

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CABRILLO UNIFIED SCHOOL
DISTRICT AND SAN MATEO COUNTY
BEHAVIORAL HEALTH AND
RECOVERY SYSTEM.

OAH CASE NO. 2010090040

ORDER DENYING MOTION TO
DISMISS

BACKGROUND

On May 5, 2011, Student filed a motion to amend his request for due process hearing (complaint) naming the Cabrillo Unified School District (District) and the San Mateo County Behavioral Health and Recovery System (referred to here as Mental Health). On May 26, 2011, OAH granted Student's motion to amend his complaint and the matter was deemed filed on that day. On June 27, 2011, Mental Health filed a motion to be dismissed as a party to this action. Neither Student nor District has filed an opposition to this motion.

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.)

A student who has been determined to be an individual with exceptional needs or is suspected of needing mental health services may, after the Student's parent has consented, be referred to a community mental health service in accordance with Government Code section 7576 when the student meets criteria for referral specified in California Code of Regulations, title 2, section 60040, and the school district has, in accordance with specific requirements, prepared a referral package and provided it to the community mental health service. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 14, § 60040, subd. (a).)

Under the Individuals with Disabilities in Education Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) Local educational agencies (LEAs) are required as part of their obligation to provide “related services” if the student needs them. (20 U.S.C. § 1401(26).) Related services are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (*Ibid.*) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) DIS can include mental health services. (Ed. Code, § 56363, subs. (b)(9), (10).)

AB 3632

In 1984 the Legislature passed AB 3632, adding Chapter 26.5 to the Government Code (Gov. Code, § 7570 et seq.).¹ AB 3632 divided responsibility for the delivery of mental health services to special education students between the Superintendent of Public Instruction and the Secretary of Health and Human Services. Under Chapter 26.5, the county mental health agency "is responsible for the provision of mental health services" to the student "if required in the individualized education program [IEP]" of the student. (§ 7576, subd. (a).) The school district remains ultimately responsible for making a FAPE available to a student needing mental health services. (20 U.S.C. § 1414(d)(2); Ed. Code, § 56040(a).)

Under AB 3632, a school district, an IEP team, or a parent may initiate a referral to a county mental health agency by requesting a mental health assessment. (§ 7576, subd. (b).) The county mental health agency then assesses the student, and if the student is eligible for its services, places a representative on the IEP team. (§ 7572.5, subd. (a).) If the student requires a residential placement, the county mental health agency becomes the lead case manager and is responsible for the non-educational costs of the placement, while the school district is responsible for the educational costs. (§§ 7572.2, subd. (c)(1), 7581.) In case of a dispute concerning the delivery of services under AB 3632, a parent, student or agency may file a compliance complaint with the Department of Education. (Cal. Code Regs., tit. 2, § 60560; tit. 5, §§ 4600 et seq.)² In addition, any parent, student, or agency may request a due process hearing, and OAH has jurisdiction to decide the matter under the procedures applicable to special education due process hearings. (§ 7586, subd. (a).) This is such a proceeding.

¹ All further code references are to the Government Code.

² If services under AB3632 are required by an IEP and are not provided, the parent, adult pupil or LEA may request that the Superintendent of Public Instruction or the Secretary of the Health and Welfare Agency resolve the dispute. (§ 7585; Cal. Code Regs., tit. 2, §§ 60600, 60610 [process for disputes between agencies].) This does not preclude a parent or adult pupil from also requesting a special education due process hearing. (§7585, subd. (g).)

The Governor's Veto and Suspension of the Mandate

In May 2010, during negotiations with the Legislature concerning the budget for fiscal year (FY) 2010-2011, the Governor requested that the Legislature suspend the AB3632 mandate. (Legislative Analyst's Office, Overview of the May Revision, Assembly, and Senate Budget Plans, June 4, 2010 (Revised), Presented to the Conference Committee on the Budget, at p. 8.) The Legislature declined to do so. On October 8, 2010, the Legislature sent to the Governor its 2010-11 Budget Act (Ch. 712, Stats. 2010), which in item 8885-295-0001 provided full funding for AB 3632 services. On that same day the Governor signed the Budget Act after exercising his line-item veto authority on several items in the Act. One of the items he vetoed was the appropriation for AB3632 services by county mental health agencies. In his veto message he stated: "This mandate is suspended." (Sen. Bill 870, 2010-11 (Reg. Sess.) (Chaptered), at p. 12.) The Governor's authority to exercise his line-item veto and to suspend the mandate was recently upheld in *California School Boards Ass'n. v. Brown* (2011) 192 Cal.App.4th 1507..

DISCUSSION

Student's complaint alleges that Mental Health committed both procedural and substantive violations of Student's rights under the IDEA and California law. Student contends that Mental Health failed to provide him with a timely assessment, measureable and appropriate mental health goals and appropriate mental health services during the 2010-2011 school year. Student's complaint states that Parents signed the assessment plan for a referral for mental health services on November 4, 2010, after the Governor's veto.

The basis for Mental Health's motion to dismiss presents two arguments. First, that Mental Health is no longer the agency responsible for services to Student under Chapter 26.5 of the Government Code ("AB3632"). Second, that Mental Health is now in contract with District to provide necessary mental health services to Students, leaving District responsible for these services.

While the Governor's veto may have released the Mental Health from any obligation to provide Student with mental health services, and placed that obligation on the District, the County decided to accept federal special education funding to provide these mental health services pursuant to the January 2011 contract. The contract specifies that the SELPA shall pass through to the County federal special education funds for the County's provision of mental health services. Additionally, the County agreed to indemnify the SELPA for any claims that arise from the County's provision of services pursuant to the contract. Finally, the County was not merely a service provider, but intrinsically involved in the IEP process in developing and providing mental health services for a student pursuant to the contract.

Mental Health failed to establish it should be dismissed as a party because it is no longer responsible to provide AB 3632 services because these services are an unfunded mandate due to the Governor's veto. Because the County, pursuant to the January 2011 contract, receives federal special education funds, is responsible for developing a student's

mental health services through the IEP process, and is responsible for ensuring the provision of mental health services in a student's IEP, the County is a public agency and a proper party in this action pursuant to Education Code, sections 56500, 56501, subdivision (a), and 56028.5. (See *Student v. Montebello Unified School District, Los Angeles County Office of Education, and Bellflower Unified School District* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2008090354, pp. 38-39.) Therefore, County's motion to dismiss is denied as it is a public agency responsible for providing special education services to Student and an appropriate party to this action.

ORDER

Mental Health's motion to be dismissed as a party is denied.

Dated: July 7, 2011

/s/

MICHAEL G. BARTH
Administrative Law Judge
Office of Administrative Hearings