

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL DISTRICT,
CALIFORNIA DEPARTMENT OF MENTAL
HEALTH, AND LOS ANGELES COUNTY
DEPARTMENT OF MENTAL HEALTH.

OAH CASE NO. 2010110435

DECISION

The due process hearing in this matter was held on January 18 and 19, 2011, in Torrance, California, before Clifford H. Woosley, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH).

Candis W. Bowles, Attorney at Law, appeared on behalf of Student. Student's mother (Mother) was present for the hearing. Joyce E. Paul, Attorney at Law, of Parker & Covert LLP, appeared on behalf of Torrance Unified School District (District). District Director of Special Education, Dina Parker, attended the hearing. Jenny Wong, Attorney at Law, appeared on behalf of the California Department of Mental Health (CDMH). Andrea Ross, Attorney at Law, appeared on behalf of Los Angeles Department of Mental Health (LACDMH).¹

¹ LACDMH did not appear the second day, indicating the hearing should proceed in its absence.

Student filed a Request for Due Process Hearing (complaint) on November 8, 2010, against the California Department of Education (CDE), California Health and Human Services Agency (CHHS), CDMH, LACDMH, and District, as respondents. On December 6, 2010, OAH denied CDMH's motion to be dismissed as a party but ordered dismissal of the complaint's issue two, which alleged violations of state and federal civil rights statutes beyond OAH's jurisdiction. On December 9, 2010, OAH granted CDE's motion, dismissing it as a party. On December 24, 2010, OAH granted, for good cause, CDMH's and District's request for a continuance of the due process hearing. On December 27, 2010, OAH denied District's motion to be dismissed as a party, but granted its motion to dismiss allegations as to similarly situated students. On December 28, 2010, OAH granted CHHS' motion and dismissed it as a party. OAH also denied CDMH's motion for reconsideration of OAH's denial to dismiss it as a party. District, LACDMH, and CDMH remained as respondents.

At the close of the hearing, the matter was continued to February 9, 2011, for the submission of closing briefs. Upon receipt of the written closing arguments, the record was closed, and the matter was submitted.²

ISSUE

Did District, LACDMH, and/or CDMH deny Student a free appropriate public education (FAPE) following the Governor's October 8, 2010 veto of AB 3632 funding, because respondents delayed providing a residential treatment center (RTC) placement in Student's individualized education program (IEP) as recommended by LACDMH's AB 3632 assessment?

² The closing briefs have been marked as exhibits: Student's brief is Exhibit S-25, District's brief is D-30, CDMH's brief is CM-10, and LACDMH's brief is LM-1.

FACTUAL FINDINGS³

EDUCATIONAL HISTORY PRIOR TO OCTOBER 8, 2010

1. Student is a 14-year-old, eighth grade boy, who has resided within the District's boundaries at all times relevant herein and is eligible for special education services as a student with emotional disturbance (ED). Student was diagnosed with bipolar disorder and has attended Heritage School, a RTC in Utah, since December 29, 2010.

2. Mother testified about the progression of Student's emotional disorder over the previous three years. In August 2007, at the beginning of fifth grade, Student was diagnosed with bipolar disorder. Student was depressed, made violent drawings, and exhibited a dark demeanor. He was becoming aggressive and was no longer a happy kid. Student's psychiatrist prescribed a number of different medication regimens, with varied success. When the prescriptions needed to be changed, the transition would cause a lot of volatility. Student treated with his psychologist, weekly. He saw his psychiatrist monthly. Student liked going to counseling and slowly responded. In fifth grade, Student was tutored two to four times a week for homework and study.

3. Soon after the beginning of the 2008-09 school year, Student started having trouble with his sixth grade classes. Student's parents (Parents) sought school

³ The parties submitted a Joint Stipulation of Facts and Evidence (Exhibit S-24) to which Student, District and LACDMH joined in its entirety. CDMH partially joined, stipulating to facts about which it had personal knowledge. To the extent that the findings include stipulated facts to which CDMH did not join, other evidence supports the factual findings.

involvement, by requesting a section 504⁴ plan to assist with class work and seeking accommodations to keep Student on task, such as sitting close to front, cuing, avoiding distractions, and using a testing room. Student's bipolar disorder had progressed and school became increasingly stressful, making homework and home life an ordeal. Mother testified that Parents needed the school to assist in keeping Student focused as part of a more consistent and holistic strategy.

4. The psychiatrist prescribed medication changes during sixth grade, which caused Student periods of anger and frustration, with increasing anxiety. Some strategies that had worked to control Student's behaviors in the past no longer worked. Student continued to act out at home, especially after the medication caused Student to gain weight. Pupils would tease him about being fat, which resulted in him coming home aggravated, and unable to focus or control his behaviors. Homework continued to be very difficult for him to complete, despite 504 accommodations. Student received grades of A, B, and C, but they were partially the result of Mother doing Student's homework for him, just to get it done. Mother explained that some of Student's teachers were aware of her completing Student's homework assignments, but accepted the homework anyway, because they knew of the struggles the family faced at home. However, Student did not act out at school, as Student viewed school as a safe place, and he invested a lot of energy in acting "normal" there.

5. In September 2009, Student started seventh grade for the 2009-10 school year. In October 2009, Student began exhibiting fits of rage at home, hitting his head on the walls and floor, and throwing objects and furniture. The family's home had holes in

⁴ Section 504 of the Rehabilitation Act of 1973 ensures that a qualified child with a disability has equal access to education. The child may receive appropriate accommodations and modifications tailored to the child's individual needs.

the walls and damaged furniture. Student also physically attacked his Mother, hurt himself, and would try to harm his older sister. His father (Father) would sometimes have to physically subdue Student.

6. Student's fits of rage were not always physical. Sometimes, Student would start screaming, use obscenities, and call people names. These episodes could last up to three hours. Eventually, Student would become exhausted, and would often collapse and sob, apologizing and saying how he hated his sickness. Mother explained that small, seemingly insignificant events could spark Student's anger.

7. During fall 2009, Parents became disenchanted with Student's psychiatrist and changed doctors. The therapist referred Student to psychiatrist Dr. Alan C. Green. Dr. Green's treatment plan included an aggressive medication treatment to control Student's aggression and mood swings. The new medications put Student in a near sedated state, which Dr. Green believed was necessary to control Student's violent behavior. As a result, Student would sleep 12 to 14 hours a day, have difficulty waking up for school, often would not go to school, and was generally drowsy and lethargic. Student's Parents developed techniques to dress and prepare him for school, even though Student would not be fully awake. Parents informed the school of what was happening regarding Student's new medication regimen and the associated lethargy. In December 2009, Parents asked District to evaluate Student for special education services.

8. In January 2010, the District's school psychologist, Crista C. Gonzalez, conducted an initial psychoeducational assessment of Student. Ms. Gonzalez testified at hearing. She had been a school psychologist with the District for more than eight years. Previously, she was a school counselor with the District, as well as with the Manhattan Beach Unified School District. She was a teacher for the Hawthorne School District from 1996 through 2000. Ms. Gonzalez earned her Bachelor's of Arts in psychology in 1996,

and her Master's of Arts in clinical psychology in 1998. She has Pupil Personnel Services (PPS) credentials in school counseling and school psychology. Her duties as a school psychologist include conducting psychoeducational evaluations, consulting with staff and parents, attending IEPs, and providing counseling to students.

9. Ms. Gonzalez explained that she designed her evaluation to determine: 1) Student's overall level of cognitive and achievement abilities in math, reading and language; 2) if Student was legally eligible for special education services as a student with specific learning disability (SLD), other health impairment (OHI), or an emotional disturbance (ED); and 3) recommendations or modifications to address Student's specific educational and social, emotional, and behavioral needs.

10. Ms. Gonzalez' assessment included: 1) a review of Student's records; 2) interviews with Parents, teachers, Student's psychologist, Student's psychiatrist, and Student; 3) Student observations; 4) Wechsler Intelligence Scale for children, fourth edition (WISC-IV); 5) Woodcock Johnson II Tests of Academic Achievement, third edition (WJ-III); 6) Test of Auditory Processing Skills, third edition (TAPS-III); 7) Developmental Test of Visual Motor Integration (VMI); 8) Achenbach Teacher's Report Form (TRF); 9) Achenbach Child Behavior Checklist (CBC); 10) Conner 3: Teacher, Parent, and Student Rating Scales; 11) Piers-Harris-2, Self-Concept Scale; and 12) Reynolds Adolescent Depression Scale, 2nd edition (RADS-2).

11. At the time of her evaluation, Ms. Gonzalez was aware that Student had been diagnosed with Bipolar Disorder-NOS and was under medication for the condition. She understood how the sedation effect of the medication impacted Student's attendance, and noted that Student's doctors described his medical condition as severe, and long term.

12. Ms. Gonzalez concluded that Student did not meet the statutory eligibility criteria for serious emotional disturbance. Specifically, Student did not demonstrate an

inability to learn, as indicated by his academic results. Per teacher reports and assessor, Student interacted with peers and got along well with others within the school setting. Though Student had a history of inappropriate conduct within the home setting, his behaviors had not interfered with school disciplinary regulations or codes of conduct. Student's citizenship grades were excellent that year and the previous years. While the teachers reported that Student appeared lethargic due to his medication, the teacher rating scales included no significant or elevated scores in the area of depression. Also, Student's depression self-report included no significant or elevated scores. Finally, the teachers observed no evidence of physical symptoms or fears in Student associated with personal or school problems.

13. Ms. Gonzalez also concluded that Student did not meet the eligibility criteria for a specific learning disability. The cognitive and achievement test results did not reveal any significant discrepancy between Student's average ability and his academic functioning. Student's full scale IQ was average and his academic skill skills in reading, math calculation and reasoning, and written expression were in the average range.

14. Ms. Gonzalez did conclude, however, that Student met the eligibility criteria for OHI due to his Bipolar Disorder-NOS. Student's medical condition adversely impacted his performance within the school day, given the sedation effects of his medication. Ms. Gonzalez also considered the severity and long term nature of his disorder.

15. The IEP convened on January 13, 2010 to discuss Student's eligibility for special education services. Ms. Gonzalez presented her report. The IEP team found Student eligible under the category of OHI, and developed an IEP. The IEP provided counseling and specialized academic instruction at the school's learning center. The IEP also provided accommodations, including modified assignments at teachers' discretion;

peer assistance, if required for note taking support; use of a calculator in the learning center; access to a computer in the library, upon request; preferential seating, close to instruction and away from distractions; and an establishment of a home school communication system, with a daily planner, notes, phone calls, and emails.

16. Parents also requested that Student be referred to LACDMH for an assessment to determine if Student qualified for AB 3632⁵ services. District prepared the AB 3632 referral documents, which Parents signed on January 13, 2010.

17. During the remainder of the 2009-10 school year, Student continued in a drowsy and lethargic state as result of his medication. In addition, the medication caused Student to obsess over food. Student continued to see Dr. Green two to four times a month and his psychologist once a week.

18. In July 2010, LACDMH assessor, Jean L. Wong, a licensed clinical social worker (LCSW), personally interviewed Mother and Student. Mother had significant problems in getting Student to the interview, but he eventually showed up. Ms. Wong described Student as polite and respectful, but very agitated.

19. Ms. Wong reviewed Student's medical and parent information forms, the January 2010 District psychoeducational assessment, and the referral packet materials. In addition to interviewing Student and Mother, Ms. Wong consulted with Student's psychologist, Dr. White. Dr. White discussed Student's psychiatric condition, his escalating violent behaviors, and recommended that Student receive a residential treatment placement.

⁵ In 1984, the California Legislature passed Assembly Bill 3632, adding Chapter 26.5 to the Government Code, which provided for mental health services to special education students. These are commonly referred to as AB 3632 services.

20. In August 2010, Student began participating in organized football. On August 31, 2010, Ms. Wong contacted Mother, and Mother advised that on one occasion, following football practice, Student had a violent tantrum in the car, and destroyed the car's console, threw things out of the car, and tried to kick out the car's window. When they arrived home, Mother remained in the car when Student got out because Mother was concerned Student would hit her. Student tried to kick in the front door of the house, raising the attention of a neighbor. When Student got into his bedroom, he ripped up his comforter and cut up his USC football jerseys. Father had to physically subdue Student. Mother told Ms. Wong that Student's behavior had become unpredictable and the psychiatrist had increased his medications. In addition, Parents and Student's psychologist decided that the football program caused too much anxiety. Consequently, Parents withdrew Student from the football program.

21. On September 1, 2010, Ms. Wong issued her AB 3632 assessment report, finding that Student met the eligibility requirements of AB 3632 as an individual with exceptional needs who required mental health treatment in order to benefit from educational programming. Ms. Wong further found that Student was in need of therapeutic residential treatment, but that LACDMH could not place Student at a residential treatment center (RTC) because District had not designated Student's eligibility as ED. She further stated that once District changed Student's eligibility to ED, LACDMH would proceed and implement placement in an RTC.

