

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2010110500

v.

CALIFORNIA DEPARTMENT OF
MENTAL HEALTH.

DECISION

Administrative Law Judge Peter Paul Castillo (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Los Angeles, California, on January 12, 2011, and telephonically on January 24, 2011.

Student was represented by Benjamin Conway, Attorney at Law. On January 12, 2011, Mr. Conway was assisted by Surisa Rivers, Attorney at Law. Student's Legal Guardian (Guardian) was present for a portion of the hearing on January 12, 2011. Student was not present at the hearing.

The California Department of Mental Health (CDMH) was represented by Jenny Wong, Attorney at Law.

Student filed his due process request (complaint) on November 12, 2010.¹ At the close of the hearing, the matter was continued to February 7, 2011, for submission of closing briefs. The parties submitted their closing briefs and the matter was submitted for decision on February 7, 2011.²

¹ Student originally named California Department of Education (CDE), Los Angeles Unified School District (LAUSD) and Los Angeles County Department of Mental Health (LACDMH) as parties in his complaint. OAH granted LAUSD's and CDE's motions to dismiss on December 8, 2010. Pursuant to a stipulation between Student and LACDMH, OAH dismissed LACDMH as a party on January 19, 2011.

² To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-11, and CDMH's brief has been marked as Exhibit M-10.

ISSUE³

Did CDMH deny Student a free appropriate public education (FAPE) from October 8, 2010 through the present by failing to provide him with appropriate mental health services through his individualized education program (IEP)?

PROPOSED REMEDY

As a proposed resolution, Student requests compensatory education for mental health services not provided to him, an order that CDMH provide Student with mental health services as required by his IEP, and a finding that CDMH is a public agency responsible for providing Student with mental health services.

CONTENTIONS OF PARTIES

Student asserts that CDMH is a public agency that became responsible for providing him with mental health services that he needs to make meaningful educational progress when LACDMH abrogated its own responsibility after Governor Schwarzenegger's October 8, 2010 veto of state funding to county mental health agencies for services under Chapter 26.5 of the Government Code. Student contends that LACDMH conducted a mental health assessment that found that Student was eligible to receive mental health services, but failed to attend Student's October 14, 2010 IEP meeting, after the Governor's veto, to discuss its assessment and make an offer of services. Therefore, Student did not receive needed mental health services from October 14, 2010 until November 18, 2010, when LACDMH did attend Student's IEP meeting, made an offer of mental health services that Guardian provided consent to and that LACDMH implemented.

CDMH asserts that it is never a responsible public agency for providing mental health services for special education services as that duty rests upon county mental health agencies, and with the Governor's veto, that duty now rests with local education agencies (LEAs).

FACTUAL FINDINGS

Jurisdiction and Factual Background

1. Student is a 14-year-old boy who resides with his legal guardian within the geographical boundaries of LAUSD and is presently in the eighth grade for school year (SY) 2010-2011. Student is eligible for special education services under the category of

³ This issue is the one framed in the January 11, 2011 Order Following Prehearing Conference and as further clarified at hearing.

specific learning disability. Student attended Magnolia Science Academy, Three (Magnolia) during SYs 2009-2010 and 2010-2011.

2. The basic facts in this matter are not in dispute. On March 8, 2010, Guardian agreed that LAUSD would make a referral to LACDMH to conduct a mental health assessment for possible mental health services, commonly referred to as AB 3632 services.⁴ LAUSD and Guardian agreed to the AB 3632 referral because Student had significant problems in following directions in class, defiance, inattention and walking out of class. At home, Student displayed bizarre behaviors, such as teaching an imaginary class, creating lesson plans and grading the student's class work, instead of completing his own homework. According to Guardian, Student displayed separation fears, manic episodes and panic attacks. Due to a delay in completing additional paperwork needed for the AB 3632 assessment referral, LACDMH did not start its assessment until the end of May 2010.⁵

3. LACDMH completed the mental health assessment and sent a copy to LAUSD and Guardian on September 21, 2010. LACDMH's assessment found Student eligible for AB 3632 services, as he demonstrated significant behavioral deficits related to obsessive compulsiveness, difficulty in regulating his mood and lack of appropriate coping skills, which significantly impaired his ability to access the curriculum. LACDMH recommended that Student participate in outpatient mental health services, with 60 to 75 minutes a week of individual therapy and 60 minutes a week of family therapy, medication assessment and monitoring, and case management services. LACDMH recommend a treatment goal to increase Student's attention span and another goal to decrease his anxiety.

4. LAUSD scheduled an IEP meeting for October 14, 2010, to discuss LACDMH's assessment. On October 8, 2010, before the IEP meeting occurred, the Governor vetoed funding for counties to perform AB 3632 duties and announced that he was suspending the counties' obligation to perform AB 3632 duties. On the day of the IEP meeting, a representative from LACDMH contacted LAUSD to inform LAUSD that LACDMH would not attend Student's IEP meeting because of the Governor's veto, and was not intending on attending any future IEP meetings. Guardian did meet with LAUSD representatives on October 14, 2010, and LAUSD agreed to provide additional school based counseling to attempt to fill in for the services that LACDMH had recommended in its assessment.

⁴ California has established a statutory scheme that provides for interagency responsibility in regards to the provision of special education related services, including mental health services. (Gov. Code, §§ 7570–7588 (Ch. 26.5).) The statutory scheme is known as AB 3632 after the Assembly Bill that created the law.

⁵ LACDMH's AB 3632 assessment does not state when it received a completed assessment referral package from LAUSD.

5. Subsequently, litigation was initiated in United States District Court regarding the Governor's veto of AB 3632 funding. Pursuant to a November 1, 2010 Stipulated Temporary Restraining Order, LACDMH agreed to provide AB 3632 services because the California Department of Education had released funds to local school districts, including LAUSD, to fund AB 3632 services that school districts could pass through to county mental health agencies.⁶

6. LAUSD convened an IEP meeting on November 18, 2010, to discuss LACDMH's assessment. A LACDMH representative attended to discuss the assessment and to make an offer of mental health goals and services. LACDMH proposed the same two goals and the mental health services as proposed in its assessment. LACDMH also agreed to provide Student with an additional 10 hours of counseling by June 2011, to make up for the counseling services that LACDMH did not provide because it did not attend the October 14, 2010 IEP meeting. Guardian consented to the two goals and LACDMH's offer of services, and the compensatory education counseling services.

7. On November 19, 2010, CDMH issued an opinion that county mental health agencies were no longer legally required to provide AB 3632 services because the Governor's veto suspended their obligation to provide these services, and that the obligation to provide mental health services now rested with school districts. Because of the November 1, 2010 stipulation, LACDMH provided the individual and family counseling agreed to in the November 18, 2010 IEP through the first day of hearing.

LEGAL CONCLUSIONS

1. Student has the burden of proof in this matter as to the allegations of his complaint. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Elements of a FAPE

2. Under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); 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(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require LEAs to provide

⁶ The Stipulated Temporary Restraining Order expired on January 14, 2011. The parties did not inform OAH of the status of the stipulation or court action.

special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) LEAs are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a LEA's compliance with the IDEA. First, the tribunal must determine whether the LEA has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

Procedural Violations

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Mental Health Services

6. CDMH raises two legal theories for the proposition that it is not legally responsible to provide mental health services to Student. CDMH first contends that the Governor's veto of funding for AB 3632 services suspended any mandate for county mental health agencies to provide these services, which by implication means that CDMH cannot be liable to provide these services. Second, even if the Governor's veto did not suspend the mandate to provide AB 3632 services, the duty to provide services to Student rests upon LACDMH.

