BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT AND THE LOS ANGELES COUNTY DEPARTMENT OF MENTAL HEALTH.	OAH CASE NO. 2011080612

DECISION

This matter was heard before Glynda B. Gomez, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on December 6 and 8, 2011 and January 23, 24 and 25, 2012 in Los Angeles, California.

Student's Mother (Mother) represented Student. Student's Father (Father) was also present for the hearing. Student was not present.

Sioban Cullen, Attorney at Law, represented the Los Angeles Unified School District (District). District due process specialists, Cynthia Shimizu and Ernest Campos were also present for portions of the hearing.

Zoe Trachtenberg, licensed clinical social worker, represented the Los Angeles County Department of Mental Health (DMH).

Student filed the Request for Due Process Hearing (RDPH) on August 15, 2011. On September 23, 2011, District's motion to reset timelines was granted by OAH. Pursuant to the order, the timelines on this matter were reset as of September 15, 2011. A continuance was granted for good cause on October 26, 2011. The matter was submitted on January 25, 2012.

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ISSUES

1. Did District and DMH deny Student a free appropriate public education (FAPE) by failing to notify Parent and obtain her consent for Student's AB 3632 mental health assessment and failing to notify Mother of Student's placement in an out-of-state residential treatment center (RTC)?

2. Within two years immediately preceding the filing of the complaint, did District and DMH deny Student a FAPE by significantly impeding Parent's right to participate in Student's individualized education program (IEP)?

3. For the 2010-2011 and 2011-2012 school years, beginning in April 2011, did District and DMH deny Student a FAPE by placing him in an out-of-state RTC at Devereux in Texas, instead of an educational placement in the least restrictive environment (LRE) near his home in California?

FACTUAL FINDINGS

1. Student is a 14-year-old boy who has been eligible for special education under the category of emotional disturbance (ED) since April 28, 2008. Student has a diagnosis of bipolar disorder and intermittent explosive disorder (IED), a history of psychiatric hospitalizations, and a history of violent outbursts at home and school.

2. At all relevant times, Student resided within the boundaries of District. Student has been enrolled in District schools since first grade. Student attended Barrett Elementary School (Barrett) for first and second grade, Barrett and Marvin Elementary School and 59th Street Elementary School (59th) for third grade, and 59th and 74th Street elementary school for fourth and fifth grades. Student attended Horace Mann Middle School (Horace Mann) for sixth and seventh grade, and Kayne Eras Center (Kayne Eras), a California certified nonpublic school (NPS) from September 2010 to April

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2011 for eighth grade. At the time of hearing, Student attended Devereux, a RTC, in League City, Texas.

3. Student was hospitalized four times for incidents related to his bipolar disorder and IED during the period of 2004 to 2008. His most recent hospitalization was at Aurora Charter Oak Hospital from February 28, 2008 to March 7, 2008. He also received therapy through Hathaways Sycamore, Kedren Community Center, and county wraparound services. Student currently takes medication to address his bipolar disorder and IED, namely Seroquel and Guanfacine. Previously, he took Zoloft, but discontinued it because of weight gain. Student is approximately 6 feet tall and weighs 250 pounds.

4. Student's parents have been engaged in a contentious custody battle for most of Student's life. As a result, Student's residence has over time shifted between Mother and Father. Student has lived with Father since 2005. At all relevant times, Mother and Father shared joint legal custody and Father had physical custody of Student.

5. On May 16, 2007, Los Angeles Superior Court Judge Maren E. Nelson (Judge Nelson) issued an order (May 16, 2007 order) which, in pertinent part, awarded physical custody of Student to father, and “joint legal custody" to both Mother and Father. The order also detailed the visitation schedule. In pertinent part, it provided that Mother would have reasonable visitation on alternate weekends from Friday after school or 4:00 p.m. until 6:00 p.m. on Sunday. The order also detailed how holidays and school break visitations would be shared. In addition, the order also provided that Father was to notify Mother within 24 hours of any medical appointments for Student. The May 16, 2007 order did not make Father the sole holder of educational rights and did not make any specific reference to educational rights.

6. On July 15, 2008, Judge Nelson appointed Guy Leemhuis, Attorney at Law, as minor's counsel (minor’s counsel) for Student. Minor’s counsel mentioned to Mother

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and Father in 2008 the prospect of Student attending an RTC such as Devereux. Mother advised minor's counsel that she was opposed to such a placement.

7. On May 6, 2010 and May 18, 2010, while Student was in seventh grade at Horace Mann, District psychologist Susan Williams (Williams), with Father's consent, conducted a psychoeducational assessment of Student. The assessment was to confirm continued eligibility, determine present levels of performance (PLOPs), and to evaluate whether Student needed a more restrictive placement and additional services. To evaluate Student, Williams used the Cognitive Assessment Scales (CAS); Kaufman Test of Educational Achievement-Second Edition (KTEA-II); Comprehensive Test of Phonological Processing (CTOPP); Test of Visual-Perceptual Skills-Third Edition (TVPS-3); Beery-Buktennica Development Test of Visual Motor Integration (VMI); Behavior Assessment System for Children, Second Edition-Parent, Teacher, Student (BASC); Conners 3, Teacher, Parent and Self report; Kovacs' Children Depression Inventory (CDI); Sentence Completion; teacher, Father and Student interviews; and review of records. Mother was never made aware of the assessment, was not interviewed, and did not have an opportunity to complete any ratings scales. Williams memorialized her assessment in a report dated May 21, 2010. Williams found that Student performed in the average range in academics, but displayed aggression, depression, non-compliant behavior, poor peer relations and conduct problems. She opined that Student continued to qualify for special education and recommended that the IEP team reconsider Student's placement, services and behavior interventions and evaluate whether or not a more restrictive placement would be appropriate for Student

8. An IEP meeting was held on May 12, 2010. Mother did not attend the May 12, 2010 IEP meeting. It is not clear from the evidence whether Mother was invited to the meeting or aware of the meeting. Mother had previously attended IEP meetings at Horace Mann and had provided her contact information to Horace Mann staff. Horace

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Mann teacher Floyd Webb provided Mother a letter attesting to her involvement in Student's education and concern for Student for submission to the Superior Court.

9. On May 12, 2010, Father provided written consent for a referral to DMH for mental health services. On May 12, 2010, Williams made a written referral and request to the DMH for an AB 3632 mental health assessment[1]. Williams' request included addresses and phone numbers for both parents.

10. On June 6, 2010, Father provided written authorization for AB 3632 psychological assessment plan and consent for release of assessment information.

11. Student was removed from Horace Mann and placed at Kayne Eras effective September 2010 after selling Marijuana on campus and for violent outbursts which required police intervention. Mother was not notified of Student's removal from Horace Mann or his placement at Kayne Eras. Two months after Student's placement a Kayne Eras, Mother learned of the placement in a conversation with Student.

12. When she learned of the placement, Mother contacted Kayne Eras and spoke with some of Student's teachers to learn about his progress and to obtain more information about the school. She spoke with Student's teachers, Walker (Walker) and Sterling Brown (Brown) several times. She also spoke with the Kayne Eras assistant

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[1] At that time, AB3632 mental health services were mental health services provided to special education students by DMH. Effective October 8, 2010, local educational authorities (LEAs) such as District became responsible for such services to the extent that Student's IEP's require the services. (See *California School Boards Ass'n, v. Edmund G. Brown, Jr., Governor* (2011) 192 Cal.App.4th 1507, 1519-1520; see also Assembly Bill (AB) 114, Chapter 43, Statutes of 2011 [providing Government Code section 7576 inoperative effective July 1, 2011, and repealed effective January 1, 2012].)

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principal George Woods (Woods). On one occasion, Walker called Mother and had Student speak to Mother to calm him down after an incident at school. Mother left several telephone messages for Woods and included her telephone number with each. On one occasion, Mother met briefly with Woods at Kayne Eras when she came to pick up letters drafted by Walker and Brown. Mother believed that Student was appropriately placed at Kayne Eras and that he was making progress there.

13. On January 24, 2011, DMH contractor Lora Joe (Joe), a licensed clinical social worker, contacted Father about the DMH assessment and obtained preliminary information from him. Joe has conducted hundreds of assessments for DMH and has previous professional experience as the educational director and intake coordinator for an RTC. Joe acknowledged that the file she received had contact information for both parents, but that she only contacted Father. She only contacted Father because District had indicated in the referral that he was the contact person and the person with which Student lived. When Joe contacted Father, Father told Joe that Mother was "not involved." Joe accepted Father's representation without further investigation, although she was aware that Student had every other weekend visits with his Mother. Joe interviewed Student, Father, Kayne Eras teachers Brown and Bunchen and Kayne Eras therapist Fred Rule on January 31, 2011. Joe did not contact Mother although Mother's contact information was in the DMH file and readily available to her. Joe reviewed the District DMH referral, Student's April 28, 2008 and May 12, 2010 IEP's, May 12, 2008 District counseling notes and an April 25, 2008 District psychoeducational assessment. Joe did not conduct any standardized testing and did not conduct any classroom or home observations.

14. Before writing her report and making a formal recommendation, Joe discussed her preliminary findings with Father and her tentative recommendation for an RTC. She explained to Father that her recommendation would be for either outpatient

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services or an RTC. After discussion, Father expressed a preference for RTC. Joe agreed that an RTC would be appropriate based upon the totality of Student's circumstances including violent outbursts at home, destruction of property at home, elopement from home, stealing, drug use, drug sales, and his history of counseling, psychiatric hospitalizations, and noncompliance with medication. Joe opined that Student had not used the coping strategies and interventions that he had been taught in counseling. Had Father not been amenable to placement at an RTC, Joe would have recommended outpatient services.

15. On February 15, 2011, Joe completed her report and submitted it to her DMH supervisor, Diane Spielman (Spielman), for approval. On March 8, 2011, Spielman reviewed and signed the report. At that time, DMH considered the report to be final.

16. In or about March 2011, Student ran away from home after having a disagreement with Father, and walked several miles to Kayne Eras. On his way to Kayne Eras, gang members confronted and attacked Student. As a result, he suffered a head injury. He felt safe with staff at Kayne Eras and spoke with counselors about his dispute at home.

17. Father received notice and an invitation to an IEP team meeting on April 7, 2011. Mother was not invited to the IEP meeting despite the fact that Kayne Eras staff and Horace Mann staff were aware that Mother was active in Student's life. District, DMH, and Kayne Eras all had contact information for Mother.

18. On April 7, 2011, Student's IEP meeting was held at Kayne Eras. In attendance at the IEP meeting were Father, administrative designee/District psychologist Perky Waterman, Kayne Eras counselor Fred Rule, Kayne Eras administrator George Woods, Kayne Eras special education teacher Sterling Brown, District AB3632 representative Sylvia Gonzalez, and DMH AB3632 representative Michele Amestoy. The

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IEP listed only Father as parent and did not list the name, address or contact information for Mother.

19. The IEP team discussed Student's PLOPs and determined that Student had educational needs in the areas of social emotional/counseling, behavior, reading, language arts, vocational education, mathematics, and mental health. Measurable goals were established in each area of need.

20. The IEP noted that Student had a history of difficulty expressing emotions and managing his anger, and that Student had explosive outbursts, mood swings and difficulty calming himself when upset. It further noted that, at school, he had a history of being argumentative, demonstrating irritability, and yelling at teachers and students. The referenced behaviors occurred primarily before his placement at Kayne Eras. At Kayne Eras, Student had some minor incidents and confrontations with other students.

21. The IEP also noted that Student had significant difficulties at home. At hearing, Father explained that Student did not always take his medication, and had outbursts and rages. The team discussed Student’s March 2011incident, where he ran away from home. The team also discussed Student’s stepmother and half-sister moving out of the family residence because of Student’s outbursts and accusations of abuse against them.

22. The IEP team determined that Student was eligible for mental health services. The IEP team, based upon the DMH assessment, recommended that Student be placed in a structured, 24-hour residential therapeutic treatment facility (RTC). The IEP team determined that Student was to receive 60 to 120 minutes of individual therapy per week, 120-240 minutes of family therapy per month, medication support as deemed appropriate by the attending psychiatrist, case management for collaboration with school, and group therapy for 300 minutes per week. DMH proposed two treatment goals: 1) to reduce anger outbursts and 2) improve age-appropriate coping skills.

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23. At hearing, teacher Brown testified that Student had been doing well and making progress at Kayne Eras. Having previously worked at Starview, a level 14 RTC, Brown was shocked that the IEP team offered Student RTC placement. Brown testified that he did not agree with the placement and felt that the decision to place Student at an RTC was rushed. Brown acknowledged that Student had presented himself as an angry person and had altercations with some of the other students. He also acknowledged that Student had a fascination with gang graffiti and gang culture. Brown believed that he had developed a positive relationship with Student and that Student was showing improvement and maturity in the seven months that he attended Kayne Eras. Brown cited one incident in which Student made an appointment with Woods and successfully explained to Woods that his points total for his grades had been erroneously calculated and should be raised. Brown believed that Student showed maturity and restraint in handling the situation. Student was awarded Student of the week recognition six times during his tenure at Kayne Eras.

24. At hearing, Woods testified that Student was making progress at Kayne Eras, but had a few disciplinary incidents. Woods opined that Student was not offered an RTC placement for academic difficulties. According to Woods, the placement was made after considering the totality of Student's situation and was heavily influenced by Student's difficulties at home.

25. On April 7, 2011, Father consented to the IEP and accepted the DMH recommendation for placement at an RTC with interim outpatient mental health services at Kedren Community Services.

26. DMH sent referral packets requesting placement for Student to four California RTCs and two out of state RTCs. Devereux in Texas and Heritage School in Utah both accepted Student for placement on April 18, 2011 and April 19, 2011, respectively. In California, the Help Group in Los Angeles and the Oak Grove Institute in

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Murietta rejected Student because of his history of aggressive behaviors. Hillsides Home for Children in Los Angeles did not have openings as of April 18, 2011. Father did not return telephone messages from Vista del Mar in Los Angeles to set up an interview for potential admission to its facility. When asked about his failure to return calls from Vista del Mar, Father responded that he was busy with many things for Student at the time and may not have remembered to call Vista del Mar. When asked whether he had a preference for an out of state placement over placement in California, Father was evasive and did not answer the question. Father testified that he had contacted minor's counsel before placing Student at Devereux and had been assured by minor's counsel that Father had the right to place Student at Devereux.

27. Father took Student to Texas on or about April 20, 2011 on the pretense of going on a sightseeing and birthday shopping trip there. Instead, Father checked Student into Devereux. When Father returned to California the next day, he informed Mother that Student was at Devereux in League City, Texas.

28. Initially, Devereux would not allow Mother to see or speak with Student. After Mother's lawyer intervened and provided Devereux with a copy of the May 16, 2007 Order, Mother was permitted to see Student, speak with him by telephone at specified times and participate in family counseling by telephone.

29. District's policy is to pay for four parental visits to RTCs per year for each Student placed in an out-of-state RTC pursuant to an IEP. Initially, District gave all four paid visits to Father for his use. Father had not visited Student, but agreed to give two of the District paid visits to Mother. At the time of hearing, Mother had visited Student once, and planned to visit a second time. Mother was distressed about Student being far from home and her inability to visit him on a regular basis due to financial constraints. Mother is considering moving to Texas to be closer to Student.

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30. Devereux has both school and residential components. Devereux students attend classes from 9:00 a.m. to 3:00 p.m., Monday through Friday. The students are assigned to units where they live and receive counseling. Because Devereux is a level 14 facility, students may be locked in the facility if circumstances warrant and are not free to leave the facility. Each student is assigned a psychiatrist, therapist, nurse, case coordinator and two classroom teachers. These professionals comprise Student's treatment team. Devereux uses a level system consisting of three levels for behavior Management. In order to complete the Devereux program, a participant must complete all three levels. Typically, students take two to six weeks to move through each level. Each level is comprised of three phases.

31. At Devereux, Student was placed in Unit 5, which housed clients up to the age of 22 years. Student, as a 14-year-old, was youngest person on the unit, and had been attacked and bitten by an 18-year-old on the unit. When Mother visited Student, she learned that Student had been diagnosed with high blood pressure and migraine headaches.

32. John Donato (Donato), a licensed clinical social worker, is the DMH representative responsible for overseeing Student's placement. Donato made three visits to Devereux to see Student on June 16, 2011, September 13, 2011 and November 19, 2011. He was not aware that Student had been treated for high blood pressure and migraines. Donato was aware of the incident in which Student was attacked and bitten by another student at Devereux on October 19, 2011. Texas licensing officials contacted Donato during their investigation of the incident. According to Donato, Student made progress at Devereux, but was not consistent in using his coping strategies. At the time of hearing, Student was on the second of three levels in the Devereux level program. Donato did not have an estimate of how long Student would be at Devereux.

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33. On June 1, 2011, the IEP team convened for a 30 day review IEP meeting. Mother participated in the meeting by telephone. Meeting participants were Mother, Father, District psychologist Debbie Gallinot (Gallinot), Devereux education director Charles Lynn Luther, Devereux therapist Amy Bush, Devereux case coordinator Tiffany Parnell, DMH representative John Donato and Devereux special education teacher Crystal Kline. At the June 1, 2011 IEP meeting, the IEP team discussed Student's progress, goals, services and placement. All IEP team members except Mother were in agreement that Student should remain at Devereux in the RTC. The IEP stated "[t]he team recommends continued placement at the residential facility; however, Mother is in disagreement. Given that both parents hold educational rights, said dispute will be resolved with the court system. It should be documented that both mother and father participated in this IEP."

34. At hearing, Gallinot, the District's psychologist, testified that it was her belief that the consent of Father was sufficient to permit placement at Devereux. Gallinot explained that based upon her experience, District was not required to obtain Mother's permission when both parents held legal custody of a student. Gallinot opined that it was an issue for a family law court to determine whether or not Mother's permission was required.

35. Several witnesses testified that they were familiar with Student and had not observed any inappropriate behavior by Student. Specifically, Mother's aunt was familiar with Student, had regular interactions with him, and was his babysitter when he was younger. She credibly testified that she did not see any rage, anger or outbursts from Student. Mother's friend and former roommate, Starr Carter, was familiar with Student and had observed him many times. She credibly testified that she had never seen him misbehave or be disruptive. Mother's employer, Katrina Watkins, had also

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observed Student on many occasions including play dates with her own son and had never seen Student behave inappropriately.

36. On December 6, 2011, at the request of minor's counsel, Judge Nelson issued an ex parte order granting Father temporary sole legal custody of Student for medical and educational purposes (December 6, 2011 order). The December 6, 2011order further provided that Father was not to make any decisions without first contacting Mother. In addition, the order provided that if the parties could not come to a joint decision, Father "ha[d] the power of decision and w[ould] make the final decision."

LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (Schaffer v. Weast (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student has the burden of proof.

ISSUE ONE

2. In her first issue, Mother contends that District and DMH violated her rights as a joint legal custodian, under the Individuals with Disabilities Education Act (IDEA), by not obtaining her consent and not providing her with prior written notice of its intent to assess Student for mental health services and placement in an out-of-state RTC. District and DMH admit that Mother was not given written notice of the mental health assessment or the placement, and that Mother did not provide consent for the assessment or the placement. District and DMH contend that the consent of Father was sufficient for the assessment and placement.

3. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400;

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Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

4. For purposes of the IDEA, the term parent means a biological or adoptive parent unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. (20 U.S.C. § 1401(a)(23); 34 C.F.R. §300.30(a).) When a judicial decree or order identifies a specific person or persons as having authority to make educational decisions on behalf of a child, that person is determined to be the parent for the purposes of the IDEA. (34 C.F.R. § 300.30(b).) In a situation where the parents of a child are divorced, the parental rights established by IDEA apply to both parents, unless a court order or state law specifies otherwise. (*Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46568 (August 14, 2006).)

5. A school district must provide prior written notice whenever it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4.) Prior written notice must include: (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action and a description of each procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (3) a statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguard can be obtained; (4) sources for parents to contact to obtain assistance in understanding their rights; (5) a description of other options considered by the IEP team and the reason

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why those options were rejected; and (6) a description of the factors that are relevant to the agency's proposal or refusal. (20 U.S.C. §1415(c)(1); 34 C.F.R. §300.503 (b).)

6. In order to assess or reassess a student, a school district must provide proper notice to the student and his parents (20 U.S.C. §1415(b)(1); Ed. Code, §56321.) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414 (b)(1); Ed. Code §56321, subd. (a).) The assessment plan must appear in language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct and provide notice that the district will not implement an IEP without the consent of the parent. District must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, §56321, subd. (a) & (b).)

7. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

8. At one time, California law provided that the provision of mental health services that were necessary to provide a FAPE were the responsibility of county offices of mental health under the supervision of the State Department of Mental Health. (See Gov. Code §7570, et seq., [commonly known by its Assembly Bill name, AB 3632 (Chapter 26.5)].) However, this mandate was rendered inoperative, and responsibility for the provision of services reverted completely to the local education agencies by the Governor's veto of funding for this program on October 8, 2010. (*California School Boards Ass'n, v. Brown, supra,* 192 Cal.App.4th at pp. 1519-1520.) Subsequently, by operation of AB 114, Chapter 43, Statutes of 2011, Government Code section 7576, which mandated that IDEA mental health services be provided by the state Department

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of Mental Health, became inoperative effective July 1, 2011, and repealed effective January 1, 2012.

9. Prior to the repeal of the mandate on October 8, 2010, a student who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the local educational agency obtained a parent's consent, be referred for assessment to a community mental health service, such as DMH. (Former Gov. Code, § 7576, subd. (b).) Although under this system a county mental health department was responsible for providing the assessment and any required services, the duty to obtain written parental consent remained exclusively with the local educational agency. (See former Gov. Code, § 7576, subds. (b)(2) and (c)(2).) After the local educational agency obtained parental consent for the referral, the assessment would only go forward if the district, in accordance with specific requirements, prepared a referral package demonstrating that the student met the criteria for referral. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 2, § 60040, subd. (a); former Gov. Code § 7576.)

10. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207, [73 L.Ed. 2d 690] (*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *Rowley*, the Supreme Court emphasized the importance of adherence to the procedural aspects of the IDEA. In pertinent part the court stated: "…we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every

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stage of the administrative process… as it did upon the measurement of the resulting IEP against a substantive standard." (*Rowley, supra, at* 206-207.)

11. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy: (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); 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, 1483-1484.)

12. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, that analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex. Rel. Annette J. v. Clark County School Dist*. (9th Cir. 2001) 267 F.3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F. 2d at pp. 1485-1487 [when parent participation was limited by district's preformulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held.])

13. Here, the evidence showed that DMH could not have deprived Student of a FAPE by failing to provide Mother with prior notice of the May 2010 plan to conduct a mental health assessment, or by failing to provide Mother with prior notice of the change in placement to an RTC at the April 7, 2011 IEP team meeting. As discussed in Legal Conclusions 8 and 9, above, the duty to obtain parental consent for the mental health assessment rested solely with District by operation of former Government Code

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section 7576, subdivisions (b)(2) and (c)(2). Similarly, effective October 8, 2010, although DMH remained in place as District's mental health assessor, the duty to provide a FAPE to Student rested solely on District. Accordingly, DMH could not have deprived Mother of her procedural rights to notice as a matter of law, as all responsibility for ensuring those rights rested with District, which was student's local educational agency. In sum, DMH did not deprive Student a FAPE on this ground. (Factual Findings 1-36; Legal Conclusions 1-13.)

14. However, as to District, Mother met her burden of demonstrating a denial of a FAPE because her rights to participate in the decision-making process were denied. Specifically, at the time of the assessment and placement, Mother held joint legal custody with Father and had the right to receive prior written notice of the assessment and proposed placement and to withhold consent for assessment and placement of Student. The evidence showed that District had Mother's contact information and was aware of Mother's existence and involvement in Student's life. Nevertheless, District opted to proceed with assessing and ultimately placing Student in an out-of-state RTC without notice to Mother and without obtaining her consent. The actions of District deprived Mother of her right to participation in the decision-making process at two critical stages, the consent for the mental health assessment, and the IEP at which a RTC was offered. Mother had no way of providing her input to the decisions without notice. As such, District significantly infringed upon Mother's rights, which constituted a denial of FAPE. (Factual Findings 1-36; Legal Conclusions 1-14.) Mother's remedy for the denial of her procedural rights will be discussed separately below.

Issue Two

15. In Issue Two, Mother contends that she was deprived of her right to participate in the IEP process between August 15, 2009 and August 15, 2011 (i.e. two years immediately preceding the filing of the RDPH), namely the IEPs of May 12, 2010,

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April 7, 2011, and June 1, 2011. She further contends that the deprivation was not cured by the June 1, 2011 IEP team meeting because her concerns were not seriously considered. District contends that Mother was afforded the opportunity to participate in the IEP process when it convened the June 1, 2011 IEP meeting.

16. As set forth in legal conclusions 3, 4, 8, 9, 10, 11 and 12 above, Student has a right to a FAPE. To comply with the IDEA, the District must comply with both procedural and substantive aspects of the IDEA.

17. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher of the pupil, (4) a representative of the local education agency (LEA), (5) an individual who can interpret the instructional implications of the assessment results, (6) at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate, and (7) the individual with exceptional needs. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subds. (b)(1-7).)

18. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322.) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempt to arrange a mutually agreed upon time and place, such as detailed telephone records, copies of correspondence, records of visits to Parent's home or work site, use of

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interpreters and other measures and to provide a copy of the IEP to the parent. (34 C.F.R. § 300.322.)

19. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*Amanda J., supra,* 267 F.3d 877, 882; *N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

20. Here, as set forth above, Mother held joint legal custody of Student. Consequently, she had a right to be a part of the IEP team at Student's May 12, 2010, April 7, 2011, and June 1, 2011 IEPs. When District failed to invite Mother to the May 12, 2010 and April 7, 2011 IEP meetings, despite having Mother's contact information, District interfered with her opportunity to participate in the IEP process, which constituted a procedural violation. Although Mother had not been a part of the May 12, 2010 IEP team, where District offered Student placement at Kayne Eras, Mother testified that when she learned of the placement, she did not disagree with it, despite District's procedural violation. However, with respect to the April 7, 2011 IEP, Mother persuasively established that she did not want Student placed in an RTC and specifically did not want Student placed out of state, and had she been part of the IEP process, she would have advised the team accordingly. As such, District's failure to notify Mother of the April 7, 2011 IEP significantly infringed upon Mother's rights.

21. Despite District's assertion to the contrary, the subsequent June 1, 2011 IEP did nothing to remedy the error. As a joint educational rights holder at the time of the IEPs, Mother had the unequivocal right to refuse consent to the April 7, 2011 IEP, prior to Student's ultimate placement in the RTC in Texas. District cited no authority to support its proposition that infringement upon a parent's right to participate in the IEP

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process in one meeting can be cured by inviting the parent to a subsequent IEP meeting. By the time of the June 1, 2011IEP, the damage was done, as Student had already been placed in the out-of-state facility without Mother's input or consent. Given the above, during all relevant time periods, District denied Mother the opportunity to participate in the IEP process. (Factual Findings 1-36; Legal Conclusions 1-20.) To the extent Student asserts this claim as to DMH, Student's claim fails because DMH was not the local educational agency responsible for holding IEP meetings either at the time of the May 12, 2010 IEP team meeting or the April 7, 2011 and June 1, 2011 IEP team meetings. Accordingly, DMH did not deprive Mother of her procedural rights under the IDEA on this ground. (Factual Findings 1-36; Legal Conclusions 3, 4, 8-13, 17-19.)

ISSUE THREE

22. Because the ALJ has already determined that District denied Student a FAPE by infringing upon Mother's right to participate in the IEP process (Issue Two), as well as failing to provide prior written notice (Issue One), it is not necessary to address Issue Three, which questions whether Student was denied a FAPE by District's placement of Student at Devereux, instead of an educational placement near his home in California. (Factual Findings 1-36; Legal Conclusions 1-22.) As to DMH, for the reasons set forth in Legal Conclusion 13, incorporated by reference, DMH did not deny Student a FAPE as a matter of law. Although DMH continued as District's mental health assessor after October 8, 2010, DMH had no legal duty to provide Student with the services necessary to provide a FAPE, which instead were the sole responsibility of District. Accordingly, Issue Three fails as to DMH.

REMEDIES

23. As set forth above, where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the

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analysis next focuses on the remedy available to the parents. (*Amanda J., supra.,* 267 F.3d at pp. 892-895.) As discussed above, after October 8, 2011, the duty to provide a FAPE became the sole responsibility of District, who was the local educational agency for purposes of serving Student under the IDEA. Therefore, the relief ordered in this case will only be directed to District.

24. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County School Dist. v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. ex rel. Student v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

25. Here, District shut Mother out of the assessment and IEP process by violating her procedural rights under the IDEA. Mother was a joint legal custodian and a holder of educational rights at all relevant times. District should have taken steps to ensure Mother's participation in the assessment and IEP process. In doing so, District did not obtain a complete view of Student and his unique needs because it failed to obtain any information from Mother as part of the mental health assessment process. As to placement, had District included Mother in the process as the IDEA required, Mother would have objected to placement at Devereux in Texas and Student would not have been sent to Devereux. As a result, Mother had to obtain counsel to exercise her rights to see Student, to speak to him by telephone, and to visit him at Devereux. District did not make provisions for Mother to visit Student and she was not financially able to pay for the lodging and travel herself. She has been able to see Student once since April of 2011 instead of the two to three times per month that she in entitled to visit Student had he not been placed out-of-state. (Factual Findings 1-36; Legal Conclusions 1-25.)

26. While it is true that after this matter was filed, Student's counsel obtained an order giving Father final say over educational decisions. However, significantly, even

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the juvenile court recognized that Mother should at least have a say in the process. The District's failure to provide Mother with her procedural rights to participate was not cured in any way by the December 6, 2011 Order. Accordingly, as a remedy in this matter, the IEP team must go back and examine the information that it failed to obtain when it shut Mother out of the process, specifically, by updating its mental health assessment of Student to include information from Mother. In addition, the evidence showed that District may not have met its obligation to exhaust placements in California given Father's testimony that he did not return a phone call from the Vista Del Mar RTC located in Los Angeles. Further, the evidence showed that District took no consideration of Mother when discussing its policy of paying for four yearly visits per year. Accordingly, District must document the exhaustion of potential placements in California as part of any IEP placing Student out-of-state. Further, by not including Mother in the assessment or IEP process, no provision was made for visitation by Mother, or for participation in family therapy. As a remedy, District is ordered to modify Student's IEP to expressly provide for Mother's participation in family therapy if required by Student's treatment plan, and to provide for visits to Devereux in an amount equal to those afforded to Father. As a further compensatory remedy, District shall fund up to four visits to Devereux by Mother, consistent with District guidelines, to be used at any time for as long as Student is placed there. Finally, because the December 6, 2011 Order is temporary, and still gives Mother a voice in making decisions about Student's education, District shall ensure that Mother has notice of any proposed assessments or IEP team meetings. (Factual Findings 1-36; Legal Conclusions 1-26.)

ORDER

1. Within 30 days of this order, District is ordered to supplement the mental health assessment of Student with an interview of Mother by either a school psychologist or licensed clinical social worker.

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2. Within 60 days of this order, District is ordered to convene an IEP team meeting with all required participants, including Mother, to present and consider the information from the supplemented mental health assessment, and consider Mother's input. The IEP team must discuss the continuum of placement options for Student, and explore available placements. If placement in a California RTC is not available, District must document the unavailability in the IEP notes. Student's IEP shall be modified to expressly provide Mother equal visitation to any out-of-state RTC that is offered to Father. In addition, the IEP shall expressly address the extent to which Mother will participate in family therapy as part of Student's treatment plan.

3. As a compensatory remedy, in excess of the visitation provided in Student's IEP, District shall, consistent with District guidelines for reimbursement of transportation and lodging, provide Mother with four visits to Devereux, to be used at any time for as long as Student is placed there.

4. Until such time as a court permanently orders Mother's parental rights to be terminated, District shall provide Mother with notice of any assessment plans and IEP team meetings for Student.

PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) Mother, on behalf of Student, prevailed on all issues as to District. DMH prevailed as to all issues against it.

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).)

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Dated: February 3, 2012

/s/

GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings

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