

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2006060539

**DECISION**

Debra Huston, Administrative Law Judge, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on February 20, 22, 27, and 28, and March 1, 2, and 12, 2007, at the offices of the Los Angeles Unified School District, Los Angeles, California.

Student (Student) was represented by his attorney, Cindy Brining of the Law Offices of Carol Graham. Student's mother (Mother) was present during the hearing on Student's behalf. Student and Student's father (Father) were present for short periods of time during the hearing.

Respondent Los Angeles Unified School District (District) was represented by Diane Willis of Lozano Smith. Lisa Kendrick, Due Process Unit Coordinating Specialist with District, was also present on the District's behalf. Greg Turnbull, Due Process Specialist with District, was present on the District's behalf instead of Ms. Kendrick for one-half day of hearing. Rhonda Chow, also of Lozano Smith, was present and observed parts of the hearing.

Student filed his due process complaint on June 20, 2006. On August 10, 2006, OAH issued an order continuing the due process hearing pursuant to an agreement by both parties. At the conclusion of the hearing, the matter was continued until March 19, 2007, for the

parties to file closing briefs. The parties filed closing briefs on that date. Upon the filing of the closing briefs, the matter was submitted for decision.

On April 5, 2007, District filed a Motion to Strike New Issue and Portions of Closing Brief. On April 10, 2007, OAH issued an order setting a briefing schedule, allowing Student until April 13, 2007, to submit an opposition to District's motion, and allowing District until April 19, 2007, to reply. Student did not file an opposition to District's motion. Additional issues raised in Student's closing brief are stricken and are not addressed in this Decision. Evidence cited in Student's closing brief that was not presented at hearing is stricken.

## ISSUES

I. Did District inappropriately assess Student with respect to his social/emotional needs, for purposes of determining if he was eligible for special education and related services under the category of emotional disturbance (ED) prior to the December 12, 2005, IEP meeting by:

- A. Not correctly administering the CBCL-TRF (teacher report) portion of the assessment
- B. Failing to include Father in the parental part of the assessment process
- C. Not correctly administering the BASC-PRS and CBCL completed by Mother and the BASC-SR completed by Student
- D. Failing to update assessment information prior to the IEP meeting
- E. Predetermining the assessment outcome

II. Was Student eligible for special education and related services under the category of ED at the December 12, 2005 IEP meeting?<sup>1</sup>

## PROPOSED REMEDY

Student seeks reimbursement for expenses resulting from Mother's unilateral placement of Student at Provo Canyon School (Provo Canyon) in Utah from February 2006 through August 2006, in the sum of \$56,970.

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<sup>1</sup> At hearing, the parties stipulated that Student does not meet the criteria of California Code of Regulations, title 5, section 3030, subdivision (i)(1), (2), and (5). Also, at hearing, a slight amount of evidence was adduced regarding Student's possible eligibility under the category of Other Health Impaired (OHI). (Cal. Code Regs., tit. 5, § 3030, subd. (f).) The only eligibility category specified in the due process complaint and in the prehearing conference order was ED. Therefore, eligibility under OHI, or any other category other than ED, is not at issue, and this Decision does not address any other eligibility category.

## PROCEDURAL HISTORY

Student's due process complaint, filed on June 20, 2006, included the Los Angeles County Department of Mental Health (LACDMH) as a respondent. On August 2, 2006, OAH granted the LACDMH's motion to dismiss LACDMH as a party.

On February 16, 2007, District filed a Motion to Bifurcate the Issue of Residency. On February 20, 2007, the day scheduled for the due process hearing, the administrative law judge ruled that District's Motion to Bifurcate Residency would be considered a Motion to Dismiss based on Student's alleged lack of residency, and ordered that an evidentiary hearing be held. The matter was continued to February 22, 2007, in order to give District and Student time to obtain witnesses for the evidentiary hearing.

The evidentiary hearing on the District's Motion to Dismiss was held on February 22, 2007. On February 27, 2007, OAH issued an order denying District's Motion to Dismiss and determining Student was a resident within the jurisdictional boundaries of District for the time period relevant to this case. The parties stipulated that this evidentiary hearing would be part of the due process hearing. The additional days of the due process hearing were held on February 27 and 28, and March 1, 2, and 12, 2007, as discussed above.

## CONTENTIONS OF THE PARTIES

Student contends that he was severely depressed and exhibited abnormal behaviors within the meaning of California Code of Regulations, title 5, section 3030, subdivision (i)(3) and/or (i)(4). Student asserts that District's failure to find him eligible for special education and related services as a student with ED during the December 12, 2005, IEP team meeting denied Student a FAPE, justifying parents' unilateral placement of Student at Provo Canyon School in Utah from February through August 2006. Specifically, Student contends that the social/emotional portion of District's assessment was inadequate because the assessment tools were not properly administered and were not administered to both of Student's parents. Student further contends that had the assessment been adequately performed, Student would have qualified for special education and related services under the eligibility category of ED.

District contends that Student did not meet the eligibility criteria for ED, and that the social/emotional portion of District's assessment of Student was adequate. The District denies that Student is, or was, eligible for special education services, and contends, in particular, that Student does not meet the criteria for ED. The District contends that Student did not exhibit inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations, and did not exhibit a general pervasive mood of unhappiness or depression. Rather, the District contends that Student's behaviors were the result of situational stressors in Student's family situation and also the result of Student's conduct disorder and drug use. The District also contends that Student's behaviors did not occur across environments and did not adversely affect Student's educational performance because Student was able to maintain a high level of academic achievement.

## FACTUAL FINDINGS

### *Background*

1. Student was born May 16, 1989, and is currently 17 years of age. Until February 2006, Student lived within the jurisdictional boundaries of District.

2. Student attended Catholic school until the eighth grade, and was a good student. Student began attending John Burroughs Middle School, within District, in the eighth grade, and began having behavioral and academic difficulties that year. Student's parents had a hostile and acrimonious relationship that involved much arguing in the home, and they separated while Student was in eighth grade at John Burroughs. Father moved to Camarillo, but the relationship between Student's parents did not improve after the separation. Student was emotionally affected and upset by the conflict.

