facility within the meaning of Welfare and Institutions Code section 727. All the residents there are placed pursuant to court order, mostly through probation officers with some exceptions placed through foster care. RSA has contracts with the probation departments of six counties including Los Angeles. RSA’s program is highly-regarded for offenders convicted of sexual misconduct. RSA’s treatment program for a particular individual is dictated by their offense, and tailored to fit the tolerance of the individual.

21. RSA is located within District. Upon Student’s residency there, beginning on or around March 23, 2010, District became the LEA responsible for his education. LACOE and District are not in the same Special Education Local Plan Area (SELPA).

22. John Bracken, Senior Social Worker with RSA, has a master’s degree in educational psychology and counseling. He has worked at RSA for fourteen years. He served as

Student's case manager. He testified at hearing that RSA was in possession of the Order and maintained a copy in Student's file. RSA did not give a copy of the Order to District. It was not RSA's normal practice to disclose court orders to District.

23. RSA billed its services to the probation departments with whom it contracted, in this case the County of Los Angeles Probation Department.

24. Mr. Bracken explained that RSA typically does not interact with DMH and has not done so in Student's case. Mr. Bracken is not familiar with AB 3632 referrals or assessments, and did not see DMH's assessment report. Mr. Bracken opined that Student's mental health needs were being addressed by the program at RSA, and that those needs were therefore not impeding his education; however, he has not done a formal assessment of Student. From approximately March 23, 2010, when Student entered RSA, Student received at RSA the following services: Individual therapy, at least 60 minutes, up to 120 minutes per week; Family therapy, at least 120 minutes, up to 240 minutes per month; and Group therapy, up to 300 minutes per week. Student's family therapy sessions are twice monthly.

25. On or around March 23, 2010, Student was enrolled at William Tell Aggeler School (Aggeler). Aggeler is a school in the District. All residents of RSA attend Aggeler; all students who attend Aggeler are residents of RSA, pursuant to court order. Aggeler is not typically privy to the nature of its students' criminal offenses, nor the terms of the court orders pursuant to which they are placed at RSA. Aggeler Assistant Principal Neezer McNab, special education teacher Michele Dunner, and school psychologist Margaret Keyser all testified that they were not aware of the Order and are not normally made aware of court orders pertaining to their students, all of whom are under juvenile court sentence. Parents' educational advocate testified that he had not provided the Order to anyone within Aggeler or District.

26. Aggeler's normal administrative practice was to interview students upon enrollment, and to review their prior IEPs to determine placement and accommodations. When he enrolled, on or around March 23, 2010, Student was placed into the special day class taught by special education teacher Dunner. Ms. Dunner received Student's February 23, 2010, LACOE IEP within one or two weeks after his enrollment. Separately, Parent also forwarded the March 15, 2010, LACOE IEP to Ms. Dunner. Ms. Dunner reviewed the IEPs upon receipt, to determine Student's accommodations.

27. When Ms. Dunner reviewed the LACOE IEPs, she did not believe DMH should be invited to Student's upcoming IEP meetings that would be convened while he was placed at Aggeler. Since Student was at Aggeler, and all students who attended Aggeler were placed by their probation officers in residential treatment at RSA, Ms. Dunner interpreted the IEPs as delineating responsibility between DMH and the Probation Department. She inferred that because of the suitable probation placement, DMH would not be responsible for Student. Ms. Dunner's opinion was that Student's transfer IEP would be convened solely to address goals and classroom placement, not to revisit his residential placement at RSA which was pursuant to court order.

28. School psychologist Keyser received Student's February 23, 2010, and March 15, 2010, LACOE IEPs within three weeks after his enrollment. She reviewed the IEPs upon receipt. From April 22, 2010, Ms. Keyser provided DIS counseling one time per week for 30 minutes, as was recommended in the LACOE February 23, 2010, IEP. Ms. Keyser acknowledged that for the period from March 23, 2010, until April 22, 2010, Student was entitled to DIS counseling that he did not receive; there was a week delay for spring break and another delay while she was unavailable.

29. Ms. Keyser's opinion, when reading the LACOE IEPs, was that although the team had agreed on AB 3632 residential placement, there were restrictions on DMH such that if the court placed Student at RSA, then the placement decision rested with the probation officer. According to Ms. Keyser, since the court had placed Student through the probation officer, the residential placement could not be revisited by a District IEP team.