22. Ms. Wong mailed the assessment to the District on September 1, 2010, with a cover letter requesting that the District contact her to schedule an IEP meeting, preferably with two-weeks notice, so she could arrange to have a LACDMH representative present and discuss the assessment finding and recommendations, and facilitate the delivery of the recommended mental health services.

23. Ms. Wong did not interview District personnel as part of the AB 3632 assessment. District first learned of LACDMH's recommendation for a RTC when District received the assessment report in early September 2010. Ms. Gonzalez was surprised by the RTC recommendations since Student's mental health had not previously substantively impacted Student in the school setting.

24. At the beginning of the 2010-11 school year, Student looked forward to his eighth grade year; however, within days, Student's attitude changed, and he stopped getting up to get to school on time. Often, Student would not show up for school until ten or eleven o'clock in the morning, or not at all, which caused Student to fall behind in his classes. This caused Student significant anxiety.

25. Ms. Gonzalez convened an IEP meeting on September 24, 2010. District invited LACDMH to the IEP team meeting but LACDMH did not attend. The IEP team amended the January 13, 2010 IEP to provide for flexible homework and class work grading by the Student's general education teachers, pending an exploration of the home hospital program because of Student's absences. The team did not review the September 1, 2010 AB 3632 assessment report for the purpose of discussing appropriate mental health services for Student, as Ms. Gonzalez explained that she was not qualified to do so. Specifically, Ms. Gonzales advised that she was not a LCSW, like Ms. Wong. However, the IEP team recognized that the AB 3632 assessment report referenced the legal requirement that a RTC could only be implemented if Student's eligibility was ED. Accordingly, the IEP team agreed that recent behaviors and the AB 3632 recommendation warranted a reevaluation of Student's OHI eligibility. Parent signed an assessment plan to review eligibility and assess Student in the area of ED. The IEP stated that LACDMH would be contacted to set up an IEP meeting to discuss the eligibility results.

26. On October 6, 2010, Dr. Green recommended that Student be put on the home hospital program because Student's recent exacerbation of his bipolar disorder required medication changes which affected Student's ability to attend school. The District authorized home hospital program instruction for Student.

THE GOVERNOR'S OCTOBER 8, 2010 LINE ITEM VETO AND THE DISTRICT'S RESPONSE

27. On October 8, 2010, the California Legislature sent to the Governor its 2010-11 Budget Act (Ch. 712, Stats. 2010), which in item 8885-295-0001 provided funding for AB 3632 services. On that same day, the Governor signed the Budget Act after exercising his line-item veto authority on several items in the Act. One of the items he vetoed was the appropriation for AB 3632 services by county mental health agencies. The Governor further stated that the AB 3632 mandate was suspended.

28. The District's director of special education, Dina Parker, first learned of the Governor's AB 3632 funds veto on October 13, 2010. Ms. Parker, who provided testimony at hearing, has been the director in charge of all special education related services since September 2000. Her job duties include overseeing 700 staff members, 2800 special education students, the delivery of services and programming, and the development and implementation of policy and procedures. She also represents the District in Southeast Special Education Local Plan Area (SELPA), and administrates all due process and compliance complaints involving District. Ms. Parker received a Bachelor of Arts in special education from Arizona State University and a Master of Arts from California State University at Dominguez Hills in educational administration. She previously held a special education teaching credential from Arizona and currently holds education specialist and administration credentials from California. Before becoming director, she held a number of District positions, including a special education

coordinator for a year and a half, a special education program specialist for a year and a half, and a resource specialist at Bert Lynn Middle School for five years.

29. On October 13, 2010, Ms. Parker attended the monthly meeting of Southwest SELPA's special education directors' counsel. The Southwest SELPA provides its member districts with crucial information related to special education, leading the discussion on maintaining special education services, negotiating and communicating with LACDMH and CDMH, conversing with state government regarding funding, and tracking legislation. The Southwest SELPA helps guide the member districts on handling special education issues and directing staff.

30. At the meeting, SELPA director, Bob Farran, talked about the Governor's veto. Ms. Parker learned that AB 3632 funding had stopped but that the SELPA was involved in developing plans to maintain services. Mr. Farran stated that LACDMH would, for the time being, continue to fund the current RTC placements and outpatient services, but that LACDMH would no longer attend IEP meetings and would refuse to accept AB 3632 referrals. The district special education directors were advised to continue to make AB 3632 referrals, as well as inviting LACDMH to scheduled IEP meetings. Mr. Farran stated that the districts' special education staff should not be speaking about the mental health services at IEP meetings because they were not qualified to do so and that the districts should so inform LACDMH. Mr. Farran recommended that the directors fully communicate the situation to their respective administrations and gather accurate information about the mental health services within their districts. Ms. Parker determined that District had 23 students in RTC placement and approximately 60 students receiving other AB 3632 mental health services.

31. On behalf of its member districts, the Southwest SELPA entered into an Interagency Agreement with LACDMH in 2008. Under the agreement, it was LACDMH's duty to provide related mental health services. Ms. Parker acknowledged, however, that

the agreement also stated it was the District's obligation to provide mental health services when LACDMH did not. Thereafter, the District could seek reimbursement from LACDMH. The District did not make use of these provisions for Student because Ms. Parker said she understood that AB 3632 funding would be coming in and LACDMH's mental health services would continue.

32. Ms. Parker began searching for potential mental health providers (therapists, social workers, and psychiatrists) with whom the District might contract in case LACDMH continued to refuse to participate in assessing and providing mental health services. However, neither Ms. Parker nor any other District representative advised Parents that the District was legally obligated to provide the mental health services when LACDMH declined to do so, nor did District retain any qualified mental health professionals to review Student's AB 3632 assessment and provide Student with mental health services. Ms. Parker explained that it was her understanding that AB 3632 funding would be coming soon, and that LACDMH would then continue providing mental health services.

OCTOBER 18, 2010 ELIGIBILITY REVIEW AND AMENDMENT IEP

33. Ms. Gonzalez issued an October 18, 2010 Social/Emotional/Behavioral Eligibility Review Assessment, which addressed whether Student had an emotional disturbance that affected his educational progress or performance, as specified in the Education Code, to the degree that it impacted Student's ability to achieve within the general education program. Ms. Gonzalez interviewed Parents, Student, Student's teachers, and Student's psychologist, Dr. White. She reviewed all available records, including documents from Student's psychiatrist, Dr. Green. She utilized the Achenbach System of Empirically Based Assessment, providing the child behavior checklist to

teachers and Parents and giving the youth self-report to Student. She had Student work on the Conners 3-Self Report, Long Form and the RADS-2. She also observed Student.

34. The most notable difference since the January 2010 psychoeducational assessment was Student's current lack of attendance. Student had been present for only six out of the first 50 days of school for 2010-2011. Ms. Gonzalez determined that the sedating properties of Student's medications affected Student's ability to wake up in the morning. Dr. Green reported Student had experienced a pervasive mood of depression during the previous six months that, with frequent mood swings, interfered with his ability to maintain satisfactory interpersonal relationships with peers. Ms. Gonzales described Student's condition as very fragile; he was lethargic and had difficulty concentrating on class work. These factors impacted Student's educational performance to a marked degree. Accordingly, Ms. Gonzalez concluded that Student met the eligibility requirements under the ED classification.

35. District scheduled an IEP team meeting for October 18, 2010 to discuss the results of the AB 3632 assessment, and invited LACDMH to attend. At the meeting, Ms. Gonzalez planned to present her assessment, recommending changing Student's eligibility from OHI to ED. Although LACDMH knew that Student's eligibility was going to be changed to emotional disturbance so that LACDMH could offer RTC placement, LACDMH refused to attend because of the Governor's line item veto of AB 3632 funding. LACDMH notified Parents and District that it would not attend the meeting, and as a result, Parents cancelled the meeting. Because the meeting was cancelled, Parents agreed to an amendment IEP dated October 18, 2010, which did not require an IEP team meeting. The amendment IEP extended the home hospital program placement for an additional two weeks. The amendment did not change Student's eligibility from OHI to ED.

36. As of October 18, 2010, the District did not inform Parents that the District was legally obligated to provide the mental health services when LACDMH declined to do so. The District did not retain qualified mental health professionals to review the AB 3632 assessment and provide Student with mental health services.

HOME HOSPITAL PROGRAM

37. Home hospital placement allowed Student to study at home, with a credentialed teacher providing five hours of personal instruction a week. The schedule was for the home hospital teacher to teach Student at home three times a week with two one-and-a-half hour sessions and one two-hour session. Student was isolated at home and Student would say he wanted to be in school. However, because Parents and Doctors knew that attending school would elevate Student's anxiety, impulsivity, and outbursts; they agreed that the home hospital program was a more appropriate placement than attending school.

38. Miriam Nebres was Student's home hospital program teacher, beginning on October 15, 2010. Her last day was December 9, 2010 because Student's doctor had excused him from the last week of school instruction before the winter break. She had been a home hospital teacher since 2009, having started with the District as a substitute teacher in 2006. She has a bachelor's degree in economics and possesses a multiple subject teaching credential.

39. In preparation for her home hospital instruction assignment with Student, Ms. Nebres met with Parents, talked with some of Student's teachers at Jefferson, determined the curriculum, and accessed the class assignments that Student's teachers electronically posted on the District's website. She would go to Student's home for the three sessions per week, but not before 12:30 p.m., because Student's medication

caused him to sleep to about noon.. Student's Father would observe the Monday teaching sessions while Mother observed all others.

40. Ms. Nebres taught Student Algebra 1, as well as eighth-grade Science, Social Studies, and English/Language Arts. Student did not like working alone. Student seldom did homework but, instead, waited for Ms. Nebres so they could work together. In math, Student would do every other odd numbered homework problem, as allowed by the teacher per the IEP modifications. Ms. Nebres never gave Student a math exam because he would not study math outside of their instructional time.

41. In English, they worked together with Edgar Allen Poe and Aesop's Fables, reading the stories and doing the comprehension questions out loud. They did not do poetry because it required memorization, which Student did not like. She worked with Student on Greek prefixes and suffixes, as well as grammar. Student was to read 20 minutes a day on his own, making note in his reading log. Ms. Nebres allowed Student to read nonfiction, because he would only read things he liked outside of their session time together.

42. For Science, Student and Ms. Nebres would take turns reading from the textbook, answering the questions at the end each section. Ms. Nebres had to help Student find most answers in the text. Student was studying United States government in social studies. She used the class textbook and two work sheets, which Student received before instruction began. Student made many errors on the worksheets, which he never did complete. Ms. Nebres used the citizenship test as a means of engaging Student, giving it orally and showing Student the answers in the textbook.

43. Student was polite and courteous to Ms. Nebres. Student never cancelled a session and the family was always prompt. However, Student was a "clock watcher" who was anxious for a session to conclude. He would become inattentive, ask for breaks, move about, read on the couch, or go outside between subjects. Generally, Student had

a very short attention span and demonstrated little motivation to learn. Student gave up easily. Two-hour sessions posed a special challenge for Student, Ms. Nebres, and Parents. To encourage Student, Ms. Nebres would break the sessions into half hour segments and not spend too much time on any one subject.

44. In her home hospital program grade report, Ms. Nebres described Student as a reluctant learner who often claimed he did not know how to do a lesson, but, once he started, found his way and could do the work. Student seemed to require someone by his side and, consequently, did not do homework except during sessions with Ms. Nebres. She used the same curriculum as that used by Student's eighth grade peers, however, Student's math skills were not at the Algebra 1 level, resulting in a grade of "F" for that subject. Student read at a seventh grade level, and had weak comprehension and oral fluency skills. Student earned a "C" in English, a "D" in Social Studies, and a "D" in science. Student's mental health symptoms and medication regimen rendered the home hospital instruction minimally beneficial to Student.

45. On October 29, 2010, the IEP team convened a meeting, and invited LACDMH. District representatives and Parents attended the meeting, but LACDMH did not. LACDMH again refused to attend because of the Governor's line item veto of AB 3632 funding, despite knowing that that Student's eligibility was going to be changed so LACDMH could offer RTC placement. The IEP team discussed the results of District's psychoeducational assessment and changed Student's eligibility to ED. Parents expressed concern about the delay caused by LACDMH's refusal to attend the IEP team meeting on September 24, October 18 and October 29, 2010. Parents stated Student's doctor said it was the District's duty to provide the mental health services because LACDMH refused. In response, the District representatives discussed county and non-public programs. They also referred Parents to the Southwest SELPA director for further

information. District did not disclose to Parents its legal obligation to provide Student with mental health services due to LACDMH's refusal to do so.

THE FEDERAL LAWSUIT AND STIPULATED TEMPORARY RESTRAINING ORDER

46. On October 27, 2010, Student was one of four named plaintiffs that filed a suit in the United States District Court for the Central District of California entitled *A.C. v. Schwarzenegger*, case number CV 10-7956 (the federal action). The federal action alleged that the Governor's veto of AB 3632 funding caused California to violate IDEA, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.

47. On November 1, 2010, Respondents LACDMH and District, entered into a stipulated Temporary Restraining Order (TRO) in the federal action. Pursuant to the terms of that TRO, LACDMH, District and the other defendants in the federal action agreed to carry out all policies and practices that were in effect prior to the Governor's actions on October 8, 2010. CDMH was not a party to this TRO.⁶

48. On November 4, 2010, the California Department of Education issued a Grant Award Notification to the Los Angeles County Office of Education, which awarded \$15,235,678 in federal IDEA funds to pay for the 2010-2011 Mental Health AB 3632 Services.

NOVEMBER 2010 IEP, AB 3632 SERVICES, AND RTC PLACEMENT

49. On November 17, 2010, LACDMH, Parents, and District representatives attended an IEP meeting. The IEP team agreed with LACDMH's recommendation that

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

Student required residential treatment. LACDMH offered the AB 3632 services recommended in its September 2010 assessment report.

50. On December 16, 2010, Heritage School (Heritage) in Utah notified LACDMH that it would accept Student into its residential program. An agreed upon December 16, 2010 IEP Amendment offered the Heritage School residential placement, nonpublic school and interim mental health services.

51. On or about December 29, 2010, Student enrolled at Heritage.

52. Parents, District, LACDMH and staff from Heritage School attended Student's annual IEP on January 10, 2011.

CDMH'S ROLE REGARDING AB 3632 SERVICES

53. California Department of Mental Health (CDMH) never directly reviewed Student for eligibility for special education and related services, nor directly provided any special education and related services to Student. CDMH has never attended an IEP meeting for Student. CDMH is not a local education agency (LEA).

54. During the relevant time period, CDMH and the California Department of Education (CDE) were entered into a State Interagency Cooperative Agreement regarding CDMH's duties related to AB 3632 mental health services. That agreement required CDMH to monitor county mental health departments to ensure compliance with AB 3632 and to make recommendations to CDE in response to compliance complaints, which were referred to CDMH by CDE because of mental health components. The agreement required CDMH to compile Client and Service Information data reports which collected data for all mental health services within a county. CDMH also agreed to report and monitor local interagency agreements between local educational agencies and community mental health departments. The agreement did

not address whether CDMH had any obligation to directly provide related mental health services when the community mental health agency failed or refused to do so.

55. Willie Deon testified as the Acting Chief of Community Programs: County Programs Technical Assistance (CPTA) section of CDMH. CPTA is the primary point of contact for the county mental health agencies, providing technical assistance and support involving AB 3632 services. CPTA's duties included responding to inquiries from local mental health and education agencies and monitoring compliance with AB 3632 guidelines. As Acting Chief, Mr. Deon would investigate and respond to compliance complaints, referred by CDE, which involved mental health services. After research and investigation, CDMH would report its findings and recommendations to CDE; CDMH did not directly respond to the compliance complaint parties.

56. Mr. Dion stated that CDMH was independent from county mental health agencies. CDMH did not contract with any county mental health agency for any specific IDEA services, and it had no authority to sanction or compel county mental health agencies to provide AB 3632 services. CDMH has never directly provided mental health services to a student, and Mr. Dion knew of no incidence of a community health care agency refusing to provide mental health services prior to the Governor's October 8, 2010 line-item veto. He was unaware of any contingent CDMH policies or procedures in the event community health care agencies failed or refused to provide AB 3632 related mental health services.

57. Mr. Dion acknowledged the existence of the interagency agreement between CDE and CDMH. He was not involved in its drafting and considered the interpretation and application of the agreement to be "above his pay grade." Accordingly, his testimony and views regarding the interagency agreement have little weight in these proceedings.

58. Charles Anders, Chief of the Local Program Financial Support for CDMH, provided testimony at hearing, stating that CDMH was a mere “pass through” for AB 3632 funds. After receipt of appropriated funds in a budget act, CDMH allocated the funds according to a pre-determined formula, which was developed and approved by the office of the California State Controller some years before. The allocated funds were, in actuality, reimbursement of claims from the counties for past AB 3632 services, typically two years old. CDMH had no discretion in allocating the funds, could not increase or decrease the appropriation made by the legislature, and was not required to audit the expenditures. No policy existed regarding county AB 3632 claims when CDMH had no money to allocate. CDMH did not administer federal funds for mental health programs and services pursuant to the IDEA.

59. Based upon the Governor’s veto of funding, no money was appropriated to CDMH for AB 3632 services. CDMH therefore had no funds to allocate to the county mental health agencies in the 2010-11 budget.

STUDENT’S EXPERT WITNESS, MICHAEL J. FRANCAZAK, PH.D.

60. At hearing, Michael J. Franczak, Ph.D. (Dr. Franczak) provided telephonic testimony regarding an appropriate mental health service remedy for Student. Dr. Franczak has been the Chief Operations Officer for Behavioral Health Services through the Marc Center, in Mesa, Arizona, since 2006. The Marc Center manages behavior health services for 3000 individuals who live in community settings, mostly adults and some children. The Marc Center is a provider for, and licensed by, the Arizona department of mental health. The Marc Center provides in-home support services of respite and psycho-educational activities for children, attends IEPs, crafts behavior support plans, and participates in child family teams. Child family teams consist of family

members, clinicians, educators, mental health providers, and whoever is important to the child's services and support.

61. Before working for the Marc Center, Dr. Franczak was the Chief of Clinical Services at the Arizona Department of Health Services, Division of Behavioral Health Services, for five years. He was responsible for the organization, development and direction of the statewide clinical infrastructure and operations for the Division. From 1995 to 2001, Dr. Franczak was Chief of the Bureau for Persons with Serious Mental Illness at the Arizona Department of Health Services, Division of Behavioral Health Services. The Bureau monitored services for 22,000 individuals throughout the state. He was responsible for the development, implementation and monitoring of community systems of care, including the transition and discharge process from psychiatric facilities to community behavioral health systems. Dr. Franczak has participated in numerous federal, state and private agencies and organizations as a panelist, expert, or consultant, in relation to the delivery of community-based mental health services that address clinical and social needs, such as housing, vocational and case management, and behavioral health services. He has made more than a hundred presentations, authored 13 chapters and journal articles, was awarded 12 federal grants, and has received numerous awards and recognitions.

62. Dr. Franczak received his Bachelor of Arts in psychology from LaSalle University in 1971, a Master of Arts in psychology from Montclair University in 1972, and his Ph.D. in psychology from Saint Louis University in 1976. He has taught general psychology, physiological psychology, learning theory, developmental psychology, developmental disabilities, behavior therapy, history and systems of psychology, and introduction to psychology, to graduate and undergraduate students. He presently serves as an adjunct faculty member of Arizona State University, supervising doctoral and pre-doctoral psychology internships. He has been involved in the mental health

system for 35 years, primarily as an administrator the past 16 years. Dr. Franczak was qualified to give expert testimony regarding mental health and behavioral services to patients transitioning from residential mental health facilities.

63. Dr. Franczak developed expertise in person-centered treatment planning, a model started in developmental disabilities about 25 years before. The basic model proposes that, in order to have a plan in which the patient will want to participate and succeed, the patient needs to be at the center of the plan. The person at the center helps fashion what the treatment should achieve, as opposed to having professionals dictate the purpose and goals. The person-centered treatment model is a system of care used in the child family team approach to treating mental illness in children and young people. In the child family team approach, the parents and the child assist in identifying the child's goals, preferences, values, and who should be involved in the child's mental care. This approach is related to the wraparound care policy, which is a national best practice model, used in many states, including various community mental healthcare agencies in California.

64. Dr. Franczak reviewed documentation regarding Student, which included IEPs, assessments, e-mails, and progress notes. He was aware of Student's early onset of bipolar disorder, the increasingly violent behaviors, the aggressive prescription medication regimen, and the consequential sleepiness and lethargy in school, causing lack of attendance. Dr. Franczak knew of Student's monthly psychiatric treatment and the weekly psychological therapy, as well as services provided by Student's special education program, before the RTC placement. Dr. Franczak opined that the psychiatric, psychological and prescription treatment were ineffective in addressing Student's bipolar disorder. Student had gone from attending school, to having home instruction, to being placed in a residential program. His experience is that children with mental

illness who do not receive adequate treatment will progress to higher levels of restrictive care.

65. Dr. Franczak explained that bipolar disorder must be treated aggressively, especially at early onset of symptoms. Psychological treatment and counseling are important but are often not sufficient. Treatment should include a psycho-educational program, family education, in-home support, and other supplements to medication and counseling. Dr. Franczak stated, in his professional opinion, Student will not develop the tools to successfully live in the community when Student returns from the residential placement. Without coming back to an adequate transition plan of recommended practices, Dr. Franczak believes Student will return to a RTC in six months or less.

66. Dr. Franczak believes the most effective treatment strategy would be those similar to a person-centered or wraparound service model. Wraparound models, which are often used in California, and even by LACDMH, would require a comprehensive team consisting of educators, Parents, mental health service providers, people from school who interact with Student, the county health case manager, and any other individuals who can contribute to Student's care. Such a team would be better able to evaluate not just what was wrong with Student, but ascertain when Student was doing well. Also, a behavior specialist should be part of the team, to understand the contingencies which resolve some of Student's behaviors. This would require a functional analysis assessment (FAA), which examines the details and triggers of problematic behaviors, in the home, at school, and in the community. The wraparound team could then develop strategies for a positive behavioral support plan to reinforce positive behaviors. Dr. Franczak stated that, given the seriousness of Student's behaviors, after the completion of the FAA, the team should meet bi-weekly for two weeks, weekly, and then monthly as the plan takes shape. According to the literature, recommended treatments for bipolar disorder are

aggressive and comprehensive. If left untreated, bipolar disorder could lead to physical changes in the brain.

67. Dr. Franczak based his opinion on his years of experience in watching patients come out of residential treatment and return to the community without adequate supports. Dr. Franczak believes that Student would have a high probability of returning to his problematic behaviors without proper services. However, Dr. Franczak admitted that Student's actual mental health needs cannot be determined until Student was deemed ready for discharge from the RTC. Dr. Franczak never saw or examined Student, did not communicate with Student's treating doctors or therapists, and had only spoken to Student's attorney. Student had been in RTC only a few weeks at the time of hearing. No evidence indicated when Student would be discharged and no admissible evidence was introduced which indicated what Student's actual mental health needs would be when Student was eventually discharged. Dr. Franczak acknowledged that Student's related mental health services, after exiting the RTC, would be an IEP team decision, noting that every case was different.

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].) In this matter, the Student has the burden of proof.

2. Student contends that he was denied a FAPE following the Governor's October 8, 2010 veto of AB 3632 funding, because respondents delayed providing a RTC placement as previously recommended by the AB 3632 assessment. Student further contends that because the Governor's veto impacted the ability of some agencies to

fund the required services, resolution of the FAPE issue includes identifying the agency responsible for providing the RTC services after October 8, 2010.⁷

3. District disagrees, and contends that Student was never without a FAPE, and that any delay in a RTC placement was due to LACDMH's refusal to appear at scheduled IEPs. LACDMH asserts, on the other hand, that it did not cause any delay because it could not offer the RTC placement until District changed Student's eligibility to ED. LACDMH further contends that it offered the RTC at the November 17, 2010 IEP, which was the first IEP following Student's eligibility change. Finally, even if there was a delay in RTC placement, District and LACDMH claim that Student continued to receive a sufficient educational program through the home hospital program until his enrollment at Heritage. CDMH contends that it had no legal obligation to provide mental health services to Student, as CDMH has never provided AB 3632 services. CDMH further contends that legislative design required the community mental health agencies to provide AB 3632 services, and not CDMH. CDMH's role was to abide by its Interagency Agreement with CDE, and funnel appropriated AB 3632 funds to the counties, pursuant to a formula over which it had no control. CDMH further claims that OAH has no jurisdiction because CDMH is not a proper party to a due process proceeding.

⁷ The timeline to complete the AB 3632 assessment began to run from the date Parent signed the consent to LACDMH's assessment plan (5 Cal. Code Regs, §60045(b) and (d)) and not from the January 2010 consent for referral. The evidence did not address when Parent consented to assessment. Student mentions the delay in the complaint and final brief, but does not raise the delay as a legal issue for due process determination. Accordingly, the AB 3632 assessment's timeliness is not part of this decision.

4. Under the Individuals with Disability Education Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) "Related services" are developmental, corrective and support services that are required to assist a special needs pupil to benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) 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).) Related services include transportation, developmental, corrective and supportive services as may be required to assist the pupil in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subds. (a).) Specially designed instruction also includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).)

5. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require LEAs to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) LEAs are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit Court of Appeals has referred to the educational benefit

standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

6. An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

7. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) Nor must an IEP conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and placement must be designed to meet the student’s unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment. (*Ibid.*)

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

9. When a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006)⁸; Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*); *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

10. A student who has been determined to be an individual with exceptional needs and who is suspected of needing mental health services may, with the Student's parent's consent, be referred to a community mental health service in accordance with Government Code section 7576. The student must meet criteria for referral specified in California Code of Regulations, title 2, section 60040, and the school district must, in accordance with specific requirements, prepare a referral package and provide it to the community mental health service. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 2, § 60040, subd. (a).)

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

11. The community mental health service assessor shall review and discuss their mental health service recommendation with the parent and appropriate members of the IEP team. If the parent disagrees with the assessor's recommendation, the assessor is required to attend an IEP team meeting if requested by the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (f).) If a special education assessment determines that a child is eligible as ED, and an IEP team member recommends residential placement based on relevant assessment information, the IEP shall be expanded to include a representative of the county mental health department. (§ 7572.5, subd. (a).) If an AB 3632 assessment determines that a student is eligible for mental health services, the assessor may recommend residential placement if the pupil eligibility is ED, as defined by the California Code of Regulations and the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60100, subd. (a) and (b), referring to § 3030, paragraph 5, and 34 C.F.R. § 300.7, subs. (c), paragraph 4.) 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. (§§ 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 request a due process hearing, and OAH has jurisdiction to decide the matter under the procedures applicable to special education due process hearings. (§ 7586, subd. (a).)

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

available to a student needing mental health services. (20 U.S.C. § 1414(d)(2); Ed. Code, § 56040, subd. (a).)

13. Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to “the public agency involved in any decisions regarding a pupil.” (Ed. Code, § 56501, subd. (a).) A “public agency” is defined as “a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs.” (Ed. Code, §§ 56500, 56028.5.)

ANALYSIS OF DISTRICT AND LACDMH

14. Here, Student met the burden of proving that LACDMH and District denied Student a FAPE from October 18, 2010 through November 17, 2010. With respect to LACDMH’s culpability in this matter, the evidence showed that District scheduled an IEP for October 18, 2010 to accept the school psychologist’s evaluation recommendation to change Student’s eligibility from OHI to ED, and to have LACDMH offer the RTC placement. The evidence also showed that LACDMH knew the purpose of the meeting. However, after District invited LACDMH to the October 18, 2010 IEP team meeting, LACDMH advised that it would not appear, causing Parents’ cancellation of the meeting. Consequently, Student was not offered mental health services on October 18, 2010. In addition, Student was not offered mental health services from LACDMH on October 29, 2010 when it also refused to attend that meeting. At all times, regardless of the veto, under California law LACDMH was the IEP team member required to attend to make mental health treatment recommendations. Although LACDMH contends that it did not appear at the IEP meetings because Student’s eligibility was still OHI, this argument is not persuasive given the evidence to the contrary. Specifically, the evidence showed that LACDMH’s refusal to appear at the October 18 and October 29, 2010 IEP

team meetings was solely due to its policy of declining to attend IEPs, offering AB 3632 mental health services, following the Governor's October 8, 2010 veto.⁹ Moreover, as discussed above, the change in Student's eligibility category was contemplated by all members of the IEP team. In sum, Student has demonstrated that despite the Governor's veto, LACDMH's refusal to attend IEP team meetings was an unjustified procedural violation because at all times it was the agency responsible for making RTC recommendations to the IEP team. (Factual Findings 35-36, 45; Legal Conclusions 9-13.)

15. As for District, the testimony of District's special education director, Ms. Parker, demonstrated that District knew of LACDMH's policy of refusing to attend IEP meetings to offer new RTC placements, in response to the Governor's October 8, 2010 veto. Yet, as of October 18, 2010, the District had not informed Parents that the District was legally obligated to provide the mental health services when LACDMH declined to do so. Consequently, Parents were unaware of District's legal obligations at the time they cancelled the October 18, 2010 meeting. In addition, despite District's obligation, it never retained any qualified mental health professionals to review Student's AB 3632 assessment and provide Student with mental health services. Moreover, at the October 29, 2010 IEP team meeting, when the IEP team changed Student's eligibility to ED, Parents expressed the belief that District was obligated to provide Student with mental

⁹ LACDMH did not argue at hearing or in its closing brief, that the Governor's veto and alleged suspension of the AB 3632 mandate justified its failure to attend. LACDMH does not argue that its AB 3632 obligations were suspended by the October 8, 2010 veto. Accordingly, this decision need not address why the Governor's actions failed to suspend the mandate.

health services when LACDMH refused to do so. However, instead of acknowledging this legal obligation, District team representatives led discussions about county and non-public programs and referred Parents to the Southwest SELPA director for further information. In sum, Student demonstrated by a preponderance of the evidence that District committed a procedural violation by delaying the IEP process when it should have, but did not, take responsibility to provide mental health services to Student in its role as the LEA . (Factual Findings 27-32, 36, 45; Legal Conclusions 9-13.)

16. Having demonstrated that District and LACDMH committed a procedural violation by the delay in offering the related mental health services to which Student was entitled, to demonstrate a denial of FAPE, Student must also show that the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (See Legal Conclusion 8, incorporated by reference.) Student has met his burden on this element as well. Specifically, during the period in which LACDMH determined that Student required a RTC placement in order to benefit from his educational programming, Student was required to participate, instead, in District's home hospital program. This placement yielded Student minimal educational benefit, because his mental health disorder, and the accompanying sedation effects from his medication, interfered with his ability to access the curriculum. It was not until the stipulated TRO in the federal action, and the CDE's distribution of AB 3632 funds to the county, that LACDMH attended Student's November 17, 2010 IEP, presented its AB 3632 assessment, and offered RTC placement. Thus, Student's denial of access to the RTC program during that time, which could have more appropriately addressed Student's ED issues that impacted Student's educational performance, denied Student educational benefit, and impeded Student's right to a FAPE. (Factual Findings 37-44, 46-51; Legal Conclusions 4-13.)

17. In addition, LACDMH's unjustified refusal to appear at the October 2010 IEPs, as well as District's failure to inform Parents of the its legal obligation to provide mental health services, significantly impeded the Parents' opportunity to participate in the decision-making process. As a result of LACDMH's failure to attend the IEP meetings, Parents could not discuss the AB 3632 assessment and Student's mental health needs. In addition, District's failure to disclose to Parents its legal obligations to provide the mental health services prevented Parents from knowledgeably discussing and making decisions regarding Student's related mental health services. (Factual Findings 32, 35-36, 45; Legal Conclusions 8, 12.)

18. In light of the above, Student was without FAPE from October 18, 2010 to November 17, 2010, a period of 30 days, because of the actions of LACDMH and District. (Factual Findings 35, 45, 49; Legal Conclusions 14-17.)

ANALYSIS OF CDMH

19. CDMH asserts that it is not an appropriate party to this action because the responsibility for conducting any mental health assessment and providing mental health services for Student rests with LACDMH, pursuant to Government Code section 7570, et seq. CDMH presented testimony and documentary evidence demonstrating that historically, its only responsibilities under AB 3632 have been monitoring county mental health agencies and serving as a conduit for delivering funds appropriated under the budget to the county agencies under a set formula. CDMH demonstrated at hearing that it has never been invited to IEP meetings, is never contacted to provide assessments or services, and was not contacted in this case by any party, even after the Governor vetoed AB 3632 funding. However, the language of Government Code section 7576, subdivision (a) is clear: responsibility for the provision of mental health services to students if required by their IEP's is given to the CDMH *or* to a community mental health

service (emphasis added). The statute does not differentiate between the two and CDMH has provided no legislative history to support its contention that the plain meaning of the statute does not prevail. CDMH's historical fulfillment of its perceived limited obligations does not relieve CDMH of its statutory duties. (Factual Findings 53-59; Legal Conclusions 12.)

20. CDMH's reliance on *Student v. California Dept. of Mental Health* (2009) California Office of Administrative Hearings, Case No. 2009050920, for its contention that it is not a proper party to this action is misplaced. In that case, CDMH was found not to be a responsible public agency. However, that case is distinguishable from this matter because Sacramento County Department of Behavioral and Health Services, Division of Mental Health, acknowledged that it was responsible for providing student's mental health services as the county of origin and was willing to provide services, including a residential placement. In contrast, in this case, LACDMH initially denied any responsibility to provide Student with mental health services due to the Governor's October 8, 2010 veto of state funding to county mental health agencies. Because LACDMH initially refused to participate in the IEP process to implement AB 3632 recommended RTC placement, CDMH was responsible for meeting its obligation to Student under AB 3632. The fact that it has not provided students with assessments and mental health services in the past does not mean it is not required to do so under the plain meaning of the statutory language. Accordingly, CDMH was responsible for providing assessments and services to students under AB 3632 when LACDMH refused to do so. (Factual Findings 27, 30; Legal Conclusions 12.) As discussed above, Student met his burden of showing that the delay in providing a RTC placement denied him a FAPE. (Legal Conclusion 14-18.)

THE REMEDY

21. Student contends that he is entitled to compensatory education and compensatory mental health services for the period of time that Student was denied educationally related mental health services. Specifically, Student seeks an order awarding mental health services similar to those described by Dr. Franczak. District, LACDMH, and CDMH assert that the proposed mental health services are too speculative because Student's special education needs upon RTC release are unknown.

22. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing "shall grant such relief as the court deems appropriate." (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) The United States Supreme Court has held that this authority "confers broad discretion on the court" to grant relief that is appropriate in light of the purpose of the IDEA. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 557 U.S. ____ [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].) The fashioning of equitable relief in IDEA cases requires a "fact-specific" analysis. (*Parents of Student W. v. Puyallup School District No.* (9th Cir. 1994) 31 F.3d. 1489, 1497.)

23. School districts and responsible parties may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Student W.*)). The conduct of all parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief." An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past

violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*)). The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

24. Here, Student was without a FAPE for 30 days. The 30-day time period represents the days between the October 18, 2010 IEP at which Student's eligibility category should have been changed and LACDMH should have attended to make its recommendation for RTC placement, and November 17, 2010, the date the IEP was held at which an RTC placement was added to Student's IEP. During the 30-day time period Student received only home hospital program teaching. Ample evidence established that Student failed to receive sufficient educational benefit from the program. Parents, Student's mental health professionals, LACDMH, and District all determined and agreed that Student required the RTC placement to benefit from his educational programming. Given the severity of Student's needs, five hours per week of home instruction was simply not a FAPE. (Factual Findings 35, 44-45, 49; Legal Conclusions 18.)

25. Dr. Franczak, who was extremely knowledgeable regarding the needs of young people with bipolar disorder, particularly when transitioning out of residential treatment, recommended a wraparound model of mental health services for Student. However, Dr. Franczak never examined Student, was never involved in his care, and never talked to the mental health providers who serviced Student. Consequently, his beliefs concerning an appropriate model of mental health care for Student would be speculation. Dr. Franczak himself admitted that each case was unique and no one could predict with certainty what Student's mental health needs would be upon his discharge from the RTC. In addition, Student had been in the RTC for only a few weeks at the time of hearing. No one knows when the RTC will discharge Student. When discharged, the

mental health professionals who have worked with Student will make recommendations for appropriate mental health services. Such recommendations will be based upon their assessments, observations, and experience with Student. The recommended services may be very similar to Dr. Franczak's wraparound model. However, the recommended services might substantively differ, and some recommended services may be educationally related, and the responsibility of an LEA, and others, while beneficial, may not be required to be part of a FAPE offer. An IEP team typically determines the appropriate related mental health services required under the IDEA when a student is discharged from RTC and still enrolled in school. The IEP team will have assessments and professionals to provide current levels of performance in determining Student's mental health services. The ALJ cannot now look into the future and fathom Student's condition or mental health service needs, or which of those services and needs would be educationally related, and which would not. For these reasons, Student's request for an award of wraparound mental health related services is denied. (Factual Findings 60-67; Legal Conclusions 22-23.)

26. However, the ALJ possesses equitable power to fashion an appropriate remedy which is reasonably likely to provide educational benefit. An award need not provide a "day-by-day compensation" (*Student W. v. Puyallup School District, supra*, 31 F.3d 1489, 1497) but, instead, should be reasonably calculated to provide educational benefits for the lost services (*Reid ex rel. Reid v. District of Columbia, supra*, 401 F.3d 516, 524). (See Legal Conclusion 25, incorporated by reference.) In this regard, Student did not receive educational benefit from the home hospital program; RTC placement was necessary to enable Student to access his special education program. The delay in placement caused Student to be without educational benefit for 30 days. Student's report cards showed that he had five to six academic classes during the two prior academic years. No evidence being submitted to the contrary, there were 22 school

days between October 18 and November 17, 2010. Five hours of lost academic instruction per day for 22 days is 110 hours. Accordingly, Student is awarded 110 hours of compensatory education, through a private learning center, similar to Sylvan Learning Center or Mathnasium, to be used at the discretion of Parents outside of school hours. Such remedy is reasonably likely to provide Student with educational benefit when he transitions to his community upon his discharge from the RTC. (Factual Findings 26, 37; Legal Conclusions 18.)

ORDER

1 Respondents, jointly and severally, shall pay for 110 hours of compensatory education, not to exceed \$100 per hour, through a private learning center, similar to Sylvan Learning Center or Mathnasium, to be used at the discretion of Parents for the benefit of Student, following Student's discharge from the RTC.

2. Student must use his 110 hours within two years after the discharge from the RTC, or the services will be forfeited.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on the sole issue.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: March 4, 2011

_____/s/____

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearings