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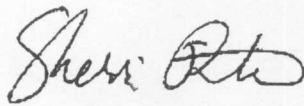
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**MEMORANDUM**

TO: Pat Ryan

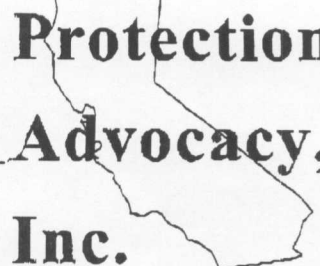
FROM: Sherri Rita 

RE: PAI Analysis of Responsibilities under IDEA Regarding Related Services

DATE: March 26, 2003

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Hi Pat--I thought you may want to see PAI's analysis of responsibilities for delivering mental health services to students who require such services in order to obtain FAPE. If you think other folks would benefit from seeing this analysis, let me know and I can send along to them. The following letter was submitted to the CDE and DMH as part of an interagency dispute that was initiated as a result of Tuolumne County's decision to cease providing 3632 services. We are not a party to that proceeding (which is still pending as far as I know) but we wanted to have the opportunity to share our analysis with the state agencies responsible for resolving the dispute. Let me know if you have any questions or think others should see this. Thanks.



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*Via Facsimile and U.S. Mail*

March 13, 2003

California Department of Education  
Special Education Division  
Scott Berenson, LCSW; Consultant, CMM Unit  
P.O. Box 944272  
Sacramento, CA 94244-2720  
Facsimile: (916) 327-0326

California Department of Mental Health  
dave neilsen, Children and Family Systems of Care  
1600 9<sup>th</sup> Street, Room 100  
Sacramento, CA 95814  
Facsimile: (916) 653-6486

Re: Case # I-0430 (02/03)

Dear Mr. Berenson and Mr. neilsen:

Protection & Advocacy, Inc. (PAI) submits this letter to assist in the resolution of the Government Code section 7585 interagency dispute between Tuolumne County Behavioral Health, the Tri-County SELPA, and its member Tuolumne County schools. Federal law requires that the Departments of Education and Mental Health reach a clear understanding as to their respective responsibilities to deliver a free and appropriate public education to children with disabilities in this state, including responsibility regarding the referral, assessment, recommendation, and inclusion of mental health services in children's individualized education plans, as well as the provision of mental health services that are already in a child's plan.<sup>1</sup>

<sup>1</sup> IDEA requires the existence of an interagency agreement or other mechanism for interagency coordination between public agencies and the state educational agency in order to ensure that FAPE is delivered, and these interagency agreements must delineate agency financial responsibilities, conditions and terms for

"Advancing the human and legal rights of people with disabilities."

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The following analysis will describe the responsibilities of the parties and establish that regardless of the pendency of the current dispute or its outcome, federal law does not allow for an interruption in special education services for students with disabilities and places ultimate responsibility for ensuring access to a free and appropriate public education upon the California Department of Education.

The federal Individuals with Disabilities Education Act (IDEA) guarantees that children with disabilities are to receive a free and appropriate public education (FAPE) in the least restrictive environment.<sup>2</sup> FAPE means special education and related services, provided at no cost to the parent.<sup>3</sup> Related services are defined as transportation, and other developmental, corrective, or supportive services that may be required to assist a child with a disability to benefit from special education, such as psychological services, counseling services, social work services, and parent counseling and training.<sup>4</sup> These services also include residential placement costs.<sup>5</sup> Therefore, for some children to obtain an appropriate education, the federal laws recognize that children may need mental health services as a related service, and that these services must be at no cost to the parent or child.

States receiving federal funds or funds pursuant to IDEA are required to ensure the delivery of a free and appropriate public education to all children with disabilities in their state.<sup>6</sup> Further, IDEA provides that none of its provisions limit the responsibility of agencies other than educational agencies for providing or paying for some or all of the costs of providing a free and appropriate public education to children with disabilities in their state, and that if any public agency other than an educational agency is otherwise obligated under federal or state law, or assigned responsibility under state policy or pursuant to interagency agreement to provide or pay for services that are considered special education or related services necessary for providing a free and appropriate public education, that public agency shall fulfill that obligation either directly or through contract or other arrangement.<sup>7</sup> Finally, IDEA's regulations apply to all states receiving IDEA funds, political subdivisions of these states involved in the education of children with disabilities (including the State Education Agency, local education agencies, educational service agencies, and other state agencies, such as Departments of Mental Health and Welfare) and are binding on each public agency in the State that provides

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reimbursement, interagency dispute procedures, and how to coordinate the timely and appropriate delivery of services. 20 U.S.C. §1412(a)(12)(A).

<sup>2</sup> 20 U.S.C. §1412(a)(1); 34 C.F.R. §300.300(a).

<sup>3</sup> 20 U.S.C. §1401(8); 34 C.F.R. §300.13.

<sup>4</sup> 20 U.S.C. §1401(22); 34 C.F.R. §300.24.

<sup>5</sup> 34 C.F.R. §300.302.

<sup>6</sup> 20 U.S.C. §1412(a)(11); 34 C.F.R. §300.600; 34 C.F.R. §104.33(a).

<sup>7</sup> 20 U.S.C. §1412(a)(11)(B)(i); 34 C.F.R. §300.600(c); 20 U.S.C. §1412(a)(12)(B); 34 C.F.R. §300.142(b).

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special education and related services to children with disabilities, regardless of whether that agency is receiving IDEA funds.<sup>8</sup>

California's special education law provides that individuals with exceptional needs shall receive educational instruction and services at no cost to his or her parents or self, as appropriate, which essentially incorporates the federal requirement of FAPE.<sup>9</sup> California education law assigns responsibility to the State Superintendent to administer the requirements of §56000 and following, and to assure provision of and supervise the education and related services to individuals with exceptional needs as required pursuant to IDEA.<sup>10</sup> The State Board of Education is required to adopt rules and regulations to implement state special education law in accordance with federal law.<sup>11</sup> County Offices of Education are required to develop a countywide plan for special education that ensures all individuals with exceptional needs within the county will have access to appropriate special education programs and services.<sup>12</sup> Special Education Local Plan Areas are charged with administering local plans, and allocating funds as required by state law.<sup>13</sup> Like IDEA, California special education law requires that educational programs and services provided by other public agencies to individuals with exceptional needs adhere to federal and state special education laws.<sup>14</sup>

In order to provide mental health services to children with disabilities who require such services in order to benefit from their educational programs, California created Chapter 26.5 of the Government Code. Chapter 26.5, the codification of Assembly Bill 3632, created an interagency system for delivering related services, including mental health services, to students in special education programs in California. As mentioned above, IDEA does not limit the responsibility of agencies other than educational agencies from providing or paying for the costs of FAPE and requires that such agencies designated by federal or state law, or by state policy or interagency agreement, deliver these services.<sup>15</sup> California law contains a similar requirement in 5 C.C.R. §3000(c), affirming that agencies other than an educational agency may be validly obligated to provide or pay for services for individuals with exceptional needs.

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<sup>8</sup> 34 C.F.R. §300.2(b).

<sup>9</sup> Ed. Code §56000 (also providing that nothing in that part shall be construed to abrogate any right provided individuals with exceptional needs under IDEA).

<sup>10</sup> Ed. Code §56135.

<sup>11</sup> Ed. Code §56100.

<sup>12</sup> Ed. Code §56140.

<sup>13</sup> Ed. Code §56195.

<sup>14</sup> 5 C.C.R. §3010.

<sup>15</sup> 20 U.S.C. §1412(a)(11)(B)(i), 34 C.F.R. §300.600(c); 20 U.S.C. §1412(a)(12)(B), 34 C.F.R. §300.142(b).

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Chapter 26.5<sup>16</sup> places responsibility for delivering mental health services that are required by students' IEPs on the State Department of Mental Health (DMH), or a community mental health service as designated by the DMH.<sup>17</sup> Government Code § 7570 and following sets forth a mandatory scheme for the assessment, recommendation, and provision of mental health services, among other services required for the delivery of FAPE.

For example, Government Code § 7572 mandates that a child be assessed in all areas related to the suspected disability by those qualified to make a determination of the child's need for services. Psychotherapy and other mental health assessments shall be conducted by qualified mental health professionals as specified in DMH regulations.<sup>18</sup> Once a formal mental health assessment has been performed, the qualified person performing the assessment must make a recommendation as to what services are needed in order for the child to benefit from education.<sup>19</sup> Whenever a related mental health service is to be considered for inclusion in a child's individualized education plan (IEP), the local education agency is required to invite the mental health agency to meet with the IEP team and participate in the development of the plan.<sup>20</sup>

Gov. Code § 7572(d) specifically provides that **"in no case shall the inclusion of necessary related services in a pupil's individualized education plan be contingent upon identifying the funding source."** Therefore, the educational and mental health agencies are obligated to assess for, include mental health services in IEPs, and provide such services even where the source of funding is unclear or in dispute.

Due to current state budget restraints and the state's historical failure to fund these federally- and state-mandated services, county mental health departments have decided to limit or, in the case of Tuolumne, cease providing services to children who would be eligible for Chapter 26.5 services. In this case, the federal law is clear regarding the responsibility to provide FAPE: **if a public agency other than an educational agency fails to provide or pay for a child's special education and related services, the local education agency shall provide and pay for the services.**<sup>21</sup>

There is a solution to counties' inability to fund the mental health services required by Chapter 26.5. California is currently receiving an increase in federal funds of

<sup>16</sup> Gov. Code 7570 and following.

<sup>17</sup> Gov. Code §7576(a).

<sup>18</sup> Gov. Code § 7572(c).

<sup>19</sup> Gov. Code § 7572(d)(1).

<sup>20</sup> Gov. Code § 7572(e).

<sup>21</sup> 20 U.S.C. §1412(a)(12)(B)(ii); 34 C.F.R. §300.142(b)(2).

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approximately \$151 million to implement IDEA. Costs of the Chapter 26.5 mental health program are estimated at approximately \$100 million per year. As Chapter 26.5 was created in order to implement the federal mandate to provide special education and related services to children with mental health service needs, the state may use federal funds intended for IDEA implementation to support these mental health services.

In light of the above, it is clear that where a county mental health department is unable or refuses to meet its obligations under Chapter 26.5, the state and local education agencies must assume county mental health's responsibilities as identified in that Chapter and its implementing regulations.<sup>22</sup> For example, if a child has already been identified as eligible for services, the local education agency or the CDE must take responsibility for funding and delivering the services. If a child requires assessment for eligibility, the local education agency or the CDE must conduct that assessment, identify and recommend needed services to the IEP team, and develop a new individualized education plan setting forth those additional services. Local education agencies or the CDE will be required to revisit IEPs when new services may be necessary or require modification. If a child requires a residential placement that would otherwise be arranged through a referral under Chapter 26.5, now the local education agency or the CDE must make such arrangements.

In closing, PAI respectfully requests the state agencies responsible for resolving this interagency dispute to be mindful of the following considerations. Federal law controls special education. Federal law anticipates the use of non-educational agencies by states to carry out their special education service responsibilities and requires those agencies to perform. Federal law also anticipated the precise situation in which special education students with mental health needs now find themselves—when a non-education agency, for whatever reason, has failed to provide services required for FAPE. Finally, federal law also anticipated a potential breach by the non-education agencies and does not allow students to go without services in the event a non-educational agency fails to fulfill its responsibilities: Federal law unequivocally requires that the local or state education agency provide the services.<sup>24</sup>

Federal law also contains an attorney-fee provision for prevailing parties in special education litigation.<sup>25</sup> It is without question that if PAI brought this matter before a federal judge, one agency or the other will be ordered to immediately provide the services to students. However, precious state funds will be wasted on attorneys'

<sup>22</sup> 2 C.C.R. §60000 and following.

<sup>24</sup> 20 USC 1412(a)(12)(B)(ii).

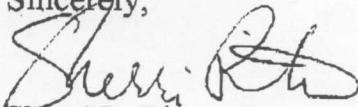
<sup>25</sup> 20 U.S.C. 1415(i).

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fees rather than on services for children. It is also without question that if a series of due process hearings are required for affected individual children, each will result in an order that the services be provided and prevailing party status will entitle each family to attorneys' fees. Especially in times of unprecedented fiscal crisis, the state agencies must resolve this funding dispute quickly and completely before it is compounded by exponentially increased attorney fee costs.

PAI is available to assist further in resolving the instant interagency dispute, so please do not hesitate to contact us if you have questions or require additional input.

Sincerely,



Sherri L. Rita  
Staff Attorney

Cc: Jack O'Connell  
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