30. At hearing, Aggeler Assistant Principal McNab did not acknowledge a duty to offer residential placement to students who are already placed at RSA, as that placement is pursuant to a court order that District cannot change. She did not believe inviting DMH to an IEP for a student placed at RSA was required, since District could not remove Student from the court-ordered placement there.

31. District's transfer IEP meeting was not convened within 30 days of Student's transfer into District. District was unable to convene the transfer IEP within 30 days of Student's enrollment due to an influx of new students. It convened the meeting as soon as it was reasonably possible to do so. Student's transfer IEP was convened on June 10, 2010, and concluded on July 23, 2010.

32. Aggeler special education teacher Dunner and Assistant Principal McNab credibly testified at hearing that Student made educational progress during the period at issue, from enrollment up to the filing of the complaint. In Ms. McNab's opinion, upon Student's transfer into District, Student received comparable educational services to those he had been receiving before. At hearing Mother conceded that Student had done well at Aggeler and had made educational progress there. Mother did not dispute that the educational placement and services Student received there were appropriate.

33. Parents have received a bill for "restitution, fines and service charges" from the Los Angeles County Probation Department in the amount of \$3,223.61. Parents have been unable to determine what this bill is for. Specifically, they do not know whether they are being charged for Student's placement at RSA. They have not paid this bill. The Probation Department has also asked Mother to fill out statements regarding her income, but Mother does not know for what purpose these may be used.

34. Parents have incurred costs in traveling from their home to RSA for family therapy. From March 23, 2010, until August 1, 2010, Parents traveled 41.4 miles each way, twice a month.

35. District has not offered transportation services or reimbursement to Student's parents for costs related to his residential placement. District has not offered payment or reimbursement for any costs Parents may be charged for Student's current residential placement.

LEGAL CONCLUSIONS

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion on all issues.

Issue One: 30-Day IEP Meeting

2. Student contends that he was denied a FAPE because District failed to hold an IEP meeting within 30 days of his transfer into District. District contends that the delay did not result in a denial of FAPE or any substantive harm to Student or Parents.

3. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a FAPE. (20 U.S.C. §1400; Ed. Code, § 56000.) A 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" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil

to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment (LRE). (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

5. In the case of an individual with exceptional needs who has an IEP and transfers into a district from a district not operating programs under the same SEPLA in which he or she was last enrolled in a special education program within the same academic year, the LEA shall provide the pupil with a FAPE, including services comparable to those described in the previously approved IEP, in consultation with the parents, for a period not to exceed 30 days, by which time the LEA shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law. (20 U.S.C. § 1414(d)(2)(C); 34 C.F.R. § 300.323(e); Ed. Code, § 56325, subd. (a)(1); Ed. Code, §56043, subd. (m)(1).)

6. To facilitate the transition from one school district to another, the new school in which the student enrolls shall take reasonable steps to promptly obtain the pupil's records, including the IEP and supporting documents and any other records relating to the provision of special education and related services to the pupil, from the previous school in which the pupil was enrolled. (Ed. Code, § 56325, subd. (b)(1).)

7. The decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(1).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents; or caused a deprivation of educational benefit. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(2).) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

8. Here, it is undisputed that District failed to develop, adopt, and implement a new IEP within 30 days of Student's transfer into the District. Student transferred into the District on March 23, 2010. District's IEP meeting thereafter was not convened until June 10, 2010, after the filing of the complaint, and was not ultimately concluded until July 23, 2010. By not convening the meeting within 30 days, District committed a procedural violation.

9. Student does not, however, contend that the procedural violation impeded his right to a FAPE, significantly impeded the opportunity of Parents to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Student's contention is solely procedural.

10. The remedy that Student requested in the complaint was that District should proceed to convene the 30-day IEP, and since that remedy was obtained after the filing of the complaint, Student seeks no further remedy. Student simply contends that he should be adjudicated the prevailing party because the remedy was already obtained, arguably as a result of his due process filing.

11. However, in order to prevail at a due process hearing, it is insufficient to establish a procedural violation. Student must also establish that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program. No such loss or interference has been proven, or even argued. At Aggeler, Student was immediately placed into the special day class taught by special education teacher Dunner, based upon Aggeler's normal administrative practice to determine placement and accommodations upon enrollment. Ms. Dunner received Student's February 23, 2010, LACOE IEP within one or two weeks after his enrollment, and his March 15, 2010, LACOE IEP shortly thereafter from Parent. Ms. Dunner reviewed the IEPs upon receipt, to determine Student's accommodations. In Ms. McNab's opinion at hearing, which was uncontradicted, Student received comparable educational services upon his enrollment in District to those he had been receiving before. Educationally, Mother concedes that Student was doing well. Aggeler special education teacher Dunner and Assistant Principal McNab testified at hearing that Student made educational progress during the period at issue, from enrollment up to the filing of the complaint, and this was not disputed. Thus, upon transferring into the District, Student received instruction specially designed to meet his unique needs. He also received the developmental and supportive services that were required to assist him in benefiting from special education. Despite a delay in receiving DIS counseling services from the school psychologist until April 22, 2010, Student's mental health needs were being addressed from March 23, 2010, onwards by the program at RSA, and those needs were not impeding his education. From approximately March 23, 2010, when Student entered RSA, Student received at RSA all the services that had been recommended by the AB 3632 assessment. (Factual Findings 20, 21, 24, 25, 26, 27, 28, 31, 32; Legal Conclusions 2-10.)

12. Student's complaint was filed on May 20, 2010, and never amended. He does not make any contentions here about any IEP ultimately developed for him, other than to stipulate that the delayed IEP meeting was concluded on July 23, 2010. The time frame under examination here is solely the period from March 23, 2010, until the filing of the complaint on May 20, 2010. During that time frame, Student has not established that the delay in convening his 30-day IEP meeting denied him a FAPE. (Factual Findings 20, 21, 24, 25, 26, 27, 28, 31, 32; Legal Conclusions 2-11.)

Issue Two: Out-of-State Residential Placement

13. Student contends that he was denied a FAPE because District should have convened an IEP meeting, invited DMH, and in conjunction with them, offered AB 3632 residential placement. Student contends that had District convened an IEP team meeting that included DMH, he would have been offered, at no cost to parents, a free out-of-state residential placement that included some reimbursement for parental transportation for therapeutic visits. Student acknowledges that the placement and services he received at RSA and Aggeler were appropriate. However, he contends that because they were not offered by District pursuant to the AB 3632 assessment through the IEP process, and instead were provided under a juvenile court order that could potentially require parental reimbursement, they were not “free” as required by the IDEA. While Student acknowledges that Parents have yet to pay anything for the placement at RSA, he contends that Parents have incurred transportation costs from their home to RSA for family therapy which should have been defrayed by District, had District offered AB 3632 residential placement. District contends that when Student transferred into District from LACOE, he was placed by court order at RSA, a placement that District had no power to change. District also contends that DMH’s AB 3632 residential placement referral was conditioned upon Student’s release from probation, a condition which never occurred.

14. As stated in Legal Conclusion 7 above, the decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents; or caused a deprivation of educational benefit. The hearing officer “shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program.”

15. The IDEA allows states the flexibility to provide related services required in IEPs through interagency agreements between the state educational agency and other public agencies. (See 20 U.S.C. § 1412(a)(12).) California has established a statutory scheme that provides for interagency responsibility, between LEAs and DMH, as regards the provision of educationally related mental health related services. (Gov. Code, §§ 7570 - 7588.) This statutory scheme is known as AB 3632 after the Assembly Bill that created the law. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1463, fn. 2.) The statutory scheme provides that the State Department of Mental Health, through county departments like DMH, is responsible for providing mental health services if required in the IEP of a child. (Gov. Code, § 7576, subd. (a).)

16. It is the explicit intent of the Legislature that the LEA and the community mental health service vigorously attempt to develop a mutually satisfactory placement that is

acceptable to the parent and addresses the educational and mental health treatment needs of the pupil in a manner that is cost effective for both public agencies, subject to the requirements of state and federal special education law. (Gov. Code, § 7576, subd. (a).) “In no case shall the inclusion of necessary related services in a pupil’s individualized education plan be contingent upon identifying the funding source.” (Gov. Code, § 7572, subd. (d).)

17. A school district, IEP team or parents can initiate a referral for a mental health assessment. (Gov. Code, § 7576, subd. (b).) This referral is known as an “AB 3632 referral.” If mental health services are recommended by the assessor as a related service, “the recommendation of the person who conducted the assessment shall be the recommendation of the [IEP] team members who are attending on behalf of the local educational agency.” (Gov. Code, § 7572, subd. (d)(1).)

