

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES COUNTY OFFICE OF  
EDUCATION.

OAH CASE NO. 2011100803

DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings (OAH), State of California, heard this matter in Downey, California, on January 11, 2012, and January 25 and 27, 2012.

Attorney Tania L. Whiteleather represented Student. Parents (Mother and Stepfather) were present at the hearing at all times. Mother was assisted by Spanish language interpreters on all hearing days. Student was not present at the hearing. Attorney Vera Koulian, Deputy Public Defender for Student, was present as an observer on January 11 and 25, 2012. Jessica Ahern, a Supervisor with the Los Angeles County Department of Mental Health, observed the hearing with the parties' permission on January 25, 2012.

Attorney Courtney Brady represented the Los Angeles County Office of Education (LACOE), accompanied by LACOE representatives Ms. Elba Vega on February 11, 2012, and Ms. Denise Hurst, Special Education Administrator for LACOE, on February 25 and 27, 2012.

On October 24, 2011, Student filed a Request for Due Process Hearing (complaint). On November 8, 2011, Student filed an amended complaint, which reset all timelines. OAH granted a continuance for good cause on December 22, 2011.

At the hearing, oral and documentary evidence was received. The case was continued to February 10, 2012 at the parties' request to permit them to file closing written arguments. On February 10, 2012, the parties filed a "stipulated extension of time to file closing briefs" requesting up to and including February 14, 2012 to settle the case or to file closing briefs. On February 13, 2012, the undersigned ALJ treated the stipulation as a request for a continuance and issued an order granting a continuance.<sup>1</sup>

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<sup>1</sup> The ALJ notes that LACOE makes reference to and attached Student's February 9, 2012, IEP as an exhibit to its closing brief. The IEP was created post-hearing. Any references in LACOE'S brief and exhibits attached thereto not identified or received in evidence as of the time of the hearing are irrelevant to the issue for decision in the present case and are stricken and will not be considered by the ALJ, nor designated as part of the record.

On February 14, 2012, before the record was closed, LACOE filed a request to admit supplemental evidence that LACOE inadvertently excluded as attachments to LACOE's Exhibit 12, provided at the ALJ's request on the last day of hearing. To the extent the request was made prior to the close of the record and sought to complete the documentary evidence previously requested by the ALJ, LACOE's request is granted. On February 14, 2012, after the record was closed, Student filed a motion to reopen the record to receive LACOE's Exhibit 12 in its entirety and to receive Student's post-hearing IEP dated February 9, 2012. To the extent Student seeks to support LACOE's timely filed request to supplement Exhibit 12, Student's motion is not warranted as LACOE's request is granted. However, to the extent Student seeks to have the ALJ consider the very same

The parties filed their closing arguments by close of business February 14, 2012. The record was closed and the matter was submitted for decision.

## ISSUE

Whether LACOE denied Student a free appropriate public education (FAPE) in the October 24, 2011, individualized educational program (IEP) by failing to offer Student an appropriate placement, with related services, in a residential treatment center as recommended in the Los Angeles County Department of Mental Health (DMH) Mental Health Reassessment Report dated September 21, 2011.<sup>2</sup>

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February 9, 2012 IEP offered by LACOE in its closing brief, on the grounds that it is an admission by LACOE that residential placement provided a FAPE for Student, the motion is denied.

<sup>2</sup> Issue One as pled in Student's amended complaint was "Whether LACOE offered [Student] a FAPE from September 23, 2100 (sic) to the present." At the prehearing conference, Student withdrew the remaining issues (Issues Two-Four) and Issue One was reframed to read "Whether LACOE denied [Student] a FAPE from September 23, 2011 to November 8, 2011, by failing to offer Student an appropriate placement, with related services, in a residential treatment center as recommended in the Los Angeles County Department of Mental Health (DMH) AB3632 Mental Health Reassessment Report dated September 2011."

The ALJ has further reframed the issue as stated above to conform to the evidence presented at hearing and for purposes of clarity in rendering the decision in this case.

## FACTUAL FINDINGS

1. Student is a 17-year-old young man. As of the time of hearing, he had been in custody at Sylmar Juvenile Hall (Sylmar) in Los Angeles County since June 29, 2011. He has attended Barry J. Nidorf Juvenile Court School (Nidorf) since June 30, 2011 and is eligible for special education services as a student with an emotional disturbance (ED) and a specific learning disability (SLD).

2. Prior to his incarceration at Sylmar, Student lived with Parents in the jurisdictional boundaries of the Los Angeles Unified School District (LAUSD) where he attended school from elementary school up through the 10th grade. There he received special education services under the eligibility category of specific learning disability.

3. Student's records establish he had a long history of social, emotional and behavioral problems which impeded his academic performance from elementary school through high school. He began receiving psychiatric services in May 2008 and was treated by Dr. Kaner, staff psychiatrist at Hathaway Sycamores Child and Family Services. He was diagnosed with psychotic disorder, not otherwise specified (NOS), for a history of auditory hallucinations dating back to when Student was six years of age. He was also diagnosed with attention deficit hyperactivity disorder (ADHD). He was treated with psychotropic medications as well as various stimulant medications. His psychiatric records indicate that Student's ADHD symptoms did not improve and were treatment-resistant.

4. His behavior first began to deteriorate in middle school. He was found truant, and was associating with negative peers and smoking marijuana. He was arrested in the seventh grade for stealing, writing graffiti, and engraving gang logos at the neighborhood park. He was mandated to do community service and was placed on probation. While on probation, he received in-school counseling services as part of his IEP from LAUSD (DIS Counseling). Unrelated to his IEP, Student continued to receive

Wrap-Around Services<sup>3</sup> through the Department of Probation, and continued Psychiatric services from Hathaway Sycamores. Student's behavior began to improve while on probation up through his enrollment in the ninth grade at Canoga Park High School (Canoga Park). There he was placed in a special day program (SDP) class with counseling services. He also participated on the volleyball, cheerleading and wrestling teams.

5. While Student's behavior had improved, he continued to struggle academically. As a result, he failed to meet his academic requirements for continued participation in extra curricular sports. He increasingly became less motivated to complete classroom assignments and to comply with school rules. For example, he was increasingly absent from classes, more aggressive toward authority figures in the school setting, and he became less willing to participate and work on his DIS counseling goals. He refused to report to the school health office when summoned to take his medications. Parents also reported Student became more defiant and non-compliant in the home.

6. Beginning in the fall semester of the 2010-2011 school year, when Student entered the 10th grade, he was hospitalized at Del Amo Hospital due to emotional difficulties and his poly-substance abuse. Student had also been hospitalized at Cerritos Hospital for trying to injure himself. Because of his declining emotional and academic performance, LAUSD made a referral to the Los Angeles County Department of Mental Health (DMH) to assess whether Student required more intensive therapeutic counseling as part of his IEP.<sup>4</sup>

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<sup>3</sup> Wrap-Around Services are a collaboration of various agencies to provide intensive psychiatric and therapeutic treatment to individuals with mental health issues.

<sup>4</sup> Assessments and services provided by DMH will be referred to in this decision as "AB 3632" services. "AB 3632," was the name of the assembly bill that, until recently,

7. DMH completed its AB 3632 assessment of Student in January 2011 and recommended outpatient individual therapy once per week for 50 minutes per session, not to exceed 250 minutes per month, and family therapy 50 minutes two weeks per month, not to exceed 150 minutes per month. The outpatient AB 3632 mental health services were implemented sometime during the spring semester of the 2010-2011 school year. In addition, LAUSD provided one-to-one assistance to ensure Student's attendance at every class and daily DIS counseling sessions with the school psychologist. However, despite the mental health and counseling services provided to Student, his behaviors became increasingly problematic and severely impacted his academic functioning.

8. LAUSD conducted a psychoeducational assessment of Student and issued a written report on April 6, 2011 (Psychoeducational Assessment Report). The purpose of the assessment was to address Student's behaviors which included truancy, talking out, leaving class without permission, poor social skills, picking on others, anger outbursts, aggressiveness, depression, failing grades, mood swings, possession and use of illegal drugs on campus, and other off-task behaviors.

9. The Psychoeducational Assessment Report established that Student's cognitive ability was in the low average range and he functioned at the fifth grade level in reading and mathematics. The Psychoeducational Assessment Report further concluded that Student's disability was primarily due to emotional factors and behaviors that impacted and impeded his educational performance, such that Student met the criteria for special education services under the category of ED. The assessment recommendations included development and implementation of a behavior support

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mandated DMH provide these services for implementation in IEP's. In contrast, "DIS counseling" refers to services provided by the school site.

plan, continuation of in-school DIS counseling and AB 3632 mental health services, and teacher reduction of task demands.

10. LAUSD convened an IEP on April 7, 2011 to review the assessment report and recommendations. The IEP team adopted the recommendations and determined Student was also eligible for special education services as a Student with ED. The IEP identified Student's unique needs and established goals and objectives in the areas of reading, writing, English language development (ELD), mathematics, social emotional functioning, behavior support, and vocational education. The IEP offered placement in a comprehensive high school with a general education curriculum in an ED program for 1400 minutes per week; transportation from home to school, extended school year (ESY); AB 3632 mental health services; a behavior support plan; and a transition plan. The IEP provided for accommodations, modifications, and classroom supports. Mother consented to the IEP.

11. Student's emotional and academic functioning continued to deteriorate in school and at home following the April 7, 2011 IEP meeting and through the end of the 2010-2011 school year. He rarely attended school, repeatedly ran away from home for periods of one-to-two weeks at a time, returned home disheveled and intoxicated, affiliated with peers who were allegedly involved in gangs, and engaged in outbursts of anger when limits were imposed on him. He received several citations for truancy and/or drug possession on campus and had numerous altercations with peers, teachers, administrators, and school police.

12. Student was arrested on May 14, 2011 for theft. He was incarcerated at Sylmar until June 14, 2011 when he was released on probation to house arrest. By the end of the 2010-2011 school year, Student had failed all of his classes. The Juvenile

Court ordered Student to be returned to Sylmar on June 29, 2011, because he violated the terms of his probation.<sup>5</sup>

## LACOE ENROLLMENT

13. Student was enrolled at the Nidorf Juvenile Court School in the 11th grade on June 30, 2011. The Juvenile Court School is operated by the Los Angeles County Office of Education (LACOE). LACOE is the educational agency that administers the Juvenile Court Schools in Los Angeles County.

14. LACOE was Student's local educational agency (LEA) and was responsible, as Student's LEA, for developing and implementing IEPs for special education students enrolled there. On July 19, 2011, Mother signed LACOE's administrative placement forms and provided LACOE with Student's school records including the April 6, 2011 Psychoeducational Assessment Report, April 7, 2011 IEP, and the January 2011 AB 3632 mental health services assessment.

15. LACOE held a Special Review (30-day) IEP meeting for Student on August 12, 2011. The attendees included Parents and Student; Susie Oh, Student's social worker through the public defender's office; Assistant Principal Robin Simmons; a general education teacher, and a probation department representative. The IEP established goals and objectives in Student's areas of need and offered individual DIS counseling once per week for 30 minutes, individual on-site AB 3632 counseling once per week for 60 minutes, and RSP five times per week for 50 minutes a session. The IEP also provided Student instruction in a general education curriculum with resource support (RSP) and participation in special education instruction 28 percent of the day as the least restrictive

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<sup>5</sup> Student did not introduce the probation conditions into evidence at hearing. However, the ALJ's orders do not override or supplant the disposition orders of the Juvenile Court.

environment. Though he was technically enrolled in the 11th grade, Student was making up credits toward the 10th grade because of having failed every subject the previous semester at Canoga Park.

16. Student complained to the IEP team that he was hearing voices that were commanding him to do bad things and that it made him fearful and caused him to suffer from headaches. Parents told the LACOE IEP team members of their concern that Student required a higher level of care because of his persistent auditory hallucinations, his history of three hospitalizations connected with his psychotic disorder, and their observation that Student's behaviors had continued to deteriorate. Ms. Oh discussed similar concerns and joined Parents in requesting an AB 3632 referral for an assessment. LACOE submitted a referral request to DMH requesting an AB 3632 reassessment of Student.

17. DMH referred the reassessment request to Ms. Eva Tauber. Ms. Tauber has a master's degree in social work and a B.A. in sociology and has approximately 27 years of experience as a licensed clinical social worker (LCSW) and psychotherapist. She has maintained a private psychotherapy practice performing diagnostic evaluations and treating individuals, couples, families, children, and adolescents. She is also a consulting clinical social worker at Tarzana Treatment Center. She has been a contract assessor with DMH for the past eight years conducting 45 to 70 comprehensive mental health assessments a year of children and adolescents to determine eligibility for AB 3632 services and providing recommendations for appropriate levels of mental health services under AB 3632. She had also conducted the initial AB 3632 assessment of Student in January 2011.

18. On or about September 19, 2011, Ms. Tauber reassessed Student to determine the need for additional AB 3632 mental health services. She reviewed her initial AB 3632 assessment, all of Student's interim school, medical, psychiatric, and

hospital records, conducted a mental status examination of Student, interviewed Parents, interviewed Student's teacher at Nidorf, talked to the school psychologist, and talked to Student's case manager at Hathaway Sycamores.

19. Prior to receipt of the AB 3632 Reassessment Report, LACOE held a second IEP team meeting on September 23, 2011 to review a speech and language assessment requested by Parents and his social worker. Student attended this meeting with his Parents and his social worker. Others in attendance included Ms. Simmons, School Psychologist Ramona Fluker, General Education Teacher Jackie Brendlinger, a speech and language therapist, and a probation representative. The IEP team determined that Student did not qualify for speech and language services. Student again complained at this meeting of hearing voices and also complained he was suffering from severe headaches. Even then the speech and language evaluator discussed concerns that the auditory hallucinations Student complained of may have affected his speech articulation. By the time of this IEP meeting, Student was receiving only 30 minutes of DIS counseling per week. He was scheduled by his social worker for outpatient mental health counseling by an outside agency, which LACOE never implemented.

20. DMH approved Ms. Tauber's AB 3632 Reassessment Report (Reassessment Report) on September 27, 2011 and provided the report to LACOE.

21. The Reassessment Report indicated that Student's condition had deteriorated since the initial AB 3632 assessment. The report further indicated Student's emotional and behavioral problems continued to interfere with his ability to benefit from his educational setting. Because of Student's ongoing history of psychotic disorder, noncompliance with medications, disregard for rules or authority figures, history of polysubstance abuse and fascination with the street lifestyle, which resulted in his current legal involvement, he clearly continued to qualify for mental health services under AB 3632. The Report noted that Student required a higher level of care and

structure than public school or his home environments were able to provide. The Report noted Student's weaknesses in the areas of impaired academic functioning, poor social skills, antisocial acts, and mood instability. The Report also included treatment goals and objectives.

22. Based on the Reassessment Report, DMH found that Student still qualified for AB 3632 mental health services and recommended residential placement as the most appropriate and least restrictive environment (LRE) for Student to receive the mental health services required to support his education plan.

23. DMH recommended the following AB 3632 residential treatment services to be provided in a 24-hour, seven-day per week, residential treatment facility (RTC), valid for six months:

- Individual therapy, at least 60 minutes weekly, up to 120 minutes per week;
- Family therapy, at least 120 minutes per month, up to 240 minutes per month;
- Group therapy, up to 300 minutes per month;
- Medication support, monthly or as determined appropriate by attending psychiatrists; and
- Case management, up to 30 hours per month.

24. The DMH recommendations were subject to approval by the Juvenile Court, which ultimately had authority over Student following the delinquency petition. DMH recommended that if the Juvenile Court was unwilling to permit Student to be placed in a residential treatment facility, DMH could provide mental health services to support the court-ordered placement which would include individual therapy, once per week, 50 minutes per session, not to exceed 250 minutes per month, family therapy once every two weeks, 50 minutes per session, not to exceed 150 minutes per month, medication evaluation, and follow up by a psychiatrist if medications were prescribed.

25. DMH also recommended treatment goals and objectives. The reassessment report included a statement at the end of the report that pursuant to a Memorandum of Understanding (MOU) between LACOE and DMH,<sup>6</sup> the findings and recommendations of the report were advisory only, and any determination of what special education program and related services were to be included in Student's IEP was left up to the IEP team.

#### THE OCTOBER 24, 2011 IEP MEETING

26. LACOE convened an IEP team meeting on October 24, 2011 to review the AB 3632 Report and DMH recommendations. Those in attendance included Student, Parents, Student's attorney Ms. Whiteleather, Ms. Koulian, and Ms. Oh. LACOE IEP team members in attendance included Ms. Simmons, Ms. Fluker, Ms. Brendlinger, RSP teacher Betty Evans, and a representative from the probation department. Courtney Bradey, LACOE's attorney, appeared briefly by telephone. DMH was represented by Michele Amestoy and Dr. Lyn Siegel.

27. Dr. Siegel presented Ms. Tauber's AB 3632 Report and recommendations to the IEP team. Parents agreed with the DMH recommendations for RTC placement. Student again stated that he was hearing voices and that he was fearful of them. Ms. Fluker responded to the DMH findings by reading a statement she had prepared in advance of the IEP team meeting on behalf of LACOE. LACOE's position was that

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<sup>6</sup> The MOU dated August 19, 2011 was received in evidence. As discussed in detail in the Legal Conclusions, a funding veto and subsequent Legislative action rescinded DMH's duty to provide AB 3632 services for IEP's. The MOU memorializes the agreement authorizing DMH to continue to conduct mental health assessments for LACOE for purposes of providing educationally related mental health services (ERMHS) (no longer mandated by AB 3632), to students within the LACOE's jurisdiction.

Student did not qualify at that time for residential treatment as the LRE because he was making progress and was receiving educationally relevant mental health services at LACOE. Ms. Fluker told the IEP team that she provided rubber bands to Student to wear on his wrist and would be using the "rubber band" technique with Student as a means of asserting control over the voices he heard. Ms. Brendlinger provided a written statement that as of October 21, 2011, Student was making progress, his grades and attitude had improved, his behavior in class was age appropriate, and he had not missed a class. Ms. Evans also provided a written statement that she saw Student 50 minutes per day during the school week to provide RSP support and that he understood all of his subjects and was earning a grade C in all his courses. Her statement further indicated that Student had trouble staying on task but once prompted and redirected he was able to refocus and complete the assignment. A probation department report noted that Student had a bad day prior to the IEP meeting but overall had a good attitude. The LACOE IEP team members determined that the LRE for Student was his current program in a general education setting with RSP for 50 minutes a day and DIS counseling provided for 30 minutes a week. Parents disagreed with the determination.

28. Because LACOE disagreed with DMH's assessment and recommendation for RTC placement, Student's attorney requested implementation of the alternative mental health services recommended by DMH in the Report. LACOE considered the request but never incorporated the services into Student's IEP and never provided the services to Student. As of the October 24, 2011 IEP meeting, Student was receiving only 30 minutes a week of DIS counseling from Ms. Fluker and no on site or outpatient mental health services.

29. Ms. Evans testified at hearing. She was Student's RSP teacher at all times starting in September 23, 2011, and provided instruction to Student in mathematics, reading, and writing and transition planning, based upon the program developed in

August 12, 2011 IEP. She stated that Student was making slow progress in her class. He showed some improvement but he needed to be prompted frequently, at least six to seven times, during the class day.

30. Ms. Brendlinger taught Student's English, mathematics, English language development, science and PE classes. Student was the only pupil in her class with an IEP. She was aware that Student's academic abilities were at the fifth grade level and she provided him grade level equivalent work and modified assignments with supports and accommodations.

31. Assistant Principal Robin Simmons testified that Student attended Nidorf because he was incarcerated at Sylmar. Student was in a general education program with RSP pull out five times a week. He was not free to leave school or a classroom without permission. He was accompanied to and from class by a probation officer. The consequences of refusing to attend school included being confined to the housing unit by probation. She attended the October 24, 2011 IEP as administrator and took the meeting notes. She did not agree with DMH's recommendation to place Student at an RTC because he did not display the behaviors identified in the AB 3632 reassessment, was making academic progress, and he had only one incident since his enrollment at Nidorf. Ms. Simmons believed that Student received educational benefit from his current placement and that DMH's recommendation was advisory only, and not binding on the IEP team, based upon the MOU between DMH and LACOE. As for Student's related services, Ms. Simmons testified that he was receiving DIS counseling based upon his IEP, and that she was not sure, but Student may have been receiving mental health services by a DMH therapist on site in the housing unit at Sylmar. The alternative mental health services recommended by DMH in the reassessment were omitted from the IEP due to an oversight by Ms. Simmons, and as consequence were never provided to Student.

32. Ms. Fluker is the school psychologist at Nidorf. She is a licensed school psychologist and has been employed for six years with LACOE as a school psychologist at various locations. Her duties included assessing students' needs, presenting assessment findings at IEP meetings, and providing DIS counseling to incarcerated students. She was not qualified to diagnose mental illness or prepare treatment plans for individuals with psychological disorders, but was working toward obtaining her license as a marriage and family therapist (MFT), which would allow her to do so. She reviewed Student's educational records, his psychiatric records, and hospital records that had been provided to her by Ms. Oh between August 2011 and the October 24, 2011 IEP meeting. She had not assessed Student to determine his emotional or academic needs prior to the October 24, 2011 IEP team meeting, but had reviewed DMH's January 2011 AB 3632 assessment and the LAUSD April 7, 2011 psychoeducational assessment. She provided DIS counseling services to Student starting in September 2011. She was aware of his history of social, emotional and behavioral problems which impeded his academic performance from elementary school through high school, including his failure to successfully complete the 10th grade at Canoga Park. She understood his diagnosis to be psychotic disorder NOS due to auditory hallucinations.

33. She attended Student's special review IEP team meeting of August 12, 2011 to discuss his DIS counseling goals. She asked him about the frequency of the voices he heard, what the voices said to him and how he responded. He could not tell her how often he heard them, but stated he talked back to them in an effort to out talk them. She suggested that Student wear rubber bands around his wrist and snap them when he heard the voices. According to Ms. Fluker, this was an accepted mental health intervention technique because it allowed Student to become "grounded to the here and now." She also described the rubber band method as a replacement behavior that

was not written into the IEP and was not an accommodation. Ms. Fluker believed Student was responding to counseling. Ms. Fluker recalled Student stating he no longer had a problem with voices after using the rubber bands. She was not sure whether Student was permitted to take the rubber bands into his housing unit at Sylmar to use when he needed them. She did not recall Student's complaints at the October 24, 2011 IEP meeting that he continued to hear voices. She also attended the September 23, 2011 IEP meeting and did not recall ever hearing Student complain about the voices.

34. Ms. Fluker also testified that placement in a RTC was not appropriate for Student for the following reasons. To her, Student was making progress at Nidorf, he was not truant from school, he performed in class, he had partially met his DIS counseling goal and responded well to counseling, he did not complain about hearing voices after using the rubber bands, he knew right from wrong and the consequences of bad behavior, and he did not display the behaviors identified in his records and in the DMH reassessment. She also believed that the placement in a RTC would be more restrictive. Ms. Fluker believed that DMH's recommendation for RTC placement was advisory only and the IEP team was not required to follow it. She concluded that based upon what LACOE knew at the time of the October 24, 2011 IEP meeting, Student's placement at Nidorf was the LRE and provided him a FAPE. Ms. Fluker's testimony was not credible or persuasive in several respects as will be discussed below.

35. Ms. Oh, Student's social worker through the Los Angeles County Public Defender's Office, testified at hearing. She is a licensed clinical social worker (LCSW) and is qualified to conduct assessments and mental status examinations. Deputy Public Defender Vera Koulian requested that she assist Student in his case concerning his mental health and special education needs.

36. At hearing Ms. Oh credibly testified that she first met with Student in June 2011 when he was incarcerated at Sylmar. After the initial meeting she met with him

once a month during his court appearances. During those meetings, Student disclosed to her that he was hearing voices that told him to do bad things. He told her that he was having trouble sleeping, focusing, and concentrating. Ms. Oh provided Student's records to Ms. Fluker at Nidorf in August 2011. She also attended the IEP meetings held on August 12, 2011, September 23, 2011, and October 24, 2011. Ms. Fluker was also present at each of the IEP meetings when Student repeatedly and consistently complained to the IEP team about his auditory hallucinations. He reported at the September 23, 2011 IEP meeting that he suffered headaches in school and needed to take breaks consisting of putting his head down on the desk. She testified of her concern about Student's medication regimen at Sylmar. She informed the IEP team at the September 23, 2011 IEP meeting that Student was not receiving his psychotropic medications as prescribed, and Student suffered side effects of headaches, drowsiness, and a tendency to eat paper. She notified LACOE that she had arranged for outpatient mental health services for Student, but LACOE never implemented the services. She was not able to meet with or identify any individual or case manager at Sylmar/Nidorf who would have been responsible for managing his medical/mental health needs and no one attended the IEP meetings to discuss his medications and their impact on his program at Nidorf. She further testified that as of the October 24, 2011 IEP meeting, Student continued to have auditory hallucinations. He reported them at the IEP meeting to Dr. Siegel. Probation also reported that he was not following directives given to him at the unit. Student told the IEP team that that he wanted to be in a special day class (SDC) classroom where he could get more help. Ms. Oh agreed with DMH's recommendation for RTC placement. However, other than Ms. Fluker's written statement that she read at the IEP meeting on LACOE's behalf, LACOE did not have further discussions about Student's placement and did not give Parents an opportunity to provide input on Student's placement.

37. Stepfather testified at hearing. His testimony supported Ms. Oh's observations that Student consistently complained to LACOE at the IEP meetings held from August 12, 2011 to October 24, 2011, that his auditory hallucinations interfered with his sleep, and affected his ability to function from day to day. He had trouble paying attention and focusing in class. His testimony also contradicted Ms. Brendlinger's, Ms. Simmons and Ms. Fluker's reports that Student was doing well in class, and was attending and participating in his classes. Stepfather also confirmed that LACOE did not seek input from Parents at the October 24, 2011 IEP meeting concerning placement options for Student.

#### STUDENT'S EXPERT WITNESSES

38. Ms. Tauber testified at hearing as Student's Expert. She first met Student when she was contracted by DMH to conduct the initial AB3632 assessment of January 2011. The referral was made by LAUSD because of Student's declining academic and emotional functioning. At that time, Student was in the 10th grade at Canoga Park. He had been receiving mental health services for approximately two years at Hathaway Sycamores based upon a referral from the Department of Children and Family Services. Hathaway Sycamores was also licensed as an AB 3632 facility. She conducted the assessment and found that Student qualified for outpatient AB 3632 mental health services and she recommended that he receive those services at Hathaway Sycamores. She turned the matter over to DMH to schedule the outpatient therapy.

39. In September 2011, she received a referral from LACOE with a request for an AB 3632 reassessment of Student. The basis for the request was that Student had not improved since the initial assessment. Student's emotional and academic functioning continued to deteriorate. He had failed the 10<sup>th</sup> grade, continued to engage in the same negative behaviors at school and in the home, refused medications, and engaged in a course of conduct that resulted in his arrest and incarceration. She reviewed the referral

packet which included all of his current school records including the April 7, 2011 psychoeducational assessment, medical and psychiatric records through the end of his 10th grade year, and his transition IEP at LACOE. She interviewed Parents and Student, conducted a mental status examination of Student, spoke with Student's teachers at Nidorf, Student's case manager at Hathaway Sycamores, the school psychologist at Nidorf, and Ms. Oh. Parents told her that Student was out of control, defiant, still refused to take his medication, and abused alcohol and drugs. Student told her that he was depressed and even though he was on medication, he still heard voices. He described the voices as a low, deep throated male voice. Student's teacher told her that Student was getting C and D grades, but she expected improvement with the implementation of RSP support services. Student's case manager at Hathaway Sycamores told her that Student was scheduled to begin AB 3632 outpatient services, but never did because he was arrested and incarcerated. When Ms. Tauber spoke to the Ms. Fluker, Ms. Fluker advised her that Student was non-compliant. In addition, Ms. Oh advised Ms. Tauber that shortly after Student enrolled at Nidorf, she arranged with LACOE for Student to receive outpatient mental health services on a weekly basis, but he never received the services.

40. Ms. Tauber persuasively testified that based upon her evaluation, she concluded that Student's ongoing history of social and emotional dysfunction and declining academic performance over a period of years established that his social and emotional functioning significantly impeded his ability to access his education. Ms. Tauber opined that while his placement had changed in between the initial assessment and reassessment, Student's mental health needs had become more severe and required a higher level of care that could only be provided in an RTC. In response to LACOE's position that Student's behaviors had improved, she persuasively noted that this had little weight because Student was in custody where he had no choice but to

comply with the requirement to attend school, to comply with rules, and to do the class work or face severe consequences. It did not surprise her that Student may have been on his best behavior or showed some improvement in his current placement. Further, in her experience, it was not uncommon for an individual with mental illness to present with inconsistent symptoms. She explained that such individuals were prone to intermittently go through periods of improved behavior and to lapse back into periods of bad behavior. She called this process "cycling". Student's past history showed he tended to improve when he was in a situation where he had no choice such as when he was on probation and in the current situation where he was incarcerated and in a structured environment. However, when removed from that structure, he reverted back to his previous behaviors as demonstrated at Canoga Park. Ms. Tauber was critical of LACOE's failure to provide appropriate services of any kind to address Student's psychotic disorder. She had never heard of, nor was she aware of, any literature that promoted the use of rubber bands as an intervention technique to dispel, or learn to cope with auditory hallucinations. She testified the best treatment interventions and services were provided through psychotropic medications and therapy and could only be administered by a licensed clinical social worker, or a licensed marriage and family therapist in conjunction with a clinical psychologist and psychiatrist, none of whom were overseeing his treatment on site at Sylmar. Ms. Tauber's opinions in this case are entitled to great weight based upon her expertise and knowledge of Student's mental health history and needs.

41. Dr. Lynn Siegel also testified as Student's Expert. He has a degree in clinical psychology and has more than 20 years experience in the field of psychology. He also has more than 15 years experience assessing pupils with mental health disorders. Dr. Siegel has been employed as a Licensed Clinical Psychologist with DMH for more than 11 years. He worked for 10 years in the AB 3632 Assessment Unit where he also

supervised AB 3632 contract assessors and approved their Assessment Reports. He currently works in the Residential Placement Center Unit.

42. Dr. Siegel was assigned to represent DMH's assessment and residential placement units at the October 24, 2011, IEP and to present Ms. Tauber's Reassessment Report and recommend treatment goals and objectives.<sup>7</sup> Prior to the meeting, he reviewed the Reassessment Report, including all of Student's records provided by LACOE with the referral, and the initial assessment. He conducted a mini mental status examination of Student at the IEP meeting. Student told him in the presence of the IEP team that the auditory hallucinations were upsetting to him and caused him some discomfort. Dr. Siegel, who characterized the voices as "command hallucinations," observed that Student had difficulty talking about the voices, but Student said the voices made it difficult for him to pay attention and to concentrate on his class materials, and he had to fight to keep from doing what the voices told him to do. He testified that Student met the criteria for RTC placement because he had ED eligibility, he was not benefitting from outpatient AB 3632 mental health services, his behaviors had reached such an extreme that he presented a danger to himself and/or others, and his psychotic disorder impeded his ability to function in the classroom setting.

43. He described a typical RTC as a 24-hour facility where pupils live. The RTC provides a six-month comprehensive program that includes academic instruction and intensive individual, group, and family therapy. The RTC also provides ongoing psychiatric care with medications and case management. In contrast, a juvenile hall/juvenile court school placement contained pupils of all types who were living and

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<sup>7</sup> At hearing, Dr. Siegel referred to the AB 3632 Assessment Report as an Educationally Related Mental Health Services (ERMHS) Assessment due to changes in California law about DMH's mandatory duties, however, the assessment was the same.

attending school under the supervision of the probation department with the threat of negative consequences for negative behaviors.

44. In Dr. Siegel's credible opinion, LACOE could not offer the same level of mental health services for Student as an RTC. Student's IEP provided only 30 minutes of individual DIS counseling services two to four times per month, which was substantially inadequate to meet Student's mental health and social/emotional needs. Dr. Siegel further indicated even if DMH provided on site mental health services at juvenile hall, they too were inadequate and were difficult to obtain because of the large caseloads and demand for the services. Dr. Siegel was unaware of any information showing Student had received DMH on site services as of October 24, 2011. Dr. Siegel was equally as critical of Ms. Fluker's intervention with Student. He testified that using rubber bands alone as a means of disrupting auditory hallucinations was inadequate. Like Ms. Tauber, he testified that psychotic disorders are best treated with more comprehensive mental health interventions including a course of psychotropic drugs and intensive therapy to learn coping skills. He opined that Student's condition was among the most severe on the continuum of mental health or mood disorders, because it affected reality testing and impacted the ability to make well-reasoned decisions, and could be a precursor to an even more severe mental health disorder without the appropriate treatment and interventions.

45. Though Dr. Siegel had only seen Student at the October 24, 2011 IEP team meeting, his testimony about Student's need for residential placement was nonetheless credible and persuasive given his years of experience in the field and the extensive review of Student's records. He testified that mood disorders typically manifested in the adolescent and teen years. As such it was absolutely necessary to identify and treat Student's mental illness at this time. Student needed a more restrictive environment because of his rapidly deteriorating mental health. He saw a psychotic youngster

struggling to overcome his mental health issues since the age of six. He was not surprised by the reports by LACOE staff of Student's purportedly improved conduct, because of the propensity for "cycling," which was a common occurrence in individuals with a mood disorder. These reports did not change his opinion or DMH's recommendation that Student needed much more intensive mental health interventions in a more restrictive environment like an RTC to benefit from his education.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on the sole issue. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Student contends that at all times relevant LACOE was the LEA responsible for provision of a FAPE. Student contends that he requires a RTC placement due to a well documented history of severely deteriorating mental health problems that have impeded his access to his education and that LACOE denied him a FAPE by failing to provide an RTC, as recommended by DMH in the Reassessment Report. Student asserts that LACOE had a duty to provide a FAPE without regard to the MOU.

3. LACOE contends that it provided Student with a FAPE during the relevant period, and placement in a RTC as recommended by DMH at the October 24, 2011 IEP team meeting was not warranted. LACOE contends that because of the language in its August 19, 2011 MOU with DMH, the MOU controls and DMH's recommendations for AB 3632 residential placements are advisory only such that LACOE is not required to adopt DMH's recommendations, so long as LACOE offers a FAPE.

4. As discussed below, Student has met his burden of proof that LACOE failed to provide a FAPE during the relevant period for two reasons. First, the regulations in effect at the time of the IEP team meeting and through the date of hearing required the IEP team to accept the placement recommendation of the DMH assessor as the recommendation of the entire IEP team. In the alternative, even assuming the

regulations no longer required LACOE to implement DMH's placement recommendation, the evidence showed that an RTC was required in order to provide Student a FAPE.

#### APPLICABLE LAW

5. A pupil with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) IDEA, consisting of special education and related services. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

6. The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).)

7. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court

addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley*, supra, at p. 200.) 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. (*Rowley*, supra, at p. 201.)

8. There are two parts to the legal analysis of whether a school district offered a pupil a FAPE, whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

9. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview*

*Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley*, at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's potential. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.*, at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program, and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

10. An IEP is evaluated in light of information available at the time it was developed; it is not judged 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* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

11. Special education due process hearing procedures extend to pupils who are wards or dependants of the court, to their parents or guardians, and to the public agencies involved in any decisions regarding the pupils. (Ed. Code, § 56501, subd. (a).) IDEA due process hearing requests brought by a pupil against a public agency properly include determinations of the public agency responsible for providing special education. (See *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525; *J.S. v. Shoreline School Dist.* (W.D. Wash. 2002) 220 F.Supp.2d 1175, 1191.)

12 In California, a county office of education is responsible for the provision of a FAPE to individuals who are confined in juvenile hall schools within that county. (Ed. Code, §§ 48645.1, 48645.2, 56150.) When a residential placement is recommended by an IEP team, the local educational agency, such as a county office of education, is financially responsible for transportation to and from the residential placement and all special education instruction and non-mental-health related services. (Cal. Code Regs., tit. 2, §§ 60010, subd. (k) (including county offices of education within the definition of local educational agency), 60110, subd. (b)(2) (for residential placements, "The LEA shall be responsible for providing or arranging for the special education and non-mental-health related services needed by the pupil."), & 60200, subd. (d).)

13. Federal and state laws require LEA's to provide a program in the least restrictive environment to each special education pupil. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education pupil must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education pupil could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has required several factors to be evaluated. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.) However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

14. Education Code section 56360 requires that the special education local plan area (SELPA) must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a) (2006); Ed. Code, § 56360.) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006); see also Ed. Code, §§ 56360, 56361.) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104 (2006).)

15. Prior to July 1, 2011, mental health services related to a pupil's education were statutorily provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code. (Gov. Code §7570, et seq., often referred to by its Assembly Bill name, Chapter 26.5.) A pupil who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the pupil's parent had consented, be referred to a community mental health service agency, such as CMHS, in accordance with Government Code section 7576. The pupil had to meet the criteria for referral specified in California Code of Regulations, title 2, section 60040; and the school district, in accordance with specific requirements, had to prepare a referral package and provide it to the community mental health service agency. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 14, § 60040, subd. (a); Gov. Code § 7576 et seq.) As part of Chapter 26.5, Government Code section 7576, subdivision (a) provided in part that an LEA was not required to place a pupil in a more restrictive educational environment for the pupil to receive the mental health services

specified in his IEP if the mental health services could be appropriately provided in a less restrictive setting.

16. On October 8, 2010, former Governor Schwarzenegger vetoed funding for mental health services provided by county mental health agencies like DMH. In *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507 (*CSA v. Brown*), the court found, following a review of California law on funding of IDEA-required mental health related services, that as of October 8, 2010, the former Governor had the authority to make changes by line item veto, which led to changes in California's delivery of IDEA mental health services. In particular, the court found that the veto suspended the mandate of county mental health agencies to provide mental health services that were required to provide individual students with a FAPE. (*CSA v. Brown, supra*, 192 Cal.App.4th, at p. 1519)

17. Subsequently, on June 30, 2011, the Governor signed into law a budget bill (SB 87) and a trailer bill affecting educational funding (AB 114). Together they made substantial amendments to Chapter 26.5 of the Government Code which is no longer called AB 3632. In particular, the Sections repealed were suspended effective July 1, 2011, and were repealed by operation of law on January 1, 2012, unless amended. The following sections of Chapter 26.5 of the Government Code were repealed: §§ 7572 (c), 7572.5, 7572.55, 7576, 7576.2, 7576.3, 7576.5, 7586.5, 7586.6, 7586.7, and 7588. Of those sections, § 7576 designated the State Department of Mental Health or a community mental health service as the agency responsible for the provision of mental health services if required in a pupil's IEP, and imposed an obligation on county mental health agencies to receive referrals for AB 3632 assessments, assess, report, add a member to an IEP team, assume case management responsibilities, or make residential placements.

18. Thus, the obligation of the State Department of Mental Health, and its county designees, including DMH, to assess and provide related mental health services

to special education pupils has been terminated, and the statutory responsibilities have been transferred to the LEAs instead. (See Gov. Code § 7573.) Henceforth, as of July 1, 2011, the LEAs, including LACOE in the instant case, have the lead responsibility to provide related mental health care services to its qualifying pupils. Thus, as of July 1, 2011, LACOE was directly responsible to provide mental health services to its pupils who require such services to receive a FAPE.

19. AB 114 directed the California Department of Education (CDE) and California Health and Human Services Agency (CHHS) to modify or repeal regulations no longer supported by statute. No action has been taken to date. The State regulations adopted to implement AB 3632 (Cal. Code Regs., tit. 2, §§ 6000, et seq.) have not been expressly repealed. In particular, at the time of the IEP meeting and through the date of hearing, the regulations provide that the county mental health assessor's recommendation for mental health services was required to be reviewed and discussed by the pupil's IEP team, including the parents, following which, the recommendation of the county mental health assessor was required to become the recommendation of the IEP team. (Gov. Code, § 7587; Cal. Code Regs., tit. 2, § 60045, subs. (f), and (f)(2).)

## ANALYSIS

### PROCEDURAL VIOLATION

20. As set forth in Legal Conclusion 8, a denial of FAPE may only be shown if the procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. As an initial matter, if the regulations survived the repeal of the portions of chapter 26.5 mandating the implementation of AB 3632 mental health services, LACOE was required to comply with the requirements under Section 60045 (f) and (f)(2), still in effect as of the date of the

October 24, 2011 IEP, to adopt and implement DMH's assessment recommendation to place Student in an RTC. Here, LACOE's failure to adopt DMH's recommendation and implement an RTC placement for Student was a procedural violation resulting in a deprivation of educational benefit and denied Student a FAPE. In its closing brief, LACOE argues that while the implementing regulation remains in effect, the statutory scheme that it purportedly supports no longer exists. LACOE cites *California School Bds Assn. v. State Bd. Of Education* (2010) 191 Cal.App.4th 530,544; *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550; *California Emp. Com. V. Kovacevich* (1946) 27 Cal.2d 546, 553); and Gov. Code Sections 11342.1 and 11342.2 for the proposition that an administrative agency may not act contrary to the statute that is the source of its power or exceed the scope of its authority. The case and statutory authorities cited here are not dispositive of the question in this case because they involve challenges to regulations which purportedly conflict with existing statutes and/or pertains to an administrative agency's authority to promulgate regulations consistent with existing statutes. Student argues in his closing brief that the regulations are inapplicable here because the statute that they were enacted to implement no longer exists, and all related codes under Chapter 26.5, including the implementing regulations even if not specifically identified by the legislature as having been repealed or amended, have been repealed by the enactment of AB 114. Student *cites Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178 and *Dobbins v. Board of Supervisors of Yuba County* (1855) 5 Cal. 414, 415 in support of his argument. Both cases involved questions of statutory interpretation and are cited for the proposition that where two statutes enacted at different times governing the same subject matter conflict with one another the latter by implication repeals the former. These authorities upon whom the parties rely are distinguishable from the instant case. Here, the question concerns the repeal of a statute and the application of a regulation still existing after the

statute it was promulgated to implement has been repealed. The parties have failed to provide any persuasive authority that the implementing regulations at issue here have been repealed by operation of law and/or are of no force and effect in the absence of the statute. As discussed in Legal Conclusion 19, the legislature recognizes that the implementing regulations remain in force and effect and has delegated to CDE and the CHHS the responsibility to modify or repeal the regulations related to the mandate. The responsible agencies have not yet modified, repealed, or enacted new regulations. However, even assuming the regulations did not survive the changes in the statute, as discussed in Legal Conclusions 17 and 18 above, and 21 below, AB114 still directs the LEA to provide a FAPE in accordance with the IDEA and LACOE failed to provide Student a FAPE. (Factual Findings 1 to 45; Legal Conclusions 1 and 4 to 26.)

#### SUBSTANTIVE VIOLATION

21. As discussed in Legal Conclusions 12 and 13, at all relevant times LACOE was statutorily responsible for providing Student with a FAPE because Student was under the jurisdiction of the juvenile court and housed at Sylmar. In addition, by operation of AB 114, the mandate for mental health to be provided by county mental health agencies like DMH had been suspended, such that LACOE was solely responsible for providing Student with a FAPE. The recommendation made at the October 24, 2011 IEP meeting of an RTC placement was a FAPE for the following reasons.

22. The program and services LACOE provided at October 24, 2011, IEP meeting were not designed to meet the student's unique needs nor were they reasonably calculated to provide some educational benefit. The evidence showed Student had an extensive and troubling history of social, emotional and behavioral problems which impeded his academic performance from elementary school through high school. He was diagnosed with Psychotic Disorder NOS for a history of auditory hallucinations dating back to when Student was six years of age, as well as ADHD.

Student began receiving psychiatric services in May 2008 and required treatment with psychotropic medications as well as various stimulant medications. His psychiatric records indicated that Student's ADHD symptoms did not improve and were treatment-resistant. Unfortunately, as confirmed by Ms. Oh, Stepfather, and Ms. Tauber, Student's access to mental health services were sporadic to non-existent starting in the spring semester of the 2010-2011 school year and had continued into his incarceration at Sylmar.

23. In addition, the testimony of LACOE's own staff, and in particular Ms. Fluker, underscores the inadequacy of the program he was offered at the October 24, 2011 IEP. Ms. Fluker testified she reviewed his records and was aware of his psychotic disorder, but had not assessed Student. Though she was not qualified to provide treatment plans to address mental illness, she devised an intervention which called for the use of rubber bands to be worn around Student's wrist which he was required to "snap" upon hearing the voices. She believed this intervention was aiding Student in developing coping skills and becoming grounded in the "here and now." She had just begun to provide this intervention to Student in September and testified that Student responded well and told her he was no longer hearing the voices. She also testified that he was compliant and had no behavior problems. Ms. Fluker was not credible. First, she attended each of his IEP meetings from August 2011 to October 24, 2011 where Student consistently complained to the IEP team about the voices, his headaches, and inability to focus, yet she had no recollection of the complaints. Second, her hearing testimony was contradicted by her statement to Ms. Tauber during the reassessment that Student was non-compliant, and the probation department's report at the October 24, 2011, IEP meeting of Student's involvement in an incident at Nidorf. Third, Ms. Fluker was unclear on what, if any, mental health counseling Student was receiving on site at Sylmar. Ms. Simmons was equally unclear concerning Student's mental health counseling services

when she testified that “she was not sure” if he received these services in the unit. Given the inconsistencies in the testimony of LACOE witnesses and their lack of knowledge about Student’s program at the time of hearing, the testimony was given little weight.

24. The evidence would also show Ms. Fluker was not credible when she testified that the rubber band interventions she used with Student in DIS counseling was successful because of Student’s report to her that he did not hear the voices since using the rubber bands. The credible testimony of Ms. Oh, Stepfather, Ms. Tauber and Dr. Siegel established that Student regularly complained about the voices and specifically at the October 24, 2011, IEP meeting, which would show that the DIS counseling and intervention was far from successful in meeting Student’s unique needs.

25. Most importantly, the testimony of DMH assessor Ms. Tauber, conclusively established that LACOE should have accepted DMH’s recommendation in order to provide a FAPE. Ms. Tauber, who had the experience and training to assess Student and make recommendations for a placement and services that would provide a FAPE, was credible and persuasive in all respects. She had the most contact with Student in assessing his needs than any of the LACOE staff, knew his medical and academic history, and had evaluated him twice over the course of one year. She had assessed Student in January 2011 and found he was eligible for AB 3632 outpatient mental health services. By the time she had reassessed him in September 2011 she found that his mental condition had deteriorated based upon his interim history and conduct. She was not surprised at LACOE’s reports that Student’s behavior had improved and he was progressing in his program there. She attributed this momentary episode of improvement to his history of cycling. Her conclusions were based on years of experience and training, and knowledge of Student in this case. Her conclusion that Student’s mental health needs had not changed and that he required a higher level of care than LACOE and his home environment could provide is supported by the

evidence. Dr. Siegel's testimony further supported Ms. Tauber's findings and conclusions, and was essentially uncontradicted by LACOE.

26. Here, LACOE's denial of an RTC was based upon its belief that Student's existing program provided the most appropriate placement in the least restrictive environment. The evidence supports a finding that Student needed a more restrictive environment and placement in an RTC was required to provide Student a FAPE. Based upon what LACOE knew as of the date of the DMH AB 3623 Reassessment Report, LACOE's failure to provide an appropriate placement and services in an RTC denied Student a FAPE. Consequently, Student has met his burden by a preponderance of the evidence that LACOE's refusal to provide placement in an RTC and mental health services, as recommended by DMH in its September 21, 2011 Reassessment Report denied Student a FAPE. (Factual Findings 1 to 45; Legal Conclusions 1 and 4 to 26.)

## ORDER

1. LACOE must begin implementing Student's placement in an RTC as recommended by DMH in the Reassessment Report dated September 21, 2011, subject to the conditions in paragraph 2, below.

2. The ALJ realizes and believes that Student is still under the jurisdiction of the Juvenile Court and, as such, the ALJ cannot override the Court's placement orders. The ALJ therefore orders placement at an RTC conditioned upon suitable placement status being determined and ordered by the Juvenile Court.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

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

DATED: March 13, 2012

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*/s/*

STELLA L. OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings