

# **SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES**

## **Chapter 9**

### **Information on Interagency Responsibility for Related Services (AB 3632)**

From a 13-Chapter Manual

Available by Chapter and in Manual Form

Written by:

**Community Alliance for Special Education (CASE)  
and  
Protection and Advocacy, Inc. (PAI)**

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## **CASE**

### **Main Office**

1550 Bryant Street, Suite 738

San Francisco, CA 94103

Tel. - (415) 431-2285

FAX - (415) 431-2289

Email: [case\\_org@yahoo.com](mailto:case_org@yahoo.com)

Website: [www.caseadvocacy.org](http://www.caseadvocacy.org)

### **Hayward Office**

680 W. Tennyson Road, Room 4

Hayward, CA 94544

Tel. - (510) 783-5333

FAX - (510) 783-8822

### **California Parenting Institute**

3650 Standish Avenue

Santa Rosa, CA 95407

Tel. - (707) 585-6108

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## **PAI**

**Toll Free: (800) 776-5746**

9:00 AM to 5:00 PM - Monday through Friday

### **Central Office**

100 Howe Ave., Suite 185-N  
Sacramento, CA 95825  
Legal Unit - (916) 488-9950  
Administration - (916) 488-9955  
TTY – (800) 719-5798

### **San Diego Area Office**

1111 Sixth Ave., Suite 200  
San Diego CA 92101  
(619) 239-7861  
TTY – (800) 576-9269

### **Los Angeles Area Office**

3580 Wilshire Blvd., Suite 902  
Los Angeles, CA 90010  
(213) 427-8747  
TTY – (800) 781-5456

### **San Francisco Bay Area Office**

1330 Broadway, Suite 500  
Oakland, CA 94612  
(510) 267-1200  
TTY – (800) 649-0154

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# **SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES**

## **Chapter 9**

### **Information on Interagency Responsibility for Related Services (AB 3632)**

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# **SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES**

## **Chapter 9**

### **Information on Interagency Responsibility for Related Services (AB 3632)**

#### **Introduction**

Assembly Bill (AB) 3632/882 (“AB 3632”), codified as California Government Code (Cal. Gov. Code) Secs. 7570-7588, is legislation that moves responsibility for providing certain related services from local education agencies to other state agencies, including California Children’s Services (CCS), and the Departments of Mental Health (DMH), Social Services (DSS), and Rehabilitation (DR). Such services include occupational and physical therapy, nursing services during the time the child is in school or traveling between school and home, psychotherapy or other mental health services, and residential services for children classified as seriously emotionally disturbed. The local education agency (LEA) and the California Department of Education (CDE) retain the responsibility to ensure that these services are provided. The LEA is still responsible for actually providing these services in certain circumstances. Regulations which implement AB 3632 are located at Title 2, California Code of Regulations (C.C.R.) Sections 60000 through 60610.

#### **Abbreviations**

Abbreviations and acronyms used in this chapter include:

AB	Assembly Bill
Cal. Ed. Code	California Code of Regulations
C.C.R.	California Code of Regulations
CCS	California Children’s Services
CDE	California Department of Education (state education agency)

C.F.R.	Code of Federal Regulations
CMH	Community Mental Health
DSS	Department of Social Services
IDEA	Individuals with Disabilities in Education Act
IEP	Individual Education Program
LEA	Local Education Agency (local school district)
OT/PT	Occupational Therapy/Physical Therapy
SELPA	Special Education Local Plan Area
U.S.C.	United States Code

**1. What is Assembly Bill 3632 and why was such legislation necessary?**

AB 3632 is a law that requires a number of state agencies, such as the California State Departments of Education, Health Services, Social Services, and Rehabilitation to provide various services to children with disabilities. It requires that these agencies coordinate and share the resources (human and fiscal) necessary to provide such children with a free appropriate public education. This “interagency cooperation” legislation was needed because, over the years, it has been difficult for the various state agencies to coordinate their services in order to focus on students with disabilities.

**2. Which students does AB 3632 affect?**

AB 3632 affects all students with disabilities who (1) may be referred to state and local public agencies for their education, and (2) may need related services such as physical therapy, occupational therapy, mental health counseling, residential placement, a home health aide, and/or rehabilitation services.

**3. When did this bill take effect?**

AB 3632 took effect on July 1, 1986. Implementing regulations, however, did not become final until July of 1999.

**4. How is this bill implemented?**

The regulations establish procedures for providing certain special education related services by noneducational agencies, such as state and county mental health

departments and CCS, that have working relationships with local education agencies. The regulations establish standards and criteria for referral and eligibility determinations of students who may need the applicable related services. There has been a great deal of debate between the various agencies at the state and local level as to the nature and degree of their responsibilities to provide services to special education students. In many instances, this has resulted in gaps in the services children should be receiving.

The regulations require, for example, that each LEA develop local interagency agreements with local offices of CMH and CCS. [2 C.C.R. Sec. 60030 and 60310.] Because local agreements often further define rights and procedures for services, parents should always ask for a copy of the agreement and question any part of it which is not consistent with the actual law.

CDE and LEA remain responsible for ensuring that students with disabilities receive appropriate educational services. See Question 6, 9 and 21. In the event of interagency disputes that result in a child not receiving services, parents and advocates should request that the LEA provide services pending resolution through the hearing or complaint process. See Chapter 6, *Information on Due Process Hearings/Compliance Complaints*.

## **5. What is the relationship between IDEA (federal law) and AB 3632 (state law)?**

IDEA, which Congress originally passed in 1975, is the federal law which governs the provision of special education services to eligible children with disabilities. AB 3632 is a state law. State law must be consistent with federal law. If there is any conflict between state and federal law, the federal law must be followed, rather than the state law, except where the state law would provide more services or procedural protections to the pupil. AB 3632 cannot reduce or narrow the rights of children with disabilities or their parents as they currently exist under IDEA.

## **6. Who is ultimately responsible for providing services under AB 3632?**

Federal regulations under IDEA specifically provide that the state education agency, which is CDE, is responsible for ensuring that programs administered by other public agencies, such as CCS or CMH, comply with IDEA. [34 C.F.R. Sec. 300.341.] Further, federal law requires that there be a single line of authority to CDE so that failure to deliver services or violations of a child's rights are squarely the responsibility of one agency. [20 United States Code (U.S.C.) Sec. 1412(a)(11);

34 C.F.R. Sec. 300.600.] Therefore, CDE, through your LEA, is ultimately responsible for ensuring that services are provided, even if another agency, such as CCS or CMH, actually delivers the service. If another agency fails or refuses to provide the specified services, the LEA or CDE must do so. [20 U.S.C. Sec. 1412(a)(12)(B).]

## **7. Who is responsible for monitoring AB 3632?**

AB 3632 states “the Superintendent of Public Instruction shall ensure this chapter is carried out through Monitoring and Supervision.” [Cal. Gov. Code Sec. 7570.] Generally, however, it is often parents and advocates who identify problems through the complaint and due process hearing procedures.

## **8. Who is responsible for ensuring that these related services are provided once the IEP team writes them in IEP?**

The LEA is responsible for ensuring that OT/PT and mental health services are provided. [Cal. Gov. Code Sec. 7573.] When a child labeled as seriously emotionally disturbed is placed in out-of-home care, the local mental health department shall provide case management services. These services include:

- (1) Locating an appropriate placement;
- (2) Completing all the financial paperwork and/or contracts required to place the child;
- (3) Completing the payment authorization in order to initiate payment for residential placement;
- (4) Facilitating placement authorization from the county’s interagency placement committee by presenting the child’s case to the board prior to placement;
- (5) Developing a plan and helping the family and student in the transition from home to placement and the subsequent return home;
- (6) Facilitating the child’s enrollment;
- (7) Notifying the LEA that placement is arranged and coordinating the transportation to the facility;
- (8) Conducting quarterly face-to-face contacts with the student at the residential facility to monitor the level of care, supervision, and provision of mental health services specified under the IEP;

- (9) Notifying the parents and the LEA if there is a discrepancy in the level of care supervision or provision of mental health services and requirements of the IEP; and
- (10) Scheduling and attending the six-month individualized education program (IEP) team meeting.

[2 C.C.R. Sec. 60110(c).]

## **9. What services are school districts responsible for?**

AB 3632 delegates responsibility for providing mental health and OT/PT services for special education students to CMH and CCS when consistent with their statutory obligations. For CCS, this means responsibility for OT/PT services which are “medically necessary.” [Cal. Gov. Code Sec. 7575(a)(1).] See Question 21. In addition, the OT/PT services must be necessary for the child to benefit from special education. [Cal. Gov. Code Sec. 7572(d).] For CMH, this means responsibility for mental health services that are necessary for the child to benefit from special education [Cal. Gov. Code Sec. 7572(d)] and beyond the capacity of the school’s counseling and guidance services to meet the child’s needs. [Cal. Gov. Code Sec. 7576(d), Cal. Ed. Code Sec. 56363.] In addition, the mental health services must come within the definition of mental health services which CMH must provide under the regulations. [2 C.C.R. Sec. 60020(i).]

All services needed by a child to benefit from special education but not available from a noneducation agency under AB 3632 remain the responsibility of the LEA under its general obligations to make a free appropriate public education, which may include related services, available to each eligible child in its jurisdiction. [20 U.S.C. Sec. 1401(8) and 1401(22); see also Cal. Ed. Code Sec. 56000 and 56031, and Cal. Gov. Code Sec. 7575(a)(2).]

The regulations, and to some extent AB 3632 itself, may leave the impression that the mental health or OT/PT services available under special education in California are limited to those available from noneducational agencies under AB 3632. This is not correct. Any mental health or OT/PT services necessary for a child to benefit from special education, that is, necessary for a child to make progress toward his IEP goals, are the responsibility of the child’s education agency, whether that means obtaining them for the child under AB 3632 or providing them directly. To be in compliance with federal special education law, California must have an interagency agreement or other method for interagency coordination between education agencies and noneducation agencies which provide related services. [20 U.S.C. Sec. 1412(a)(12)(A).] The agreement must include a process whereby an

education agency can be reimbursed (and vice versa) for services another agency was supposed to provide and a process for resolving disputes between agencies. [20 U.S.C. Sec. 1412(a)(12)(A)(ii)and(iii).] Most important to students, however, the agreement must specify the mechanism to ensure that needed services are provided to the child, including during the period of any dispute between agencies. [20 U.S.C. Sec. 1412(a)(12)(A).] The negative consequences of a noneducation agency's failure to do what the school district says it was supposed to do cannot fall on the child. The school district must provide the needed services and pursue the offending public agency for reimbursement if it believes another agency was ultimately responsible.

Although schools are responsible for providing those services which CMH or CCS should have provided, parents should make sure that their children's IEPs specify that the related services of mental health or OT/PT services are necessary for the child to benefit from special education. This will make it less difficult to pursue the school district for services if the noneducation agency fails to provide required IEP services. Also, even though it can be assumed that any services listed in an IEP are educationally necessary, a specific statement to this effect should eliminate the possibility of the school district contending that the services were purely psychotherapeutic or medical and, therefore, not the school's responsibility.

Services listed in an IEP are, by definition, services related to the student's education, and should not be part of the IEP if they are not. However, to avoid the delays of a new IEP meeting and the potential for a change in opinion by the rest of the IEP team as to the need for OT and/or PT for educational reasons, it is recommended that the IEP reflect the fact that the team has determined that the psychotherapy and other mental health services, occupational and/or physical therapy are necessary to the student's education, even though the IEP team anticipates that a noneducation agency will provide the therapy under its own criteria.

## **10. What are the eligibility requirements for community mental health?**

AB 3632, as amended by AB 2726, and the regulations set out eligibility criteria for the referral of a pupil to CMH for mental health services. The criteria are as follows:

- (1) The pupil has been assessed by the school district and determined to be eligible for special education and must be suspected of needing mental health services;

- (2) The school district has obtained parental consent for the referral to CMH and for the release of information to CMH and for the observation of the pupil by mental health professionals in an educational setting (the school must provide CMH a referral packet containing all the necessary documents to process the referral within five days of receiving the parent's consent for the referral);
- (3) The pupil must have emotional or behavioral characteristics that:
  - (A) Are observed by qualified educational staff as defined in 5 C.C.R. Sec. 3001(y): certified, licensed or registered in the area in which he/she is providing special education or related services in educational and other settings;
  - (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 as demonstrated by deliberate noncompliance with accepted social rules, a demonstrated ability to control unacceptable behavior, and the absence of a treatable mental disorder;
  - (E) Are associated with a condition that cannot be described solely as a temporary adjustment problem that can be resolved with less than three months of school counseling.

In addition to all of the above, the following two conditions must also be met:

- (1) As determined using educational assessments, the pupil's functioning, including cognitive functioning, is at a level sufficient to enable the pupil to benefit from mental health services; and
- (2) The school has provided counseling, psychological, or guidance services to the pupil under its service structure, and the IEP team has determined that the services do not meet the pupil's educational needs; or, in cases where these services are clearly inappropriate, the IEP team has documented which of these services were considered and why they were determined to be inappropriate.

[Cal. Gov. Code Sec. 7576(b); 2 C.C.R. Sec. 60040.]

If the IEP team representatives from the school do not believe that a child meets all the factors above and refuse to make a referral to CMH, the parent will likely have to initiate a due process proceeding to challenge the school's refusal to make the referral and prove that the child does meet all these factors. See Chapter 6 for

information on due process. But if the IEP team has agreed to make a referral to CMH, the referral must include information which addresses each of the factors above and refers to any information in the child's records which evidence that he/she meets these factors. This will reduce the possibility that CMH will delay processing the referral and/or determine that the child does not need or is ineligible for CMH services.

The language of the regulations may cause problems for certain children seeking mental health services from CMH. For example, many psychological conditions cause children to act "deliberately." Some children with psychological needs comply with social rules in some structured and supportive settings but not in unstructured settings with little or no adult supervision and reinforcement. The important point for parents to remember is that just because a child's psychological needs, which are inhibiting educational benefit, do not meet CMH criteria for eligibility, does not mean that the child's school district is not responsible for meeting those needs. Schools are responsible for special education which meets the unique needs of each child with a disability. [20 U.S.C. Sec. 1401(25).] If a school district believes a child's psychological needs exceed the school's resources and the school wants CMH to serve the child, the school should make a thorough and careful referral of a child to CMH with an explanation of why the child meets each of the factors listed above and with reference to any relevant records. If, despite such a referral, CMH still refuses to provide the services, schools cannot wash their hands of responsibility for assessing the child in all areas of suspected disability. [34 C.F.R. Sec. 300.532(h); Cal. Ed. Code Sec. 56320(f).] A school district cannot contend that it does not suspect disabilities in the area of mental health after it has just referred a child for assessment of that area by CMH just because CMH has refused to conduct the assessment and serve the child.

Although the law lists sufficient cognitive functioning as a criterion for eligibility, schools and mental health cannot automatically determine that every child who is a regional center client or who has a certain IQ or diagnostic label is not eligible for mental health services under AB 3632. Each individual referred should be individually considered in terms of her ability to benefit from one or more of the services offered by county mental health. In addition, the regulations specifically include children with mental retardation or autism in the definition of pupils with disabilities for purposes of implementation of AB 3632 services. [2 C.C.R. Sec. 60010(q).]

**11. Is it only pupils who have already been identified as eligible for special education who can be referred to mental health for services?**

No. If, based on the preliminary results of assessments by the school district, the school district assessment staff suspect that a pupil will ultimately be found eligible for special education when the assessment and initial IEP meeting process are over, the school district can start a referral to CMH if the pupil meets all the other criteria listed in Question 10. [Cal. Gov. Code Sec. 7576(d); 2 C.C.R. Sec. 60040(c).] Initiating such a referral to CMH at the same time the child is being evaluated by the school district for special education will save time in getting mental health services started for a student who obviously will qualify for special education because it will reduce or eliminate a second sequential 50-day assessment period.

Referral packets must include all the necessary documents and must be given to CMH within one work day. [2 C.C.R. Sec. 60040(c).] A child referred by the school to CMH in this situation must still meet all the factors listed in Question 10 except he/she need not have been assessed by the school and found eligible for special education and need not have been provided with counseling, psychological, or guidance services by the school prior to being referred to CMH as long as those services are determined to be clearly inappropriate to meet the pupil's needs. [2 C.C.R. Sec. 60040(c).]

**12. What does the assessment process by county mental health involve?**

Within five days of receiving a referral for assessment, CMH must determine if the assessment is necessary or appropriate. If CMH determines assessment is not necessary or is inappropriate, it must notify the school and the parents within one working day of making that determination. If the referral is simply incomplete, CMH must notify the school within one working day. If CMH agrees to assess the child, it must give the parent a consent form and assessment plan within 15 calendar days of receiving the referral. As soon as the parent returns the signed consent form, CMH has one working day to contact the school to schedule an IEP meeting to discuss the results of the assessment no later than 50 days from receiving the parent's written consent to assess the child. The 50-day time line may only be extended upon the written request of the parent. The parent must receive a written copy of the assessment report at least two days prior to the IEP meeting. The CMH assessor must attend the IEP meeting if requested to do so by the parent.

The recommendations of CMH become the recommendation of the school district IEP team members. In other words, school district representatives cannot make different mental health service recommendations than those made by the CMH representative. [2 C.C.R. Sec. 60045.]

### **13. How do you write mental health related services under AB 3632 into an IEP?**

To reflect the mental health services under AB 3632, the IEP must contain the same basic components that the IEP must contain for other special needs and services but specific to mental health: 1) a description of the present levels of social and emotional performance; 2) the goals and objectives of the mental health services with objective criteria and evaluation procedures to determine whether they are being achieved; 3) the types of mental health services to be provided; 4) the initiation date, duration and frequency of the mental health services; and 5) a separate parent consent for the mental health services. [2 C.C.R. Sec. 60050.] See Question 28.

### **14. What services does the county mental health agency provide to pupils under AB 3632?**

Mental health services include the following, as needed by the pupil to benefit from special education: individual or group psychotherapy, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. [2 C.C.R. Sec. 60020(i).]

### **15. My child may need a residential setting in order to be educated appropriately. Under AB 3632, how will this process work?**

Special education students must be assessed in all areas related to their suspected disability, including social and emotional status. [Cal. Ed. Code Sec. 56320(f).] With regard to whether a child may need a residential educational placement in order to receive an appropriate special education program, the IEP team must be expanded within 30 days to include a CMH representative (if CMH is not already on the IEP team) if the child is identified as “seriously emotionally disturbed” or “emotionally disturbed” and any member of the IEP team, including the parent, recommends residential placement. [Cal. Gov. Code Sec. 7572.5(a).] The expanded IEP team then reviews information on the child and determines whether residential placement is necessary, or whether the child’s needs can be met through nonresidential services. [Cal. Gov. Code Sec. 7572.5(b).] Some of the

nonresidential services the IEP team must consider include: a behavioral specialist and full-time behavioral aide in the classroom; home and other community environments, and/or parent training in the home and community environments. [2 C.C.R. Sec. 60100(c).] If it is determined that the child needs residential placement in order to benefit from special education, the IEP must identify CMH as the lead case manager. Lead case management responsibility can be delegated to the county welfare department. [Cal. Gov. Code Sec. 7572.5(c).] If the expanded IEP team does not agree that residential placement is necessary and the parent disagrees with the expanded IEP team's decisions, the parent can pursue special education due process. See Chapter 6.

**The AB 3632 procedure for obtaining residential placement applies only to children who are seriously emotionally disturbed.** The provision of any educationally necessary residential care for all other children is the responsibility of the LEA.

**16. My child was placed in a facility in another state by a public agency but it was not an education agency and no education agency was involved in the process. Who is responsible for his educational, residential, and treatment costs?**

Any public agency, other than an education agency, that places a child with a disability or one who is suspected of having a disability in a facility out of state without the involvement of the school district, special education local plan area, or county office of education in which the parent or guardian resides, must assume all financial responsibility for the child's residential placement, special education program, and related services costs in the other state, unless the other state or a local agency in the other state assumes responsibility. [Cal. Gov. Code Sec. 7579(d).]

**17. What do the case management services for a child in an AB 3632 residential placement involve?**

The case manager coordinates the residential placement plan of the pupil. The plan must include whatever the IEP specifies for the student in the way of care, supervision, mental health treatment, and psychotropic medication monitoring, if required. The case manager must convene a meeting with the parents and education agency to identify an appropriate residential placement. The placement cannot be made in a public inpatient facility, private psychiatric facility, or in a state hospital facility. [2 C.C.R. Sec. 60110(c)(1).] The case manager also handles all the

paperwork and responsibility for payment. The case manager assists the family with the child's transition from home to facility and coordinates arrangements for transportation. The case manager conducts quarterly face-to-face contacts with the pupil at the facility to monitor the level of care and supervision and the provision of mental health services under the IEP. The case manager must notify the parent and school if there is a discrepancy between the services actually being provided and the IEP. The case manager schedules and attends an expanded IEP team meeting every six months to review the case and whether the child continues to need residential placement. [2 C.C.R. Sec. 60110; Cal. Gov. Code Sec. 7572.5(c).]

**18. My child is temporarily placed in a psychiatric hospital in another county and may need a residential treatment setting. Who is responsible for conducting a special education assessment and/or an assessment for mental health services?**

Individuals with exceptional needs who are placed in a public hospital, state licensed children's hospital, psychiatric hospital, proprietary hospital or a health facility for medical purposes are the educational responsibility of the district, special education local plan area, or county office of education in which the hospital or facility is located. [Cal. Ed. Code Sec. 56167.]

Responsibility for mental health services for a child in this situation is not so clear. If the county in which the child and facility are located is different than the county in which the parent resides and if the placement is temporary, there probably has been no "transfer" which would change responsibility for mental health services to the county in which the child is located. [See 2 C.C.R. Sec. 60055.] A child in this situation would be the responsibility of his/her "county of origin" for mental health service purposes. The county of origin is the county in which the pupil's parent resides or, for children who are wards or dependents of the court, the county in which that status currently exists. [2 C.C.R. Sec. 60020(b).] The CMH from the county of origin is responsible for the child's assessment and services and must provide them either directly or by contractors. [2 C.C.R. Sec. 60200(c).] The "host county," which is the county in which the child and the facility are located, must make its provider network available to the county of origin and must provide the county of origin with a list of appropriate providers from its managed care plan. [2 C.C.R. Sec. 60200(c)(1).]

**19. If my child needs residential treatment to benefit from education, must I make him a ward of the court? Do I have to pay for part of the cost of residential treatment?**

It is a violation of federal law to require that your child be made a ward or dependent of the court if she needs residential care in order to benefit from educational services. [*Christopher T. v. San Francisco Unified School District*, 553 F. Supp. 1107 (N.D. Cal. 1982).] Further, you cannot be required to pay for any part of the cost of residential treatment if the placement is necessary to provide special education and related services to your child and your child has been placed pursuant to an IEP. [34 C.F.R. Sec. 300.302.]

Residential placements made by a court can result in cost-reimbursement actions by counties against parents for the costs of the placement. If the residential placement was needed for educational purposes, these cost reimbursements would violate the “at no cost” requirement of special education law. [20 U.S.C. Sec. 1401(8)(A) and 1401(25).] If, when the child was made a dependent or ward of the court and placed residentially, it can be shown the child needed to be placed and should have been placed residentially under AB 3632 for educational purposes, the county has no right to recover the residential costs from the parent. [*County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500; 88 Cal.Rptr.2d 159.]

**20. What is the role of the Department of Social Services in the AB 3632 process?**

The Department of Social Services (DSS) is responsible for establishing the rates to be paid to residential facilities that accept seriously emotionally disturbed children who are placed pursuant to an IEP. [2 C.C.R. Sec. 60100(g).] The DSS also licenses and inspects various facilities which are used for residential placements under AB 3632. [See 2 C.C.R. Sec. 60025 and referenced provisions of the Cal. Health and Safety Code.] AB 3632 requires that residential placement facilities be licensed by the DSS. By reference to other California laws, it also requires that facilities be organized as nonprofits. If facilities do not meet these requirements, they are not eligible for AB 3632 financing. This can cause a problem when the only appropriate facility identified is not licensed by DSS or is organized as a for-profit entity. In this situation, the parent’s only recourse is to request that the school district finance the entire cost of the placement. If the school district refuses, the parent will have to initiate a due process hearing on the grounds that state laws cannot act to deny a student what he needs for a free appropriate public education under federal law. [U.S. Const., art. VI, cl.2; *Pacific*

*Gas & Elec. Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203-204 (1983).]

## **21. What are the eligibility requirements and specific services available from California Children's Services?**

AB 3632 [Cal. Gov. Code Sec. 7575(a)(1)] states CCS shall be responsible for the provision of medically necessary occupational therapy and physical therapy, as specified by Section 123800 and following of the Health and Safety Code, by reason of medical diagnosis and when contained in the child's IEP.

Section 123830 provides that the director of CCS shall establish the conditions which are included in the definition of physically handicapped. CCS regulations list a great number of eligible conditions. Those that are relevant to the potential need for OT/PT may include:

- (1) Orthopedic conditions due to infection, injury, or congenital malformation;
- (2) Conditions requiring plastic reconstruction, such as cleft lip, orofacial anomalies and burns;
- (3) Congenital anomalies causing disabling or disfiguring handicaps;
- (4) Conditions of the nervous system such as inflammatory disease of the central nervous system which produces motor disability such as paralysis, ataxia, etc., and neuromuscular disease such as cerebral palsy, muscular dystrophy;
- (5) Conditions resulting from accidents or poisoning which may be potentially handicapping, such as complicated fractures, brain and spinal cord injuries, stricture of the esophagus;
- (6) Other disabling or disfiguring conditions which are handicapping.

[Title 22 C.C.R. Sec. 41800.]

The AB 3632 regulations, however, offer a potentially smaller list of conditions. The regulations list diagnosed neuromuscular, musculoskeletal, or muscular diseases, for example: cerebral palsy and other neuromuscular diseases that produce muscle weakness and atrophy, such as poliomyelitis, myasthenias, muscular dystrophies and other chronic musculoskeletal diseases, deformities or injuries, such as osteogenesis imperfecta, arthrogryposis, rheumatoid arthritis, amputation, and contractures resulting from burns. [2 C.C.R. Sec. 60300(j).] If a child has a CCS-eligible condition under either the list from Title 22 or Title 2, she should be eligible for services on the basis of a qualifying condition.

In addition to having a CCS-eligible condition, the services a child needs must also be “medically necessary.” Section 123825 of the Health & Safety Code states that CCS shall provide “necessary medical services” to “physically handicapped children.” CCS regulations define “medical necessity” as follows: “‘Medically necessary benefits’ are those services, equipment, tests, and drugs which are required to meet the medical needs of the client’s CCS-eligible medical condition as prescribed, ordered, or requested by a CCS physician and which are approved within the scope of benefits provided by the CCS program.” [Title 22 C.C.R. Sec. 41518(a).] Occupational and physical therapy are within the scope of benefits of the CCS program. [Cal. Health and Safety Code Sec. 123840(e)(f).]

The AB 3632 regulations regarding OT/PT services define “medically necessary OT or PT” as “those services directed at achieving or preventing further loss of functional skills, or reducing the incidence and severity of physical disability.” [2 C.C.R. Sec. 60300(n).] Again, if a child’s need for OT or PT could be characterized as “medically necessary” under either definition, the child should be eligible for services on the basis of medical necessity.

The CCS definitions of medical necessity for service eligibility differ from the federal definition of related services. Federal law states that OT/PT shall be provided when required to help a student “benefit from special education.” [34 C.F.R. Sec. 300.24(a).] OT is defined by federal law as services provided by a qualified occupational therapist and includes improving, developing or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function. [34 C.F.R. Sec. 300.24(b)(5).]

If these therapy services are needed in order for a child to benefit from special education, but they are not within the scope of available CCS services, or are needed for a child with a non-CCS eligible condition to benefit from special education, or are denied by CCS for any other reason, the important point to remember is that your LEA is ultimately responsible for providing those services. [Cal. Gov. Code Sec. 7575(a)(2).]

## **22. If my child is not receiving OT/PT services, but needs them, who makes the initial referral and does the assessment?**

Generally, a parent or teacher first notices that a child is having fine or gross motor problems. The first agency a parent or teacher will likely look to is the education agency. Who actually does the assessment, the LEA or CCS, depends on the

information given with the referral. If the LEA determines that a referral to CCS would be inappropriate, the LEA must assess the child's fine and gross motor skills deficits. If the LEA chooses to refer the child to CCS, the referral must include the child's medical diagnosis, current medical records, parental consent for exchange of information, and CCS application if the child is new to CCS. If CCS determines the child does not have a CCS-eligible condition, CCS must notify the LEA and parent within five days. If CCS determines the child has an eligible condition, it must propose a therapy assessment to the parent and obtain the parent's consent, and implement the assessment not more than 15 days following the determination that the child had an eligible condition. As soon as CCS receives the parent's consent for the assessment, it must notify the LEA, and the LEA must then schedule an IEP meeting to be held within 50 days of CCS' receipt of the parent's consent. CCS must provide the parent and LEA a copy of the assessment report or proposed therapy plan prior to the IEP meeting. If CCS determines the child does not need therapy, the parent is entitled to the assessment report and a statement describing the basis for that determination. [2 C.C.R. Sec. 60320.]

If CCS does not find the student eligible or in need of "medically necessary" services under AB 3632, the LEA must assess the student to determine if the student needs these services in order to benefit from special education. [34 C.F.R. Sec. 300.24(a) ; Cal. Gov. Code Sec. 7575(a)(2).] In addition, the parent may obtain an independent assessment of the child's need for OT/PT for educational reasons. The independent assessment must be considered by the IEP team and financed by the LEA unless the LEA takes the parents to fair hearing and demonstrates that its assessment was appropriate. [Cal. Ed. Code Sec. 56329.]

### **23. Can a private physician write a prescription for OT/PT services? Will CCS accept this prescription? How does this process work?**

Yes. A parent can obtain a private physician's prescription. CCS will have the opportunity to review the prescription to determine whether the student "needs medically necessary occupational or physical therapy." If CCS finds that the student is not eligible for CCS services or does not require "medically necessary" services, the LEA must provide services the IEP team determines to be necessary for the student to benefit from special education. If there is a disagreement between your private physician's recommendation and CCS or the LEA, you can use your physician's prescription as evidence in a fair hearing if that becomes necessary.

AB 3632 requires that all physicians who recommend OT/PT services complete a written report. The written report shall include the following:

- (1) The diagnosed neuromuscular, musculoskeletal, or physical handicapping condition prompting the referral.
- (2) The referring physician's treatment goals and objectives.
- (3) The basis for determining the recommended treatment goals and objectives, including how these will ameliorate or improve the student's condition.
- (4) The relationship of the medical disability to the student's need for special education and related services.
- (5) Any relevant medical records.

[Cal. Gov. Code Sec. 7575(b).]

AB 3632 does not require a report from a physical or occupational therapist documenting the child's need for therapy. However, such a report can be helpful in the IEP process and can be submitted as evidence at a due process hearing should one be necessary.

#### **24. What services is Medi-Cal responsible for under AB 3632?**

Medi-Cal can be responsible for providing life-supporting medical services through a home health agency while the child is in school or traveling between school and home. The child must be otherwise eligible for one of the Medi-Cal programs through which medical nursing or health aide services are normally provided in the home. [Cal. Gov. Code Sec. 7575(e); 2 C.C.R. Sec. 60400.] Children who are not Medi-Cal eligible may still be entitled to receive nursing services in the school provided by the LEA if the services are necessary for the child to attend school and receive an appropriate educational program in the least restrictive environment. [See *Cedar Rapids Community School District v. Garret F.* (1999) 119 S.Ct. 992; 5 C.C.R. Sec. 3051.12; Cal. Ed. Code Sec. 49423.5; *Hawaii Department of Education v. Katherine D.* (9th Cir., 1983) 727 F.2d 809.]

#### **25. What happens if my child does not meet eligibility requirements of California Children's Services, Community Mental Health or Medi-Cal but still needs the services?**

CDE is responsible for ensuring that services are provided as required by federal and state law. Federal law provides that if your child needs services, and those services are contained in her IEP, the services must be provided. The LEA can secure services through CCS, through CMH, by employing personnel, or by contracting for services. If services are not in your child's IEP, and CCS or CMH state that your child is not eligible, then you must go to the LEA for assessment

and provision of any services your child needs in order to benefit from special education. If there is a problem, you can obtain an outside independent assessment, request a fair hearing, or file a compliance complaint, depending on the situation. See Chapter 4, *Information on IEP Process*, Chapter 2, *Information on Assessments/Evaluations*, and Chapter 6, *Information on Due Process Hearings/Compliance Complaints*.

## **26. How does AB 3632 affect the IEP Process? Will CCS or CMH representatives attend the IEP meeting?**

AB 3632 sets forth the process which should be followed when OT, PT, or mental health services are to be considered for inclusion in the IEP. First, the LEA shall invite CCS or CMH to attend the IEP meeting if CCS or CMH might be responsible for providing the service. They can either participate by attending the meeting or by sending a written recommendation and participating through a conference call. If CCS or CMH is not available to participate at the IEP meeting, the LEA shall ensure that a qualified substitute is available to explain and interpret the evaluation to the student's parent or guardian. [Cal. Gov. Code Sec. 7572.]

A unique aspect of this law is contained in Sec. 7572(d)(1), which provides that when an assessment for OT, PT or mental health services has been completed, the person who conducted the assessment shall review and discuss the recommendation for services with the parent and appropriate members of the IEP team **before** the IEP meeting. If you disagree with the recommendation, you can require the person who conducted the assessment to attend the IEP meeting, and that person must attend.

**The final decision of CCS or CMH assessment personnel is binding on the IEP members who attend on behalf of the LEA.** Many parents and advocates think that this provision undermines the power of the IEP team to decide on appropriate and necessary services. The LEA is bound to go along with the CMH or CCS assessment personnel's recommendation, even if they disagree with the recommendation or instead agree with an independent assessment. Even if the LEA cannot or will not challenge the CMH or CCS findings and recommendations, parents and advocates should still insist that the LEA independently consider whether or not the requested services are educationally necessary. As a practical matter, it may be necessary to pursue a due process hearing in order to obtain a resolution of the issue.

## **27. Should services be written in the IEP?**

The CCS assessment report and therapy plan must include at least the following:

- (1) A statement of the pupil's present levels of functional performance;
- (2) The proposed functional goals to achieve a measurable change in function or recommendations for services to prevent loss of present function and documentation of progress to date;
- (3) The specific related services required by the pupil, including the type of PT or OT intervention, treatment, consultation, or monitoring;
- (4) The proposed initiation, frequency, and duration of the services to be provided;
- (5) The proposed date of medical evaluation.

[2 C.C.R. Sec. 60325(a).]

The regulations require that if OT/PT services are necessary for a child to benefit from special education, goals and objectives relating to the activities identified in the assessment report be written into the IEP. [2 C.C.R. Sec. 60325(f).] Although the AB 3632 regulations do not require that the IEP specify the date for initiation, frequency, location, and duration of the OT/PT services, both state and federal special education law do. [20 U.S.C. Sec. 1414(d)(1)(A)(vi); Cal. Ed. Code Sec. 56345(a)(6).] See Question 28.

## **28. Can CCS or CMH refuse to write the frequency, location and duration of related services in the IEP?**

No. CMH and CCS are bound by all federal and state special education laws. Therefore, the agencies must include frequency and duration of services in the IEP if related services are necessary for the student to benefit from special education instruction. [20 U.S.C. Sec. 1414(d)(1)(A)(vi); 34 C.F.R. Sec. 300.347(a)(6); Cal. Ed. Code Sec. 56345(a)(vi); 5 C.C.R. Sec. 3051(a)(2).]

## **29. Can CCS or CMH modify or change a service written in an IEP without calling for an IEP meeting and obtaining the parent's consent?**

No. Federal law requires that the public agency (including the LEA, CCS, and CMH) must give reasonable notice before it proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child (which includes related services).

[20 U.S.C. Sec. 1415(b)(3).] The prior written notice must describe the action the agency proposes to take; why the agency is taking that action; what alternatives to the action were considered and why those were rejected; a description of each evaluation, procedure, test, record or report on which the proposed action is based; and a description of the parent's rights to challenge the proposed reduction or termination. [20 U.S.C. Sec. 1415(c).]

Any change is then subject to the IEP process and due process procedures if necessary. During the pendency of any due process procedure, the student must continue to receive the services that were currently being provided. [20 U.S.C. Sec. 1415(j); 34 C.F.R. Sec. 300.514; Cal. Ed. Code Sec. 56505(d).]

### **30. If I get an independent assessment for OT/PT or mental health services, how will it be considered?**

An independent assessment for provision of mental health or OT/PT services must be reviewed by either the designated mental health professional in the case of mental health services or the designated qualified medical personnel in the case of OT/PT. The recommendation of the person who reviewed the independent assessment must then be discussed with the appropriate IEP team members and the parent prior to the IEP meeting. If the parent requests the presence of the person who reviewed the independent assessment at the IEP meeting, that person must attend the meeting to discuss his recommendation. Following this review and discussion, the recommendation of the person who reviews the independent assessment shall be the recommendation of the team members who are attending on behalf of the LEA. [Cal. Gov. Code Sec. 7572(d)(2).]

### **31. How does AB 3632 affect due process hearing rights?**

AB 3632 does not change federal due process hearing rights. If the dispute concerns several services, provided by more than one agency, then one hearing shall be conducted to address all issues. [Cal. Gov. Code Sec. 7586; 2 C.C.R. Sec. 60550.] The regulations emphasize that on the issue of a child's need for OT/PT services from CCS, the hearing officer must apply CCS' "medical necessity" standards when deciding whether a child needs therapy from CCS, and that all other therapy necessary only to benefit from special education must be provided by the LEA. [2 C.C.R. Sec. 60550(e).]

**32. What can I do if the LEA and CCS or CMH cannot agree on which agency is responsible to provide specific services already included in my child’s IEP?**

If any agency responsible for providing related services under AB 3632 fails to comply with the procedures established under state or federal law, you can file a compliance complaint with the CDE using the procedures described in Chapter 6, *Information on Due Process Hearings/Compliance Complaints*. Similarly, if services are specified in a child’s IEP and are supposed to be provided by CMH or CCS but are not being provided, you can file a compliance complaint with the CDE. [2 C.C.R. Sec. 60560.] Section 60560 specifies that complaints against schools, CMH, or CCS are to be resolved under the regulations governing compliance complaints in Title 5 (5 C.C.R. Sec. 4600 and following). The Title 5 regulations are CDE regulations. The regulations allow certain complaints filed with the CDE to be referred to other agencies [see section 4611], but the list does **not** include complaints against CMH or CCS. Therefore, the CDE must investigate and resolve complaints about failures by CMH and CCS to follow the law and honor the terms of a child’s IEP and not just refer the complaints over to the Department of Mental Health or the Department of Health Services.

The interagency dispute resolution procedures of Cal. Gov. Code Sec. 7585 and 2 C.C.R. Sec. 60600 apply if your child is not receiving OT/PT or mental health services as specified in the IEP because of an agency dispute over who is responsible for the services. In that situation, you can file a notice of failure to provide related services with the Superintendent of Public Instruction or the Secretary of Health and Welfare. [Cal. Gov. Code Sec. 7585(a).] This procedure is a way for the agencies involved to decide who will provide the service as specified in the IEP. It is not intended to be used by parents if there is a dispute about the need for the service itself. In that case, parents would have to go through a due process proceeding. If there is no dispute about which agency is responsible for the service but that agency is simply not complying with the IEP, that issue would be addressed through a compliance complaint.

Send your written complaint to:

Secretary of Health & Welfare  
1600 Ninth Street, 4th Floor  
Sacramento, CA 95814

Superintendent of Public Instruction  
California Department of Education  
1430 N Street  
Sacramento, CA 95814

Before reviewing your complaint, the agencies involved will want to see a copy of your child’s IEP. Send a copy of the IEP with your complaint.

The Superintendent and the Secretary shall meet to resolve the issue within 15 calendar days of receipt of the notification. A written copy of the meeting resolution shall be mailed to the parent, the LEA, and the affected departments, within 10 days of the meeting. [Cal. Gov. Code Sec. 7585(b).]

If the issue cannot be resolved within 15 days to the satisfaction of the departments involved, it can be appealed to the Office of Administrative Hearings. The Office of Administrative Hearings shall review the issue and submit findings within 30 days of receipt of the case. This decision is binding on all parties to the dispute. [Cal. Gov. Code Secs. 7585(c), (d), and (e).]

When you file a complaint pursuant to Section 7585(a), your child is entitled to continue to receive the services specified in the IEP pending resolution of the dispute. [Cal. Gov. Code Sec. 7585(f); 2 C.C.R. Secs. 60600, 60610.] When the services were already being provided by CMH or CCS when the complaint was filed, CMH or CCS must continue to provide the services. If the services were specified in the IEP but no agency actually ever began providing them, the Superintendent of Public Instruction must make sure that the LEA provides the services pending resolution of the dispute. The Superintendent of Public Instruction is supposed to make sure that there are available funds to cover the costs of these services during the pendency of these disputes. [Cal. Gov. Code Sec. 7585(f).]

**33. CMH and the LEA have told me that my child will be on a waiting list for services. They say that services may be delayed because my child's emotional disturbance is not as acute as others'. Can they do this?**

No. Under federal law all services specified in a student's IEP must be provided. School districts and other agencies cannot maintain waiting lists for services. Advocates for children with disabilities challenged the existence of waiting lists for mental health assessments and services in *Butterfield v. Honig*. The court-approved consent decree in that case prohibited waiting lists for children in Los Angeles County.

If mental health services are specified in your child's IEP, and CMH refuses to provide the services, state and federal law require that the LEA provide the services. Disputes between CMH and the LEA regarding responsibility for providing the service will be resolved through the procedures specified in Government Code Sec. 7585. [Cal. Gov. Code Sec. 7585.] See Question 32.

It also is not permissible to delay providing services based on the acuteness of the student's disabilities. Although when DMH provides services under the Short-Doyle program, it may make decisions to delay services based on the acuteness of the disability, such a delay is not legal under AB 3632. All children whose IEPs specify that they are to receive mental health services are entitled to receive those services without delay under AB 3632. [34 C.F.R. Sec. 300.342(a)(1)(ii); 5 C.C.R. Sec. 3040(a).]

**34. I believe my child needs residential placement, but the AB 3632 process seems too slow. I heard that a quicker response is available through a court-ordered placement under juvenile court or mental health laws. Will a court-ordered placement differ in any substantial way from an AB 3632 placement?**

The placement may be very much the same – but the court, not you, will make the decision about where to place your child. Your child will become a ward of the court. As part of the dependency process, you may lose your parental rights for the duration of the placement. In addition, the county may seek reimbursement from you for the costs of the out-of-home placement. [Cal. Welfare and Institutions Code Sec. 903.] The court, at its discretion, may allow you to retain educational rights so that you may participate in the IEP at the residential site if your child is in special education.

If your child is placed in residential treatment through AB 3632, all student and parental rights and protections guaranteed by law will be available to you, and no placement or services can be provided to your child without your approval and written consent.

Responsibility for implementing the IEP of a court-placed child is with the LEA where the child is placed. The responsibility for an AB 3632-placed child is with the LEA and CMH that made the placement.

There is a critical difference in the financial responsibility for the cost of the placement. A placement under AB 3632 is at no cost to the parent. A court placement is at the cost of the court, **but the court must seek reimbursement from the parents in the form of a support order based upon the court's determination of the parents' ability to pay.** This will result in a substantial financial burden to any parent, unless the family income is minimal.

A court placement has serious disadvantages to a parent when compared to an AB 3632 placement.

**35. My child’s case is already pending before the court, and she is temporarily placed while we wait for court placement. Can I do anything to avoid or minimize the consequences of a court placement?**

You may be able to convince the court to defer placement pending the AB 3632 process. Point out to the court that an AB 3632 placement will not only be in your interest, but will be in the court’s interest as well – enabling the court to avoid financial and legal responsibility for the child. You should tell the court that court placement will preclude any further AB 3632 placement procedure until the court placement is terminated. If you take this approach with the court, it is helpful to have already made the appropriate referral for residential placement to the LEA and CMH.

Since your child is currently involved in the court system, this argument is best made by a private attorney or public defender who is knowledgeable about the AB 3632 process or who has help from a special education advocate. If the court insists on placing the child, you can at least try to convince the court to allow you to retain educational rights. In this way, you can continue to participate in the educational planning for your child.

If a minor dependent or ward of the court has already been placed somewhere by court order, a petition may be filed with the court to change or modify the court’s order of placement. Anyone can file such a petition. The petition would have to assert that because of changed circumstances (in this case, the availability of potential residential placement under AB 3632) the court should terminate its jurisdiction over the child or at least allow the AB 3632 process to determine appropriate placement and services rather than the court. [See Cal. Welfare and Institutions Code Secs. 388 and 778.]

**36. Who makes decisions and advocates for a special education pupil whose parents’ rights have been terminated or who has no parent involved in his life?**

In cases where a child has been made a dependent or ward of the court, beginning in 2003, the court has certain new duties to ensure that the child’s interests are represented and to minimize confusion regarding who is able to make educational decisions for such children. In these cases, the court may leave educational decision making authority with the parent. However, the court has the power to limit the parent’s authority. If the court limits the authority of the parent regarding educational decisions it must do so specifically in a court order. The limitations

may not be greater than are necessary to protect the child. If the court limits the parent's rights to make educational decisions, it must, at the same time, appoint a responsible adult to make those decisions for the child until one of the following things happens:

- (1) The child turns 18 (unless he/she chooses not to make those decisions or is found by the court to be incompetent to do so);
- (2) Another responsible adult is appointed to make educational decisions for the child;
- (3) The parent's rights to make these decisions are restored;
- (4) The child is appointed a guardian;
- (5) The child is placed into long-term foster care and the foster parent is given educational decision-making authority.

[Cal. Welf. & Inst. Code Sections 361 and 726.]

The responsible adult appointed by the court cannot have any conflict of interest with the child's interests. A conflict of interest means any interest that would restrict or bias his/her ability to make educational decisions, including the receipt of compensation for making these decisions. [Cal. Welf. & Inst. Code Sections 361(a) and 726(b).]

AB 3632 contains the section of state law establishing "surrogate parents" for special education students. Surrogate parents are individuals, usually volunteers, who are appointed by the school district to represent students in the IEP process if all of the following are true:

- (A) The child is a dependent or ward of the court;
- (B) The court has limited the parent's or guardian's rights to make educational decisions; and
- (C) The court has not appointed, or for whatever reason the child does not have, a responsible adult to represent him/her in the IEP process.

[Cal. Gov. Code Sec. 7579.5(a)(1).]

The school must appoint a surrogate parent for children who are not wards of the court if no parent of the child can be identified or if the school, after making reasonable efforts, cannot locate the parent. [Cal. Gov. Code Sec. 7579.5(a)(2)&(3); 34 C.F.R. Sec. 300.515(a).]

The school must first appoint a relative caretaker as the surrogate. If there is no relative care taker then a foster parent or court appointed special advocate, if any of

these exist and are willing and able to serve. If none of these exist, then the school may choose the surrogate. If a child's surrogate has been a relative caretaker or foster parent and the child leaves the home of that surrogate, the school must appoint a new surrogate, if a new appointment is necessary to ensure adequate representation of the child. [Cal. Gov. Code Sec. 7579.5(b).]

If the school appoints the surrogate, the law allows retired teachers, social workers, or probation officers, who do not work for a public agency which is involved in the education or care of the child, to be surrogates. An employee of a private agency may be appointed surrogate as long as the private agency provides noneducational services to the child. A person otherwise qualified to be a surrogate is not considered an employee of the school just because the school pays the surrogate for surrogate services. [Cal. Gov. Code Sec. 7579.5(j).]

A surrogate parent has all the powers a parent or guardian would have related to special education and related services and the provision of a free appropriate public education. The surrogate may consent to IEPs and to nonemergency medical services, mental health treatment, and occupational or physical therapy services. [Cal. Gov. Code Sec. 7579.5(c).]

Although the surrogate is given complete authority to sign IEPs and consent to other services as described above, the surrogate is only required to meet with the child one time. The surrogate may meet with the child on more occasions, attend the IEP meetings, review the child's records, and consult with persons involved in the child's education. [Cal. Gov. Code Sec. 7579.5(d).] The authors of this manual believe that for a surrogate to competently carry out his/her duties, he/she likely must attend the IEP meeting, review the child's records, and consult with the child's teachers and others involved in his/her education.

The surrogate should, as far as is practical, be culturally sensitive to his/her assigned child. [Cal. Gov. Code Sec. 7579.5(e).]

The surrogate must comply with federal and state student record confidentiality laws and must use discretion in the necessary sharing of the information with appropriate persons. [Cal. Gov. Code Sec. 7579.5(f).]

The school must terminate a surrogate if he/she is not properly performing the duties; a school district may not appoint and must terminate a surrogate if the surrogate has a conflict of interest with the interests of the child. [Cal. Gov. Code Sec. 7579.5(h)&(i).] A conflict of interest means any interest that might restrict or bias his/her ability to advocate for all of the services required to ensure that the child receives a free appropriate public education. [Cal. Gov. Code Sec. 7579.5(i).]

The surrogate may represent the child until the child no longer needs special education, or he/she turns 18 (unless he/she then chooses not to begin making his/her own educational decisions, or unless a court finds the 18-year-old to be incompetent to make these decisions), or another responsible adult is appointed to replace the surrogate, or the parent's rights to make educational decisions are restored. [Cal. Gov. Code Sec. 7579.5(k).]

The California Department of Education must develop model surrogate parent training modules and a surrogate training manual that is available to local education agencies. [Cal. Gov. Code Sec. 7579.5(m).]

The surrogate parent laws do not prevent a parent or guardian from designating another adult to represent the child. [Cal. Gov. Code Sec. 7579.5(n).] A parent or guardian could only designate another adult to make educational decisions for the child if that parent's or guardian's rights to make educational decisions had not been limited by the court.

### **37. What if the surrogate parent appointed for a child does not regularly attend the IEP meetings, signs the IEPs later, or appears not to be acting in the interests of the child?**

AB 3632 prohibits individuals who have a conflict of interest from being appointed surrogate parents for a child. A conflict of interest means any interest that might restrict or bias her ability to advocate for all of the services required to ensure a free appropriate public education for the child. [Cal. Gov. Code Sec. 7579.5(f).] Therefore, if some other individual in the child's life - such as a care facility operator, social worker, probation officer, foster parent, or other advocate - believes that a surrogate is not acting in the interests of the child, but rather, perhaps, acting more in the interests of the school district or another agency serving the child, the advocate should ask that the school appoint a different surrogate. If the school district refuses, the child and advocate should initiate a due process proceeding to challenge the appropriateness of the surrogate. California law allows a child who is a ward or dependent of the court or for whom no parent can be identified to initiate due process proceedings herself **if** a hearing officer determines that the school has either not appointed a surrogate or has appointed a surrogate who has a conflict of interest. [Cal. Ed. Code Sec. 56501(a).] Therefore, any request for due process on the issue of the appropriateness of the surrogate must be accompanied by as much documentary evidence as can be assembled of the inappropriate actions or conflicts of interest of the surrogate so that the hearing officer can recognize the request for due process and hear the case.

**38. My child is being placed in a juvenile facility by the court. Who is responsible for providing services to him?**

State education law assigns responsibility for the administration and operation of juvenile court schools to the county board of education. [Cal. Ed. Code Sec. 48645.2.] The county superintendent of schools may contract with the county board of supervisors for the administration and operation of such schools. Special education is also the responsibility of the county board of education for special education students who have been placed in juvenile hall, a juvenile home, a day center, a ranch or camp, or a county community school. [Cal. Ed. Code Sec. 56150.] In addition, each Special Education Local Plan Area (SELPA), which may be a district, a collection of districts, or a county office of education, must develop a local plan that describes the process for coordinating and providing services for individuals with exceptional needs placed in juvenile court schools or county community schools. [Cal. Ed. Code Sec. 56195.7(g).]

Having various agencies responsible for ensuring special education to eligible pupils in these settings sometimes results in no one agency assuming responsibility for making sure that children's IEPs are implemented. Special education is often not provided to children in juvenile hall or other juvenile detention settings. If this occurs, advocates should file complaints against the county with the department of education to compel compliance with IEPs and with special education assessments and other procedures. In addition, advocates should contact the responsible SELPA and obtain a copy of the SELPA local plan to see what provision, if any, was made for coordinating and providing services to special education students in juvenile court and county community schools. If the SELPA plan contains no such information or if the SELPA is not carrying out its responsibilities under its plan, advocates should file compliance complaints against the SELPA. Advocates may also wish to consider due process proceedings against counties and/or SELPAs if the services provided to eligible students are not appropriate.

**39. My child may be committed to the California Youth Authority. Will he continue to receive the special education services he needs under his IEP?**

A juvenile court may not order a special education pupil to the California Youth Authority until the child's IEP has been furnished to the Youth Authority. In addition, the juvenile court must assure that the child's probation officer communicates with appropriate staff at the juvenile court school, county office of

education, or SELPA to facilitate this transmission of the IEP to the Youth Authority. [Cal. Welfare and Institutions Code Sec. 1742.]

**40. I am a foster parent for a child who is in special education. What are my rights?**

California law makes it clear that foster parents must be given preference, after relative caretakers and before court appointed special advocates, when a school appoints a surrogate parent. [Cal. Gov. Code Sec. 7579.5(c).] In addition, federal law allows foster parents to act like a natural parent in the IEP process if the natural parent's rights have been terminated, the foster parent has an ongoing, long-term parental relationship with the child, is willing to make these educational decisions, and has no conflicting interest. [34 C.F.R. Sec. 300.20(b).]

**41. Are probation officers/social workers allowed to attend IEP meetings?**

Probation officers and social workers are not among those specifically listed as part of the IEP team. [20 U.S.C. Sec. 1414(d)(1)(B), 34 C.F.R. Sec. 300.344, Cal. Ed. Code Sec. 56340.] Assuming they have special expertise or knowledge regarding the child, they can attend the IEP only at the invitation of the parent or surrogate parent or school district.

**42. Are probation officers/social workers allowed to authorize services for my child on an IEP?**

No. Absent termination of parental rights, parents or guardians sign the IEP. If there has been a termination of parental rights, and the court has not appointed another responsible adult for the child, a surrogate parent must be appointed and he/she signs the IEP. [Cal. Gov. Code Sec. 7579.5(a).] If a probation officer or social worker was appointed by the court, he would not be volunteering, in his individual or private capacity, to make special education decisions for the child. Rather, he would be acting as an employee and agent of the county. California special education law specifically excludes the state or any political subdivision of government from the definition of parent. [Cal. Ed. Code Sec. 56028.] Similarly, federal law specifically excludes state officials from the definition of parent if the child is a ward of the state. [34 C.F.R. Sec. 300.20.]

Both federal and state law prohibit persons who are employees of a public agency involved in the education or care of a child from being that child's surrogate parent for purposes of special education. [34 C.F.R. Sec. 300.515(c)(2)(i); Cal. Gov. Code

Sec. 7579.5(j).] Therefore, since a probation officer or social worker who is employed by a public agency involved in the care of the child could not lawfully be officially appointed as a surrogate parent, she may not lawfully unofficially assume these responsibilities either.

#### **43. Can the court help me get services for my child?**

When a child is made a dependent of the court, the court may make any and all reasonable orders for the care, supervision, custody, maintenance and support of the child. The court may also join in any court proceedings of any agency, which the court has determined has failed to meet a legal obligation to provide services to a child – such as the right to a free appropriate public education and compliance with the provisions of AB 3632. [Cal. Welfare and Institutions Code Sec. 362 and 727.]

#### **44. My son is receiving mental health services under his IEP. He will continue to be a special education student and receive services from the school district after he turns 18 and maybe even up to age 22. But the county mental health representative on my son's IEP team is saying that mental health services will stop at some point after my son turns age 18. Is that true?**

No, eligibility for special education related mental health services from county mental health departments does not end at age 18. Section 7584 of AB 3632 uses the definition of individuals with exceptional needs found Cal. Ed. Code Sec. 56026. Section 56026 defines individuals with exceptional needs as potentially those from birth up to age 22, assuming they have not otherwise become ineligible for special education. The regulations implementing AB 3632 define pupils with disabilities as those from birth through age 21. [See Title 2 Cal. Code of Regulations Sec. 60010(q).] The discrepancy between the reference in the statute (Cal. Gov. Code Sec. 7584) to Cal. Ed. Code Sec. 56026, which caps eligibility at age 22, and the reference in the regulation (2 Cal. Code of Regs. Sec. 60010(q)), which caps eligibility at age 21, should be resolved in favor of the higher authority of the statute which allows eligibility to age 22. CMH departments are also subject to certain federal special education laws. [34 C.F.R. Sec. 300.2(b)(1)(iii).] Federal special education regulations provide for eligibility through age 21 if consistent with state law. [34 C.F.R. Sec. 300.122.]

**45. My child is two (or three) years old and the school officials on his IEP team would like to have county mental health assess him for some potential mental health services. I would like such an assessment also. But county mental health is refusing to assess him on the grounds that he is too young for AB 3632 services. Is that true?**

A two or three year old may be eligible for AB 3632 mental health services because special education eligible pupils are defined in state law to include those younger than three. [Cal. Gov. Code Sec. 7584; Cal. Ed. Code Sec. 56026(c)(1).] CMH cannot refuse assessment on the grounds that the child is not eligible due to age. Whether the child actually needs mental health services in order to receive educational benefit is a clinical question that would be addressed by assessment. See answer to previous question.