18. Government Code section 7572.5 describes the process by which an IEP team determines whether a residential placement is required for a student. When an assessment determines, and a member of the pupil’s IEP team recommends, a residential placement for a pupil with a serious emotional disturbance, the IEP team shall be expanded to include a representative of the county mental health department. (Gov. Code, § 7272.5, subd. (a).) If the resulting IEP calls for residential placement, the IEP must designate the county mental health department as lead case manager. (Gov. Code, § 7572.5, subd. (c)(1).) The county mental health case manager shall coordinate the residential placement plan as soon as possible after the decision has been made to place the pupil in a residential placement. (Cal. Code Regs., tit. 2, § 60110, subd. (b).) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. (34 C.F.R. § 300.104.)⁴

19. The county mental health agency’s responsibility is derivative of that of the school district. The county mental health agency “is responsible for the provision of mental health services” to the pupil only “if required in the individualized education program” of the pupil. (Gov. Code, § 7576, subd. (a).) On the other hand, the school district’s obligation to expand the IEP team to include a representative of county mental health, and to designate county mental health department as lead case manager, is derivative of the assessment’s recommending residential placement. (Gov. Code, §§ 7572.5 & 7572, subds. (d), (e).)

20. As stated in Legal Conclusion 3 above, “related services” are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. The transportation included within the definition of “related services” is not specifically defined. (20 U.S.C. §1401(26).) It generally includes transportation of the student from home to school. (34 C.F.R. § 300.34(c)(16); Ed. Code, §§ 41850; 41851; 56195.8, subd. (5).) Transportation may, when educationally appropriate, also include transportation costs and expenses related to family visits to a distant residential

⁴ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

placement. (See *Bridgewater-Raritan Regional Board of Education* (N.J. 2008) 50 IDELR 270, 108 LRP 48811; *Provincetown Public Schools* (MA 2004) 42 IDELR 94 ,104 LRP 51968; *Niskayuna Central School District* (N.Y. 1999) 30 IDELR 913, 30 LRP 5702.)

21. Welfare and Institutions Code governs the authority of the juvenile court, and sets forth the statutory regime governing wards of the court. Children under the age of 18 may be subject to the jurisdiction of the juvenile court, and may be adjudged as wards of the court when they have violated municipal, state or federal law. (Welf. & Inst. Code, §§ 601, 602.) When a minor is adjudged a ward of the court pursuant to Welfare and Institutions Code section 602, the juvenile court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor, including that he be suitably placed under a probation officer's supervision in a licensed community care facility. (Welf. & Inst. Code, §727.)

22. Welfare and Institutions Code sections 900 through 914 provide that the "support and maintenance" costs of wards of the court, up to a certain amount, are paid by the county in which the court is located. If that amount is insufficient, the court may, under certain circumstances, order the parents to pay the balance. (Welf. & Inst. Code, §§ 902, 903 & 903.4.)

23. The Government Code and the Education Code provide for coordination between courts and SELPAs, and division of financial responsibility, when courts place disabled children in residential facilities. (Gov. Code, §§ 7579-7582; Ed. Code, §§ 56155-56166.5.) These provisions facilitate locating an appropriate special education program in the SELPA where the residential facility is located. (Gov. Code, § 7579, subd. (a); Ed. Code, §§ 56156, 56156.4.)

24. These provisions also place financial responsibility for the "residential costs and the cost of noneducation services" of such students onto the placing agency, court or parent, and explicitly state that the LEA is not financially responsible for such costs when it is not the placing agency. (Gov. Code, §§ 7579, subd. (b), 7581; Ed. Code, § 56159.) The terms "residential costs" and "cost of noneducation services," as used here, are not specifically defined by any statute or regulation. The regulations governing the interagency responsibilities under AB 3632 state: "Words shall have their usual meaning unless the context or a definition of a word or phrase indicates a different meaning." (2 C.C.R. § 60010, subd. (a).) Thus the terms "residential costs" and "cost of noneducation services," include room and board.

25. The provisions of the Welfare and Institutions Code (Welf. & Inst. Code, §§ 900 – 914), Government Code (Gov. Code, §§ 7579-7582), and Education Code (Ed. Code, §§ 56155-56166.5), all of which provide for the payment of the residential costs of wards of the court by the court or other placing agency, and allow for the ultimate shifting of those costs to the parents, conflict with the IDEA, which provides that residential programs, including room and board, must be at no cost to the parents of the child if required by the IEP. (34 C.F.R. § 300.104.)

