BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ORANGE COUNTY HEALTH CARE AGENCY.	OAH CASE NO. 2010110101

DECISION

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 4, 2011, in Oakland and Van Nuys, California, by videoconference.

Danielle Augustin, Attorney at Law, represented Student. Student's Parents were present throughout the hearing. Student was not present.

There was no appearance for the Orange County Health Care Agency (OCHCA).

Student filed his request for due process hearing on November 1, 2010. At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to January 17, 2011, for the submission of Student's closing brief. On January 18, 2011, the record was closed and the matter was submitted for decision.[1]

ISSUE

Did OCHCA deny Student a free appropriate public education (FAPE) by failing to provide Student educationally related mental health services as required by Chapter

[1] January 17, 2011, was a holiday.

26.5 of the Government Code (AB 3632), notwithstanding the Governor's veto of funding for those services for this fiscal year and his announced suspension of the AB 3632 statutory mandate?[2]

PROCEDURAL MATTER

OCHCA was properly served with the request for due process hearing in this matter, and responded on November 2, 2010, by making a special appearance for the sole purpose of challenging OAH's jurisdiction over it. OCHCA argued that OAH lacked jurisdiction because the Governor had vetoed funding for mental health services under Chapter 26.5 of the Government Code (AB 3632) and announced that he had suspended the statutory mandate that such services be provided. OCHCA stated in its pleading that it no longer had any duties under Chapter 26.5 and, thus, would take no further part in the proceedings in this matter.

On December 16, 2010, OAH filed an order overruling OCHCA's objection to its jurisdiction, holding that the Governor lacked the authority to suspend the AB 3632 mandate, that OCHCA was therefore a proper party hereto, and that OAH continued to have jurisdiction over it.[3] OCHCA continued to decline to participate in any proceedings herein, although it was properly notified of all proceedings and offered an opportunity to participate in them.

Because OCHCA chose not to appear at the hearing, the facts set forth below are undisputed.

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[2] The ALJ has slightly revised the issue for clarity.

[3] The substance of that Order is set forth in the Legal Conclusions in this Decision.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 16-year-old male who resides with his parents within the geographical boundaries of the Newport-Mesa Unified School District (District), which is not a party to this matter. He is in the 11th grade and is eligible for and has been receiving special education and related services because he is emotionally disturbed. He has a secondary qualification in the category of other health impaired, and has been diagnosed as having Asperger's Syndrome. Student's emotional condition is characterized by irritability, poor social skills, an inability to establish and maintain meaningful relationships, extreme anxiety regarding school activities and rejection by his peers, refusal to do school work, defiance, and refusal to follow parental directions.

2. Student is enrolled at present in the Family Life Center (FLC) in Petaluma, California, a certified non-public school and residential treatment center (RTC), pursuant to his individualized education program (IEP) of October 25, 2010, agreed to by Parents and the District. The District is now financing both the educational and mental health costs of his enrollment.

3. Before the Governor's veto and announcement, OCHCA recommended that Student be placed in an RTC, and agreed that FLC was an appropriate placement for him, but after the Governor's actions it withdrew from the process of placing him there and declined to provide any further services to him.

THE DECISION TO PLACE STUDENT IN AN RTC

4. Under the IDEA and state law, children with disabilities have the right to a FAPE, which is defined as special education and related services that are available to the child at no charge to the child's parents, meet state educational standards, and conform to the child's IEP. Federal and California law require related services to be provided to a

disabled student as needed to enable the student to benefit fully from instruction. Mental health services are related services. A local educational authority is responsible for the provision of such services to a student who needs them in order to receive a FAPE.

5. County mental health agencies are also obliged in certain cases to deliver mental health services under the IDEA. Chapter 26.5 of the Government Code provides that 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. 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. If the student requires a residential placement, the county mental health agency must identify such a placement, manage the student's case, and provide funding for the mental health costs of the residential placement, while the school district is responsible for the educational costs.

6. In March 2010, Student was receiving AB 3632 outpatient services from OCHCA pursuant to an earlier IEP. At a March 8, 2010, meeting of the expanded IEP team, which included an OCHCA representative, Parents requested that OCHCA evaluate Student for possible residential placement. OCHCA agreed to do so.

7. On September 16, 2010, OCHCA presented to the expanded IEP team its assessment, which recommended that, due to Student's emotional disturbance, he should be placed in an RTC. OCHCA also presented a Client Service Plan detailing the services Student should receive, including residential placement; family, group, and individual therapy; monthly case management; medication evaluation; and quarterly visits by an OCHCA representative.

8. At the IEP team meeting on September 16, 2010, Parents and the District agreed with OCHCA'S recommendation and Client Service Plan. The team discussed various RTC placement options, including FLC and the Oak Grove Center (Oak Grove) in

Murrieta, California. An addendum IEP team meeting was scheduled for September 30, 2010, so that OCHCA could report on its investigations of those options. At the addendum IEP team meeting, OCHCA stated that both FLC and Oak Grove would be appropriate placements for Student.

9. Dr. Victor Cota has been a Service Chief II at OCHCA since 1993. His duties include supervising psychologists, consulting with staff, and attending IEP meetings. He is personally familiar with Student's situation and attended the IEP team meetings on September 16 and 30, 2010. Dr. Cota, called as a witness by Student, testified that at the addendum IEP team meeting on September 30, 2010, OCHCA and the District offered only to place Student at Oak Grove. He explained that they would also have offered to place Student at FLC, because they agreed that either placement was appropriate and would provide Student a FAPE, but Student had not yet been interviewed or accepted by FLC. Parents declined the offer of placement at Oak Grove, and another meeting of the expanded IEP team was set for October 19, 2010, so that Parents could visit and evaluate FLC. At some time in mid-October 2010, Student and Parents visited FLC, which interviewed Student and decided to accept him. Parents decided to seek placement of Student at FLC.

OCHCA'S WITHDRAWAL FROM THE IEP PROCESS

10. On October 8, 2010, in signing the annual budget bill, former Governor Schwartzenegger vetoed funding for AB 3632 services by county mental health departments and announced that the statutory mandate to deliver those services was suspended. On October 18, 2010, Orange County officials instructed the administrators of OCHCA to cease delivery of AB 3632 services. OCHCA therefore declined to appear at the scheduled October 19, 2010 meeting of Student's expanded IEP team.

11. The District scheduled another meeting for October 25, 2010, in an attempt to persuade OCHCA to attend. Because of the Governor's announced

suspension of the AB 3632 statutory mandate and its instructions from Orange County officials, OCHCA declined to attend the October 25, 2010 meeting of Student's expanded IEP team or to participate any further in the delivery of services to him. Parents and the District proceeded with the meeting and agreed on an IEP placing Student at FLC. The District has since been financing both the educational and mental health costs of that placement.

12. On November 8, 2010, OCHCA sent to all the parents, guardians, and educational representatives of students eligible for its AB 3632 services a letter announcing that, because of the Governor's actions, OCHCA would no longer deliver those services. On November 29, 2010, OCHCA unilaterally issued Student a Discharge Summary, formally discharging him from its care due to a "program change." Dr. Cota testified that the "program change" was the agency's cessation of AB 3632 services due to the Governor's actions.

STUDENT'S CONTINUING ENTITLEMENT TO AB 3632 SERVICES

13. The testimony of witnesses and the documents introduced at hearing established that Student has been and remains eligible for, and entitled to, AB 3632 services under all of his IEPs in the relevant time period. Since September 30, 2010, he has been eligible for and entitled to residential placement and the services set forth in his September 16, 2010 Client Service Plan.

14. Dr. Cota testified that if the AB 3632 mandate had not been suspended by the Governor and AB 3632 services were still financed, OCHCA would be discharging its AB 3632 duties to Student and supporting his placement at FLC.

15. Manuel Robles is also a Service Chief II at OCHCA, and has worked for the agency for 28 years. He is its AB 3632 Coordinator. His duties include training agency staff, representing the agency in due process hearings and attending IEP meetings. He is personally familiar with Student's situation. He was called as a witness by Student,

and his testimony fully corroborated that of Student's witnesses and Dr. Cota. He confirmed that OCHCA ended Student's services only because of the Governor's actions in vetoing AB 3632 funding and announcing that the statutory mandate was suspended.

16. The undisputed evidence therefore showed that, but for the Governor's veto of AB 3632 funding and announced suspension of the AB 3632 statutory mandate, OCHCA would still be recognizing and discharging its AB 3632 duties to Student, financing its share of the costs of his placement at FLC, and delivering all the services required by Student's September 16, 2010 Client Service Plan.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student filed the request for due process hearing, and therefore has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

FAPE AND RELATED SERVICES

2. Under the IDEA 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. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) 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).) Mental health services are related services. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

AB 3632

4. In 1984 the Legislature passed AB 3632, adding Chapter 26.5 to the Government Code (Gov. Code, § 7570 et seq.). 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. (Gov. Code, § 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).)

5. 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. (Gov. Code, § 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. (Gov. Code, § 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. (Gov. Code, §§ 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.)[4] 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. (Gov. Code, § 7586, subd. (a).) This is such a proceeding.

UNFUNDED MANDATES

Article XIII B

6. 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.

The Commission on State Mandates

7. 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

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[4] If services under AB 3632 are required by an IEP and are not provided, the parent, adult pupil or local education agency may request that the Superintendent of Public Instruction or the Secretary of the Health and Welfare Agency resolve the dispute. (Gov. Code, § 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. (Gov. Code, §7585, subd. (g).)

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.)

8. 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).)

9. 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. (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.) [5]

10. The Commission reports to the Legislature at least twice a year, identifying the mandates it has found to exist and projecting their costs. (Gov. Code, § 17600.) In 2004, Proposition 1A, approved by the voters, amended article XIII B, section 6 to provide that, once the costs of a local government claim were determined to be payable

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[5] 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 rejected the County's argument that it could unilaterally end its services. (Id., 123 Cal.App.4th 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].)

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.

11. 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.)[6] 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 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.)[7] 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.

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[6] Official notice is taken of these decisions of the Commission.

[7] Official notice is taken of the Legislative Analyst's Overview.

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.

Legality of the Governor's Announced Suspension of the AB 3632 Mandate

13. 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.

14. 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]

15. 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.)

16. 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

[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.

> 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.)

17. 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.

18. 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.

19. 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.) The Governor therefore had the authority to eliminate the AB 3632 appropriation, but lacked the authority to suspend the AB 3632 mandate.

ISSUE: DID OCHCA DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT EDUCATIONALLY RELATED MENTAL HEALTH SERVICES AS REQUIRED BY CHAPTER 26.5 OF THE GOVERNMENT CODE (AB 3632), NOTWITHSTANDING THE GOVERNOR'S VETO OF FUNDING FOR THOSE SERVICES FOR THIS FISCAL YEAR AND HIS ANNOUNCED SUSPENSION OF THE AB 3632 STATUTORY MANDATE?

20. Based on Factual Findings 1-16 and Legal Conclusions 1-19, OCHCA denied Student a FAPE by failing to discharge its duties to him under Chapter 26.5 of the Government Code (AB 3632). Student is, and at all relevant times has been, eligible for and entitled to AB 3632 services from OCHCA. The Governor's veto of the appropriation for AB 3632 services for this year did not, by itself, suspend OCHCA's duties to provide AB 3632 services to Student. The Governor's announced suspension of the AB 3632 statutory mandate was without legal force or effect. That mandate continues unless and until OCHCA is relieved of it by legislative action or court order in compliance with the legal provisions set forth above.

ORDER

1. OCHCA shall immediately resume the discharge of all of its duties to Student under Chapter 26.5 of the Government Code, including but not limited to attending his IEP meetings, managing his case, funding its share of Student's placement at the Family Life Center, and delivering to Student the services described in the Client Service Plan of September 16, 2010. This Order does not preclude changes in OCHCA's responsibilities to Student pursuant to subsequent IEPs.

2. This Order is effective forthwith.

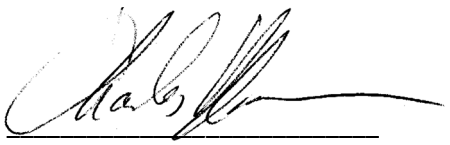
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on the issue decided.

RIGHT TO APPEAL 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: January 27, 2011



CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings