

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

In the Matter of:

STUDENT,

Petitioner,

v.

TORRANCE UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2005110591

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on September 27-29, 2006, and on October 23-24, 2006, at the offices of the Torrance Unified School District, 2336 Plaza Del Amo, Torrance, California. Sworn testimony and documentary evidence were received at the hearing.

Petitioner-Student (Student) was represented by her attorney, Henry Tovmassian, of Newman·Aaronson·Vanaman. Student's mother (Mother) was present during the hearing on Student's behalf. Also present for one day of hearing each were George D. Crook, Raja Marharib, and Monica Corral, all of Newman·Aaronson·Vanaman.

Respondent Torrance Unified School District (the District) was represented by Sharon A. Watt, of Filarsky and Watt. Aaron Benton, the District's director of special education services, was also present on the District's behalf. Dena Parker, program specialist, was present on the District's behalf instead of Mr. Benton for one-half day of hearing.

At the conclusion of the hearing, the matter was continued until November 22, 2006, for the parties to file closing briefs. Subsequently, at the request of the parties, the time for filing closing briefs was continued through and including December 1, 2006, and then through and including December 8, 2006. All parties filed closing briefs on that date. Student's closing brief has been designated in the record as Student's exhibit III. The District's closing brief has been designated in the record as Respondent's exhibit 35. Upon the filing of the closing briefs, the matter was submitted for decision.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) during the 2003-2004 school year and extended school year by failing to fulfill its child find obligations?
2. Did the District deny Student a FAPE during the 2004-2005 school year and extended school year by failing to fulfill its child find obligations?
3. Did the District deny Student a FAPE during the 2005-2006 school year and extended school year by failing to find Student eligible for special education and related services under the category of serious emotional disturbance (ED), pursuant to California Code of Regulations, title 5, section 3030, subdivisions (i) (2), (3), and/or (4)?¹
4. Did the District improperly fail to provide Student an independent educational evaluation (IEE) during the 2005-2006 school year?
5. Is Student entitled to any or all of the following:

¹ 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 request for due process and in the prehearing conference order was ED. Therefore, eligibility under OHI is not at issue, and this Decision does not address that eligibility category.

- A. Compensatory education;
- B. Placement at a non-public school designed to address her unique needs, including counseling, social skills development classes, anger management training, and an appropriate behavior intervention plan;
- C. Reimbursement for all expenses her parents incurred in obtaining an independent assessment?

CONTENTIONS OF THE PARTIES

Student contends that she is, and has been, eligible for special education services from the District under the eligibility category of ED on one or more of the following grounds: (1) she has an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, (2) she exhibits inappropriate types of behavior or feelings under normal circumstances in several situations, and (3) she exhibits a general pervasive mood of unhappiness or depression. Student contends that the District failed to provide her a FAPE during the school years and extended school years 2003-2004, 2004-2005, and 2005-2006, in that the District failed in its child find obligations to identify Student as eligible for special education under the ED category, and in that the District found her ineligible for special education services after it assessed Student in 2005. Student also contends that the District denied her a FAPE during the 2005-2006 school year in that the District failed to perform an independent educational evaluation (IEE), despite her parents' written request on December 1, 2005, for such an independent psychoeducational assessment, and failed to provide her parents with any written notice of denial of the request.

The District contends that it did not have reason to suspect that Student had ED, and thus it did not violate its child find obligations. 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 as set forth in California Code of Regulations, title 5, section

3030, subdivision (i). Rather, the District contends that Student's temper outbursts were situation specific, were the result of situational stressors in Student's home environment, occurred when she would not get her way or was being annoyed/teased by her peers, were of short duration, and were within her control. The District also contends that Student's temper outbursts did not occur over a long period of time, to a marked degree, and across all environments, and did not adversely affect Student's educational performance, because Student was able to maintain a high level of academic achievement. The District contends that Student is able to build and maintain satisfactory interpersonal relationships with peers and teachers, did not display inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations, and did not display a general pervasive mood of unhappiness or depression.

The District conceded that it had failed to respond to Student's request for an IEE, but contended that its assessments were sufficient.

As a consequence of the District's denials of a FAPE, Student contends that she is entitled to compensatory education, reimbursement for and prospective placement at a nonpublic school with an appropriate Individualized Education Program (IEP) designed to address her unique needs, including counseling, social skills development classes, anger management training, and an appropriate behavior intervention plan. Student also seeks reimbursement for all expenses her parents incurred in obtaining an independent assessment.

The District denies that Student is entitled to any such relief. Further, the District contends that its recommended placement at Torrance Community Day School was appropriate, and that Student's placement at a nonpublic school (NPS) was not appropriate.

FACTUAL FINDINGS

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student was born on June 4, 1994. She is 12 years old and resides in the District. She has attended public schools in the District since kindergarten. On September 29, 2005, Student was suspended from Richardson Middle School (Richardson) in the District when she was in 6th grade, with a recommendation of expulsion. The suspension continued pending the expulsion proceedings. On January 18, 2006, Student was expelled from Richardson. Since November 2005, Student has been attending the Center for Learning Unlimited, a certified California nonpublic school (NPS). Both during the pendency of the expulsion proceedings, and after District expelled Student, the District offered Student placement in Torrance Community Day School, a public school in the District populated by students whom the District had expelled.

THE DISTRICT'S CHILD FIND OBLIGATIONS DURING THE 2003-2004 SCHOOL YEAR AND EXTENDED SCHOOL YEAR

2. As is discussed in Legal Conclusion 3, the term "child find" refers to the affirmative, on-going obligation of school districts to identify, locate, and assess all children residing within their jurisdictions who are suspected of having disabilities and who need special education as a result of those disabilities. If the District had reasonable grounds to suspect that Student was eligible for special education, the District had an obligation to assess her, as a first step in providing a FAPE. As is stated in Legal Conclusion 4, the failure to assess is a procedural denial of a FAPE. A procedural denial of a FAPE is actionable if it deprived Student's parents of the opportunity to participate in an IEP, or deprived Student of an educational opportunity.

3. The District and the Special Education Local Plan Area (SELPA) work cooperatively with respect to their child find activities. The District transmits information about special education from the SELPA office to the District's schools. The District sends

letters to all pediatricians in the SELPA's geographic boundaries regarding assessments for special education and the types of special education services that are available. The District also sends letters to all pre-schools and to all public and private schools in the area regarding special education services and what to do if a disability is suspected. These letters contain flyers to be posted at the school sites. The SELPA serves as a speaker's bureau, and the District provides speakers to local organizations regarding special education and related services. There are SELPA and District programs regarding special education, and the District disseminates enrollment packets for those programs at every school site.

4. Student attended Edison Elementary School (Edison), located in the District, from kindergarten (the 1999-2000 school year), through the first trimester of fourth grade, in the 2003-2004 school year, when she was nine years old. Until recently, she has consistently displayed superior academic skills since kindergarten, and her standardized achievement test scores have always been well above average. In general, until recently, she has consistently performed well in all of her academic subjects. In April 2003, when she was eight years old and in the third grade, Student was referred to the Gifted and Talented Education (GATE) Program. The referral was based upon Student's grades and test scores. In furtherance of the referral, information was provided by her parents and her teacher. Student was placed in GATE during the first trimester of the 2003-2004 school year, when she was in the fourth grade.

5. After the first trimester of the 2003-2004 school year, while Student was still in fourth grade, Student's residence changed from the Edison school area to Walteria Elementary School (Walteria), also located in the District. Therefore, Student commenced attending Walteria. There was no space for Student in the GATE program at Walteria when she commenced attending there, and she was placed with higher-achieving students. There was no evidence that Student was placed in GATE at any time while attending Walteria. During 2004, while attending fourth grade at Walteria (in a combined fourth

grade and fifth grade class), Student misbehaved on several occasions. The first documented incident, which occurred on January 30, 2004, involved Student's response to being told by her teacher that Student would be attending study hall to finish a math assignment. Student responded by throwing a tantrum, which included pounding her head on her desk, hitting her head with a water bottle, and throwing a water bottle across the table. The water bottle hit another child in the arm. Student was suspended for one and one-half days for this incident. (The documentation describing this incident also mentioned that Student had previously thrown a chair in another teacher's room.) On April 7, 2004, Student squeezed another child's arm and refused to release it, despite the child's repeated requests. She also swung her water bottle as though to hit other students. This conduct resulted in a lunchtime detention for one day. On April 27, 2004, Student was suspended for two and one-half days for pulling another student's head back by the hair and then punching another student in the stomach. On May 13, 2004, Student was involved in another episode. After another student had commented that Student's feet "were stinky," Student threatened to hit the student in the head with a notebook. When a third student intervened, Student punched the third student in the nose. The school imposed an office suspension as punishment. On May 17, 2004, Student pinched another Student and pulled her hair, due to a temper outburst. On that day, she also punched someone in the stomach who was "bossing" her. On June 9, 2004, at lunch, she jumped on another student, and did not get off until he had twice demanded that she do so. Her citizenship evaluation on her fourth grade progress report specifically noted that her classroom behavior was satisfactory, and that her playground behavior was unsatisfactory, but there was no evidence as to the particular trimester to which this notation applied. While at Walteria, Student's teacher implemented an informal behavioral program, which included behavior contracts, and daily behavior charts, which were monitored by Mother and the teacher.

6. Prior to the 2003-2004 school year, Student had had no disciplinary actions taken against her at school, except for two incidents in early 2000, when she was five years old and attending kindergarten at Edison. She was suspended from kindergarten twice for behavioral issues. On January 24, 2000, Student was suspended for one day after she had bitten and caused bruises on a fellow student. The documentation regarding the incident noted that Student had been previously warned "many times" about such behavior. On February 3, 2000, Student was suspended for one day for spitting on a student because, according to the suspension notice, "she wanted to." Her third trimester progress report for the 1999-2000 academic year noted that she ". . .made great progress with her behavior. When she wants to she. . .works well with others."

7. The lack of formal disciplinary action while Student attended Edison in the first through third grades did not mean that Student was entirely well-behaved at school or elsewhere during that time period. Her progress reports for those grades all indicate that Student needed to improve her behavior. Her teachers responded to her behavioral lapses with various informal behavioral strategies, such as the use of behavioral checklists, the "friendship club," brief removals from the classroom, moving her desk to be closer to the teacher's desk, and other similar interventions to improve Student's behaviors and social skills. (The "friendship club" is a group of students who meet and discuss issues pertaining to self-esteem, anger management, conflict resolution, and other social skills.) Student's Mother mentioned Student's difficulty controlling her impulses and anger in a two-page letter to Student's third grade teacher that Mother wrote in approximately October 2002. Mother's letter emphasized Student's superior intellectual abilities while asserting that her behavior was improving. Mother's letter does not mention that Student was unhappy or depressed, or that she was unable to socially interact with her peers.

8. A Student Success Team (SST) meeting was convened on May 6, 2003, when Student was eight years old and in third grade at Edison, to address her behavior. The SST noted that Student "becomes upset and acts inappropriately," that she had

thrown a chair at a teacher, and had banged her head with objects. At this time, Student's parents minimized her behavioral issues, describing her as "very dramatic," and attributing her behavior to a recent illness. The SST noted that "Parents state that behavior chart is effective," and also noted that "Dr. Akyuz is working with student," a fact that was not mentioned in Mother's letter of October 2002. The SST report is the only documentary evidence regarding when the District first learned that Student was receiving professional assistance for her behavioral issues.

9. Indeed, in September 2001, when Student was seven years old and in second grade, Student began therapy with Rebecca Akyuz, MFT, Psy.D., a licensed clinical psychologist.² Student has continued to see Dr. Akyuz through the present, with breaks in service from February 2005 through September 2005, due to Student's involvement in a proceeding with Los Angeles County Department of Children and Family Services (DCFS), which is further described below. Dr. Akyuz worked with Student and her parents to address Student's anger management skills and social skills, and was in telephone contact with some of Student's teachers at WALTERIA. At some point, Dr. Akyuz diagnosed Student with Dysthymic Disorder, a long-term, chronic, depression that is not as severe as Major Depression. She testified that this diagnosis applied to Student from 2001 through the present. There was no evidence that anyone advised the District that Student had been diagnosed with any depressive disorder prior to the incident of September 29, 2005, which resulted in Student's expulsion from the District. There was also no evidence that Dr. Akyuz had ever formally assessed Student. Dr. Akyuz testified that she had identified Student as eligible for ED at an early stage of Student's therapy, and was surprised to learn (at an

² The evidence was inconsistent as to the year in which Student commenced therapy with Dr. Akyuz. Mother testified that the therapy commenced in 2002, but Dr. Akyuz confirmed that Student commenced therapy in September 2001, and documentary evidence was admitted which supports this date.

unidentified point in time) that Student did not have an IEP.³ Dr. Akyuz did not state why she had determined, at an early stage of therapy, that Student met the eligibility criteria for ED. No documentary evidence was presented to support that Dr. Akyuz had formulated such an opinion at that time. There was no evidence that, prior to October 2005, the time of the District's psychoeducational assessment which is further discussed below, Dr. Akyuz or anybody else had reported to the District her opinion that Student met the criteria for ED.

10. Student's parents did not request an assessment in writing during the 2003-2004 school year. Mother testified that she was ignorant of the possibility that a child could obtain special education for ED and the procedure for obtaining it. Mother's testimony on this issue is not entirely consistent with the other evidence that the parties presented at the hearing. Dr. Akyuz was aware that ED eligibility could result in special education, and she had contacts with Student's teachers and engaged in family therapy with Student's parents. It is unlikely that she would keep to herself that Student met the criteria for ED, and her surprise that Student had no IEP and was not receiving special education services. Dr. Akyuz's knowledge and long-term relationship with Student and Student's family, in addition to the District's child find efforts, Mother's close contact with Student's teachers and her involvement in Student's education, Mother's concerns about Student's behavioral difficulties, and Mother's and Father's participation in the SST meeting that had been convened at Edison, do not support the contention that Mother was unaware that special education services might be available to Student and how to obtain them.

³ Sandra R. Kaler, R.N., Ph.D., Student's expert, testified to her opinion that, had Student been adequately evaluated during the school years 2003-2004 and 2004-2005, she would have been found eligible for special education as a Student with ED. Dr. Akyuz' failure to formally evaluate Student during these time periods, therefore, is significant.

11. During the 2003-2004 school year, the District did not act unreasonably in failing to suspect that Student had ED. The behavior in which Student engaged after transferring to Walteria during the latter part of the school year was more severe than the behaviors which Student had demonstrated during her first, second, and third grades at Edison, and which Student's parents had minimized. The subject behaviors coincided temporally with Student's transfer to Walteria, and the District could reasonably assume that they were transitory. Student's academic performance remained at a high level, as she attained As and Bs in all academic subjects. There was no specific evidence that Student's misconduct at school should have led the District to suspect that Student was eligible for special education, and that she required special education services. The fact that the District was aware that Dr. Akyuz was providing therapy to Student is not grounds for the District to suspect ED, especially since Dr. Akyuz had not formally assessed Student, and there was no evidence that she had transmitted to the District her own opinion that Student was eligible for special education as ED. Evidence was presented at hearing that, as of approximately summer 2001 and continuing through the present, Student had behavioral problems at the summer camp that she attended, but there was no specific evidence that the District knew of these events.

Under these circumstances, the District did not violate its child find obligations.⁴

⁴ Student contends that the District did not comply with its child find obligations, because the District's child find activities did not include mailings to parents, in violation of Education Code section 56301, subdivision (d)(1). That statute is inapplicable, as it is expressly directed at SELPAs, not Districts, and it does not contain any obligation that items be mailed to parents.

THE DISTRICT'S CHILD FIND OBLIGATIONS DURING THE 2004-2005 SCHOOL YEAR AND EXTENDED SCHOOL YEAR

12. The legal principles that pertain to this issue are the same as were discussed above with respect to the school year 2003-2004. As is stated in Legal Conclusions 3, 4, and 12, if the District had reasonable grounds to suspect that Student met the eligibility requirements for special education, and required special education services, the District had an obligation to assess her, as a first step in providing FAPE. The failure to assess is a procedural denial of FAPE, which is actionable if it deprived Student's parents of the opportunity to participate in an IEP, or deprived Student of an educational opportunity.

13. During the 2004-2005 school year, when Student was 10 years old, Student was in the fifth grade at Walteria. On September 24, 2004, she pulled another student's hair at recess, because that student was teasing Student's friend. On October 8, 2004, she kicked a student twice "for her [Student's] own amusement." After each of these incidents, Student filled out a form describing her behavior, acknowledging fault, and suggesting how she could have better handled the situation.

14. Mother testified that, in September 2004, her niece suggested that she talk to the District regarding assessing Student. Mother testified that she asked Cindy Ryan, Walteria's principal, what Mother should do to obtain an assessment. Mother testified that Ms. Ryan replied, "Well, that was special ed." Mother did not pursue the topic further with Ms. Ryan or anyone else at the District at that time. Also during this conversation, Mother testified that Ms. Ryan asked whether Student's parents had considered medicating Student, and Ms. Ryan mentioned that she had heard favorable things regarding psychiatrist Alan Green⁵

⁵ As is discussed below, in approximately July 2005 Dr. Green commenced treating Student. There was no evidence that this was due to Mother's conversation with Ms. Ryan.

15. On October 19, 2004, Student was disciplined twice while at school. In one of the incidents, she threw a water bottle at another student in the classroom, because she thought that the other student was making fun of her for failing to bring a pencil. In the other incident, she kicked another student in line for not walking quickly enough. As a result of these episodes, the school denied her recess for three consecutive days.

16. Also during September and October 2004, David Fox, Ph.D., a clinical psychologist, evaluated Student. (Inexplicably, the title of the report contains the date "6/4/94.") The referral to Dr. Fox was generated by Dr. Akyuz. Mother testified that she sought the assessment after Ms. Ryan dismissed her inquiry regarding having the District assess Student. Dr. Fox generated a report dated October 22, 2004.⁶ Dr. Fox reported that he obtained a developmental history from Mother on September 13, 2004, and tested Student during three one-hour sessions in September and October 2004. The report does not specify the instruments Dr. Fox used for his evaluation. The report notes Student's high level of intellectual development, and that her perceptual motor skills also display a high level of cognitive development. With respect to other areas, the report states:

Her coordination, analytic grasp and persistent concentration are strong. She does less well on tasks requiring applied social reasoning. The application of logic and comprehension of interpersonal situations are her least well developed abilities and whereas she does perform therein at an average level, her overall abilities are decidedly at a superior level, which makes this contrast very significant.

⁶ Dr. Fox did not testify at the hearing. The parties stipulated to the admissibility of his report.

17. Dr. Fox examined "both the neuropsychological underpinnings of [Student's] approach to tasks, and her psychosocial maturity and outlook." He found "no meaningful patterns which might suggest a strong 'brain-based' origin to her mood, temper and impulsivity." Dr. Fox further noted that testing did not demonstrate patterns consistent with a formal Attention Deficit disorder, and that "she does not show strong evidence of a clinical or a latent disorder of mood." Further, the report states, "She does not appear to meet criteria for a diagnosis of Intermittent Explosive disorder."

18. Dr. Fox found that Student was frustrated because, when she was younger, she

. . .learned that she can get by with minimal effort. . . . Over the course of time, she likely missed out on those elements of maturing and cognitive growth which must be acquired through effort, exposure, interaction, learning and trial and error.

19. Dr. Fox also reported that Student appeared to have identity issues, which he noted was common in very bright children. Such children surpass their peers in academic areas early on, but miss some of the benefits of learning to socialize along with their own age group. He was also concerned that she displayed "masculine traits," but he offered no description as to the specific traits to which he was referring.

The report notes:

While [Student's] mental circuitry is programmed at a gifted level, her emotional apparatus is still that of a younger child. The implications for psychotherapy at this point are to help her develop a better age appropriate gender identity, to model for her the interests that are typical of her female classmates and

peers, to help her overcome her anxiety of facing hard work in school and in social interaction, to help her identify her feelings of being frustrated because learning does not come as easily as it used to, and to help soften her so that she is comfortable relating with others in ways other than by displaying her gifted and advanced skills of self expression.

The report concludes:

. . .this is a gifted ten year old fifth grader who displays sudden anger and impatience. She seems most comfortable drawing on behavioral patterns which are more appropriate for younger children. She does not interact or function in many areas at a level commensurate with her fine intellectual level. These concerns appear rooted in her having missed out. . .on many of the basic steps of early social learning and academic problem solving abilities as a function of being so bright and having learned to rely on forming rapid and impulsive impressions about how to get things done. Now that her social and academic environments demand the application of more sophisticated reasoning and task persistence, she is often at a loss in having the mental stamina to focus and comprehend. She is frustrated with the challenge, and frustrated with herself. She acts this out by becoming obstinate and noncompliant, and becomes moody and down on herself. It is important to help her override these patterns through personal and family psychotherapy lest complications of mood and conduct eventuate in more entrenched patterns of unhappiness.

The report does not mention any need for special education services, nor recommend any strategies or actions to apply in an educational setting.⁷

20. Mother showed Dr. Fox's report to Ms. Ryan, and Student's homeroom teacher also saw the report. There was no evidence that these individuals, or the District, took any particular action as a result of the report.

21. Student's misbehavior at school continued sporadically throughout the remainder of the 2004-2005 school year. On November 5, 2004, Student was suspended for one and one-half days for shoving and punching another student in the lunch line. On April 1, 2005, she was suspended for two days, based upon her behavior in intimidating and bullying another student for at least one month, which was reported by the victim's parent. On April 18, 2005, she was suspended for two days, because she lost her temper and chased two students down a hallway. When she caught up to them, she kicked one student in the leg, and pulled another student's hair. She then threw her backpack and hit another child. On June 8, 2005, Student was sent home for the afternoon after she swung her jacket and thereby injured one student in the eye and one in the head. A teacher who witnessed the episode stated that Student had acted deliberately. Student refused to talk about the incident.

22. Student's third trimester citizenship evaluation on her progress report reflected marks of "Unsatisfactory" in every checked category, a decline from the previous two trimester evaluations for that academic year, in which her citizenship evaluations were more mixed.

⁷ In this regard, Dr. Fox's report does not support the opinion of Student's expert, Dr. Kaler, that an adequate evaluation in 2004-2005 would have revealed that Student was eligible for special education as ED. Nor does it support Dr. Kaler's description of Student, quoted below, as a "poster child" for ED.

23. The suspensions and misbehaviors during this school year coincided with several stressors in Student's personal life, none of which were addressed in Dr. Fox's report.⁸ Her parents separated in early 2005, and subsequently Mother filed for divorce. Student was removed from her home by DCFS in February 2005, due to issues related to her father's status as a registered sex offender, and his nudist lifestyle, which included being nude in the Student's presence.⁹ Student was placed in a relative's home in the San Fernando Valley for foster care for approximately one month, and then she was moved to

⁸ Dr. Fox's report pre-dated the separation of Student's parents and the DCFS proceedings that are described in this paragraph. However, the evidence reflects that at least some of the circumstances that gave rise to these events had existed for some time. For example, Mother knew of Father's sex offender status prior to their marriage, and Father's nudist lifestyle had also been of some duration at the time of Dr. Fox's report. Yet, there was no evidence that Dr. Fox knew of any of these background circumstances at the time he wrote his report. Dr. Fox's report notes that it did not include a review of Student's developmental history, because that history was already known to Dr. Akyuz. One does not know whether these particular family stressors were among those items that Dr. Fox decided to exclude from the report because Dr. Fox believed they were already known to Dr. Akyuz. Regardless, Dr. Fox's failure to mention any family stressors as part of his analysis, and his failure to mention the specific behaviors which Student was displaying at school at approximately the same time as he was performing his evaluation, diminish his report's weight and utility.

⁹ There was some evidence that Student's father viewed internet pornography, but the evidence was unclear as to the role, if any, this conduct played in the decision to remove Student from her home. There was also conflicting evidence as to whether Student's father had exposed Student to internet pornography.

a foster home in south Torrance for approximately two and one-half weeks. On April 6, 2005, Student was allowed to return to live in her home, under her maternal aunt's custody. Her father no longer lived in the home at that time, but he had supervised visitation with Student.

24. Student's teachers were aware of these stressors in Student's personal life, including Student's daily commute to school from the San Fernando Valley and back again. Her homeroom teacher, in particular, took special note of Student's situation, and attempted to accommodate Student's stress by allowing her to go to the nurse's office to rest, or by permitting her go to another classroom if she needed to change her environment. Student needed more personal space during this period, so the tables in the classroom were configured differently. Two of her teachers observed that she became sadder towards the end of the school year, whereas she had not been unhappy earlier in the school year. Her homeroom teacher also noted that Student's anger increased towards the end of the school year.

25. During the 2004-2005 school year, the District had no reason to suspect that Student had ED and required special education services. The behavior that Student exhibited generally coincided with the severe stresses and upheavals in Student's home and living situations, and the District reasonably could have assumed that they were related to those events. Student's grades were entirely As and Bs in academic areas until the third trimester, when her math grades dropped from Bs to Cs. Mother had submitted a health history form dated September 22, 2004, which stated that there were no emotional or mental conditions that required regular medical observation, noting only that testing for such conditions was "in process." Again, there was evidence that Student had behavioral difficulties at camp, but there was no evidence that the District had any knowledge of these difficulties. Dr. Fox's report emphasized that Student's emotional functioning was at a lower level than her intellectual functioning, and discussed her identity issues and her frustrations, but his report does not support that the District should

have suspected ED. It does not mention her specific behaviors at school, even though they were occurring contemporaneously with his evaluation, nor does it address any particular aspect of Student's educational program, nor does it recommend that Student be assessed for eligibility for special education. Indeed, by failing to address these matters, Dr. Fox's report does not support Dr. Kaler's and Dr. Akyuz's opinions that Student was eligible for special education as a student with ED during the extended school years 2004-2005 and previously.

26. Additionally, Student's parents did not request an assessment in writing during the 2004-2005 school year. Mother's contention that her conversation with Ms. Ryan constituted a request for assessment is not persuasive. It is not clear from Mother's testimony precisely when the conversation occurred, the context of the conversation, what each party said precisely, whether Mother had actually requested an assessment so as to determine eligibility for special education, whether Ms. Ryan should reasonably have so understood the conversation, and what Ms. Ryan intended by mentioning Dr. Green and medication. There was no other evidence, such as documentation or testimony, to support Mother's conversation with Ms. Ryan. There was no evidence that Ms. Ryan or anybody at the District customarily ignored face-to-face requests for special education assessments, or had any reason to do so. Under these circumstances, the District did not violate its child find obligations.

THE DISTRICT'S DENIAL OF ED ELIGIBILITY TO STUDENT DURING THE 2005-2006 EXTENDED SCHOOL YEAR.

27. As is stated in Legal Conclusion 8, 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: (a) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain

satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations; (d) a general pervasive mood of unhappiness or depression; and (e) a tendency to develop physical symptoms or fears associated with personal or school problems. Student contends that she meets the criteria for eligibility under one or more of the categories (b), (c), and (d).

28. As is stated in Legal Conclusion 6, in conducting an assessment to determine whether a child is eligible for special education services, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the student is a child with a disability.

29. Student commenced sixth grade at Richardson in September 2005. Mother regained custody of Student on September 12, 2005.

30. During the process of enrolling Student at Richardson, Mother submitted a health history form, dated August 23, 2005, which noted that Student was taking Zoloft. On the form, Mother also mentioned that Student had anger management/impulse control difficulties that required regular medical observation, but she did not state that Student had been diagnosed with depression, dysthymia, or any other mood disorder.¹⁰ The Zoloft had been prescribed by Dr. Alan Green, a child psychiatrist who had

¹⁰ Student contends that Mother's submission of this form served as notice to the District of Student's diagnosis of dysthymia or depression, because Zoloft is an antidepressant medication. Student offered no evidence that any of the District personnel who evaluate whether a child should be assessed for special education reviewed this form. To the contrary, the evidence showed that this form was used by the student health department at the school for emergencies.

commenced to treat Student in or about July 2005. Subsequently, in or about December 2005, Dr. Green also prescribed Seroquel for Student. The Zoloft was for depression, and the Seroquel was for mood volatility and aggression. There was no evidence as to when the District learned that Dr. Green had prescribed Seroquel.

EXPULSION INCIDENT

31. On September 28, 2005, another student teased Student in gym class. Student lost her temper, attempted to punch the other student several times, and ultimately punched him once in the mouth. After the incident, the teacher sent Student to the principal's office, accompanied by another student. Student was suspended for five days, and, on September 30, 2005, the principal, Dr. Liberati, recommended expulsion, based upon Student's past disciplinary history. Dr. Liberati felt that Student could be a danger to herself or others. Jane Siffert, Richardson's assistant principal, felt that Student was a danger to other students on a public campus, and needed to be placed in a school where her behavior could be addressed. Because the District determined that Student's presence at school would cause "disruption of the instructional process and may create a dangerous situation on the ...campus," the District extended Student's suspension pending the decision on the expulsion recommendation. After a hearing that occurred on December 6, 2005, the District expelled Student on January 17, 2006.

32. While the expulsion proceedings were pending, and thereafter, the District offered Student placement at Torrance Community Day School, a school in the District composed of other students who had been expelled. The student population there was mostly older, and mostly male. The District offered no therapeutic services or behavioral support as part of the District's offer of placement there, although such services might have been available had Student requested them.

DISTRICT'S PSYCHOEDUCATIONAL AND SPEECH AND LANGUAGE ASSESSMENTS

33. Also while the expulsion proceedings were pending, on October 6, 2005, Student's parents requested, in writing, that Student be assessed for eligibility for special education. This was the first time that Student had made any such written request. The District responded in an expedited fashion. An assessment plan was formulated and Mother consented in writing to the assessment plan on October 18, 2005. The assessment plan called for assessments in the areas of academic/preacademic achievement, social and emotional development, motor ability, language/speech/communication, general ability, and health and development.

34. The assessments were performed promptly, and a psychoeducational report was generated on October 25, 2005, seven days after Mother had executed the consent to assess. Most of the assessments were performed by Amy Schumaker, M.A., the school psychologist, who also wrote the report. The assessments consisted of:

Interview with Mother;

Interviews with all of Student's teachers at Richardson;

Interviews with three of Student's teachers at Walteria;

Interviews with the principals of Walteria and Richardson;

Interview with Student;

Review of records;

Observation of Student;

Interviews with DCFS;

Interviews with Dr. Akyuz and Dr. Alan Green; and

Administration of the following instruments:

Wechsler Intelligence Scale for Children—Third Edition (WISC-III)¹¹;

Developmental Test of Visual-Motor Integration/3rd edition (VMI-3);

Test of Auditory Perceptual Skills-3 (TAPS-3);

Learning Efficiency Test—II;

Woodcock-Johnson III Tests of Achievement (WCJ-III);

Child Behavior Checklist for Ages 6-18 (completed by Mother);

Conners' Parent Rating Scale: Long Version;

Teacher Behavior Checklist for Ages 6-18 (completed by current teachers);

Youth Self Report for Ages 11-18 (completed by Student);

Children's Depression Inventory (CDI) (completed by Student);

and

Reynolds Adolescent Depression Scale—2nd Edition (completed by Student).

¹¹ Elsewhere in the report, this test is referred to as the WISC-IV. Also elsewhere in the report, the WCJ-III is referred to as the WCJ-II. The documentary evidence received at hearing reflects that the District administered the WISC-IV and the WCJ-III.

The answer forms for nearly all of these instruments were admitted into evidence. All of these assessments were administered by Ms. Schumaker, with the exception of the WCJ-III, which was administered by a special education teacher. Student challenged neither the validity of the testing nor the evaluators' qualifications. Both Ms. Schumaker and the special education teacher were qualified, by education, training, and experience, to administer the assessments.

The assessments in which Student participated as part of the psychoeducational assessment occurred during four different time periods on three different days.

35. Ms. Schumaker's report contains background information, including that Student commenced taking Zoloft two months prior to the assessment, and was being followed by Dr. Green. The report refers to the DCFS proceedings and Student's recent history living in foster homes. The report also mentions Dr. Fox's report, and provides the WISC-III scores that he obtained when he evaluated Student in September, 2004. Ms. Schumaker noted that the scores of September 2004 were provided "per verbal report." Ms. Schumaker's report states that Dr. Akyuz felt that Student's "acting out behavior was usually the result of significant family stressors."¹² The report notes Student's high intelligence, and states that "Mother feels that Student is 'emotionally disadvantaged' and that Student has difficulty interacting with her peers in a school setting."

36. The report discusses Ms. Schumaker's interviews with Student's teachers, both at Richardson and at Walteria. Nearly all of them stated that she struggled with peer

¹² Dr. Akyuz denies that she made this statement; rather, she testified that she said that Student's behavior was "exacerbated" by Student's family stressors. The form that Dr. Akyuz submitted to Ms. Schumaker dated October 20, 2005, in connection with the psychoeducational assessment, states that Student has "Difficulties and sensitivities with peers due to current and recent past situational stressors." Therefore, Ms. Schumaker's report contains a fair distillation of Dr. Akyuz's opinion.

relationships, but they also stated that they had positive relationships with her, and that she was a bright child who excelled academically. They also reported that she was able to make and keep friends. The report refers to the SST meeting at Edison on May 6, 2005, at which time the parents attributed her recent behavior difficulties to a "recent illness."

37. Ms. Schumaker's report lists Student's scores on the various assessments. On the WISC-IV, her full-scale IQ was 136. The WCJ-III scores were all in the High Average to Superior Range. The scores on the VMI-3, TAPS-3, and Learning Efficiency Test-II revealed no sensory motor deficits, visual perceptual deficits, auditory processing deficits, or memory deficits. Her scores on these instruments ranged from average to very superior.

38. Ms. Schumaker did not formally assess Student's adaptive skills, but, based on previous testing, assumed that they were "within expectancy range for cognitive ability." Mother, teachers, and Student completed a variety of forms for assessment of Student's social/emotional functioning. On the Conners' Ratings Scales—Long Form, Mother's concerns included Psychosomatic, Oppositional, Hyperactivity and Anxious-Shy, and the index scores for these areas were in the clinically significant range. There were slight clinically significant elevations in the areas of the Conners' Global Index for restless and impulsive behaviors as well as emotional lability. The Conners' Global Index: Total was elevated, and the DSM-IV: Inattentive index score was also in the clinically significant range. The DSM-IV: Total index score and the Social-Problems index were in the borderline clinically significant range. Ms. Schumaker's report notes that Student is fidgety and restless at times, and that Mother reports that Student has frequent temper outbursts in the home. She also does things to deliberately annoy others, is angry, resentful, and impatient. She frequently does not get invited to friends' houses. Mother's responses on the Achenbach Child Behavior checklist indicated clinically significant elevations in the areas of social problems, somatic complaints, thought problems and aggressive behaviors. There was a borderline clinically significant elevation in the area of anxious-depressed behaviors.

39. The Achenbach Teacher Report forms reflected no clinically significant elevations. The responses of three of the teachers indicated a borderline clinically significant elevation in the area of social problems, and one teacher reported a borderline clinically significant elevation in the area of aggression.

40. Student completed the Achenbach Youth Self-Report for Ages 11-18, and indicated clinically significant elevations in the areas of thought problems (hearing and seeing things that are not there, strange thoughts), anxious-depressed behaviors, social problems, and aggressive behaviors. Student had borderline clinically significant elevations in the areas of somatic complaints and attention problems.

41. Student also completed two forms to assess depression. One such form, the Reynolds Adolescent Depression Scale-2nd, reflected a moderate elevation in the area of negative self-evaluation, and mild elevations in the areas of somatic complaints and total depression T-score. Student's most significant concern was that she has trouble sleeping, and Student primarily attributed this to the recent burglary at her house. She sometimes thought about wanting to hurt herself, but she then stated she would never do that, and that she had no specific plan. Student also completed the Children's Depression Inventory, which focuses on Student's feeling during the previous two weeks. Student indicated no areas of clinically significant elevations.

42. Ms. Schumaker noted that Student was dealing with a very high level of environmental stress. She reported that Student admitted that her conduct difficulties were the result of change occurring in her life as well as her desire to win friends by being tough and intimidating. Ms. Schumaker was impressed that Student was able to recognize that her strange thoughts and hearing and seeing things that were not there were coping strategies to escape into a safer world. Student also identified that her need to be controlling may be related to the fact that her life was not under control. Ms. Schumaker observed Student interacting with Mother, and noted that some of Student's challenging behaviors with Mother might be due to "limited firm limit setting."

43. The report listed each element of the ED criteria and determined that Student met none of them. In particular, Ms. Schumaker's report noted Student's ability to develop and maintain good relationships with her teachers, as well as that Student's diagnosis of depression may be related to her family stressors. Further, Student's depression was not pervasive or significantly impacting her educational performance. Finally, Ms. Schumaker noted that Mother reported somatic symptoms, but that they had not been observed at school.

44. Ms Schumaker concluded that as of the time of the report, Student presented with no significant discrepancy between ability and achievement, that no processing deficits were identified, and that Student did not meet criteria for ED. Therefore, Ms. Shumaker concluded that Student's educational needs could best be met in the regular education classroom setting.

45. In addition to the psychoeducational assessment, the District performed a speech-language pathology evaluation on October 26, 2005. The evaluation was conducted by Carl Borders, M.A., a licensed California Speech-Language Pathologist. Student challenged neither the validity of the testing nor the evaluator's qualifications. Mr. Borders was qualified, by education, training, and experience, to perform the assessments. He used the following instruments and procedures:

Comprehensive Assessment of Spoken Language (CASL)--

selected subtests;

Oral Mechanism screening;

Speech Sample and Analysis;

Student Interview; and

Review of Records.

46. Student's answer sheet for the CASL and a quantitative interpretation of the CASL test results were admitted into evidence. Mr. Borders evaluated Student in the areas of speech (articulation/phonology, voice, fluency), language ability, expressive/receptive language (supralinguistics), and pragmatics. Mr. Borders concluded that Student's supralinguistic functions were in the superior range, with a relative strength in pragmatic judgment. Her use of pragmatic language conventions was within normal limits, if not advanced for her age. She was also functioning in the superior range based upon informal and formal assessments of communicative competence. During conversations, she did not demonstrate deficits in word finding, word knowledge, syntax/morphology, pragmatics, or supralinguistic abilities. Her articulation, voice, resonance, and fluency were unremarkable, and there were no findings of structural, motor, or sensory deficits. Mr. Borders concluded that Student did not meet eligibility for speech-language pathology services.

IEP MEETING AND ELIGIBILITY DETERMINATION

47. On October 26, 2005, Mother was invited to the IEP team meeting, which was scheduled for October 27, 2005. Mother waived, in writing, the 10-day notice requirement for the IEP meeting. The IEP team meeting was held on October 27, 2006, as scheduled. The purpose of the meeting was to determine Student's eligibility for special education, and, if she were eligible, whether the behavior for which she was disciplined was a manifestation of her disability. In attendance were Ms. Schumaker, Mother (who received a copy of her procedural safeguards), a paralegal from the law office representing Mother, Aaron Benton (the District's director of special education services), an attorney for the District, Student's general education teacher, Richardson's principal and assistant principal, Mr. Borders, and a special education teacher. The teachers reported on Student's superior intellectual ability. Student's general education teacher reported that there was a bond between her and Student. She also reported that Student had some trouble working in a group, and was moody and sullen on some days. Mr. Borders reported that Student

had no speech and language deficits, based upon his assessments. Ms. Schumaker gave her report, and the team discussed the reports of other mental health professionals and reviewed Ms. Schumaker's data. The team determined that Student did not meet the criteria for special education and related services under the categories of emotional disturbance or speech and language, and was not eligible for special education. Mother expressed her disagreement with the results of the psychoeducational assessment, and stated her belief that the community day school placement that the District had offered was not an appropriate placement for Student.

CENTER FOR LEARNING UNLIMITED

48. In November 2005, Mother placed Student in the Center for Learning Unlimited (the Center), a certified California NPS. The Center focuses on children with learning disabilities, Asperger's Syndrome, Bipolar Disorder, and behavioral and emotional issues. At the time of the hearing it had a population of 27 students. The Center educates in small groups, and, according to California state standards. The Center offers a therapeutic day school program, with emphasis on the development of relationship skills. The Center charges a base rate of \$185 per day, plus the costs of additional services, such as individual counseling.

49. During Student's initial 30 days at the Center, she demonstrated emotional lability and little self-control. On four occasions, her behavior was deemed so dangerous to herself or others that she was subject to physical restraint. Her emotional issues impeded her ability to access her education, and she was placed in gradually smaller groups of students. By mid-January, and continuing through the end of the school year, she was educated on a one-to-one basis, and attended the Center for partial days, from 11:00 a.m. to 3:00 p.m. During the 2005-2006 school year, the Center focused more on her behavioral issues than on educational issues. From September 2006 through the date of the hearing, she was attending the Center on a full academic day basis, and her behavior

was improving. She is currently in a group of three students. Although she still manifested frustration, she had not physically or verbally assaulted anyone since September 2006 through the date of the hearing. She is not being taught by any teachers with special education credentials, but a transdisciplinary team consisting of an educator, a behaviorist, and a clinical psychologist provide services to Student, directly or indirectly.

INDEPENDENT PSYCHOLOGICAL EVALUATION OF STUDENT

50. Mother obtained a psychological evaluation of Student by Sandra R. Kaler, R.N., Ph.D., a licensed California psychologist and an assistant clinical professor at the UCLA Neuropsychiatric Institute. Dr. Kaler evaluated Student during two two-hour sessions on April 21, 2006, and May 23, 2006. She wrote a report dated May 23, 2006. She used the following instruments and procedures:

Children's Sentence Completion (CSC);

Children's Depression Inventory (CDI);

Thematic Apperception Test (TAT);

Rorschach;

Informal Test of Social Know-How;

Vineland Adaptive Behavior Scales—2nd Edition (Vineland-II);

Behavioral Observations;

Record Review;

Teacher Interview (Tayesha Noise, Student's teacher at the Center); and

Therapist Interview (Dr. Akyuz).

In her report, Dr. Kaler summarized the background information that she had received from Mother, and her interviews with Ms. Noise and Dr. Akyuz. She then reported on the test results. None of the protocols or answer sheets of the instruments used by Dr. Kaler were attached to her report or otherwise offered into evidence. Dr. Kaler reported that the Vineland-II, which was completed by Mother, showed that Student's adaptive functioning was age-appropriate in the Communication domain, but that she was delayed in self-help skills in the Daily Living Skills domain, and her socialization scores ranged from 4 years, 11 months in interpersonal relationships to 5 years, 6 months, in coping skills. On the CDI, Student received a score of 20, indicating that "she was experiencing a moderate degree of depressive symptomatology at the time of testing." Her scores clustered around interpersonal problems, where her T score was 79.

51. On the CSC, Student's responses were "brief and somewhat concrete." She expressed a belief that dragons are extinct, but were once real. Dr. Kaler did not note the significance of this belief or of any of Student's other responses on the CSC in her report. She testified at hearing that she was concerned about Student's belief that dragons had once existed, and about Student's report that she sometimes heard voices. Dr. Kaler referred to these matters as "phenomena."

52. Student had "a great deal of difficulty" on the Informal Test of Social Know-How. She did not understand why it might be inappropriate to ask a stranger in an elevator to borrow her comb, or why a girl being followed in a store might be uncomfortable.

53. On the TAT, Dr. Kaler's report stated that Student "tended to engage in highly imaginative stories that were somewhat hard to follow." Dr. Kaler noted the specific responses that Student made to two of the TAT cards, but Dr. Kaler did not state the

significance of these responses in her report, nor mention them specifically during her testimony.

54. On the Rorschach, Dr. Kaler stated that Student's responses

. . .demonstrated preoccupation with primitive experience in congruous combinations, idiosyncratic thinking and autistic logic

. . .Her responses suggest difficulty with strong affect where she disorganized. . .Her responses reflect inability to inhibit primitive responses under affected stimulation and poor form quality.

55. Dr. Kaler concluded:

[Student's] behavioral presentation, as well as formal testing, are consistent with major depressive disorder. In addition, [Student] demonstrates a great deal of mood lability. Testing further reflects her inability to inhibit strong responses in emotional related situations. At the current time, [Student] is not making academic progress and is not able to interact with peers.

Record review reveals that Student has had behavioral difficulties throughout her lifetime. At the present time, it is clear that Student lacks the ability to understand appropriate social mores, both by her behavior and by her testing.

56. The report labeled Student a "poster child" for ED, based on behavior and formal testing, and stated that Student met all of the criteria for ED under all three of the

categories at issue in this case. The report noted that Student's ED behaviors occurred despite medication management, therapy, and placement in a therapeutic school, and they persisted despite the decrease in family stressors during the previous year. Dr. Kaler diagnosed Student with Dysthymia, Major Depressive Disorder, and Identity Disorder, which she noted was a juvenile precursor to Borderline Personality Disorder. She recommended an IEP, placement in an NPS program "with both a therapeutic orientation as well as strong behavioral contingencies," placement in a social skills group that works on social flexibility, as well as anger management, continued individual therapy, and family therapy with Mother to develop appropriate limit setting. With respect to her recommendation for an NPS placement, Dr. Kaler testified that she had "no strong opinion" regarding Student's continued placement at the Center.

57. Student's behavior and emotional state arguably deteriorated after her suspension from Richardson and after she matriculated at the Center, although they improved during the 2006-2007 school year. These events occurred after the due process complaint herein was filed, and Dr. Kaler's report was not prepared until approximately six months after the filing of the due process complaint. Based upon Legal Conclusion 14, as well as the issues raised by the due process complaint, however, the District's conduct herein must be evaluated prospectively, based upon the information that was available to the IEP team at the time of the IEP meeting of October 27, 2005, and not in hindsight. As of the time of the IEP meeting, Student did not qualify as a student with ED under California Code of Regulations, title 5, section 3030, subdivision (i)(2), in that she was able to maintain relationships with her teachers, and, to a certain extent, with her peers. Her teachers testified about Student with genuine affection and empathy, and more than one stated that she had a good relationship with Student. Dr. Kaler testified that Student's relationships with teachers were inappropriate, in that she gave them gifts and notes. However, she had never seen Student in a classroom, and she had not interviewed the District teachers. One teacher in particular appeared to appreciate that Student had loaned

her a CD of a musical after they had discussed their shared interest in musical theater and in that particular musical.

58. The testimony regarding Student's relationships with her peers was far more conflicting than the evidence of Student's relationships with her teachers. Mother testified that Student had no actual friends, yet, on the Achenbach Child Behavior Checklist administered by Ms. Schumaker, even Mother stated that Student had two or three close friends. Dr. Akyuz testified that Student could not maintain peer relationships, but she had never observed Student in a school setting. Dr. Akyuz wrote a letter dated September 29, 2006, to Dr. Liberati, Richardson's principal, to persuade Dr. Liberati to reverse his expulsion recommendation. Contrary to her testimony at hearing, Dr. Akyuz's letter stated that, "In the short time [Student] has been at Richardson, she has created some strong bonds with other students. . . ." Student herself recounted to Ms. Schumaker and to Dr. Kaler that she had numerous friends, although Dr. Kaler doubted the veracity of Student's self-report on this issue, based upon Dr. Kaler's own assessment. However, like Dr. Akyuz, Dr. Kaler had not observed Student at school. Every classroom teacher from the District who testified stated that Student was not a loner, but was always with a group of friends. One teacher recalled that Student had "trick-or-treated" at her house one Halloween with a group of friends. Indeed, Student's misbehavior during the incident of September 24, 2004, was initiated because Student was defending a friend. Under these circumstances, Student does not meet the criteria for emotional disturbance set forth in section 3030, subdivision (i)(2), since Student was able to maintain relationships with teachers and peers, although her relationships with peers were more dramatic and problematic.

59. Further, as of the time of the IEP meeting, Student did not qualify for ED eligibility under California Code of Regulations, title 5, section 3030, subdivision (i)(4) (a general, pervasive mood of unhappiness or depression). Anger can be a symptom of depression, but the only specific evidence that Student's emotional outbursts at school were related to depression was the Dr. Akyuz's declaration dated December 9, 2005, which

Dr. Akyuz submitted to the District in opposition to the expulsion hearing, as well as Dr. Akyuz's testimony at the due process hearing. Dr. Akyuz's statements are not persuasive, for several reasons. All other reports and letters that Dr. Akyuz submitted to the District that were admitted into evidence related Student's conduct to situational stressors. Dr. Akyuz did not observe Student in any school setting. Additionally, in rendering her opinion, Dr. Akyuz did not explain her reasons for her opinion that Student's outbursts at school were related to Student's depression, as opposed to being related to other factors. The evidence showed that Student only exhibited obvious sadness in the school setting towards the end of fifth grade, and was "sullen some days" in sixth grade. Student's exhibition of sadness towards the end of fifth grade could have been related to her family circumstances, as the District contends. In general, there was no evidence that Student exhibited a general pervasive mood of unhappiness or depression at school, to a marked degree, over a long period of time, which adversely affected her educational performance.

60. A determination of this issue is further complicated by the different views of Student's therapists and experts regarding her diagnosis. Dr. Akyuz at first diagnosed Student with Dysthymia, but, in her report to the District dated October 18, 2005, Dr. Akyuz diagnosed her with Major Depression, due to the recent turmoil in Student's family. In a letter to Student's parents dated October 18, 2005, and in his report to the District dated October 26, 2006, Dr. Green diagnosed Student only with Dysthymic Disorder. In a previous letter to Dr. Liberti, dated September 26, 2005, Dr. Green was less definite, referring to "a longstanding depression." Dr. Fox does not diagnose Student with any depressive disorder, but suggests that she may have an Identity Disorder. In support of Dr. Fox's impressions, Dr. Kaler diagnosed Student with an Identity Disorder. Although Dr. Kaler also concluded that Student was depressed, she stated that Student's depression could be transitory and that she was not surprised that Student was not depressed according to Ms. Schumaker's assessments. In view of all of the evidence, Student has not met the criteria for ED under the category of depression or unhappiness.

61. However, at the time of the IEP meeting, Student was eligible as a Student with ED under Code of Regulations, title 5, section 3030(i), subdivision (3) (inappropriate types of behaviors or feelings under normal circumstances). The sudden and intense aggressive, emotional outbursts that Student displayed over a period of approximately two years by the time of the IEP meeting in October 2005, support a finding of eligibility under this category, especially when considered with the behavioral difficulties that Student has manifested in a variety of settings for many years. Student's reactions to the rather commonplace events in everybody's daily life such as anger, frustration, and disrespectful comments by others, are markedly out of proportion to the significance of these events. These emotional outbursts occurred not only in the school setting, but also at home and camp. The District and others attempted to control Student's outbursts with various behavioral modification techniques, which were of only limited success. Long-term therapy with Dr. Akyuz to attempt to modify these behaviors, and, more recently, the administration of Zoloft, did not block these intense displays of temper while Student was in attendance at District schools. Several of Student's past emotional outbursts are temporally correlated to temporary upheavals in her family situation, but the evidence did not reflect that all of them were. For example, the event of September 28, 2005, which resulted in Student's expulsion from school, occurred at a time when she had been reunited with her mother and when her home situation, while still troubled, was becoming more stable.

62. In this regard, the District's psychoeducational assessment did not place Student's behavior into the broad historical context that it warranted. This lapse is understandable to some degree, as it is not entirely clear that Ms. Schumaker was completely advised by Mother, Dr. Akyuz, Dr. Green, or Student herself about Student's long-term conduct problems at camp, and other facts which would indicate that Student's behavioral difficulties were complex and were not entirely due to situational stressors. Furthermore, Student had only attended Richardson for approximately 15 days before she

was suspended, and Ms. Schumaker did not have the opportunity to observe her on a District campus. Additionally, the psychoeducational assessment had been expedited. However, the District's conclusion that Student did not meet the criteria for ED because, in part, her academic performance had not been adversely affected, reflects an unduly narrow interpretation of the ED criterion of adverse educational impact. Student was expelled from school due to behavior that the District admits reflected that Student was an unacceptable danger to others or herself. The expulsion demonstrates that Student's education has been adversely impacted by her behavior. To over-emphasize Student's high level of academic performance and ability in considering her for ED eligibility is to, essentially, penalize her for being very bright. The ED criteria do not require that a very bright child be so emotionally devastated that she is no longer capable of generally maintaining her grades and performing well on achievement tests.

63. As is stated above, the evidence does not support a finding that the District should have suspected that Student had ED during the school years 2003-2004 and 2004-2005. By the time of the District's psychoeducational assessment, however, Student's history from kindergarten onward demonstrated a pattern of unpredictable and aggressive temper tantrums across numerous environments, which caused or threatened to cause physical harm to her or to third parties, and there was no reason to anticipate that they would simply stop. Rather, their intensity and pervasiveness, in varying degrees, throughout Student's scholastic career and in other settings, despite a variety of attempts at behavioral modification, rather severe disciplinary measures, therapy, and medication, evidence Student's inability to control her behavior. That these outbursts resulted in numerous suspensions from school, as well as, eventually, expulsion from school, demonstrates that Student's emotional disturbance was adversely impacting her education. Student's inappropriate behaviors had been manifested over a long period of time, to a marked degree, and adversely affected her educational performance. Student requires special education services to enable her to learn to control her behavior so that

she can remain in a classroom and in school. The District's failure to find Student eligible for special education was a substantive denial of a FAPE during the 2005-2006 school year and extended year.

IS STUDENT ENTITLED TO REIMBURSEMENT FOR THE COST OF THE IEE PERFORMED BY SANDRA KALER, PH.D.?

64. As is discussed in Legal Conclusion 7, a school district must provide an independent assessment of Student if the Student disagrees with the district's assessment, unless the district seeks a determination from an ALJ that its assessment is adequate.

65. By letter dated December 1, 2005, to Mark Knox, the District's director of Child Welfare and Attendance, Student and her parents notified the District of their disagreement with the District's psychoeducational assessment, and requested an independent assessment of Student. By letter to Student's parents' counsel dated December 1, 2005, the District acknowledged receipt of the request for an assessment, and stated that the request was "under review." The District did not provide any other response to parents' request for an assessment prior to the filing of the Student's due process hearing request, and never agreed to pay for an independent assessment. Student's parents obtained an independent assessment, at their own expense, from Dr. Kaler.

66. The District never initiated a due process hearing to determine whether its assessment was appropriate. It simply ignored the Student's request, which is not one of the District's legal options. Student was entitled to the IEE that Dr. Kaler performed, and Student's parents are therefore entitled to be reimbursed for that IEE.

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. § 1402(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. § 1402(29).)¹³

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

¹³ Certain of the Student's allegations concern the period of time prior to the reauthorization of the IDEA, which became effective July 1, 2005. Thus, this case straddles both versions of the IDEA. To the extent that provisions of the former version of the IDEA differ from the reauthorized version, and such differences are relevant to the determination of any issue in this Decision, they will be specifically noted. In most, if not all instances, however, the provisions of the former IDEA that are relevant to this Decision were not amended by the reauthorized IDEA.

education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

3. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state. (20 U.S.C. § 1412(a)(3).) California specifically obligates the District to actively and systematically seek out “all individuals with exceptional needs.” (Ed. Code, § 56300 et seq.) The district’s duty is not dependent on any request by the parent for special education testing or referral for services. A district’s child find obligation toward a specific child is triggered where there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Education, State of Hawaii v. Cari Rae S., supra*, 158 F.Supp. 1190 at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

4. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student’s educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student’s educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds. (e) & (f).) 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 School District, et al.* (9th Cir. 2006) (464 F.3d 1025, 1031-1033.))

5. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to

perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320(g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed.Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2),(3); Ed. Code, § 56320, subds. (a) & (b).)

6. In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is a child with a disability. (20 U.S.C. §1414(b)(2)(A)(i).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

7. A parent is entitled to obtain an IEE of a child. (20 U.S.C. § 1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) ¹⁴ A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b)). When a parent requests an IEE at public

¹⁴ Effective October 2006, the Code of Federal Regulations (CFR) pertaining to the IDEA were revised. This Decision cites to the version of the CFR that was in effect in November 2005, when the Student’s due process hearing request was filed.

expense, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense, unless the school demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

8. 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. (34 C.F.R. 300.7(c)(4)(i); Cal. Code Regs., tit. 5, § 3030, subd. (i).)

Neither the IDEA nor its regulations, nor the Education Code nor its regulations, define "to a marked degree" or "a long period of time." With respect to eligibility under subpart (5), the focus is on the student's ability to control the behavior and to act pursuant to socially acceptable norms. (Off. of Special Education Programs, interpretative letter (August 11, 1989), 213 IDELR 247.)

9. Social maladjustment alone is not sufficient to render a student eligible for special education as ED. (34 C.F.R. § 300.7(c)(4)(ii.); Ed. Code, § 56026, subd. (e).)

10. A school district must provide parents with prior written notice when it refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3).)

11. 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].)

12. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) Citing *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034], the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p. 1484.) 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. (*Ibid.*) 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).)

13. In *Rowley, supra*, 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to

satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

14. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. 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 v. State of 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.*) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031.)

15. The ALJ has authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified Sch. 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. (*Department of Education, State of Hawaii v. Cari Rae S., supra*, 158 F.Supp.2d 1190 at p. 1196-1197.)

16. 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].)

17. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.)

B. DETERMINATION OF ISSUES

Issue 1: Did the District deny Student a FAPE during the 2003-2004 school year and extended school year, by failing to fulfill its child find obligations?

18. As is stated in Legal Conclusion 3, a district shall be deemed to have knowledge that Student is a child with a disability when Student's behavior or performance suggests the need for special education services. Based upon Factual Findings 1, and 3 through 11, Student's behavior did not suggest that Student was in need

of special education services, and the District had no reason to suspect that Student had ED. The District met its child find obligations.

Issue 2: Did the District deny Student a FAPE during the 2004 and 2005 school year and extended school year, by failing to fulfill its child find obligations?

19. Relying again on Legal Conclusion 3, and based upon Factual Findings 1, 3, 9, 10, and 13 through 26, Student's behavior or performance did not suggest that Student was in need of special education services, and the District had no reason to suspect that Student had ED. The District met its child find obligations.

Issue 3: Did the District deny Student a FAPE during the 2005-2006 school year and extended school year, by failing to find Student eligible for special education and related services under the category of ED?

20. Based upon Legal Conclusions 8 through 15, and Factual Findings 1, 29, 31 through 56, and 61 through 63, the District denied Student a FAPE from October 2005, and continuing through the present, in determining that Student was not eligible as a student with ED. Student is determined to be eligible for special education and related services as a student with ED. Student is entitled to a functional analysis assessment, to an appropriate IEP, and to an educational placement in the least restrictive environment. In this regard, there is insufficient evidence from which to determine that the Center, which has been an appropriate placement for Student during the 2005-2006 school year through the present, is an appropriate placement for Student in the long-term. This is a matter to be determined by the IEP team, as is further discussed below. However, although Student's due process hearing request was filed during the 2005-2006 school year, the hearing was not held until the 2006-2007 school year, and the Student has remained at the Center during the pendency of these proceedings. By the time the District holds the IEP meeting ordered herein to determine her placement, most of the 2006-2007 school year will have elapsed. Student's unique needs, such as her development of social skills and other

suitable behaviors, would be negatively impacted should she be transferred to another school during the current school year. Therefore, the Center is an appropriate placement for Student for the remainder of the 2006-2007 school year. Student shall remain at the Center for the 2006-2007 school year, at the District's expense, with an appropriate IEP and related services. The IEP team shall determine an appropriate placement for Student for the school year 2007-2008, in the least restrictive environment, based upon the functional analysis assessment and all other pertinent information that is reasonably available to it.

Issue 4: Did the District improperly fail to provide Student an IEE during the school year 2005-2006?

21. Based upon Legal Conclusion 7, and Factual Findings 1, and 65 through 66, Student is entitled to reimbursement for the IEE performed by Dr. Kaler, in the sum of \$1600. Student's parents properly requested an IEE. The District acknowledged receipt of the request, but neither initiated a request for due process hearing to confirm the appropriateness of its own assessment, nor provided the IEE requested, nor notified the parents as to the District's decision regarding their request.

Issue 5: Is Student entitled to compensatory education, NPS placement and services, reimbursement for expenses, and reimbursement for the cost of an IEE?

22. Based upon Legal Conclusions 16 and 17, and Factual Findings 1, 29, 31 through 56, and 61 through 63, Student is entitled to compensatory relief, because the school district has failed to provide a FAPE. The purpose of compensatory education is to provide Student a remedy for her lost opportunities. The requested compensatory education is appropriate in view of a denial of a FAPE commencing in the fall semester of the 2005-2006 school year and continuing thereafter. Based upon Factual Findings 48 through 49, Mother's placement of Student at the Center in fall 2005 was appropriate and designed to provide Student with educational benefits which Student should have

received from services provided by the District. Student has presented sufficient evidence to establish the sum of \$21,020 as the cost of tuition at the Center for the 2005-2006 school year.

23. Additionally, as a form of compensatory education, Student has requested placement at an NPS. As was discussed above, the due process hearing request was filed during the 2005-2006 school year, but the hearing was not held until the 2006-2007 school year. Student has attended the Center during the pendency of these proceedings, including during the current 2006-2007 school year. Student's unique needs for the development of social skills and other suitable behaviors justified her continued attendance at the Center during this period, and, as was discussed above, justify her remaining there throughout the 2006-2007 school year. Therefore, the requested compensatory education is appropriate, and Student's attendance at the Center during the entire 2006-2007 school year shall be at the expense of the District.

24. Student submitted evidence of payment for Dr. Green's services, in the sum of \$1,100. No evidence was presented as to the services that Dr. Green provided in exchange for these payments, how those services related to Student's education, and why the District should be legally obligated to reimburse Student's parents for these payments. Consequently, Student is not entitled to reimbursement for these payments.

ORDER

1. The District shall classify Student as eligible for special education and related services as a Student with ED. The District shall perform a functional behavioral assessment, and then convene and hold an IEP team meeting, at which time the IEP team shall decide upon appropriate services for Student designed to address her unique needs, including, but not limited to, counseling, social skills training with an emphasis on anger management and conflict resolution, and a behavioral intervention plan that is based upon the functional analysis assessment. The IEP team shall also decide whether an AB 3632

referral is appropriate, and shall decide upon an appropriate placement for Student, in the least restrictive environment, for the 2007-2008 school year.

2. Student shall remain at the Center for the entire 2006-2007 school year at District expense. Such expense shall also include the expense incurred as a result of Student's attendance at the Center since the beginning of the 2006-2007 school year.

3. Student shall be reimbursed for the cost of attending the Center, in the amount of \$21,020 through July 18, 2006.

4. Student shall be reimbursed for the independent assessment performed by Dr. Kaler, in the amount of \$1600.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on Issues 3, 4, and 5 (A), (B), and (C), and the District prevailed on Issues 1 and 2.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: January 5, 2007

_____/s/_____

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings

Special Education Division