26. *County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500 (*Smith*), addressed the conflict between these IDEA and these Welfare and Institutions Code provisions, and found that the parent of a ward, who normally is required to repay the county for the costs of her child's juvenile court placement, is not required to do so if the child has an IEP and the juvenile court places him in a special education facility. In *Smith*, as here, the minor had an IEP that did not offer AB 3632 residential placement. He came under the jurisdiction of the juvenile court and was made a ward pursuant to Welfare and Institutions Code section 602, and was suitably placed. The county sought to enforce the cost provisions of Welfare and Institutions Code section 903 against the mother. The court found that to do so would violate the IDEA's guarantee of a FAPE, which trumped the provisions of Welfare and Institutions Code section 903 by virtue of the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2). (*Smith, supra*, 74 Cal.App.4th at pp. 518-519.)

27. The Welfare and Institutions Code contains other provisions for fines to be levied against wards of the court who have violated municipal, state or federal law, and for restitution to victims of their conduct. (Welf. & Inst. Code, §§ 703.5 & 703.6.) Parents can under certain circumstances be held jointly and severably liable for the fines and restitution levied against the ward. (Welf. & Inst. Code, §§ 703.7.)

28. OAH's jurisdiction is limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing. OAH is expressly barred from issuing declaratory decisions in special education matters, regarding the applicability of a statute, regulation, or judicial precedent unless otherwise expressly authorized by the IDEA. (Cal. Code Regs. tit. 5, § 3089.) Like other judicial and administrative bodies, OAH cannot write advisory opinions based upon speculation as to what might occur. (See e.g., *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [84 Cal. Rptr.3d 223, 230] [the court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].)

29. Here, Parents have failed to meet their burden that they were denied a FAPE because Student's placement at RSA was not free. No evidence was presented that Parents have paid, or even been billed any costs related to Student's placement at RSA. They have only received a bill for "restitution," and no evidence was provided that the bill was for the RSA placement. Instead, on its face, this bill appears to relate not to the costs of Student's placement, but to fines and restitution under Welfare and Institutions Code sections 703.5, 703.6 and 703.7. Moreover, any potential order against Parents for "support and maintenance" costs of wards of the court under Welfare and Institutions Code sections 902, 903 and 903.4 would be unenforceable, under the analysis of *Smith, supra*, 74 Cal.App.4th at pp. 518-519. Thus, Parents have failed to prove that the placement at RSA was not "free" within the meaning of the IDEA. Any determination otherwise would be pure speculation and result in an advisory opinion. (Factual Findings 1-35; Legal Conclusions 1, 3-7, 13-28.)

30. Parents thus rely solely on the costs of their transportation to RSA for family therapy, 41.4 miles each way, twice a month from March 23, 2010, until August 1, 2010, arguing that they would have been reimbursed these costs within the “transportation” component of “related services” if District had convened an IEP, invited DMH and offered an AB 3632 residential placement. However, Parents have not established that District made a procedural error in failing to invite DMH to an IEP meeting, nor that District denied Student a FAPE by failing to offer an AB 3632 residential placement under the facts and circumstances of this case. Here, Student was under a juvenile court placement order that placed him in the care, custody and control of the probation officer, and that ordered Student to be suitably placed by the probation officer in sexual offender counseling. DMH’s assessment report and its statements in each of the LACOE IEPs recommended residential placement only if Student were released or dismissed, not if he were suitably placed by his probation officer. District’s obligation to expand the IEP team to include a representative of DMH, and to designate DMH as lead case manager, was derivative of the assessment’s recommending residential placement. Here, District’s obligations were pre-conditioned by DMH upon Student’s release from probation, a condition precedent that had not yet occurred. Although the Order contemplated that AB 3632 funding might still come through, Aggeler was not made aware of the Order by anyone including the court, DMH, LACOE, RSA, nor Parents. Thus District was not aware of the Order’s contemplation of a possible AB 3632 placement. As far as District was, or reasonably could have been aware, Student was at Aggeler and RSA under a suitable placement order that precluded AB 3632 residential placement. Thus, Parents have not met their burden of proving that Student was denied a FAPE because District failed to invite DMH to an IEP meeting or offer AB 3632 residential placement. (Factual Findings 1-35; Legal Conclusions 1, 3-7, 13-29.)

ORDER

All of Student’s requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this case.