3. Mother enrolled Student in Crespi Carmelite High School (Crespi) for the ninth grade. Student left Crespi in March 2004, and Mother enrolled him at Los Angeles High School (LA High) for the ninth grade. While at LA High, Student's attendance was very poor, as were his grades. He eventually dropped out of organized sports, which had previously been very important to him. Student's behavior at home, which had been poor while he was at Crespi, continued to deteriorate after he entered LA High. Student was defiant and disrespectful toward Mother, did not feel guilty after misbehaving, had friends who got into trouble, ran away from home, and stole from people.

4. In September 2004, Student left LA High because of a problem with a former friend and Mother enrolled Student at University High School, also within District. That placement did not last because Student made a comment to the principal in the hallway that caused a problem. In December 2004, Student enrolled in Indian Springs High School, which is a continuation school and drop-out prevention program that is on the campus of University High School. Student's attendance became a problem at that school as well. Student returned to LA High in the spring of 2005.

5. Mother requested an IEP for Student in April 2005. Mother stated in her written request that Student was depressed in the fall of 2004, was seeing a therapist, and was having truancy problems. Mother was concerned because Student was bright enough to be in honors classes and was not being challenged in regular classes. A student study team (SST) meeting was schedule for Student.

6. At the April 8, 2005, SST meeting, Student was described as being very bright, happy, and healthy. Also, it was recorded that Student liked sports and hanging out with his friends. Mother described him as "happy most of the time." With regard to performance levels, Student did not challenge himself at school, was not motivated, and was not focused on what he needed to be doing. Academically, Student was failing. With regard to attendance, Student was "not in class."

7. In the fall of 2005, Student's attendance and grades remained poor, as did his relationship with Mother. Student did not follow through with the recommendations of the SST, which included, among other things, various programs to help Student get caught up on credits. As of the fall of 2005, Student had only 20 credits he had earned at Crespi in the 2003-2004 school year and needed well over 200 credits to graduate.

8. Student was assessed by District staff in September 2005, pursuant to Mother's request and a settlement agreement, to determine whether he was eligible for special education and related services. It was determined at the December 12, 2005, IEP meeting that Student did not meet any category of eligibility for special education services. Mother was present and participated at the meeting. Student was present as well. Mother did not express disagreement at the meeting. She thanked the team and left the meeting with the papers she was given. She did not request any further assessment. Student finished the fall 2005 semester that December 2005, receiving all "F" grades.

9. Student's parents enrolled him at Provo Canyon on February 2, 2006, and Student remained there until he was discharged in August 2006. Since August 2006, Student has lived with Father in Camarillo and attends Ventura High School. Student is not receiving special education services at Ventura High School.

#### *The Appropriateness of District's Assessment*

10. As stated in Legal Conclusion 3, in conducting its evaluation, a district is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and matters relating to the child's IEP. The district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. The district is required to use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors.

11. As stated in Legal Conclusion 4, a district is required to ensure that assessments and other evaluation materials used to assess a child: Are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; are used for purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of such assessments. As stated in Legal Conclusion 6, State law also requires that a psychological assessment be performed by a credentialed school psychologist.

13. Ms. Mitra Avari,<sup>2</sup> a credentialed school psychologist with LA High, completed the psycho educational assessment of Student on September 26, 2005. As part of her assessment, Ms. Avari reviewed Student's cumulative file and administered several tests. Specifically, with respect to the social/emotional part of the assessment, Ms. Avari administered the following: (A) Vineland Adaptive Behavior Scales-Survey Form (VABS); (B) Child Behavior Checklist (CBCL); (C) Child Behavior Checklist-Teacher's Report Form (CBCL-TRF); (D) Behavior Assessment System for Children-Self-Report (BASC-SR); (E) Behavior Assessment System for Children-Parent Rating Scale (BASC-PRS); (F) Sentence completion; and (G) Interviews of Mother and Student.

14. Ms. Avari determined that Student had average to above-average cognitive ability. Student had a history of academic success in primary grades, with no behavior concerns. After his transfer to public school and the onset of family based stressors, Student's academic performance and attendance became problems. These problems "escalated parent-son problems to a degree that [Student] has been rated with conduct problems by his mother." Student's truancy was interfering with his academic progress. Parent conferences, suspension, change of educational environment, change of track, and school changes had not been successful in improving Student's attendance. Student did not display any significant emotional or behavior problems at school, however, and showed ability to learn when he was in the classroom.

15. Ms. Avari determined, based on her assessment of Student, that Student did not meet the criteria of ED because he did not exhibit inappropriate types of behaviors or feelings under normal circumstances in several situations, and he did not exhibit a general pervasive mood of unhappiness or depression. Student contends the assessment was inappropriate in several respects.

*Mr. Kung's CBCL-TRF*

16. Student contends that Lance Kung,<sup>3</sup> the teacher who completed the Child Behavior Checklist—Teacher's Report Form (CBCL-TRF), did not know Student well

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<sup>2</sup> Ms. Avari has been a school psychologist with District for 13 years. She provides special education assessments, among other duties, at LA High. Ms. Avari received a master's degree in psychology in 1994, and holds credentials in school psychology, school counseling, and child welfare and attendance. Ms. Avari also holds a certificate in applied behavioral intervention. She holds a master's degree in clinical psychology from Iran. Ms. Avari has also worked as a behavior specialist with a private agency, and has provided counseling and behavior intervention. She worked for a psychiatric hospital in Iran for five years and evaluated patients and provided therapy, including people with depression. Prior to that, Ms. Avari was an English teacher. Ms. Avari has been at LA High for three years and does an average of 50 assessments per year, approximately 10 of which are for ED. She currently works with children with suicidal ideation and provides counseling. She runs groups at LA High for drug intervention and grief counseling. Ms. Avari is qualified to conduct special education assessments.

<sup>3</sup> Mr. Kung has a bachelor of science in industrial technology and worked for 10 years as an engineer. In 2000, he obtained a single subject credential in industrial technology with a supplemental in physics. He specializes in ninth grade science. Mr. Kung has been a teacher with District for 14 years. For one and one-half years, he taught middle school, and has been teaching high school science since that time. Mr. Kung is now working on an

enough to complete the form and did not receive proper instructions for completing the form and, therefore, the form he completed is invalid.

17. The assessments Ms. Avari conducted for the social/emotional portion of the evaluation, described in Factual Finding 13, are used to identify social and behavioral problems, and are designed to distinguish between conduct disorders, behavior disorders, and emotional disorders. Teacher input is an important part of the social/emotional evaluation because one has to look at the student's behavior in different settings to determine if the behavior is pervasive and if it is occurring across all environments. The classroom is one such environment. An emotional disorder will manifest in all settings, according to Ms. Avari, but behavior disorders, such as a conduct disorder, are situation-specific. A conduct disorder alone will not support a finding of ED and, therefore, it is important to determine through the assessment process whether the student has a behavior disorder or an emotional disturbance. According to Ms. Avari, the CBCL-TRF form completed by a teacher or teachers is "critically significant" to the assessment.

18. A teacher should not be permitted to complete a CBCL without first affirming that he or she knows the student well enough to complete the form. In addition, a teacher should not complete the form without instructions from the school psychologist because this rating scale is significant and important, and there are instructions to be used when completing it. Failing to explain the test and the test purpose to the teacher completing the form would be unprofessional and an ethical violation.

19. The CBCL-TRF consists of 113 statements, and next to each statement is a "0", a "1", and a "2". The teacher is to circle the number that describes the student with respect to the corresponding statement. According to Ms. Avari, if the statement is not true, the teacher should circle "0"; if the statement is sometimes true, the teacher should circle "1"; and if the statement is very often true, the teacher should circle "2". If a certain number of questions are left unanswered, the form is invalid. Therefore, if the teacher does not know the answers to some of the questions, the teacher should talk to Ms. Avari.

20. Mr. Kung, Student's science teacher, was the only teacher who completed a CBCL-TRF for Student's assessment. Mr. Kung completed the form on September 20, 2005. Mr. Kung circled the "0" as to each and every one of the 113 statements regarding Student. Below the 113th statement, Mr. Kung circled a "2" and, in the blank space provided, wrote "Absent from class."

21. When Ms. Avari received the completed CBCL-TRF form from Mr. Kung, she assumed Student had no problems because zeroes were marked with respect to all 113 statements on the form. In completing her psychoeducational assessment report of Student, Ms. Avari wrote in the "Social/Emotional Status" portion that: "Mother's rating of Student on the (Child Behavior Checklist) CBCL puts Student in the clinical range on the delinquent

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administrative credential, and has 40 units of college credit toward that. Mr. Kung has no special education background or classes, and has never taught a special education class.

behaviors subscale and in the borderline clinical range in attention and aggressive behavior. However, [Student's] science teacher, Mr. Kung's rating on the Teacher Report Form (TRF) does not confirm [Mother's] rating, as he has rated [Student's] behavior in the not significant range on all subscales. According to Mr. Kung, [Student] performs adequately on most class work and seems to be well adjusted."

22. Mr. Kung testified credibly that he hardly knew Student when he completed the CBCL-TRF on September 20, 2005, and that he completed the form because it was sent to him. Student had been present in Mr. Kung's class only seven or eight periods out of the 20 or 25 days of school that had passed since the beginning of the semester, and Mr. Kung knew Student only in passing. Mr. Kung did not know that the form was for a psychoeducational assessment of Student.

23. Mr. Kung receives this type of form to complete a couple times a year, and he never knows the reason he is completing it. Sometimes parents request these forms to check on how their children are doing in school. According to Mr. Kung, the form was placed in his box, he completed it, and sent it back. Mr. Kung positively remembers that he never talked with Ms. Avari about the form. Ms. Avari did not instruct him with regard to completing the form. Mr. Kung is positive that he never spoke with Ms. Avari or any counselor about Student.

24. If Mr. Kung does not know anything about a student for whom he is completing a CBCL-TRF form, he marks all zeroes on the form, and that means that the items are not true as far as Mr. Kung knows, or that he has not seen the behavior in class.

25. Mr. Kung was a credible witness who had a clear memory of completing the form and no apparent motive to testify untruthfully. Ms. Avari's testimony was directly contrary to that of Mr. Kung in several respects: She testified that she personally delivered the form to Mr. Kung, explained the purpose of the form to Mr. Kung, explained the directions to Mr. Kung, asked Mr. Kung if he knew Student well enough to complete the form, and told Mr. Kung to see her if he could not complete any of the answers. Ms. Avari's memory was weak and her testimony contradictory with regard to how many of Student's teachers to whom she gave a CBCL-TRF form to complete.<sup>4</sup> Likewise, Ms. Avari's testimony that Mr. Kung's marking of zeroes to all 113 statements on the CBCL-TRF form regarding Student did not give her concern about the reliability or validity of the form was not credible given Dr. Jose Joaquin Gonzalez's<sup>5</sup> testimony that it would be "unusual" and

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<sup>4</sup> For example, Ms. Avari testified that she gave the form to all of Student's teachers to complete, and most said they did not know Student because he did not come to class. She later testified she gave the form to Mr. Kung and one other of Student's teachers. She then testified she could not remember to which teachers she gave the form.

<sup>5</sup> Dr. Gonzalez, a specialist/administrator in the District's Due Process Department of the Division of Special Education since December 2003, is responsible for reviewing cases that go to due process. Dr. Gonzalez holds a bachelor of arts from University of California, Los Angeles, with a major in psychology. He holds a master of arts from the University of Georgia in school psychology, and doctorate of philosophy from the University of Georgia, in school psychology, with a concentration in child and adolescent psychology. He holds a school

“rare” for a teacher to mark all zeroes on the CBCL-TRF. While Ms. Avari’s testimony was very credible in some respects, this was not one of them. Ms. Avari’s testimony regarding her administration of the CBCL-TRF instruction with Mr. Kung was not credible.

26. Many of Mr. Kung’s responses were inaccurate, in that he would have responded to many of the questions differently had he been properly instructed. For example, after having known Student for three months, instead of giving Student all zeroes, meaning not true as far as Mr. Kung knows, he would have given student a “1”, meaning somewhat or sometimes true, or at least a “1”, in response to many of the questions. Yet, Mr. Kung’s inaccurate responses were used to discount Mother’s report of Student’s social/emotional condition, as discussed in Factual Finding 21.

27. Based on the foregoing, District did not ensure that the CBCL-TRF form completed by Mr. Kung and used to assess Student was administered in accordance with the instructions provided by the producer of the assessments. Further, District did not ensure that Mr. Kung knew Student well enough to complete the form and did not instruct Mr. Kung as to how to complete the form in order to achieve valid results. The CBCL-TRF was not appropriately administered to Mr. Kung.

*CBCL-TRF forms for other teachers*

28. Student also contends that other teachers should have been required to complete the CBCL-TRF for Student’s assessment.

29. Ms. Avari was not consistent in her testimony regarding which of Student’s fall 2005 semester teachers she gave a form to complete. She received a form back only from Mr. Kung. Ms. Avari did not consider going to Student’s teachers from the August 2005 track because some teachers were off track and might not be available to complete the form. Although, she did not check to see if those teachers were working at the time of the assessment.

30. It is preferable to have a CBCL-TRF form completed by more than one teacher to gather information across all environments as part of an assessment for special education eligibility. However, Student offered no evidence that it is a requirement of the producer of the form that the form be completed by more than one teacher.

31. Based on the foregoing, Ms. Avari’s failure to have other teachers complete a CBCL-TRF as part of her assessment did not render the assessment inappropriate.

*The failure to include Father in the parental part of the assessment process*

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psychologist credential, among other credentials. He has been a school psychologist at all levels, and has completed approximately 100 evaluations as a school psychologist. Dr. Gonzalez has worked in a drug rehabilitation clinic. He also has a private practice involving children outside District.

32. Student contends that Ms. Avari did not talk with Father, and did not have Father complete any forms, and that the failure to do so in the course of conducting her assessment rendered that assessment inappropriate.

33. Father was not interviewed as part of Ms. Avari's psychoeducational evaluation of Student and was not asked to complete a BASC-PRS or a CBCL. Ms. Avari conceded that it is better to interview both parents, but Student's parents were in the process of a divorce, and she thought it was not appropriate to get Father involved. She did not want "to get in the middle of that."

34. There is no requirement that a district gather information from both of a student's parents in conducting a psychoeducational assessment. Ms. Avari conducted lengthy interviews with Mother, and Mother completed the VABS, the CBCL, and the BASC-PRS as part of the assessment of Student. Ms. Doreth Dunlap, the school nurse also conducted an interview of Mother as part of the assessment. In addition, Father lived in Camarillo and Student was not residing with Father at that time. The input from Mother was adequate parental input for purposes of the evaluation.

35. Based on the foregoing, District did not fail to provide a full evaluation with respect to Student's social/emotional needs as a result of Ms. Avari's failure to gather information from Father.

*The BASC-PRS and CBCL completed by Mother and the BASC-SR completed by Student*

36. Student also claims that the social/emotional portion of the District's assessment was inadequate because the BASC-PRS and CBCL that Ms. Avari assisted Mother in completing should have been completed by Mother herself, and that the BASC-SR that Ms. Avari assisted Student in completing should have been completed by Student himself.

37. Ms. Avari asked Mother the questions from the BASC-PRS and CBCL, and filled in the answers for Mother on the questionnaires. Mother was concerned that the questions were limited to those on the form, which were "broad brush" questions. In addition, Ms. Avari asked Student the questions from the BASC-SR and filled in the form herself.

38. Student offered no evidence at hearing that this method of administering the BASC-PRS, the CBCL, and the BASC-SR was not in accordance with any instructions provided by the producer of such assessments,<sup>6</sup> and Student failed to offer evidence that the

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<sup>6</sup> Student's closing brief cites to the Achenbach System of Empirically Based Assessment Web site for the proposition that "Contrary to the design of the test instrument, the CBCL was designed to be administered according to the Frequently Asked Questions of the ASEBA website. . . ." This information was not presented as evidence at the hearing and, therefore, District did not have the opportunity to cross-examine a person who may so testified at the hearing, or to offer rebuttal testimony regarding the statement. Therefore, this statement is not part of the record.

forms were invalid because of the way they were administered. Moreover, Ms. Avari testified credibly that she interviewed Mother and also interviewed Student, apart from the time she spent completing the forms with Mother and Student. Mother spent two mornings with Ms. Avari in the course of the assessment, and Mother conceded that it is her tendency to elaborate and that she would have elaborated during the interview with Ms. Avari.

39. Based on the foregoing, Student failed to establish that District did not ensure that the CBCL, the BASC-PRS, and the BASC-SR were administered in accordance with the instructions provided by the producer of the assessment.

*Failure to update assessment information prior to the IEP meeting*

40. Student claims the assessment information was outdated by the time of the IEP meeting, and that this rendered his assessment inappropriate.<sup>7</sup>

41. Ms. Avari concedes that none of the information gathered regarding Student was updated and that it is unusual to hold the IEP meeting nearly three months after the assessment is completed. No explanation was offered by Student or by District as to why the IEP meeting was not held until December 12, 2005.

42. Student contends that Mr. Kung should have been asked by Ms. Avari to complete another CBCL-TRF closer to the time of the IEP meeting.<sup>8</sup> It has been determined that the assessment was not appropriately administered to Mr. Kung. In addition, Student offered no evidence with respect to how long a CBCL-TRF form is valid. In addition, it is not clear that having Mr. Kung complete another CBCL-TRF closer to the time of the IEP team meeting would have made a difference in the outcome of that meeting because Mr. Kung never talked with Student about personal matters, even in December 2005. While Mr. Kung noted that Student was unhappy at times later in the semester, he believed, and was told by Student, that Student was feeling hopeless about school because Student was not attending school and knew that he was hopelessly behind in the science class. This, according to Mr. Kung, is a normal reaction to failing.

43. Student also contends that the IEP team did not have relevant information regarding Student during the December 12, 2005, IEP team meeting. For example, Student testified that he was living on the streets beginning in November 2005, and that the IEP team was not aware of that. Mother expelled Student from her home in May or June 2005 because

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<sup>7</sup> Failure to hold a timely IEP meeting was not an issue pled in Student's due process complaint. It is considered here only for the purpose of determining whether the information at the IEP was unreliable or invalid as a result of the passage of time between the time the assessment was completed and the time the IEP meeting was held.

<sup>8</sup> Student argues in his closing brief that District's failure to have a general education teacher at Student's December 12, 2005, IEP meeting constituted a denial of FAPE. However, this issue was not pled in Student's complaint and was not an issue for hearing.

of Student's behavior, which included, for example, drug usage, aggression toward Mother, and allowing "unsavory" people into the family home. Mother took Student to live with Father in Camarillo. Student stayed there only a week, and stole Father's car and returned to Los Angeles, which was where he wanted to live. Father made arrangements for Student to live with a friend within District, and Student was living with that friend at the time Ms. Avari conducted her assessment of Student in September 2005. However, neither Student nor Mother told Ms. Avari that Student was not living with Mother.

44. According to Student, he began living on the streets, at friends' houses, and in friends' yards in November 2005, and the IEP team was not aware of that information at the December 12, 2005, meeting. Student and Mother were both present and had the opportunity to discuss this with the IEP Team, but did not. Both Student and Mother testified that it was discussed at the IEP team meeting that Student lived with a friend, which contradicts Student's testimony that he was living on the streets at the time.

45. Neither Student nor Mother was forthcoming with accurate information, either at the time they met with Ms. Avari and she specifically asked where Student lived, or during the IEP meeting when incorrect information was given.

46. Based on the foregoing, District's failure to update information in Student's assessment prior to the IEP meeting did not render Student's assessment inappropriate.

*Predetermination of assessment outcome*

47. Student claims that prior to the time Ms. Avari conducted her assessment of Student, she had already made up her mind that Student did not meet the criteria of ED, and that she limited her assessment so as not to uncover any facts that would support an ED diagnosis for special education purposes.

48. As discussed in Factual Finding 13, Ms. Avari used a number of assessment tools in completing her assessment of Student. Ms. Avari assisted Mother in completing the VABS, which measures Student's adaptive skills and general ability. Ms. Avari assisted Mother in completing the BASC-PRS and the CBCL, also with regard to social/emotional matters. Ms. Avari assisted Student in completing the BASC-SR, with regard social/emotional matters. Student completed the sentence completion test, which gives information about Student's social/emotional status. Ms. Avari conducted interviews with Mother and Student. Ms. Avari observed Student in class two times. In addition, Ms. Avari reviewed all of Student's records, including his cumulative file and test scores, and she was present at the SST meeting regarding Student in April 2005.

49. The tests administered by Ms. Avari for the social/emotional portion of the evaluation have been in use for well over a decade, and are technically sound. Dr. Gonzalez reviewed the raw data and the test results, and he agreed that the test results on the BASC-PRS, the CBCL, and the BASC-SR were valid, and the form completed by Mr. Kung did not

invalidate the forms completed by Mother and Student. Also, there was no claim that Ms. Avari improperly recorded responses on the forms.

50. Based on the foregoing, Student failed to establish that Ms. Avari had already made up her mind that Student was not ED, and “limited” her assessment so as not to uncover any facts that would support an ED diagnosis for special education purposes.

### *ED Eligibility*

51. Student contends that had the social/emotional portion of Student’s psychoeducational report been adequate, Student would have met the criteria for ED.

52. As is stated in Legal Conclusion 9, eligibility for special education services in the category of ED requires that the child exhibit one or more of the following characteristics over a long period of time, and to a marked degree, and that the child’s educational performance be adversely affected: An inability to learn which cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. Student contends that he meets the criteria for eligibility under the categories of inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations and a general pervasive mood of unhappiness or depression.

53. As stated in Legal Conclusion 10, social maladjustment alone is not sufficient to render a student eligible for special education as ED.

### *Inappropriate types of behaviors and feelings under normal circumstances exhibited in several situations*

54. Student contends that one basis of his eligibility for special education under the criteria of ED is that he exhibited inappropriate types of behaviors or feelings under normal circumstances in several situations.

55. According to Ms. Avari, “inappropriate types of behaviors or feelings” for purposes of the ED criteria means very bizarre behaviors, suicidal ideation, hallucinations, delusions, harming self or others, or experiencing paranoia. “Inappropriate types of behavior or feelings” for purposes of ED criteria does not include behavior-disordered behaviors. It also does not include conduct disorder, social maladjustment, or oppositional defiant disorder.

56. In terms of bizarre behaviors, Student had at least one, and as many as three, episodes of hallucinating. However, both he and Mother testified that these hallucinations resulted from the use of crystal methamphetamine. There was no evidence of Student

hallucinating except for when he was under the influence of crystal methamphetamine. There was no indication that Student was suicidal. On the contrary, there was evidence that Student was well-liked, popular, had many friends, lived with his friends, and was well-groomed and well-mannered. There was uncontroverted evidence that Student skipped school and was truant but, by Student's own admission at hearing and to various school counselors over the years, Student ditched school to hang out with his friends and play basketball on the LA High campus or go to friends' houses.

57. Mother testified credibly that Student was aggressive at home and Student corroborated this testimony. However, Student did not display aggressive behavior at school. There was no evidence that Student exhibited that behavior anywhere other than in his family home. Therefore, this behavior was not exhibited in several situations for purposes of the ED criteria. Rather, it was isolated to Student's home and situations involving Student's family members.

58. There was nothing in any of the assessments or any testimony to indicate that Student exhibited inappropriate types of behavior at school. Student's aggressive behavior at home, his drug use, and his ditching school are not of the type of behaviors that meet the criteria for ED as inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations. Student scored in the clinically significant range in the areas of delinquent and aggressive behavior on the CBCL and BASC forms completed by Mother and Student, and scored in the normal range in the areas of depression, anxiety, somatic complaints, and withdrawal, which is consistent with a conduct disorder. Student's behaviors were consistent with social maladjustment and, as stated in Legal Conclusion 10, social maladjustment alone is not sufficient to render a student eligible for special education as ED.

59. Based on the foregoing, Student did not establish that he exhibited inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations at the time of the December 12, 2005, IEP meeting.

*A general pervasive mood of unhappiness or depression*

60. Student contends that he also met the criteria for eligibility for special education under the category of ED because he exhibited a general pervasive mood of unhappiness and depression.

61. In support of Student's claim, Mother testified that at and around the time of the December 12, 2005, IEP meeting, Student had a poor appetite, significant weight loss, insomnia, loss of interest in activities usually valued or enjoyed, impaired concentration, and fatigue or exhaustion. According to Mother, Student had guilt and low self-esteem. Mother conceded that Student did not feel helpless or hopeless about the future, and Mother did not believe that he had suicidal intent.

62. In Ms. Avari's opinion, Student was not depressed and did not meet the criteria for eligibility under the category of ED as a result of a general pervasive mood of unhappiness and depression. On the testing that Ms. Avari conducted, there were no red flags for depression and no information that indicated that Student had a pervasive mood of unhappiness or depression. According to Ms. Avari, if a student is depressed, he or she would typically be withdrawn, have somatic complaints, have anxiety, and have social problems. Student did not have these problems. Also, as discussed in Factual Finding 58, Student scored in the clinically significant range in the areas of delinquent and aggressive behavior and in the normal range in the areas of depression, anxiety, somatic complaints, and withdrawal.

63. According to Ms. Avari, in order to meet the criteria of exhibiting a "general pervasive mood of unhappiness and depression," the student must meet four of the DSM-IV criteria for depression. This is incorrect. According to Dr. Gonzalez, the regulations that specify the criteria for ED do not mention the DSM, and it is not a requirement that a Student meet the diagnostic criteria for major depression specified in the DSM in order to meet the criteria for ED.

64. However, Ms. Avari's opinion and testimony that Student did not meet the criteria of ED, regardless of whether she misunderstood the criteria, were supported by the opinion and testimony of Dr. Gonzalez, who understood the criteria. Although Dr. Gonzalez did not assess Student, he was a credible witness with an extensive background in school psychology and psychology in general. Dr. Gonzalez reviewed the District records regarding Student, the December 12, 2005, IEP, Ms. Avari's psychoeducational assessment report, the reports from Provo Canyon, Student's April 2005 SST records, Student's attendance records, and all of tests administered by Ms. Avari. Dr. Gonzalez also reviewed the CBCL-TRF completed by Mr. Kung. Mr. Kung's information is not critical to Student's assessment given all of the other testing Ms. Avari did and the fact that she observed Student in the classroom and was present at his SST meeting. Based on his review, it is Dr. Gonzalez's opinion that Student does not qualify for eligibility under the category of ED.

65. According to Dr. Gonzalez, Student's records do not show the types of problems associated with ED, such as anxiety, depression, somatic complaints, and withdrawal. In order to support a finding of ED, Dr. Gonzalez would expect to see elevations in these areas, and it would be very unlikely for a person to have ED without elevations in these areas. In addition, Dr. Gonzalez would expect to see lower social skills indicated on the tests if Student had an emotional disturbance. Mother did not indicate social problems, significant and pervasive mood of unhappiness, somatic complaints, or thought problems in her ratings of Student. In addition, according to Dr. Gonzalez, the BASC completed by Student shows that he was not reporting any difficulties. Most of the time, Students with ED report difficulties. In addition, Student's sentence completion does not indicate emotional disturbance.

66. According to Dr. Gonzalez, Student's records and testing, as discussed in Factual Finding 58, show clinically significant aggressive and delinquent behaviors, which

are not indicative of ED. While Dr. Gonzalez acknowledged that people express depression in different ways and a person with depression might possibly express delinquent and aggressive behavior, it is his opinion that it is not possible to cover depression when scores are valid, and the CBCL and the BASC-PRS completed by Mother and the BASC-SR completed by Student, which were all valid, do not indicate depression.

67. Doreth Dunlap, school nurse, assessed Student on December 5, 2005, just a week prior to the December 12, 2005, IEP meeting. Student was not exhibiting a general pervasive mood of unhappiness or depression when he met with Ms. Dunlap, and Mother reported no unhappiness or depression on Student's part when she met with Ms. Dunlap. Mother's concern when she spoke with Ms. Dunlap was Student's truancy. Student seemed to be very cheerful and happy. Ms. Dunlap's physical examination showed that his skin and eyes looked good, he was well-mannered and well-groomed, he was a good height and a good weight, he was focused and answered questions in an appropriate manner, and he had good eye contact. If Student had been sad, anxious, depressed, or nervous, Ms. Dunlap would have noted that.

68. Karla Spivey,<sup>9</sup> who did the academic testing portion of Student's evaluation in the fall of 2005, and spent approximately five hours with Student in the course of the testing and was also present at the December 12, 2005, IEP team meeting, did not believe Student was in a depressive mood. He was a "happy-go-lucky young man with lots of friends." Student's behavior at home, as described by Mother at the IEP meeting, was not evident at school at all.

69. In addition, Mother's testimony that Student was depressed was contradicted by her own letter to Provo Canyon dated January 20, 2006. This letter was dated just five weeks after the December 12, 2005, IEP meeting. According to Mother, the contents of that letter were true to the best of her knowledge when it was written. In that letter, Mother describes Student's defiance, destruction of property, stealing her car and other personal property, staying out all night, running away, experimenting with alcohol, marijuana, and crystal methamphetamine, hallucinating on crystal methamphetamine three times, and being hospitalized for alcohol intoxication. She describes changing the locks on her home and the interior doors and purchasing a safe to secure her valuables. She describes Student bringing unsavory persons into their home and causing "great fear, stress, and anxiety." Mother took away Student's house keys. Student allowed people who looked like a pimp or drug dealer and prostitutes into the house in the middle of the night one evening, and Student had to get Mother's help to get the people out of the house. Mother moved her daughters to her brother's home for their safety. Mother's letter mentions none of the criteria of ED, except that she mentioned that Student had gained weight and needed a residential program to boost his self-esteem. Mother testified that she saw Student off and on through the fall of 2005.

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<sup>9</sup> Ms. Spivey is the testing coordinator for LA High School. She coordinates the state testing and testing for the high school exit exam. Before July 2006, she was a GATE teacher, a special education coordinator, and a special education teacher. She taught English and reading in a special day class. Prior to that, she was a regular education teacher. Ms. Spivey holds a bachelor's degree in psychology and legal studies and a master's degree in special education. She holds a special education credential.

Yet, she did not note unhappiness or depression in that letter to Provo Canyon. According to Mother's testimony at hearing, Mother did not know at the time of the IEP that depression qualified as ED. She was seeking help for her son, whom she believed needed "concentrated health and residential treatment," and she asked if he qualified for an IEP so she could place him in a residential boarding school.

70. Finally, Student described himself in the fall of 2005 through December of 2005 as always getting along with friends and teachers, playing basketball a lot, and he ditching school to do so. He was eating really well that fall. He did not have stomach aches and did not sleep an excessive amount of time. He did not mention to his friends the relationship problems he had with Mother, and he would not let any sadness he felt affect his relationships with his friends. Using drugs and problems at home affected Student's ability to go to school, and using drugs made him more negative.

71. Student's claim that he was depressed but that the depression was deep, unknown even to him, and could not be observed is unpersuasive. Student offered evidence that his problems with Mother "came out" in his counseling sessions at Provo Canyon in 2006, the year following the December 12, 2005, IEP meeting, and that he had been in denial about being depressed in the fall of 2005 and that he did not know he was depressed until later on. Student was diagnosed with major depression while at Provo Canyon in 2006, and prescribed Prozac.<sup>10</sup> This evidence does not establish that Student met the criteria of ED in December 2005. As discussed in Legal Conclusion 9, the regulation requires that Student "exhibit" a general pervasive mood of unhappiness or depression, and Student did not do so in the fall of 2005. It is noteworthy that Student did not exhibit a general pervasive mood of unhappiness and depression when he was at Provo Canyon in 2006. Susan Peterson,<sup>11</sup> Student's therapist at Provo Canyon in March 2006 through August, saw him in individual therapy once per week, in family therapy once per week, in group therapy twice per week, and also in the hallways. While Student was often very sad, he presented as being happy, and he did not exhibit sadness in class at Provo Canyon. Student's sadness was confined to therapy, and was evident when he was dealing with his parents. Thus, even at Provo Canyon, Student did not "exhibit" a general and pervasive mood of unhappiness and depression. He was quite sociable and happy in class, and his sadness was confined to therapy.

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<sup>10</sup> Student's initial diagnoses at Provo Canyon on Axis I were polysubstance dependency, parent-child relational problems, conduct disorder, and "rule out depression, not otherwise specified." Sometime prior to his discharge from Provo Canyon, "major depression, recurrent, moderate" was added to Student's Axis I diagnosis.

<sup>11</sup> Ms. Peterson started working at Provo Canyon as a therapist in March 2006. Prior to that, Ms. Peterson worked part-time as an intern. Ms. Peterson is a certified professional counselor intern. Until August 2006, she was a practicum intern. Ms. Peterson has a bachelor's degree in youth leadership. She also has a masters degree in counseling, which she obtained July 30, 2006. She is the primary therapist for a team of 12 boys. She is the primary therapist for each boy, and also conducts group therapy and family therapy.

72. Based on the foregoing, Student did not meet his burden of proving that, at the time of the December 12, 2005, IEP meeting, Student exhibited a general pervasive mood of unhappiness or depression. Student's history, since the ninth grade<sup>12</sup> and through August 2006 when he was discharged from Provo Canyon, is quite consistent and establishes that, during that time, Student maintained a diagnosis of a conduct disorder, polysubstance abuse, and family problems. Student has not, over time, shown behaviors that are typical of ED.

*Adversely affects educational performance*

73. According to Ms. Avari, "adversely affects educational performance" means the student cannot benefit from his or her education. The condition renders the student unable to benefit from the educational setting regardless of how much intervention the school does, even though the child has average cognitive ability. The student has all the tools of learning, but is not learning, despite interventions.

74. In order to meet this criteria, it is necessary to rule out attendance and motivation problems. A student has to be at school to benefit from his or her education, and some students just are not motivated. It must be documented that poor educational performance is not due primarily to lack of attendance or lack of motivation.

75. Ms. Spivey, the testing coordinator for LA High conducted Student's academic testing as part of his evaluation in the fall of 2005. Ms. Spivey administered the Kaufman Test of Educational Achievement (KTEA), which is a norm-referenced test. Everything except math fell in the average range, which includes standard scores between 85 and 110. Student's standard score of 101 in math yields a grade equivalency of 11.2, and his standard score of 91 in math computation yields a grade equivalency of 8.1. In reading decoding, Student's standard score of 101 yields a grade equivalency of 11.3, and in reading comprehension, Student's standard score of 91 yields a grade equivalency of 10.6. Ms. Spivey determined that Student's relatively lower math computation score was due to lack of attendance, and had Student been attending math classes, his score would have been higher because math computation skills build over time.

76. Student was receiving educational benefit, despite his poor attendance.

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<sup>12</sup> Mother retained Dr. Nathaniel Thomas, a licensed clinical psychologist, in July 2004 to provide counseling to Student. Dr. Thomas conducted an initial assessment of Student. According to Dr. Thomas, Student had more than enough behaviors to support a conduct disorder diagnosis at that time. There were at least three instances of Student stealing from Mother, and he had been accused of stealing from Father. Student had been caught shoplifting. He had pushed Mother across the room, and had total disregard for the rules of the house and no respect for others. He had also abused methamphetamine. In addition, he was constantly truant, and not going to school. Student liked to talk to Dr. Thomas about Student's "walk on the wild side." According to Dr. Thomas's assessment, Student "[h]as [a] fatalistic attitude. Presents as apathetic, hopeless about future." Dr. Thomas gave Student an Axis I diagnosis of "conduct disorder (adolescent onset) severe w/depressive features. 305.70 amphetamine abuse." Mother did not provide this information to District during or prior to the assessment process, and Dr. Thomas could not give any opinion as to whether Student was depressed in December 2005. In addition, Dr. Thomas is not familiar with the criteria of ED for purposes of the IDEA.

77. Based on the foregoing, Student was not eligible for special education under the category of ED at the time of the December 12, 2005, IEP meeting.

## LEGAL CONCLUSIONS

### A. *Applicable Law*

1. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).)

2. Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

### *Assessment*

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs, a district is required to conduct a full and individual initial evaluation of the student (20 U.S.C. § 1414(a)(1); Ed. Code, § 56320) within 60 days of receiving parental consent for the evaluation (20 U.S.C. § 1414(a)(1)(C)(i)(I)). In conducting the evaluation, the district is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and matters relating to the child's IEP. (20 U.S.C. § 1414(b)(2)(A).) The district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B).) The district is required to use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

4. The IDEA imposes additional requirements with respect to assessment. A district is required to ensure that assessments and other evaluation materials used to assess a

child: (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) Are used for purposes for which the assessments or measures are valid and reliable; (iv) Are administered by trained and knowledgeable personnel; and (v) Are administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3)(A)(i) through (v).)

5. In addition, the district is required to ensure that the child is assessed in all areas of suspected disability (20 U.S.C. § 1414(b)(3)(B)) and that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided (20 U.S.C. § 1414(b)(3)(C).)

6. State law required that a psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.)

7. As part of an initial evaluation, if appropriate, the IEP Team and other qualified professionals, as appropriate, are required to review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers. (20 U.S.C. § 1414(c)(1)(A); see also 34 C.F.R. 300.533(a) (1999).) In interpreting evaluation data for the purpose of determining if a child is a child with a disability for purposes of eligibility and placement, the school district is required to draw upon information from a variety of sources, including, among others, parent input and teacher recommendations, and is required to ensure that information obtained from these sources is documented and carefully considered. (34 C.F.R. 300.535(a) (1999).)

8. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1484.) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

### *Eligibility*

9. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reasons of mental

retardation, hearing impairments, speech or language impairments, visual impairments, ED, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. (20 U.S.C § 1401(3)(A)(i) and (ii); Cal.Code Regs., tit. 5, § 3030.) A child meets eligibility criteria for ED if the child exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (3) Inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations;
- (4) A general pervasive mood of unhappiness or depression;
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (i).)

10. Social maladjustment alone is not sufficient to render a student eligible for special education as ED. (Ed. Code, § 56026, subd. (e).)

11. The ALJ has authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If the District failed to identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the Student, the District has denied a FAPE. (*Dep't of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196-1197.) An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

### *Reimbursement*

12. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School*

*Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96, 85 L.Ed.2d 385].)

### *Burden of Proof*

13. The United States Supreme Court recently ruled that the student in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *B. Determination of Issues*

*I. Did District inappropriately assess Student with respect to his social/emotional needs, for purposes of determining if he was eligible for special education and related services under the category of emotional disturbance (ED) prior to the December 12, 2005, IEP meeting?*

1. As stated in Factual Findings 16 through 27, and in application of the legal principles stated in Legal Conclusions 3, 4 and 7, District did not appropriately assess Student with respect to his social/emotional needs, for purposes of determining if he was eligible for special education and related services under the category of emotional disturbance (ED) prior to the December 12, 2005, IEP meeting, because it failed to ensure that the CBCL-TRF form completed by Mr. Kung and used to assess Student was administered in accordance with the instructions provided by the producer of the assessments.

2. As discussed in Legal Conclusion 8, a school district's failure to conduct appropriate assessments may constitute a procedural denial of a FAPE. Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation constitutes a denial of FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits.

3. District's failure to appropriately assess Student did not impede Student's right to a FAPE or cause a deprivation of educational benefits because Student does not meet the eligibility criteria for ED, as discussed in Factual Findings 51 through 77.

4. The remaining determination to be made is whether District's failure to appropriately assess Student significantly impeded Student's parents' opportunity to participate in the decision making process. Student offered no evidence that it did, or that his parents would have done anything differently if the assessment had been appropriate. As discussed in Factual Finding 8, Mother participated in the December 12, 2005, IEP team meeting, took the reports that had been prepared, thanked the IEP team members and left.

Mother did not request another assessment, and did not contact the school again. According to Mother's testimony, as discussed in Factual Finding 69, Mother did not know at the time of the IEP that depression qualified as ED. She was seeking help for her son. According to Mother, Student needed "concentrated health and residential treatment," and she asked if he qualified for an IEP so she could place him in a residential boarding school.

5. In addition, as discussed in Factual Findings 26 and 42, Mr. Kung explained that even though he would have answered some questions differently in December 2005 than he did in September 2005, by December 2005, Student was hopelessly behind in Mr. Kung's science class, and it is natural for a student to be unhappy when he is failing. According to Mr. Kung, Student explained to Mr. Kung that it was hopeless for Student to do any work because he was so far behind. As discussed in Factual Finding 64, Dr. Gonzalez reviewed District documents pertaining to Student and his assessment and determined that Mr. Kung's CBCL-TRF was not critical to Student's assessment given all of the other testing Ms. Avari did and that fact that she observed Student in the classroom and was present at his SST meeting. District's failure to appropriately assess Student did not impede Student's parents' opportunity to participate in the decision-making process.

6. As stated in Factual Findings 28 through 50, and in application of the legal principles stated in Legal Conclusions 3 through 7, District's assessment of Student with respect to his social/emotional needs, for purposes of determining if he was eligible for special education and related services under the category of emotional disturbance (ED) prior to the December 12, 2005, IEP meeting, was otherwise appropriate.

*II. Was Student eligible for special education and related services under the category of ED at the December 12, 2005 IEP meeting?*

7. As stated in Factual Findings 51 through 77, and in application of the legal principles stated in Legal Conclusions 9 through 11, Student was not eligible for special education and related services under the category of ED at the December 12, 2005, IEP meeting, and District did not deny Student a FAPE by failing to find him eligible.

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: April 20, 2007

A handwritten signature in black ink, appearing to read "Debra R. Huston", written over a horizontal line.

DEBRA R. HUSTON  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division