

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES COUNTY DEPARTMENT OF
MENTAL HEALTH and PALMDALE SCHOOL
DISTRICT,

Respondents.

OAH CASE NO. N 2007110570

AMENDED DECISION¹

Administrative Law Judge (ALJ) Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 28, 2008, in Palmdale, California.

Educational advocate Brian Allen represented Student for the entire hearing, and attorney David Burkenroad represented Student for a portion of the hearing. Student's mother (Mother) was present on Student's behalf for a portion of the hearing. Spanish interpreter Susana Bianchi de Pisterman provided interpretation services while Mother was present at the hearing.

¹ This decision is amended solely to incorporate citations inadvertently omitted from Legal Conclusion 10 on page 10. No other changes have been made to the content of this decision.

Paul L. McIver, District Chief, represented Los Angeles County Department of Mental Health (DMH). Adele M. Katz, Program Manager, was present on behalf of DMH.

Attorney Lee G. Rideout represented Palmdale School District (District). Dr. John Porter, Director of Special Education, was present on behalf of the District.

On November 19, 2007, OAH received Student's request for due process hearing (Complaint). On December 11, 2007, OAH granted Student's motion to amend the Complaint, and ordered that the timelines recommenced as of that date. At the hearing, the ALJ received sworn testimony and documentary evidence. The parties requested leave to submit closing arguments in writing. Upon receipt of those arguments, the record was closed on February 5, 2008, and the matter was submitted.

ISSUES

1. Did DMH deny Student a free appropriate public education (FAPE) because it improperly declined to assess her for eligibility for mental health services on or after November 1, 2007?
2. Did the District deny Student a FAPE because it failed to adhere to the applicable timelines for mental health assessment referrals?

REQUESTED REMEDIES

Student seeks the following remedies: (1) DMH shall complete a comprehensive mental health assessment within 60 days, and find Student eligible to receive AB 3632² mental health services; and (2) CMH and the District shall fund private counseling services

² Chapter 26.5 of the Government Code, which includes Government Code section 7576, governs interagency responsibilities for mental health services. These legal provisions are commonly referred to as "AB 3632," in reference to one of the bills in the California Assembly which enacted these provisions into law.

to Student as compensatory education.

CONTENTIONS OF THE PARTIES

Student contends that she met all criteria for an AB 3632 mental health referral to DMH pursuant to Government Code section 7576 and California Code of Regulations, title 2, section 60040; therefore, DMH's refusal to conduct the mental health assessment was contrary to the law and denied Student a FAPE. Student also contends that the District denied her a FAPE by failing to adhere to the applicable timelines governing a referral to DMH.

DMH argues that the referral package it received from the District did not contain the necessary documentation establishing that Student met the criteria for an AB 3632 mental health referral. Hence, DMH contends that its refusal to conduct the mental health assessment was legally required and did not deny Student a FAPE.

The District argues that, because an August 2007 settlement agreement did not specify a deadline for the referral to DMH, the District's October 2007 referral to DMH complied with the terms of that agreement.³ The District contends that the referral timelines contained in Government Code section 7576 and California Code of Regulations, title 2, section 60040 are not applicable, because the terms of the August 2007 settlement agreement control.

³ The District also argues that Student's claim against the District concerns compliance with the settlement agreement dated August 14, 2007. The District contends that, because OAH does not have jurisdiction to determine whether the District complied with the terms of a settlement agreement, OAH lacks jurisdiction to decide this issue. In a motion to dismiss filed on January 2, 2008, the District raised this jurisdictional argument and sought to be dismissed as a party. In an order dated January 18, 2008, OAH denied the District's motion.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Student is a 14-year-old girl who resides with her mother and siblings within the boundaries of the District and DMH. For the 2006-2007 school year, she attended eighth grade at the District's Juniper Intermediate School. Because the District is an elementary school district that serves pupils from preschool through eighth grade, Student has completed her attendance within the District. Student currently attends ninth grade in the Antelope Valley Union High School District. On May 15, 2007, Student was determined eligible for special education under the category of specific learning disability (SLD).

FACTUAL BACKGROUND

2. In spring 2007, District school psychologist Dean Smith and District resource specialist Dr. Ronald Ball conducted an initial psychoeducational assessment of Student. On May 15, 2007, the individualized education program (IEP) team convened and agreed that Student was eligible for special education due to an SLD. The IEP team members agreed that Student would participate in special education for 13 percent of her school day, with the remainder of her time in general education eighth grade classes. The IEP document indicated that Student's special education program and services would consist of resource specialist program for two periods per day, and designated instruction and services (DIS) of individual counseling for one 45-minute session per week.⁴ Pursuant to Mother's request, the IEP minutes indicate that "the district will submit a referral to LA

⁴ The first page of the IEP document does not specify a frequency for the individual counseling session. However, the IEP Minutes state that "the district psychologist will coordinate counseling services for [Student] with a schedule of one 45-minute counseling session per week."

County Mental Health for AB 3632 assessment.”

3. In late May 2007, Student had two counseling sessions with District school psychologist Kathleen Scherich. Thereafter, the District did not submit a referral to DMH for a mental health assessment of Student.

4. On or about June 21, 2007, an amended request for due process hearing was filed with OAH on behalf of Student, naming the District as the respondent. OAH designated the matter, *Student v. Palmdale School District*, as OAH Case No. N2007050801. On August 14, 2007, Student and the District executed a Final Settlement Agreement And Release (Settlement Agreement) which resolved the matter.⁵ In the Settlement Agreement, the parties agreed that Student “waives any and all claims related to, or arising from, Student’s educational program through the Effective Date of this Agreement.” Among the other terms of the Settlement Agreement was the following provision:

The District will complete a referral to [DMH] for an assessment of Student in order to determine whether Student requires mental health services to benefit from her educational program, upon receipt of written consent to complete such referral.

5. On August 24, 2007, the IEP team members convened and agreed to amend the IEP to incorporate provisions of the Settlement Agreement. Pursuant to the Settlement Agreement, one of the provisions in the IEP amendment was the following: “sign referral

⁵ The Settlement Agreement is signed in counterparts, with Mother’s signature dated August 9, 2007, Student’s attorney’s signature dated August 11, 2007, and signatures from the District’s deputy superintendent and attorney dated August 14, 2007.

for AB3632.” Also on August 24, Mother signed her consent to allow the District to refer Student to DMH for an AB3632 mental health assessment.

6. On or about October 26, 2007, the District submitted to DMH a request for an AB 3632 mental health assessment, which was prepared by Ms. Scherich. In a letter dated November 1, 2007, DMH supervisor Jessica Ahearn informed the District that DMH was unable to complete an AB3632 assessment of Student because the referral did not include evidence that school-based interventions, including at least three months of DIS counseling, had been attempted.

7. On November 19, 2007, OAH received Student’s Complaint, which named DMH as the respondent. On December 11, 2007, OAH received Student’s Amended Complaint, which added the District as a respondent.

DMH’S REFUSAL TO CONDUCT MENTAL HEALTH ASSESSMENT

8. Based on the results of a pupil’s special education assessments, an IEP team may refer a pupil who is eligible for special education, is suspected of needing mental health services, and meets all of the legal criteria, to a community mental health service for an AB 3632 mental health assessment. Among those criteria is the requirement that the pupil emotional or behavioral characteristics that are all of the following: (A) Observed by qualified educational staff in educational and other settings, as appropriate; (B) Impede the pupil from benefiting from educational services; (C) Significant in their rates of occurrence and intensity; and (D) Associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling.

9. During the time period at issue, Student had emotional or behavioral characteristics that impeded her from benefiting from educational services. Testimony from Mother and Dr. Ball established that Student had emotional and behavioral characteristics, including depression, which appeared to negatively impact her attendance

at school. This evidence was supported by findings in the May 2007 psychoeducational assessment report regarding Student's difficulties in the areas of social-emotional and behavioral functioning.

10. However, there was no persuasive evidence that Student's emotional and behavioral characteristics were associated with a condition that was not temporary and could not be resolved with short-term counseling. Although Dr. Ball initially testified that Student should receive an AB 3632 referral, he later clarified that competent, professional counseling at the school level would be preferable, and that he had no reason to believe that school counseling would not address Student's needs. He also acknowledged that he did not know whether the criteria for an AB 3632 referral had been met in Student's case. Thus, Dr. Ball's testimony did not establish that Student's emotional and behavioral characteristics could not be resolved with short-term counseling.

11. In contrast, Ms. Scherich, the school psychologist who counseled Student twice in May 2007, testified that an AB 3632 mental health referral was not warranted because Student's problems were relatively mild and likely could have been remediated with lower-level interventions, such school counseling. In her testimony and the Documentation Of Counseling Intervention (contained in Student's Exhibit C), Ms. Scherich reported that Student was cooperative, insightful, and responsive to problem-solving approaches during the counseling sessions in May 2007, and that Student's attendance had improved during that time period. While Ms. Scherich was generally a credible witness, it is unclear whether her estimation of Student's problems was ultimately correct. Since there was very little time left before the end of the 2006-2007 school year for Student to receive counseling, it was difficult for school staff to determine whether Student's emotional and behavioral problems were temporary in nature and could have been resolved by short-term counseling.

Nevertheless, there was no credible evidence to refute Ms. Scherich's opinion. Given

these circumstances, there is insufficient evidence that that Student's emotional and behavioral characteristics were significant as indicated by their rates of occurrence and intensity, and were associated with a condition that could not be described solely as a social maladjustment or a temporary adjustment problem, and could not be resolved with short-term counseling.

12. Among the documentation that an LEA or IEP team must provide when referring a pupil to a community mental health service is an explanation as to why school counseling, psychological and guidance services are clearly inappropriate in meeting the pupil's needs. Likewise, the documentation should include a description of the counseling, psychological, and guidance services, and other interventions that have been provided to the pupil, as provided in the pupil's IEP, including the initiation, duration, and frequency of these services, or an explanation of the reasons a service was considered for the pupil and determined to be inadequate or inappropriate to meet his or her educational needs.

13. If no mental health assessment is determined to be necessary, or the referral is inappropriate or incomplete, the reasons shall be documented by the community mental health service. As discussed above, the Documentation Of Counseling Intervention that the District submitted to DMH indicated that the only interventions Student had received prior to the referral were two DIS counseling sessions, and that those sessions had been effective. Testimony from DMH supervisor Jessica Ahearn established that DMH could not initiate a mental health assessment based on this information, because there was no explanation as to why school counseling services and similar interventions were inadequate or inappropriate to meet Student's needs. Instead, because school counseling was an appropriate service to meet Student's needs, an AB 3632 mental health assessment was unnecessary. Ms. Ahearn was a credible witness, and there was no evidence contrary to her persuasive testimony. Hence, DMH established that the documentation it received in the AB 3632 referral did not contain the required information about why school

counseling, psychological and guidance services were inappropriate to meet Student's needs. In a letter dated November 1, 2007, DMH documented the reasons why the referral was incomplete, and notified the District and Mother accordingly.

DISTRICT'S COMPLIANCE WITH TIMELINE FOR MENTAL HEALTH ASSESSMENT REFERRAL

14. An agreement to settle a legal dispute is a contract and its enforceability is governed by the principles of contract law. Where the language of a contract is clear and not absurd, it will be followed. As determined in Factual Finding 5, the August 24, 2007 IEP amendment provided that the District would refer Student to DMH for an AB 3632 mental health assessment. The District takes the position that, because the IEP was amended solely to implement the terms of the Settlement Agreement, the terms of the Settlement Agreement supersede the legal requirements that would otherwise govern implementation of the IEP.⁶

However, as recited in Factual Finding 4, the Settlement Agreement stated only that the District will initiate the referral "upon receipt of written consent to complete such referral," without any provision for how much time could elapse between the District's receipt of the written consent and the District's submission of the referral package to DMH. The Settlement Agreement is silent regarding the timeliness of the referral, and there is no contractual language governing the time frame for the District's compliance. It would be absurd to assume that the Settlement Agreement's lack of a deadline constituted a clear agreement to allow the District an unlimited time to submit the referral, particularly given that the ordinary timeline for a LEA's submission of a referral to a

⁶ The ALJ infers this position from the District's arguments. The District's written closing brief did not acknowledge or address the August 24, 2007 IEP Amendment. Instead, the District simply argued that the terms of the Settlement Agreement controlled

community mental health agency is within five working days of receipt of parental consent for the referral. Had the parties intended to allow the District an unlimited time to submit the referral, some indication to that effect would be contained in the Settlement Agreement. Hence, there is no contractual language to supersede the ordinary provisions of California law regarding implementation of the IEP provision to initiate a mental health assessment referral to DMH.

15. One of the components of FAPE is that an educational program must comport with the pupil's IEP. Pursuant to Factual Finding 14, the District was required to provide an educational program in conformity with the August 24, 2007 IEP amendment. Thus, the District was required to refer Student to DMH for an AB 3632 mental health assessment pursuant to ordinary legal timelines.

16. A referral package for a mental health assessment shall be provided within five working days of the LEA's receipt of parental consent for the referral. Here, the District received Mother's consent on or about August 24, 2007, but did not provide the referral to DMH until approximately October 26, 2007. This two-month period exceeded the legal timeline of five working days and, therefore, constituted a procedural violation.

17. A procedural violation may constitute a denial of FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. As determined in Factual Finding 13, DMH could not initiate a mental health assessment of Student, because school counseling was an appropriate service to meet Student's needs, making an AB 3632 mental health assessment unnecessary. Ms. Ahearn also established in her testimony that, had the same documentation been submitted in August or September 2007, DMH's response would have been the same.⁷ Thus, even if the District had submitted the referral to DMH within

⁷ The District's Documentation of Counseling Intervention is dated May 30, 2007.

five working days of receipt of Mother's consent, DMH would not have conducted the mental health assessment. As a result, the District's delay in submitting the referral did not impede Student's right to a FAPE, significantly impede Mother's opportunity to participate in the decisionmaking process regarding provision of a FAPE, or cause a deprivation in educational benefits. Therefore, the procedural violation did not result in a denial of FAPE.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student, as the petitioner, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

ELEMENTS OF A FAPE

2. Under the Individuals With Disabilities In Education Improvement Act (IDEA) and state law, children with disabilities have the right to FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) 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).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) 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).)

There is no allegation or indication that the documentation would have been any different had the District submitted it to DMH in August or September 2007, instead of October 2007.

3. 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, 200 [73 L.Ed.2d 690].) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Ibid*)

4. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Bd. of Educ. v. Rowley, supra*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) School districts 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. (*Bd. of Educ. v. Rowley, supra*, 458 U.S. at p. 201.)

5. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams, etc. v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

DID DMH DENY STUDENT A FAPE BECAUSE IT IMPROPERLY DECLINED TO ASSESS HER FOR ELIGIBILITY FOR MENTAL HEALTH SERVICES ON OR AFTER NOVEMBER 1, 2007?

6. "Mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals in conformity with

Education Code sections 56320 through 56329. (Cal. Code Regs., tit. 2, § 60020, subd. (g).)

An IEP team may initiate a referral to community mental health services for a special education student who is suspected of needing mental health services, if the pupil meets all of the criteria specified in Government Code section 7576, subdivision (b), and California Code of Regulations, title 2, section 60040, subdivision (a), including the following:

- (3) The pupil has emotional or behavioral characteristics that are all of the following:
 - (A) Are observed by qualified educational staff in educational and other settings, as appropriate.
 - (B) Impede the pupil from benefiting from educational services.
 - (C) Are significant as indicated by their rate of occurrence and intensity.
 - (D) Are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling.

- (5) The local educational agency . . . has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to the pupil pursuant to Section 56363 of the Education Code, or behavioral intervention as specified in Section 56520 of the Education Code, as specified in the individualized education program and the individualized education program team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the individualized education program team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

(Gov. Code, § 7576, subd. (b); see also Cal. Code Regs., tit. 2, § 60040, subd. (a).)

7. Referral packages to a community mental health service for a mental health assessment must include specific documentation, including a description of the counseling, psychological, and guidance services, and other interventions that have been provided to the pupil, including the initiation, duration, and frequency of these services, or an explanation of why a service was considered for the pupil and determined to be inappropriate. (Gov. Code, § 7576, subds. (c)(4) & (e)(4)(5); Cal. Code Regs., tit. 2, § 60040, subds. (a) & (b).) Similarly, a referral package must include “an explanation as to why school counseling, psychological and guidance services are clearly inappropriate in meeting the pupil’s needs.” (Cal. Code Regs., tit. 2, § 60040, subd. (d)(4); see also Cal. Code Regs., tit. 2, § 60040, subd. (c)(2).)

8. If the community mental health agency determines that no mental health assessment is necessary, or the referral is inappropriate, the community mental health agency shall document the reasons and shall notify the LEA and the parent of this determination within one working day. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(1).) If the referral is determined to be incomplete, the community mental health service shall document the reasons and shall notify the LEA within one working day. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)

9. Based on Factual Findings 8-13, DMH did not improperly decline to conduct a mental health assessment of Student, and therefore did not deny her a FAPE. Student did not meet her burden of proving that she met all of the criteria in Government Code section 7576, subdivision (b), and California Code of Regulations, title 2, section 60040, subdivision (a). Specifically, she did not prove that her emotional and behavioral characteristics were significant as indicated by their rates of occurrence and intensity, and were associated with a condition that could not be described solely as a social maladjustment or a temporary adjustment problem, and could not be resolved with short-

term counseling. Moreover, the documentation DMH received in the AB 3632 referral did contain the required information about why school counseling, psychological and guidance services were clearly inappropriate to meet Student's needs. Pursuant to the information contained in the referral, DMH's refusal to conduct the mental health assessment was consistent with the law and did not deny Student a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE BECAUSE IT FAILED TO ADHERE TO THE APPLICABLE TIMELINES FOR MENTAL HEALTH ASSESSMENT REFERRALS?

10. An agreement to settle a legal dispute is a contract and its enforceability is governed by the principles of contract law. (*Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727, 733; *Village of Kaktovik v. Watt* (D.C. Cir. 1982) 233 U.S. App. D.C. 39, 689 F.2d 222, 230.) Where the language of a contract is clear and not absurd, it will be followed. (Civ. Code, § 1638; see, *Apra v. Aureguy* (1961) 55 Cal.2d 827, 830.)

11. A school district must initiate a referral for a mental health assessment within five working days of its receipt of parental consent to a referral. (Cal. Code Regs., tit. 2, § 60040, subd. (a).)

12. When analyzing whether an LEA complied with the procedures set forth in the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation may constitute a denial of FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii), Ed. Code, § 56505, subd. (f)(2); see also Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

13. Based on Factual Findings 14-17, the District violated the procedural requirement, pursuant to the August 24, 2007 IEP, the District was required to initiate a referral for mental health assessment to DMH within five working days of receipt of Mother's consent to the referral. However, based on Factual Finding 17, this procedural violation did not impede Student's right to a FAPE, significantly impede Mother's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or cause a deprivation of educational benefits. Because the referral would still have been incomplete had the District submitted it earlier, DMH's response would have been the same; hence, regardless of the District's delay in providing the referral to DMH, DMH would have determined that the referral documentation did not comply with the criteria in Government Code section 7576 and California Code of Regulations, title 2, section 60040. Accordingly, the District's delay did not affect Student's receipt of any assessment, services, or other educational benefits, and therefore the procedural violation did not deny Student a FAPE.

ORDER

All of Student's requests for relief are denied.

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. The following findings are made in accordance with this statute: DMH prevailed on Issue 1. The District prevailed on Issue 2.

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 ninety days of receipt

of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 29, 2008

A handwritten signature in cursive script, reading "Suzanne B. Brown". The signature is written in black ink on a light gray background.

SUZANNE B. BROWN

Administrative Law Judge

Special Education Division

Office of Administrative Hearings