

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL
DISTRICT and SACRAMENTO COUNTY
DEPARTMENT OF BEHAVIORAL
HEALTH SERVICES.

OAH CASE NO. 2010110682

ORDER DENYING SACRAMENTO
COUNTY DEPARTMENT OF
BEHAVIORAL HEALTH SERVICES'
MOTION TO DISMISS

BACKGROUND

On November 19, 2010, Student filed a request for due process (complaint) naming the Elk Grove Unified School District (District) and the Sacramento County Department of Behavioral Health Services (referred to here as Mental Health). On April 7, 2011, Mental Health filed a motion to be dismissed as a party to this action. The District filed an opposition to Mental Health's motion on April 13, 2011. Student has not filed an opposition or otherwise responded to the motion.

The basis for Mental Health's motion to dismiss is that it is no longer the agency responsible for services to Student under Chapter 26.5 of the Government Code ("AB3632"). Mental Health contends that former Governor Schwarzenegger's October 8, 2010 veto of funding and suspension of the mandate for county mental health agencies to provide services under AB3632 has been upheld by the court of appeal in its decision in *California School Boards Ass'n, et al. v. Schwarzenegger, et al.* (2011) 192 Cal.App.4th 1507 (*California School Boards*), and in the related superior court decision in *County of Sacramento, et al. v. State of California, et al.* (Super. Ct. Sacramento County, March 25, 2011, No. 34-2010-00090983-CU-OE-GDS). Mental Health asserts that because of the veto of funding and the suspension of the mandate, it is not an appropriate respondent in this case because it has no obligation to provide services to Student or to any other child under AB3632 for fiscal year 2010-2011.

The District takes issue with Mental Health's position. It points out that Student's complaint alleges violations of his rights under the Individuals with Disabilities Education Act (IDEA) during the applicable two-year statute of limitations period applicable to this case, approximately December 2008 through the filing of Student's complaint. During the majority of that period, until October 2010, Mental Health was responsible for assessing students and providing appropriate mental health services under AB3632. Therefore, the fact

that Mental Health is not responsible for providing assessment or services during fiscal year 2010-2011 does not negate its prior obligations to Student or its potential liability to compensate Student if the Office of Administrative Hearings finds that Mental Health violated any duties to him.¹

APPLICABLE LAW

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, 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.).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

¹ The District also asserts that a memorandum of understanding between the District and Mental Health makes Mental Health potentially responsible for mental health services to children such as Student between April 1, 2011, and June 30, 2011. However, the scope of a school district’s contracts with other governmental agencies is not within the jurisdiction of the Office of Administrative Hearings in special education proceedings.

² All further code references are to the Government Code.

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

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, supra*.

DISCUSSION

Student's complaint alleges that Mental Health committed both procedural and substantive violations of Student's rights under the Individuals with Disabilities Education Act (IDEA) and California law. Student contends that Mental Health, along with the District, failed to provide him with an appropriate placement since approximately December 2008, failed to provide him with an appropriate reading program and to identify him as a student with a specific learning disability, and failed to provide him with family counseling, and with measurable goals in his individualized education program (IEP). Student also contends that both respondents failed to convene an annual IEP team meeting for him and failed to convene an IEP meeting for him when he did not demonstrate any progress. Student further alleges that since September 2010, both respondents have failed to offer him a continuum of placement options, placement in the least restrictive environment, placement in

³ 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).)

a safe environment, and an appropriate amount of home visits. As resolutions, Student seeks compensatory education and services, and an appropriate prospective placement.

Student's complaint therefore is not limited to allegations that occurred subsequent to the Governor's veto. Rather, it encompasses an almost two-year period prior to October 8, 2010. Student's complaint alleges that he was receiving AB3632 services during this entire time period. Although Mental Health's obligations to Student for the present fiscal year may have ended at the time the Governor vetoed funding for AB3632, Mental Health provides no authority for the proposition that it is not responsible for remedying any violations of Student's rights under the IDEA or state law which may have occurred prior to the Governor's veto of funding. Mental Health is therefore a proper party to this action.

ORDER

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

Dated: April 15, 2011

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings