

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED HIGH SCHOOL
DISTRICT AND ORANGE COUNTY
HEALTH CARE AGENCY.

OAH CASE NO. 2010120257

ORDER OVERRULING ORANGE
COUNTY HEALTH CARE AGENCY'S
OBJECTION TO JURISDICTION

On December 6, 2010, Student filed a request for due process hearing (complaint) naming the Irvine Unified High School District (District), the Orange County Health Care Agency (OCHCA), and the California Department of Education (CDE) as respondents. On December 10, 2010, OCHCA filed a response to the complaint, making a special appearance challenging the jurisdiction of the Office of Administrative Hearings (OAH) over OCHCA, and filing a memorandum in support of its objection. Treating OCHCA's objection as a motion to dismiss, the Student and the District filed oppositions on December 15, 2010. OCHCA filed a reply to the oppositions, noting that its response was not a motion to dismiss but a special appearance objecting to OAH's jurisdiction.

APPLICABLE LAW AND DISCUSSION

The sole ground for OCHCA's objection to OAH's jurisdiction over it in this matter is that the agency is no longer responsible for services to Student under Chapter 26.5 of the Government Code (AB 3632) because the Governor has vetoed funding for those services and suspended the statutory mandate that the services be provided by county mental health agencies such as OCHCA. The District recognizes that the Governor had the authority to eliminate the appropriation, but argues that the Governor lacked the power to suspend the statutory mandate, which still obliges OCHCA to provide AB 3632 services. While at least three pending civil matters address the Governor's announced suspension of the AB 3632 mandate, none is likely to be resolved by the time that this matter must be heard and decided under federal law.¹

¹ See 34 C.F.R. § 300.515(a) (2006); see also Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) The pending matters are *California School Boards Ass'n, et al. v. Schwarzenegger, et al.* (Ct.App. [2d Dist.] No. B228680) (petition for original writ of mandate); *County of Sacramento, et al. v. State of California et al.* (Sup. Ct. [Sacramento] No. 34-2010-00090983) (complaint for declaratory and injunctive relief); *A.C. et al. v. Schwarzenegger et al.* (U.S.Dist.Ct.,C.D.Ca. No. 2010-cv-07956) (same).

Related Services under the IDEA

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, subds. (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.).² 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.)³ In addition, any parent, student, or agency may request a due process hearing, and OAH has jurisdiction to decide the matter under the procedures

² All statutory citations herein are to the Government Code unless otherwise stated.

³ If services under AB 3632 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).)

applicable to special education due process hearings. (§ 7586, subd. (a).) This is such a proceeding.

The complaint asserts, and OCHCA acknowledges in its response, that OCHCA received and processed a referral for Student from District on or about October 29, 2010. Parent signed the AB 3632 assessment plan on November 8, 2010 and began assessment. In so doing, OCHCA notified the District and Parent that OCHCA would have no further involvement with the Student's case upon completion of the assessment, and would not be responsible for follow-up placement or services.⁴ Normally these allegations would establish OAH's jurisdiction over OCMHA, and OCMHA does not dispute that conclusion. In this matter, however, OCMHA argues that OAH lost jurisdiction over it as a result of the Governor's suspension of the AB 3632 mandate and funding. The District argues that the Governor's announcement that the AB 3632 mandate was suspended was without legal authority and had no legal effect.

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 AB 3632 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.)⁵ 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 AB 3632 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 exercise of his line-item veto power is not in dispute here.

Article XIII B

The California Constitution grants power to the Legislature to suspend an unfunded statutory mandate on local government. (Cal.Const., art. XIII B.) Article XIII B was placed in the Constitution by the voters in 1979 to limit and regulate the Legislature's imposition of a statutory obligation on local government agencies without fully funding the discharge of that obligation. Section 6 of Article XIII B, as adopted in 1979, provided that whenever the Legislature mandates "a new program or higher level of service" on any local government

⁴ OCHCA states that it also notified the school districts that it would accept referrals received before November 8, 2010, and complete the assessments, as a courtesy in light of the sudden suspension of AB 3632.

⁵ Official notice is taken of the Legislative Analyst's Overview.

agency, “the State shall provide a subvention of funds” to reimburse local government for the costs of the program or service.

The Commission on State Mandates

In 1984 the Legislature created an administrative system to assist it in discharging its duties under Article XIII B, section 6. It added sections 17500 et seq. to the Government Code, which created the Commission on State Mandates (Commission). The Legislature empowered the Commission to make final, quasi-judicial determinations as to whether a particular legislative or executive act imposes “costs mandated by the state” within the meaning of Article XIII B. (§§ 17525; 17751, subd. (a).) A local government entity that seeks relief from a state mandate may file a “test claim” with the Commission and present evidence and argument in support of its claim. (§§ 17521, 17551, 17553.)

In ruling on the test claim, the Commission may determine, for example, that a particular statutory mandate is compelled by federal law, in which case Article XIII B does not apply; or that it is imposed by state law, in which case Article XIII B does apply. (§§ 17556, subd. (c); 17561, subd. (a).) The Commission then adopts a “statement of decision,” and if the Commission determines a state mandate exists, it adopts “parameters and guidelines” defining the specific activities to be reimbursed. (§§ 17557.1, subd. (a); 17558.) The State Controller then issues instructions to assist local entities in claiming reimbursement. (§ 17558, subd. (c).) The Commission’s decisions are reviewable in court by writ of mandate under section 1094.5 of the Code of Civil Procedure. (§ 17559, subd. (b).)

The District correctly argues that this statutory procedure, allowing test claims before the Commission and making its decisions subject to judicial review, is the exclusive remedy for a local government agency seeking reimbursement or relief from an unfunded statutory mandate. (§ 17552; *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010) 183 Cal.App.4th 1110, 1135; *California School Boards Ass’n v. State* (2009) 171 Cal.App.4th 1183, 1200; *Grossmont Union High School Dist. v. California Dept. of Educ.* (2008) 169 Cal.App.4th 869, 884.) If a decision of the Commission is not set aside by administrative mandamus, it is final and binding, and cannot be collaterally attacked. (*California School Boards Ass’n v. State, supra*, 171 Cal.App.4th at p.1200.)⁶

⁶ OCHCA does not argue that it had the authority on its own to declare the mandate unfunded and cease its provision of services. (See *Tri-County Special Education Local Plan Area v. County of Tuolumne* (2004) (*Tri-County SELPA*) 123 Cal.App.4th 563.) In *Tri-County SELPA* a trial court had dismissed a complaint seeking to compel a county mental health agency to restore AB 3632 services on the ground that the SELPA had failed to exhaust its administrative remedies. On appeal, the mental health agency argued that it had the power to cease its services unilaterally because the services had not been funded by the Legislature. The Court of Appeal affirmed the trial court’s ruling for a different reason, but

The Commission reports to the Legislature at least twice a year, identifying the mandates it has found to exist and projecting their costs. (§ 17600.) In 2004, Proposition 1A, approved by the voters, amended article XII B, section 6 to provide that, once the costs of a local government claim were determined to be payable for a particular state mandate, “the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not previously been paid, or suspend the operation of the mandate” for that fiscal year.

The Commission has previously determined that almost all of the duties imposed by AB 3632 on counties involve new programs or increased levels of service, and therefore require reimbursement under Article XIII B. (*In re Test Claim: Government Code sections 7570, etc.* (2005) CSM 02-TC-40/02-TC-49, at pp. 12-15, 24-29; *In re Test Claim on Government Code 7576, etc.* (2000) CSM 97-TC-05, at pp. 8-9; *Claim of: County of Santa Clara* (1990) CSM 4282, at pp. 10-14.)⁷ Thus, in crafting the Budget Act for 2010-2011, the Legislature had a choice: it could either fully fund the AB 3632 mandate or declare it suspended. The Legislature chose to fully fund the mandate. It is that choice that the Governor sought to reverse.

The Governor’s Role

As the District points out, the Governor has no role in the constitutional and statutory scheme described above. No constitutional provision, statute, regulation, or judicial decision authorizes him to suspend a statutory mandate. In using the line-item veto, the Governor exercised his constitutional power to “reduce or eliminate one or more items of appropriation ...” (Cal.Const., art. IV, § 10, subd. (e).) But reducing an appropriation and suspending a statutory mandate are different acts. If the Governor had simply reduced the AB 3632 appropriation and not announced that he was suspending the AB 3632 mandate, counties would have been required to continue AB 3632 services and could have sought relief before the Commission and the courts. However, if the mandate were suspended, services would cease immediately, as they have in this case.

rejected the County’s argument that it could unilaterally end its services. (*Id.* at pp. 571-574.) The Court explained in dictum that the Legislature, in establishing the remedy before the Commission and making it exclusive, intended to prevent the chaos that would result if counties could make such decisions on their own:

[T]he Legislature has ensured an orderly procedure for resolving these issues, eschewing the local government anarchy that would result from recognizing a county’s ability *sua sponte* to declare itself relieved of the statutory mandate.

(*Id.*, 123 Cal.App.4th at p. 573 [footnote omitted].)

⁷ Official notice is taken of these decisions of the Commission.

The Governor's line-item veto authority does not extend to substantive policy decisions. In *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078 (*Harbor*), the Supreme Court explained that in vetoing legislation, the Governor acts in a legislative capacity, and in doing so may only exercise legislative power "in the manner expressly authorized by the Constitution . . ." (*Harbor, supra*, 43 Cal.3d at p. 1089.) This is because the separation of powers in the Constitution allows one branch of government to exercise the powers of another branch only if it is expressly authorized to do so by the Constitution. (Cal.Const., art. III, § 3; *Harbor, supra*, 43 Cal.3d at p. 970.)⁸

In *Harbor* the Legislature in the Budget Act had appropriated more than \$1.5 billion for aid to families with dependent children (AFDC). It had also passed a trailer bill, to be effective only if the Budget Act was signed, which contained a provision allowing AFDC benefits to be paid under certain circumstances from the date a benefits application was made, rather than from the date on which the application was processed. The Governor reduced the AFDC appropriation in the Budget Act and then approved the trailer bill, but purported to veto the section relating to the timing of AFDC benefits payments. (*Harbor, supra*, 43 Cal.3d at pp. 1082-1083.) The Supreme Court held that the purported veto of that portion of the trailer bill was not authorized by the Governor's line-item veto authority because the provision was not an "item of appropriation." (*Harbor, supra*, 43 Cal.3d at pp. 1089-1090.)

In the course of its opinion in *Harbor*, the Supreme Court distinguished an item of appropriation from a substantive measure. The former operates to make appropriations of money from the public treasury. A statute containing substantive policy has a different purpose:

Its effect is substantive. Like thousands of other statutes, it directs that a department of government act in a particular manner with regard to certain matters. Although . . . the direction contained therein will require the expenditure of funds from the treasury, this does not transform a substantive measure to an item of appropriation.

(*Harbor, supra*, 43 Cal.3d at pp. 1089-1090.)

In *Harbor* the Governor "attempted to veto a portion of a substantive bill which he claims contains the 'subject of the appropriation,'" but the Court stated: "We are aware of no authority that even remotely supports the attempted exercise of the veto in this manner." (*Harbor, supra*, 43 Cal.3d at p.1091.) *Harbor* states current law; the Supreme Court

⁸ The Constitution permits only an "incidental" duplication of executive and legislative functions. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 117.) The suspension of the AB 3632 mandate cannot fairly be characterized as incidental.

explained and relied on it extensively in the context of mid-year budget reductions in *St. John's Well Child and Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 975-978.)

Under the *Harbor* court's definition, the AB 3632 mandate is a substantive measure; AB 3632 did not, by itself, appropriate money. Instead it "directs that a department of government act in a particular manner with regard to certain matters." (*Harbor, supra*, 43 Cal.3d at pp. 1089-1090.) Thus the Governor's attempted suspension of the substantive mandate of AB 3632 was not supported by his line-item veto authority.

Nor does the Governor have inherent authority to suspend a statutory mandate. That decision is committed by the Constitution to the legislative branch of government. The original language of article XIII B, section 6 (now section 6, subd. (a)), required "the State" to reimburse local governments for the costs of statutory mandates, but as a result of Proposition 1A in 2004, it is now "the Legislature" that must reimburse or suspend a mandate. (Cal.Const., art. XIII B, § 6, subd. (b)(1).) Enacting, amending, suspending, and repealing statutes are quintessentially legislative acts. The Governor may not exercise such legislative power "except as permitted by this Constitution." (Cal.Const., art. III, § 3.)

Thus, the District is correct. The Governor had the authority to eliminate the AB 3632 appropriation, but he lacked the authority to suspend the AB 3632 mandate. That mandate continues in effect. OCHCA is therefore a proper party to this case, and OAH retains jurisdiction over the dispute.

ORDER

1. OCHCA's objection to OAH's jurisdiction is overruled.
2. To the extent that OCHCA's objection is also a motion to dismiss it as a party, that motion is denied.

Dated: January 4, 2011

/s/

CLIFFORD H WOOSLEY
Administrative Law Judge
Office of Administrative Hearings