BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. MANTECA UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2011060184 NO. 2011050574
MANTECA UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2011050289

DECISION

Administrative Law Judge (ALJ), Michael G. Barth, Office of Administrative Hearings (OAH), State of California, heard this matter in Lathrop, California, on October 24, 25 and 26, 2011.

Parent represented Student. Student was not present during the hearing. Daniel A. Osher, Attorney at Law, represented the Manteca Unified School District (District). Roger Goatcher, Senior Director of Student Services and Special Education was present throughout the hearing on behalf of District.

The District filed a request for due process hearing in OAH Case Number 2011050289 on May 4, 2011. On May 12, 2011, Student filed a request for due process hearing in OAH Case Number 2011050574. On May 17, 2011, OAH ordered District's and Student's complaints to be consolidated and ordered the statutory timelines in the consolidated matters to be controlled by Student's complaint.

On May 24, 2011, Student filed a second request for due process hearing in OAH Case Number 2011060184. On June 20, 2011, as clarified in an Order Granting Reconsideration on June 27, 2011, OAH granted Student's motions to amend his complaints, consolidate all three matters, and restart all timelines based on Student's second complaint. On August 1, 2011, OAH granted a continuance of the consolidated matters.

At hearing, oral and documentary evidence were received. At the close of the hearing, based on Student's request, the record was left open until November 14, 2011, for the submission of written closing arguments. Student and District submitted closing briefs by November 14, 2011, and the matter was then submitted for decision.[1]

ISSUES[2]

Student's Issue:

Issue No. 1: Whether District procedurally denied Student a free appropriate public education (FAPE) in connection with its 2010-2011 triennial assessment because it:

a. conducted the *Naglieri Nonverbal Ability Test (NNAT)* during the assessment of Student in violation of *Larry P. v. Riles* (*Larry P.* injunction);[3]

b. conducted social and emotional assessments of Student not authorized by Parent;

c. failed to provide sufficient information to Parent when obtaining his consent for Student's assessments, specifically the methods of alternative assessment; and

d. infringed upon Parent's rights to participate in the decision making process when it limited his participation in the individualized education program (IEP) development process?

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[1] To maintain a clear record, Student's closing brief has been marked as Exhibit S-37; Student's reply closing brief has been marked as Exhibit S-38; and District's closing brief has been marked as Exhibit D-16. District's motion to strike Student's reply brief is denied as discussed in the *Post-Hearing Matters* section of this Decision.

[2] The issues are as framed in the October 12, 2011 Order Following Prehearing Conference and modified as further clarified at hearing.

[3] *Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963); all references to the *Larry P.* injunction relate to the state of the law at the time this decision is written as presented in Legal Conclusions paragraphs 5-6.

District Issue:

Issue No. 2: Whether District may conduct a social and emotional assessment of Student without parental consent?

CONTENTIONS OF THE PARTIES

Student presents four contentions. (1) That District utilized the NNAT when assessing Student, who is of African-American descent, resulting in an intelligence quotient score in violation of the *Larry P.* injunction. (2) That Parent refused consent for any social or emotional assessments of Student in the assessment plan approved by him on November 10, 2010; and District then conducted unauthorized social and emotional assessments of Student. (3) That District failed to provide Parent with sufficient information when obtaining his consent for Student's assessments, specifically the methods of alternative assessments. (4) That District infringed upon Father's ability to participate in the decision-making process when it limited his participation in the IEP development process. Student contends that District procedurally denied him a FAPE as the result of these activities.

District contends that Parent withheld consent for District to conduct a social and emotional assessment of Student and that the denial of this consent prevented District from assessing Student in all areas of suspected disability. District requests an order to allow them to conduct social and emotional assessment of Student without parental consent.

PRELIMINARY MATTERS

Student's Motions for Monetary Sanctions

Prior to starting the hearing, Student brought two motions to impose monetary sanctions against the attorneys representing District. These motions were argued by the parties at the beginning of the hearing.

Under certain circumstances, an administrative law judge presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH.[4] The first motion that was filed on September 25, 2011, Student argued that the District's representatives engaged in bad faith litigation tactics in order to inappropriately shape the record by offering to stipulate that it had violated the *Larry P.* injunction. However, the District representatives' prehearing conference statement was not done in bad faith, as

[4] Gov. Code, §§ 11405.80, 11455.30; Cal. Code Regs., tit. 5 § 3088, see *Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5 § 3088, subd. (b).

stipulations are permitted and encouraged in due process hearings. Here, District proposed to stipulate that it had violated the *Larry P.* injunction, Parent rejected the offer of a stipulation, and the issue was stricken at the prehearing conference statement. Accordingly, Student's motion for monetary sanctions is denied.

The second motion to impose sanctions was filed by Student on October 21, 2011. Here, Student argues that District's representatives had an obligation to inform the California Department of Education (CDE) of the details of the Order Following Prehearing Conference dated October 12, 2011, and that the issue of whether Mr. Morgan, a CDE employee, would testify in person or telephonically was resolved at the prehearing conference. Further, Student argues that District's failure to inform CDE of the details of the order caused additional motions to be filed as CDE filed a motion to quash Student's subpoena of Mr. Morgan. Student's motion for monitory sanctions is without merit. Even though Parent filed a complaint with CDE and CDE opened an investigation, CDE is not a party to this case. The attorneys representing District had no obligation to serve CDE with its filings or OAH orders, or to otherwise inform CDE of any part of these proceedings. Accordingly, Student's second motion for monitory sanctions is denied.

Post-Hearing Matters

Student filed his closing brief with OAH on the morning of November 14, 2011, and served District. District filed its closing brief at the end of the day on November 14, 2011 and responded to many of the issues raised in argument in Student's closing brief. Student then submitted an additional ten pages of argument in response to District's closing brief on the morning of November 15, 2011. Later that morning, District filed a motion to strike Student's second closing brief arguing that the undersigned ALJ did not authorize the parties to file reply briefs. However, because Student filed his closing brief early on the date the brief was due, District took the liberty to respond to the arguments presented when its brief was later filed. This provoked Student to file additional argument. District in essence used the time advantage to "reply" to Student's brief, and should not now complain that Student wanted an equal opportunity to reply to District's arguments. In that District opened the door to this opportunity by raising issues presented in Student's closing brief, District's motion to strike Student's reply closing brief is denied.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 9-year-old boy of African-American descent born in January 2002. He is eligible for special education services under the primary category of Specific Learning Disability and a secondary category of Speech and Language Impairment.

2. Since 2008, Student's educational placement in the District has been at the Children's Home of Stockton (CHS), a non-public school certified by CDE. CHS primarily serves students who are emotionally disturbed. Student was placed at CHS because his

behaviors could not be controlled in the general education setting. Student has a history of violent tantrums, throwing objects, and attempting to strike teachers as well as other students. Since his placement at CHS, Student is making both academic and behavioral progress. There is no dispute between the parties whether Student's IEP was reasonably calculated to provide Student a FAPE and whether he is receiving educational benefit from his placement at CHS.

Assessments

3. For purposes of evaluating Student for special education eligibility, District must ensure that Student is assessed in all areas of a suspected disability. The evaluation must be sufficiently comprehensive to identify all of Student's needs for special education and related services, also known as designated instructional services in California, whether or not commonly linked to the disability category that Student is classified.

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district.

2008 Assessment of Student

5. In order to evaluate Student's claims that District committed procedural violations in connection with its triennial assessment of Student in the beginning of the fall of 2010, District's 2008 assessment of Student is relevant. In January 2008, District prepared an assessment plan that was approved by Parent. School psychologist Nalee Thao, then conducted a psychoeducational assessment of Student when he was six-years-old.[5] The assessment was initiated by the Parent to determine if Student's placement was appropriate. Ms. Thao has been employed by District for the past eight years.

[5] Ms. Thao holds a bachelor of arts (1998) and a master of science (2003) degree from National University and holds a California Pupil Personnel Services Credential--School Psychology.

6. Ms. Thao issued the assessment report in early February 2008. She used the following assessment instruments to make her findings and recommendations: (1) Wide Range of Assessment of Memory and Learning (WRAML-2); (2) Woodcock-Johnson-III Test of Achievement (WJ-III, Achievement); (3) DevelopVMI Demental Test of Visual Motor Integration Full Format (VMI); (4) The VMI Developmental Test of Visual Perception: Visual Perception; (5) The VMI Developmental Test of Visual Perception: Motor Coordination; (6) The Learning Efficiency Test-II (LET-II); (7) Behavior Assessment System for Children (BASC, TRS); (8) Behavior Assessment System for Children (BASC, PRS) (9) Connors' Teacher Rating Scale, Revised (L); Connors' Parent Rating Scale, Revised (L); (10) Connors' Parent Rating Scale, Revised (L): (11) Differnential Test of Conduct and Emotional Problems (DT/CEP), PRS; (12) Differential Test of Conduct and Emotional Problems (DT/CEP), TRS; (13) Parent Family Questionnaires Form; (14) a review of records; (15) observations.[6]

7. During his assessment Student was extremely distracted and had difficulty paying attention to the tasks presented. Student had academic challenges because of his disruptive behaviors and his overall ability scores fell within the low to average range. Student's scores showed deficits in both auditory and visual processing skills as well as the presence of oppositional problems.

2010-2011 Triennial Assessment

8. In November 2010, District began preparations to conduct Student's triennial assessment. Kristopher Hensley,[7] District School Psychologist, prepared an individual assessment plan to obtain consent from Parent. Mr. Hensley has been a school psychologist for the District for nine years. Mr. Hensley recommended that the following assessments be conducted: (1) language, speech, and communication development; (2) academic and pre-academic achievement; (3) social, emotional and behavior status; (4) health development; (5) alternative assessment; and (5) records review.

9. The November 2010 assessment plan expressly provided that intellectual assessments were not applicable and that alternative assessments were recommended to assess Student's cognitive abilities. However, no explanation was provided in the written assessment plan that these recommendations were made because Student is African-American and that District believed he could not be administered standardized intelligence tests because of the prohibition in the *Larry P.* injunction.

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[6] A detailed analysis of each finding is not provided as the results of assessments are not at issue in this case.

[7] Mr. Hensley holds a bachelor of science degree in Psychology from San Diego State University (2000) and a master of science degree in counseling from National University (2002); he also holds a California Pupil Personnel Services Credential--School Psychology.

10. Mr. Hensley discussed with Parent why he recommended the social, emotional and behavior status assessments by explaining that even after changing Student's placement to CHS, a school designed to assist children with behavioral problems, Student continued to exhibit behaviors that interfered with his educational program. Parent demanded that Student not be assessed for an emotional disturbance and asserted that he would not authorize social, emotional and behavior status assessments.

11. Mr. Hensley used the following assessment instruments to make his findings: (1) Test of Visual Perceptual Skills-Third Edition (TVPS-3); (2) Woodcock-Johnson Test of Achievement-Third Edition (WJ-III); (3) Naglieri Nonverbal Ability Test (NNAT); (4) Test of Auditory-Processing Skills-Third Edition (TAPS-III); (5) review of records; (6) observation (7) Parent interview.[8] The assessment met all requirements of the law.

NNAT

12. Student asserts that District conducted the NNAT in the assessment of Student in violation of the *Larry P.* injunction. The NNAT was administered by school psychologist Kristopher Hensley on December 2, 2010, as an alternative assessment. as part of Student's triennial assessment. Generally, the *Larry P.* injunction and subsequent cases prohibit the use of I.Q. testing of African-American students.

Findings Related to Student's Evidence

13. On February 11, 2011, Parent filed a Request for Complaint Investigation with CDE. In his complaint, Parent argued that District did not seek his consent to conduct social, emotional and behavior status, autism, or conduct disorder assessments and observations. Parent requested that CDE order the assessments conducted without his consent be destroyed. Parent did not raise, within his CDE complaint, an allegation that District assessed Student in violation of the *Larry P.* injunction.

14. The complaint was accepted by CDE and assigned Case #S-0596-10/11. The matter was investigated by CDE and District was found in compliance. On April 25, 2011, Parent requested reconsideration of the matter. On May 2, 2011, CDE granted reconsideration and assigned Robert Morgan as the investigator.

15. Robert Morgan[9] is employed by CDE and serves as the Administrator of Focus Monitoring and Technical Assistance Unit 5, which serves counties in Southern California.

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[8] A detailed analysis of each finding from the assessment is not provided as the results of assessments are not at issue in this case.

[9] Mr. Morgan attended Minot State University and holds a bachelor of science degree (1980) and a master of science degree (1981) in special education.

In addition to his responsibility to manage Unit 5, Mr. Morgan is responsible for assuring compliance with the complaints investigation process statewide. Mr. Morgan has been an administrator with CDE for approximately four years. Mr. Morgan is not a psychologist or an attorney and is not an expert related to the application of the *Larry P.* injunction. He reviewed 1263 complaints last year and reviews approximately five complaints each day.

16. Mr. Morgan's investigation reconsidered Student's initial complaint that District conducted social, emotional and behavior status, autism or conduct disorder assessments and observations without parental consent. Mr. Morgan found that District did not conduct assessments related to social, emotional and behavior status, autism or conduct disorder and observations and was in compliance with applicable laws regarding parental consent. However, Mr. Morgan found that District's use of the NNAT was an I.Q. test in violation of the *Larry P.* injunction and therefore found District was not in compliance, reasoning that District did not obtain consent to complete intelligence testing for Student.

17. Mr. Morgan's investigation of this matter consisted of reviewing the NNAT publisher's web site. From the website, Mr. Morgan found that the NNAT was designed to assess non-verbal reasoning and general problem-solving ability. Mr. Morgan interpreted this to be an I.Q. test and found District out of compliance.

18. Mr. Morgan was a credible witness, but his reconsideration report lacks credibility for three reasons. First, in the citation of applicable law he provided information related to the *Larry P.* injunction, but failed to review a subsequent Ninth Circuit case that modified the *Larry P.* injunction[10] which allows African-American children to take intelligence quotient (I.Q.) tests in spite of the ban by CDE, thus misstating the current prohibitions of the *Larry P.* injunction. Second, in the citation of applicable law, he relied on two federal regulations.[11] One of the regulations cited relates only to placement decisions that were not at issue in the complaint that he was investigating. Third, his findings related to the NNAT, relied solely on the following sentence found at the publisher's web site:

> "[the Naglieri Nonverbal Ability Test] allow(s) for a culturally neutral evaluation of students' nonverbal reasoning and general problem-solving ability . . ."

Mr. Morgan's report failed to explain how this statement makes the NNAT an I.Q. test. Mr. Morgan's testimony that any test for general ability is an I.Q. test was unpersuasive because as found below, District's witnesses persuasively established that the NNAT is a brief nonverbal assessment instrument designed to assess general abilities and does not result in an I.Q. score. Accordingly, the CDE reconsideration report and Mr. Mogan's testimony is given little weight.

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[10] *Crawford v. Honig* (9th Cir. 1994) 37 F3d 485

[11] 34 C.F.R. § 300.136 and 34 C.F.R. § 300.9

Findings Related to District's Evidence

19. District presented three witnesses that provided testimony related to the NNAT: Russell Backman, Janis Peters, and Kristopher Hensley.

Russell Backman

20. Mr. Backman[12] is employed by CHS and has been in his current position for the past 13 years. Mr. Backman conducted the WJ-III assessment of Student in January 2011. Mr. Backman has been trained in administering a number of assessment instruments including the NNAT. He testified persuasively that the NNAT is a brief, nonverbal assessment instrument designed to assess general abilities and was designed by the publisher to meet the requirements of the *Larry P.* injunction and does not result in an I.Q. score when conducted. Mr. Backman's testimony was credible and is given substantial weight.

Janis Peters

21. Ms. Peters[13] is the lead program specialist for District and has served in this capacity for the past four years. Ms. Peters has attended the IEP team meetings for Student as District's administrative team member. While Ms. Peters is not a psychologist, in her position as a program specialist, she is familiar with the process and procedures of comprehensive assessments of pupils in special education and is familiar with different tests and their purposes. Ms. Peters is familiar with the NNAT and testified that many districts use the NNAT as an alternative assessment tool to evaluate the cognitive ability for African-American students. Ms. Peter's testimony was credible and given substantial weight.

Kristopher Hensley

22. As discussed in paragraphs 27 through 31, Mr. Hensley prepared the individual assessment plan for Student and conducted the majority of Student's assessment. Mr. Hensley was aware that the CDE found District out of compliance for administering the NNAT to Student as an alternative assessment.

23. Mr. Hensley explained that the NNAT provided him with another score to assess Student's visual processing ability and to verify consistency among his assessments. During a telephone conversation with Parent, Mr. Hensley explained to Parent that he could not conduct I.Q. testing on Student and that is why he recommended alternative assessments.

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[12] Mr. Backman holds a bachelor of arts degree in psychology (1986) from California State University, Sacramento and a master of science degree in education and computer science (1988) from National University.

[13] Ms. Peters holds a bachelor of arts degree in communication disorders (1973) and a master of arts degree in communication disorders (1974); she also holds a California Life Standard Restricted Special Education Credential.

24. Mr. Hensley conducted the NNAT because he classified it as an alternative assessment to an I.Q. test. The NNAT is commonly used in District and other school districts and is the norm for African-American children. In addition, the California Association of School Psychologist publishes a list of assessments that are barred by the *Larry P.* injunction, and the NNAT is not listed among them.

25. Mr. Hensley is aware of CDE's determination that administering the NNAT violated the *Larry P.* injunction. Mr. Hensley continues to believe that the NNAT is a nonverbal ability test and does not agree with the findings of CDE. Mr. Hensley's testimony was credible and is given substantial weight.

Findings Related to the NNAT

26. The evidence established that the NNAT, while testing general ability, does not result in an IQ score and is not an IQ test. Accordingly, District did not violate the *Larry P.* injunction.

2010 Individual Assessment Plan and Parental Consent

27. Mr. Hensley invited Parent, by a hand-written note on the last page of the assessment plan, to call him if he had questions and provided Parent with his telephone number. Mr. Hensley also enclosed a rating scale for Parent to fill out for the social, emotional and behavior status portion of the assessment he recommended. Parent disputes that a rating scale was enclosed in the assessment plan, but a preponderance of evidence shows that the rating scale was enclosed with the assessment plan.

28. Upon receiving the assessment plan, Parent telephoned Mr. Hensley. Mr. Hensley reviewed the assessment plan with the Parent over the telephone and explained each recommended assessment. Mr. Hensley discussed alternative assessments and explained that Student could not be assessed for intellectual development by using tests that measure I.Q. because of the *Larry P.* injunction.

29. In that same telephone conversation, Mr. Hensley asked Parent to detail in writing any portions of the recommended assessments that he did not approve and return the assessment plan. Parent returned the assessment plan and wrote: "No Rating Scales Needed. All Other Testing Should Be Done. SAED (sic)." Mr. Hensley understood that when Parent stated that no rating scales were needed that he meant that no social, emotional and behavior status assessments were authorized. Mr. Hensley understood that the SAED acronym meant the scale of emotional disturbance, which is an assessment tool. Parent approved all other aspects the individual assessment plan.

30. Student argued in his closing brief[14] that Parent did not consent to alternative assessments being conducted. This claim is not supported by the evidence. Parent signed the assessment plan that specifically called for the administration of alternative assessments. Mr. Hensley reviewed the assessment plan with Parent during their telephone conversation, Parent was aware that he could refuse any portion of the assessment plan and Parent made no notation that alternative assessments were not authorized. A preponderance of the evidence shows that Parent authorized District to conduct alternative assessments.

31. At the top of the listing of the assessments to be conduced in the assessment plan is a notice that states: "Detailed descriptions of specific tests are available upon request." Parent did not request descriptions of specific tests prior to approving the individual assessment plan. However, after the assessments were completed, Parent requested and District provided information related to specific tests administered. Given that Parent did not avail himself of District's offer to provide detailed descriptions of specific tests, Parent's charge that District did not fully explain the instruments to be used is unsubstantiated.

2011 Assessment of Student

32. Mr. Hensley established that social, emotional and behavior status assessments were a necessary part of the psychoeducational assessment for Student because his behaviors continued to interfere with his ability to access his academic program. However, these social and emotional components of the District's triennial psychoeducational assessment were not authorized by Parent. Mr. Hensley proceeded to conduct the assessment according to the individual assessment plan without giving Student a social, emotional and behavior status assessment as directed by Parent and used the assessment instruments discussed in Factual Findings 11.

33. The assessments showed that Student has low to average general learning ability and has a discrepancy between his learning ability scores and his achievement results in all areas except for mathematics. These results are consistent with the 2008 assessments conducted by Ms. Thao. Although Mr. Hensley did not conduct a social, emotional and behavior status assessment for Student, he did note that Student had significant emotional concerns. This information was derived from the records review and observations associated with the other approved assessments and did not constitute a social and emotional assessment.

34. Student contends that Mr. Hensley conducted social, emotional and behavior status assessments without parental consent. There are valid reasons for Student reaching this conclusion as is discussed in the 2011 Assessment Report portion of this decision presented in paragraph 35 through 40 herein. However, a preponderance of evidence shows

[14] Student's closing brief page 3, paragraph A.

that Mr. Hensley only administered assessments as authorized by Parent in the assessment plan and conducted no social, emotional and behavior assessments.

2011 Assessment Report

35. Mr. Hensley produced a psychoeducational assessment report that is flawed and caused Parent to believe that Mr. Hensley conducted social, emotional and behavior assessments. The problems in the report detract from the appropriate and accurate findings that Mr. Hensley made for the authorized assessments that he conducted. There are three problems presented in the report.

36. The first problem is that Mr. Hensley reported that he used the Differential Test of Conduct and Emotional Problems (DT/CEP) and the Scale of Assessing Emotional Disturbance (SAED). A preponderance of the evidence shows that Mr. Hensley did not administer either of these instruments. However, Parent expressly requested that the SAED not be administered. By stating in his report that he used these instruments, Mr. Hensley undermined the confidence of Parent for himself and District and angered Parent, thus impairing communication and cooperation between Parent and District.

37. The second problem is that Mr. Hensley added three pages of outdated boilerplate in his ten-page assessment report under the eligibility determination heading. The preamble to the list provided states: "The Individuals with Disabilities Education Act of 1990 is a major U.S. federal special education law, P.L. 104-476, which guarantees the right to an appropriate education for all children and youth with disabilities. . . . " The text went on to list the following categories in bold type above explanations: (1) Specific Learning Disabilities; (2) Emotionally Disturbed Disability; (3) Other Health Impaired; (4) Autistic; (5) DSM-IV Disorder; (6) Aggression to People and Animals; (6) Destruction of Property; (7) Deceitfulness or Theft; (8) Serious Violations of Rules; (8) Behavioral Signs of Conduct Disorder; (9) Behavioral Traits of Oppositional Defiant Disorder.

38. Mr. Hensley testified that this portion of the report is only included to assist members of the IEP team to explain eligibility to parents. He further testified that he included this boilerplate in the majority of his assessment reports. When asked how he determined which report would require the boilerplate, Mr. Hensley responded that it depended on the form that he started his report. Mr. Hensley's cavalier attitude to information that constitutes one third of his report is troubling. Most troubling is that this information left Parent with questions of whether Mr. Hensley may have assessed his son for autism or emotional disturbance, which he specifically did not agree to in the assessment plan, further undermining Parent's confidence in District.

39. The third problem is that Mr. Hensley dedicated a portion of his summary in his report to his concerns related to Student's emotional issues by stating: "[Student] does appear to have significant emotional concerns that will need to be addressed in the future if he is to continue to progress behaviorally, emotionally, and socially." In light of Parent's

expressed refusal to allow any social or emotional assessments and Mr. Hensley not conducting a social and emotional assessment, this statement is unsupported by his observations of Student during other portions of his assessment. During the IEP team meeting, Parent requested that Mr. Hensley remove the remark. Mr. Hensley declined to comply with Parent's request. During his testimony, Mr. Hensley conceded that it could have been worded better.

40. The combination of the problems presented in Mr. Hensley's assessment report is the genesis of this case. The report caused Parent to distrust District and to continue to withhold his consent for social and emotional assessments presented after the IEP team meeting. District then filed its request for a due process hearing to obtain an order to assess Student without parental consent. This was followed by the two filings for due process hearing by Student.

Parent's Response to the 2011 Assessment Report

41. After receiving the assessment report, Parent sent an email to Robert Goatcher,[15] Senior Director of Student Services and Special Education, on January 27, 2011. This email was followed by a telephone conversation between Parent and Mr. Goatcher on January 28, 2011. Parent questioned the assessment report because he believed that Mr. Hensley conducted a social and emotional assessment as well as other unauthorized tests based on the report. Mr. Goatcher responded to this claim by a letter dated February 2, 2011.

42. Mr. Goatcher reviewed the report, spoke with Mr. Hensley, and determined that no social and emotional assessments were conducted for Student. Mr. Goatcher also accurately identified that pages 7 through 9 of the assessment report that provided information from District to areas that may or may not be of concern to Student, but were provided as information for general eligibility for special education. The explanations provided by Mr. Goatcher are consistent with the evidence that was submitted at hearing. Parent was fully apprised of weaknesses in the assessment report.

43. Mr. Goatcher offered to have District provide a new psychological assessment of Student to include social and emotional assessments. Mr. Goatcher agreed to allow Parent, in cooperation with District, to select the school psychologist that would conduct the assessment. Mr. Goatcher explained District responsibilities to assess students eligible for special education services in all areas of suspected disabilities. Mr. Goatcher further suggested to Parent that a mediator may assist the parties in reaching resolution and offered

[15] Mr. Goatcher holds a bachelor of arts degree (1992) from California Polytechnic State University and a master of arts degree (1998) from Saint Mary's College. He also holds the following California credentials: Administrative Service Credential; Multiple Subject Credential K-8; Single Subject Authorization English 9-10; Single Subject Credential Social Science 9-12.

to file a mediation only request with Parent's consent. Parent did not accept Mr. Goatcher's explanations.

Parental Participation at the 2011 IEP Team Meeting

44. A school district may be found to have denied Student a FAPE if it is shown that a procedural violation significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE.

45. Parent is a loving father and a strong advocate for his son. He has attended all IEP team meetings and has actively participated in planning his son's educational program and placement. It is clear from the testimony of all concerned that Parent is aware of smallest details of his son's educational program and keeps in close contact with CHS and District.

46. Ironically, it is this attention to detail that sparked the dispute between Parent and District. Errors in the assessment report led Parent to believe that District had conducted social and emotional assessments contrary to his explicit instructions not to do so. Although this dispute has caused Parent countless hours of work in preparing for hearing and presenting his son's case, there is no evidence that District infringed on Parent's ability to participate in the decision-making process for his son. Rather, all evidence shows that Parent is an active participant in all aspects of the decision-making related to his son. The evidence shows that Parent asks questions, seeks assistance for understanding, and provides continued input and District makes changes based on this information. Accordingly, Parent has not been significantly impeded from participating in the decision making process as it relates to his son.

47. Student, in his closing brief, argues that that Parent was denied participation because District made its decisions regarding the IEP and placement without Parent's involvement. Here, all parties agree that the IEP and Student's placement at CHS provide Student with educational benefit and Parent has been instrumental in this placement, as he requested the 2008 assessments that preceded that placement. Also, there is no disagreement regarding the results of the assessments, only whether District administered assessment instruments without the consent of Parent or in violation of the law. Parent was actively involved in the decision-making process regarding the educational program for his son at all times. Based on the foregoing, the evidence did not establish that District significantly impeded Parent's right to participate in the decision-making process.

Need for Social and Emotional Assessment of Student

48. District requests that social and emotional assessments of Student be ordered without parental consent. For purposes of evaluating a child for special education eligibility, District must ensure that the child is assessed in all areas of a suspected disability. The determination of what tests are required is made based on information known at the time that the assessment plan is developed. District is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified.

49. Parent cannot withhold consent as a means of forcing the District to adopt the Parent's own evaluation. If Parent wants Student to receive special education under the Individuals with Disabilities Education Act (IDEA), he must allow District to reevaluate Student. Parent cannot force District to rely solely on an independent evaluation.

50. Parent initially reasoned that Student has been evaluated and received mental health services through the Valley Mountain Regional Center and that further evaluation is unnecessary. Later during testimony, Parent stated that if he had been approached differently he would likely have consented to social and emotional evaluation of his son. Parent believed that the assessment plan should have been vetted at the IEP team meeting and a vote taken to determine what tests should have been administered.[16] Parent's belief is unfounded. It is District's responsibility to assess Student in all area related to his suspected disability and, as here, when the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of District.

Student's Current Behavior in School

Anne Romena

51. Anne Romena[17] is employed by CHS as a special education teacher. Student has been a member of her class for the past 18 months. There are nine to twelve students in

[16] The IDEA does not allow for an IEP team to make decisions by taking a vote. The IEP team is required to consider the input all members and if a dispute exists between the parents and the education agency, the proper forum for resolution is the due process hearing procedures.

[17] Ms. Romena holds a bachelor of arts degree in Child Development (2002) from California State University, Stanislaus; a master of arts in Education (2005) from the University of Phoenix; and holds a California Specialist Credential in Mild/Moderate Instruction.

Ms. Romena's class. The class has a full-time aide and some students have an individual aide. Student is assigned a full-time individual aide and has a behavior support plan.

52. Student reacts, as discussed below, to environmental stimuli, but sometimes becomes agitated when there are no known environmental stimuli. Student is now adjusting to a new aide and his ability to control himself has regressed. Student was placed at CHS because of his behavioral problems. Since attending CHS, the frequency of Student's tantrums has decreased, but the intensity of these events has not diminished.

53. When Student becomes agitated he is unable to express verbally what has him upset. He then lashes out, throwing books and other objects and using profanities. In one instance, he slapped the glasses off of his aide's head. When Student is in this state, he is removed from the class and sent to a study hall until he is able to gain his composure and return to class. These outbursts happen approximately two times each week, some weeks he does better and some weeks he does worse. Student is showing signs of self-monitoring as he has removed himself from the classroom on occasion when he is becoming agitated. Ms. Romena's testimony was credible, she is with Student throughout his school day, and her testimony is given substantial weight.

Patricia Lynch

54. Patricia Lynch[18] is a program assistant working for CHS. Ms. Lynch was Student's classroom aide from April 2010 through August 2011. Ms. Lynch worked closely with Student each day and established that Student's behaviors improved during the period that she worked with him. When she began as his aide in April 2010, Student had tantrums each day and frequently more than once each day. During these tantrums, Student would throw objects and attempt to hit other students as well as adults in the classroom. When these tantrums occurred, Student wass sent to the study hall with his aide to compose himself. When angry Student cannot express to others why he is angry, he becomes frustrated and lashes out at the people and objects around him. It is difficult to understand what events initiate these tantrums whether it is in reaction to behaviors by others around him, but at other times there appears to be no event that causes the tantrum.

55. By the time Ms. Lynch left in August 2011, the tantrums were occurring two to three times each week, which was a significant decrease in frequency from a year earlier; however, the intensity of the tantrums did not change. The outbursts were sometimes violent and when Student vocalizes he uses profanity and can only be controlled by moving him from the location where the tantrum began. Ms. Lynch's testimony is given substantial weight; she worked closely with Student on a daily basis.

[18] Ms. Lynch holds a bachelor of arts degree in Liberal Studies (2000) from California State University, Sacramento.

Michael Dutra

56. Michael Dutra[19] is the educational director of CHS and has been employed by CHS since 1984. In his capacity as educational director he supervises the teachers, works with students and parents and manages the finances of CHS. CHS primarily serves students with emotional disturbances and he has worked with these children for more than 30 years.

57. Mr. Dutra sees Student every school day at least once and Student exhibits emotionally based behavioral traits: difficulty handling frustration, difficulty with peers, and impulsiveness. Although progress has been made by Student at CHS, Mr. Dutra recommends an assessment of Student's present social and emotional condition will that provide useful information in adjusting the current program and services provided by CHS. Mr. Durtra's testimony is given substantial weight because of his vast experience working with children with emotional disturbances and his daily observations of Student.

Andrea Littlejohn

58. Andrea Littlejohn[20] is a service coordinator and case manager for the Valley Mountain Regional Center. Ms. Littlejohn is the case manager for 80 disabled children, including Student. She has served as Student's case manager since 2006. Ms. Littlejohn acts as an educational advocate for the children under her care and has attended each of Student's IEP team meetings. As part of her responsibilities, she sees each child annually to check on their well being and progress. Ms. Littlejohn has met with Student and Parent once each year since 2006, in addition to attending his IEP team meetings.

59. Ms. Littlejohn participated as a member of the IEP team in 2008 when Student was placed at CHS and recalls that Student was emotionally withdrawn at that time, he would retreat under tables while at school and was aggressive toward teachers. Ms. Littlejohn recommended CHS to Parent as a more appropriate placement for Student.

60. Ms. Littlejohn testified that since Student is currently eligible for mental health services from the regional center, further evaluation by District is unnecessary. She believes that Student's behavior has improved since his placement at CHS. Much of her opinion regarding Student's behavior was formed during her annual review of Student in January 2011, which was held at her office. There Student was calm, answered questions, and

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[19] Mr. Dutra holds a bachelor of arts degree in Liberal Studies (1982) and a master of arts degree in Special Education (1984) from the University of the Pacific; and holds the following California teaching credentials: Multiple-Subject Credential, K-12-Supplimental Authorization: Physical Education and Social Science; Specialist Credentials, Learning and Severely Handicapped, K-12.

[20] Ms. Littlejohn holds a bachelor of science degree in Social Work from San Jose State University.

nodded his head affirmatively that he liked school. Ms. Littlejohn believes that Student has made great behavioral progress and appears more comfortable. Ms. Littlejohn was credible, but her testimony is given little weight because her observations of Student are brief and infrequent and were not made in the class room setting.

Parent

61. Parent testified that Student's behavioral issues in 2008 were more severe than they are now. Student's behavior is caused by a preexisting medical condition that has been treated for some time. According to Parent, in 2008, Student "ripped the classroom apart," he was depressed and withdrawn, and was crying at home even before he went to school. In 2008, Student displayed a lot of aggression laced with profanity. Student was frequently removed from his classroom for three to four hours and missed substantial academic instruction. For these reasons, Parent requested the assessment in 2008 that was completed by Ms. Thao. This assessment included tests for Student's social and emotional conditions. As a result of these assessments, in consultation with the IEP team, Student was placed at CHS.

62. Parent concedes that Student continues to have some minor problems at home and continues to have difficulties in school. Parent believes that between the mental health services received from Sacramento County Mental Health, which are now concluded and the services that Student receives from CHS that further social and emotional assessments are not needed. Parent believes that District is required to gain consensus for the assessment instruments to be used during assessment much like the process used to determine placement. Parent's belief is unfounded as District may select the assessment instruments without input when procedures are followed.

Findings Related to Student's Behaviors

63. Student's behaviors have improved since he enrolled at CHS; however, a preponderance of evidence shows that Student continues to have emotional problems that deny him full access to his academic program. It has been three years since the last comprehensive assessment of Student's social and emotional needs. District has appropriately requested that social and emotional assessments be conducted as part of its statutory responsibility to conduct Student's triennial assessment.

LEGAL CONCLUSIONS

Burden of Proof

1. In this consolidated matter, both parties are petitioning parties. Each party carries the burden of proof as to the issues it has raised. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

FAPE

2. Under the IDEA and State law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term FAPE means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(9).). "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available or to provide instruction or services that maximize a student's abilities. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, at p. 198 [73 L.Ed.2d 690] (*Rowley*).) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

4. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Larry P. Injunction

5. In *Larry P. v. Riles* the Ninth Circuit Court of Appeals enjoined California schools from using standardized intelligence tests for the purpose of identifying African-American students for special education and services. (*Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963.) The rationale behind the prohibition was that there appeared to be a disproportionate number of African-American students found eligible for special education services under the eligibility category of mental retardation based on intelligence testing.

6. The California Department of Education has also issued a legal advisory prohibiting intelligence or I.Q. testing of African-American students. In 1984, the court expanded the original *Larry P.* injunction, where the parties stipulated to a settlement which provided a complete ban on the use of I.Q. testing on African-American students for any purpose. (*Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969.) Thereafter, in *Crawford v. Honig* (9th Cir. 1994) 37 F3d 485, the Court held that the *Larry P.* injunction would not prevent the use of I.Q. testing for purposes other than the identification of African-American students as special education students, particularly where the parent consents to I.Q. testing.

Furthermore, the IDEA and the Education Code prohibit the use of discriminatory testing and evaluation materials. (34 C.F.R. § 300.532(a)(1)(i); Ed. Code, § 56320, subd. (a).)

Assessment

7. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The right to a FAPE arises only after a pupil is assessed and determined to be eligible for special education. (Ed. Code, § 56320.)

8. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

9. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically-sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

10. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).) If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. (Off. of Special Education Programs (OSEP) interpretative letter (September 17, 1993), 20 IDELR 542.)

11. A parent cannot withhold consent as a means of forcing a school district to adopt the parents' own evaluation. "Every court to consider the [Individuals with

Disabilities Act's] reevaluation requirements has concluded that "'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.'" (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178-179.) The Ninth Circuit held in *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 that "if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing."

Student Issue 1 a: Whether District procedurally denied Student a FAPE because it conducted the *Naglieri Nonverbal Ability Test (NNAT)* during the assessment of Student in violation of *Larry P. v. Riles* (*Larry P.* injunction)*?*

12. Student contends that District relied on intelligence testing conducted by Mr. Hensley to develop the January 15, 2011 IEP in violation of the *Larry P.* injunction. Based on Factual Findings 3 through 26 and Legal Conclusions 1 through 6 Student failed to prove by a preponderance of evidence that the use of the NNAT constituted an impermissible I.Q. test and violated the *Larry P.* injunction. Accordingly, District did not deny Student a FAPE

Student Issue 1 b: Whether District procedurally denied Student a FAPE because it conducted social and emotional assessments of Student not authorized by Parent.

13. Student contends that District conducted social and emotional assessments of Student without Parent's consent. Based on Factual Findings 3 through 11 and 32 through 43 and Legal Conclusions 1 through 4 and 7 through 11, Student failed to prove by a preponderance of evidence that District conducted social and emotional assessments of Student. As discussed in Factual Findings 35 through 40 the assessment report contained errors that let Parent to believe that social and emotional assessments had been conducted, but District explained these errors to Parent. Accordingly, District did not deny Student a FAPE.

Student Issue 1 c: Whether District procedurally denied Student a FAPE because it failed to provide sufficient information to Parent when obtaining his consent for Student's assessments, specifically the methods of alternative assessment?

14. Student contends that District failed to provide Parent with sufficient information related to Student's assessment, specifically the methods of alternative assessment. Based on Factual Findings 27 through 31 and Legal Conclusions 7 through 11 Student failed to prove by a preponderance of evidence that District did not provide sufficient information. District complied with the law by identifying the types of assessments it intended to conduct. Parent failed to request information related to specific tests to be conducted as offered in the assessment plan discussed in Factual Findings 31.

District offered to answer questions and Parent called and asked questions of the school psychologist who conducted the assessment. Accordingly, District did not deny Student a FAPE.

Student Issue 1 d: Whether District procedurally denied Student a FAPE because it infringed upon Parent's right to participate in the decision-making process when it limited his participation in the IEP development process?

15. Student contends that District's actions infringed upon Parent's right to participate in the decision-making process by limiting his participation in the IEP development process. Based on Factual Findings 44 through 47 and Legal Conclusions 1 through 4 Student failed to prove by a preponderance of evidence that District significantly infringed on his rights to participate in the decision-making process related to his son. Parent has actively participated in the decision-making process related to Student. No evidence was presented that showed any District activity that significantly interfered with Parents participation. Accordingly, District did not deny Student a FAPE.

District Issue 2: Whether District may conduct a social and emotional assessment of Student without parental consent?

16. District contends that Parent withheld his consent for District to conduct a social and emotional assessment of Student and that the denial of this consent prevented District from assessing Student in all areas related to his suspected disability. Based on Factual Findings 51 through 63 and Legal Conclusions 7 through 11 District has proven by a preponderance of evidence that a social and emotional assessment is necessary for District to assess Student in all areas of suspected disability. According, District will be allowed to conduct social and emotional assessments of Student without Parent's consent.

ORDER

1. Student's requests for relief are denied.

2. District may conduct a social and emotional assessment of Student, without parental consent.

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, District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

Dated: December 13th, 2011

/s/
MICHAEL G. BARTH
Administrative Law Judge
Office of Administrative Hearings