Mental Health Service Delivery in California

7. When a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C.

§ 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006)⁷; Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the “systematic implementation of procedures that result in lasting positive changes in the individual’s behavior,” including the “design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual’s right to placement in the least restrictive environment as outlined in the individual’s IEP.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*); *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

8. 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, 56028.5.)

9. A student who has been determined to be an individual with exceptional needs and who 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. 2, § 60040, subd. (a).) Once a parent has signed and returned an assessment plan the LEA must develop an IEP required as a result of the assessment and convene an IEP meeting no later than 60 calendar days from the date of receipt of the parent’s written consent, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C)(i)(I); Ed. Code, §§ 56043, subd. (c); 56344, subd. (a).)

10. The 60-day requirement was extended from 50 days pursuant to AB 1662, found in Chapter 653, Statutes of 2005, which took effect on October 7, 2005. The California Legislature amended the statutory timelines from 50 to 60 days in 2005 to conform to the timelines delineated in the federal IDEA. California Code of Regulations, title 2, section 60045, subdivision (e), was similarly amended to affect a 60-day timeline. Although the language of section 60045, subdivision (d), still retains a reference to a 50-day timeline, this appears to be an oversight. The Government Code requires that a regulation “shall be within the scope of authority conferred.” (Gov. Code, § 11342.1.) A regulation must also be “consistent and not in conflict with the statute and reasonably necessary to

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

effectuate the purpose of the statute.” (Gov. Code, § 11342.2.) Therefore, the conflict between section 60045, subdivision (d) of the California Code of Regulations and section 56344 of the Education Code must be resolved in favor of the statute.

11. If required by a student’s IEP, CDMH, or a community mental health service agency designated by CDMH, is responsible for the provision of mental health services after the completion of mental health assessment. (Govt. Code, § 7576, subd. (a) and (b).) CDMH has designated by regulation that the community mental health service agency of student’s county of origin is responsible for conducting the mental health assessment and provision of mental health services. (Cal. Code Regs., tit. 2, § 60200, subd. (c).) 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, subd. (a).)

The Governor’s Veto and Suspension of the Mandate

12. 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.)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 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

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

⁸ Official notice is taken of the Legislative Analyst’s Overview.

The Commission on State Mandates

14. 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. (Gov. Code, §§ 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. (Gov. Code, §§ 17521, 17551, 17553.)

15. 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. (Gov. Code, §§ 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. (Gov. Code, §§ 17557.1, subd. (a); 17558.) The State Controller then issues instructions to assist local entities in claiming reimbursement. (Gov. Code, § 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. (Gov. Code, § 17559, subd. (b).)

16. A test claim before the Commission, subject to judicial review, is the exclusive remedy for a local government agency seeking reimbursement or relief from an unfunded statutory mandate. (Gov. Code, § 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.)

17. In 2004, voters approved Proposition 1A, which amended article XIII 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.

18. 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.)⁹ Thus, in creating 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, a decision that the Governor sought to reverse.

The Governor's Role

19. 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 did in this case, or be provided by the school district.

20. 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.)¹⁰

21. 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 Governor’s line-item veto authority did not authorize the purported veto of that portion of the trailer bill because the provision was not an “item of appropriation.” (*Harbor, supra*, 43 Cal.3d at pp. 1089-1090.)

⁹ Official notice is taken of these decisions of the Commission.

¹⁰ 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.

22. 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.)

23. 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 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.)

24. 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 line-item veto authority did not support his attempted suspension of the substantive mandate of AB 3632.

25. 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 because of Proposition 1A in 2004, “the Legislature” must now 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.)

26. Thus, 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, and county health mental agencies are required to continue to provide AB 3632 services. Therefore, CDMH’s position that it cannot be found liable for failing to provide AB 3632 services because the Governor’s veto suspended any obligation for county mental health agencies, which by implication would also include CDMH, is without legal support.

CDMH's Obligation to Provide AB 3632 Services

27. CDMH asserts that it is not responsible to provide direct AB 3632 services because that responsibility rests with county mental health agencies. Since the enactment of AB 3632, CDMH has not provided direct services to students. CDMH provides the counties with technical assistance regarding their legal obligations, investigates complaints made to the California Department of Education regarding county mental health agencies and AB 3632 services, and coordinates fiscal payments to the counties.

28. The plain meaning of a statute controls and courts will not resort to extrinsic sources to determine the Legislature's intent unless the application of the plain meaning leads to unreasonable or impracticable results. (*Nuclear Info. & Res. Serv. v. DOT Research* (9th Cir. 2006) 457 F.3d 956, 960; *In re Jennings* (2004) 34 Cal. 4th 254, 263.)

29. While school districts would normally be responsible for providing mental services that students eligible for special education services require to receive a FAPE, the Legislature in Government Code section 7576, subdivision (a), placed this duty on CDMH or county mental health agencies. Government Code section 7576, subdivision (a), states explicitly that "State Department of Mental Health, *or* a community mental health service . . . designated by the State Department of Mental Health, is responsible for the provision of mental health services, as defined in regulations . . . , if required in the individualized education program of a pupil." (Emphasis added.) The intent of the Legislature is clear in Government Code section 7576, subdivision (a), because of the use of 'or,' which means that the duty to provide AB 3632 services might rest upon CDMH.

30. Typically, the duty to provide AB 3632 services rests upon county mental health agencies, along with the obligation to appear in due process hearings in which a student contends that a county mental health agency denied Student a FAPE by failing to assess or provide AB 3632 services. (Gov. Code, § 7585; Cal. Code Regs., tit. 2, §§ 60200, subd. (c), 60550.) If this case just involved LACDMH's failure to attend Student's October 14, 2010 IEP meeting, CDMH would be correct that it is not an appropriate party because it was LACDMH that purportedly denied Student a FAPE due to its failure to attend an IEP meeting and make an offer of goals and services.

31. However, this is not the usual case because LACDMH's failure to attend the October 14, 2010 IEP meeting was due to the Governor's October 8, 2010 veto, in which the Governor stated that the mandate to provide AB 3632 services was suspended. CDMH subsequently provided incorrect advice to county mental health agencies that the Governor's suspension of the mandate was lawful and effective. Because the term 'mandate' in the law concerning unfunded mandates applies to obligations to be performed by local agencies, such as county mental health agencies, and not state agencies, the Governor's veto message told LACDMH that it no longer needed to perform AB 3632 services. However, the Governor's veto of AB 3632 funding did not terminate CDMH's obligation to ensure that AB 3632 services were provided pursuant to its obligation in Government Code section 7576, subdivision (a). Moreover, for the reasons above, the Governor would have had no more

power to suspend CDMH's statutory obligations than he did to suspend those of local agencies. Finally, while CDMH had previously delegated its responsibilities to county mental health agencies, when it issued its interpretation of the Governor's veto and the suspension of the local mandate, it formally assumed the responsibility to provide AB 3632 services pursuant to Government Code section 7576, subdivision (a).

32. CDMH relies on *Student v. California Dept. of Mental Health* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2009050920, for its contention that it is not a proper party to this action. In that case, CDMH was found not to be a responsible public agency. However, that case is distinguishable from this matter because Sacramento County Department of Behavioral and Health Services, Division of Mental Health acknowledged in that matter that it was responsible for providing student's mental health services as the county of origin and was willing to provide services, including a residential placement. In contrast, in this case, LACDMH denied any responsibility to provide Student with mental health services due to the Governor's October 8, 2010 veto of state funding to county mental health agencies and his purported suspension of the AB 3632 mandate. Because LACDMH refused to provide Student with mental health services by not attending Student's October 14, 2010 IEP meeting, the responsibility reverted to CDMH to provide the requested mental health services pursuant to Government Code, section 7576, subdivision (a).

Issue: Did CDMH deny Student a free appropriate public education from October 8, 2010 through the present by failing to provide him with appropriate mental services through his IEP?

33. This case is not a typical matter in which a county failed to provide a student with a FAPE due to its failure to assess, an inaccurate assessment, or inappropriate services or placement. In this case, the Governor informed county mental health agencies that their legal mandate to provide AB 3632 services was suspended, and accordingly LACDMH ceased the process of providing mental health services to Student by not attending the October 14, 2010 IEP meeting. While LACDMH should not have ceased AB 3632 services in response to the Governor's veto (*Student v. Orange County Health Care Agency* (2011) Cal.Ofc.Admin.Hrngs. Case No. 2010110101), its decision was dictated by the Governor's veto of AB 3632 funding and his veto message.

34. Because the Governor attempted to release counties of the mandate to perform AB 3632 services, the obligation to provide these services rests upon CDMH because of the language of Government Code section 7576, subdivision (a), which places the duty to provide services on CDMH or county mental health agencies. Therefore, CDMH had the legal obligation to ensure that Student received AB 3632 services, which included direct provision of services, once the Governor attempted to relieve LACDMH of the mandate to provide services.

35. Pursuant to Factual Findings 2 through 6 and Legal Conclusions 5, 9 and 10, LACDMH needed to complete its assessment and present its findings within 60 days after its receipt of a completed assessment request, which was received on or about late May 2010. LACDMH's assessment period was tolled by Student's summer break. (Ed. Code, § 56343.5.)

Because the parties did not establish the exact date when the 60-day assessment period began, based upon LACDMH receiving a completed assessment package in late-May 2010, the 60th day would be in mid-October 2010, around the time of the October 14, 2010 IEP meeting. Therefore, LACDMH did not make a timely offer of services as it made its offer on November 18, 2010.

36. Therefore, Student was denied a FAPE when LACDMH did not attend the October 14, 2010 IEP meeting, and delayed its presentation of its AB 3632 assessment until November 18, 2010. This denied Student an educational benefit because LAUSD's offer of additional counseling was not sufficient to meet Student's need because LAUSD did not offer family counsel, nor the intensity Student required for individual counseling. As shown above, once the legal mandate placed upon the counties was allegedly removed, the duty to provide AB 3632 rested solely on CDMH. Therefore, CDMH denied Student a FAPE on or after October 14, 2010, because CDMH became the responsible public agency to provide AB 3632 services to Student, and CDMH failed to ensure that needed mental health services were provided to him.

Relief

37. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).

38. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Puyallup, supra*, 31 F.3d at p. 1496).)

39. In this case, Student lost approximately 10 hours of mental health services between October 14, 2010 and November 18, 2010, when LACDMH made its formal offer of goals and services. LACDMH agreed in the November 18, 2010 IEP to provide Student with 10 hours of compensatory services to make up for the delay in service caused by its failure to attend the October 14, 2010 IEP meeting, and Guardian consented to LACDMH's offer. (Factual Findings 6.) Therefore, any additional award of compensatory education would not be warranted.

40. However, CDMH's failure to ensure that Student received adequate mental health services after the Governor's veto, and its decision to abrogate its duty to ensure students eligible to receive special education services who require mental health services to receive a FAPE, make it appropriate that CDMH monitor LACDMH to ensure that it provides Student with the 10 hours of compensatory education services promised in the November 18, 2010 IEP. If LACDMH fails to provide the 10 hours of compensatory education by June 30, 2011, CDMH shall provide Student with any compensatory education

required by Student's November 18, 2010 IEP that LACDMH was obligated to provide, but did not.

ORDER

CDMH shall monitor LACDMH's compliance with Student's November 18, 2010 IEP, and ensure that LACDMH provides the 10 hours of compensatory education by June 30, 2011. If LACDMH does not provide the 10 hours of compensatory education by June 30, 2011, CDMH shall, by August 1, 2011, provide any compensatory education that LACDMH was obliged to provide under the November 18, 2010 IEP, but did not.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the sole issue for hearing.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 14, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings