BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT on behalf of STUDENT, v. GARVEY ELEMENTARY SCHOOL DISTRICT.	OAH CASE NO. 2009120683

DECISION

Administrative Law Judge Eileen M. Cohn (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Rosemead, California, on March 16, 17, 18, 19 and 29, 2010.

Janeen Steel and Janelle Ureta, Attorneys at Law, of Learning Rights Law Center, represented Petitioner (Student). Student and Student's father (Father) were present one day of the hearing. On various days, attorneys, staff and volunteers affiliated with Learning Rights Law Center were present.

Benjamin Nieberg, Attorney at Law, of GCR LLP represented Respondent, Garvey Elementary School District (District). Barbara Razo, Program Administrator for District, was present each day of hearing and Ted Saulino, Program Specialist for District, was present on certain days.

Student filed a Request for Due Process Hearing (complaint) on December 9, 2009. Student filed a Motion to Amend the Complaint on January 22, 2010. Student's Motion to Amend the Complaint was granted on January 27, 2010, resetting all applicable timelines as of that date.

At the due process hearing, oral and documentary evidence was received. At the close of hearing, the matter was continued to April 19, 2010, for the submission of

closing briefs. On that day, briefs were filed, the record was closed and the matter was submitted.

ISSUES

1) Whether District's initial assessment of Student and determination of eligibility for special education were invalid because it:

A. failed to develop an assessment plan; and

B. failed to obtain consent from an individual authorized to make educational decisions on behalf of Student.

2) Whether District failed to conduct an appropriate assessment.[1]

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[1] At the hearing, Student enlarged this issue through expert testimony to suggest a claim that the assessment was inappropriate because District failed to assess Student in all areas of suspected disability, particularly a specific learning disability (SLD), suggested by one low subtest score in listening comprehension. Although District's school psychologist capably responded to the testimony of Student's expert on this point at hearing, this decision does not reach this supplementary issue. (See 34 C.F.R. § 300.511(d) (2006); *Whittaker Corp. v. Execuair Corp*. (9th Cir. 1992) 953 F.2d 510, 515.) A possible claim that District failed to assess Student in all areas of suspected disability beyond suspected social-emotional disabilities, was not supported by Student's complaint, prehearing conference statement, her motion to amend where she expressly represented that no new issues were being raised, or Student's closing brief. Further, this decision does not reach Student's broader policy-related claims regarding District's overall practices with regard to Marysvale residents, and its assignment of assessment responsibilities to Logsdon NPS as it was unnecessary to consider these broader issues to make a determination about parental consent and the appropriateness of the

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student resided in Maryvale, a licensed children's institution (LCI), from April 13, 2009, through February 2010. At the time of her admission to Maryvale, Student was a 13-year-old seventh grade regular education pupil and had not been made eligible for special education. District's responsibility for providing a public education, including a free and appropriate public education (FAPE), for all pupils residing at Maryvale, including Student, was not disputed.

2. Student had been a dependent child under the jurisdiction of the Superior Court of Los Angeles County (Juvenile Court) from the time she was removed from the home of her biological mother when she was approximately two-and-a-half years old. Student's childhood was marked by abuse and neglect, first by her biological mother, and then by caretaker-relatives with whom she was placed.

3. For five-and-a-half years prior to her admission to Maryvale, Student had been residing with a non-relative legal guardian (Legal Guardian). As part of her court-ordered responsibilities, Legal Guardian was authorized to make educational decisions on Student's behalf. District was aware of Legal Guardian and knew that she was responsible for making educational decisions on Student's behalf. Legal Guardian shared her responsibilities with her sister, who was designated by the court as a co-legal guardian. Student's co-legal guardian was listed on Maryvale's intake form. However,

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assessment. Finally, Student's requested remedy of an IEE was made part of the issue at the PHC. However, the requested remedy is equitable only because Student did not make a request for an IEE at public expense as required by statute. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) For this reason, Student's request for an IEE is made part of her list of requested remedies and not included with the issue.

there is no evidence that Student's co-legal guardian was involved in any communications with Maryvale or District, or that Maryvale or District was on notice that Student's co-legal guardian should be included in decisions about Student's therapeutic or educational needs.

4. Legal Guardian testified. She had been experiencing increasing challenges with Student since the 2007-2008 school year. It was her view that Student did well when she first enrolled in a new school, and would have challenges later on after she became familiar with the teachers and other pupils. Student never got into physical altercations with other pupils, but because she was very bright, was able to manipulate others into disputes. Student's behaviors became more pronounced after summer 2008 when Student's body matured due to hormonal changes related to puberty. It was her view that Student became less interested in school after that time. Legal Guardian never spoke to Student's assessor. There is no evidence whether her views of the significance of Student's puberty on her emotional status were communicated to the assessor and made part of the assessment.

5. Student was a very bright and capable pupil. At the beginning of the 2008-2009 school year, Student attended a public middle school in another school district. She was enrolled in advanced classes for her core academic subjects of English and history. English and history were taught by the same teacher. She was also enrolled in pre-algebra, integrated science, physical education, home arts and music appreciation. Student's public school provided a progress report followed by a quarterly, and then a final semester grade report during each semester. Only two grades were reported in Student's first progress report; a D in pre-algebra, and an F in advanced world history. After her first progress report, Student received a quarterly report which included grades for all her classes. Her grades in pre-algebra and advanced world history had improved. She received a B in pre-algebra and a C in advanced world history. She received an A

minus in integrated science, and B grades in advanced English, pre-algebra, and introduction to music.

6. From January 12, 2009, through January 29, 2009, after Student's first progress report and through the end of the first semester, Student was absent from school because she was hospitalized for psychiatric observation due to suicidal ideations. Student received final passing first semester grades for all her classes, but her final grades were generally lower than her first quarter report. Her grade in advanced English dropped to a B minus from a B, her world history grade dropped from a C minus to a D and her grade for integrated science dropped to a B from an A minus.

7. Student returned to seventh grade at her public middle school after her hospitalization and began her second semester. Student's grades dropped during the first quarter grading period of the second semester. Student received Fs in advanced English, pre-algebra and home arts. She received a D plus in integrated science and a D minus in advanced world history. Her teachers' comments in her student grade report for this marking period indicated that she missed assignments and had excessive absences. Her pre-algebra teacher noted that her test scores were low.

8. During her time in seventh grade public school, Student also had a record of behavioral incidents. On one occasion, Student was suspended for writing on a locker door "your locker is now 1409." On another occasion, she called another pupil names. After her hospitalization in January 2009, Student sought intervention from the school counselor on two occasions to mediate conflicts with her peers. In one incident, she was not invited to a party, and on another occasion she was having difficulty with a male pupil after he rejected her advances.

9. Student's seventh grade public school guidance counselor, Carla Calderon (Ms. Calderon), testified. Ms. Calderon knew Student very well. She saw Student more frequently than other pupils as Student consistently came in to see her each morning to

say "hello" and to converse. Ms. Calderon thought Student was friendly and had a "sweet" nature. She perceived that she came to her each day because she needed some one-on-one interaction and wanted to be known.

10. Ms. Calderon has been a guidance counselor in Student's middle school for several years and possessed all the necessary qualifications to work as a guidance counselor, including a bachelor of arts in psychology and a masters degree in school psychology with credentials in three areas: school psychology, child welfare, and attendance. In her capacity as a guidance counselor, she addressed academic, social and behavioral issues that arose in the classroom. Teachers, parents and pupils would bring to her attention, academic, social and behavioral issues related to her assigned pupils and generally relied upon her to assist them with keeping her assigned pupils on track academically and behaviorally. Ms. Calderon testified on behalf of Student. However, she responded to questions plainly and simply and without any antagonism to either party. Given her experience as a middle school guidance counselor, her familiarity with Student in her professional capacity, and her demeanor at the hearing, her testimony was persuasive.

11. Ms. Calderon did not view Student's academic or behavioral record as atypical. She considered her first semester grades to be good and fairly stable over the course of the semester. Only one teacher, Student's teacher for advanced English and history, contacted Ms. Calderon, with concerns about Student's academic performance. Student's challenges as reflected in the teachers' comments on Student's grade report were not atypical for a seventh grade pupil. Ms. Calderon indicated that, due to Student's medical issues, she would have been given the opportunity to make up her work and her final grades would have been higher than her low quarter grades.

12. Student's last day at her public middle school was March 17, 2009. On that day, Student was removed from Legal Guardian's home and placed at an all-female

residential facility in Long Beach (Long Beach facility) by the Department of Children and Family Services (DCFS). After she was placed at the Long Beach facility, she did not return to her public school. During her stay at the Long Beach facility, she only attended school one day.

STUDENT'S ENROLLMENT IN DISTRICT

13. On April 13, 2009, Student was admitted to Maryvale, a licensed children's institution, by her clinical social worker (CSW) from DCFS.

14. Maryvale is classified as a Level 12 residential facility for minors aged six through 17. Most minors admitted to a Level 12 residential facility, such as Maryvale, have experienced a long history of childhood mistreatment, are in a very fragile emotional state, and require a comprehensive and intensive mental health treatment program. Maryvale provides an intensive therapeutic environment for minors. It is staffed seven days a week, 24 hours a day, by professionals from various disciplines that are trained to focus on the mental health needs of its residents.

15. After Student was admitted to Maryvale, Legal Guardian communicated with Student's assigned therapist, and provided background information about Student. Legal Guardian did not communicate to anyone else at Maryvale about Student's background.

16. Maryvale is not a school and does not retain licensed or credentialed educators to work with its residents. Maryvale is required by its contract with DCFS to enroll new residents in the appropriate school district within three days of admission. As required, within two days after she was admitted to Maryville, Student was enrolled as a pupil with the District. A District school with a seventh grade was located two blocks from Maryvale. Student's CSW suggested to Maryvale that Student be initially placed on independent home study. At the request of a Maryvale representative, Student executed an independent study contract with the District. It is Maryvale's practice to enroll its new

residents in independent study in order to give them time to adjust to their new living arrangement, and to provide Maryvale time to conduct clinical evaluations, observe its new residents' behaviors and develop a treatment plan.

17. District's independent home study contract began on April 14, 2009, and was scheduled to expire on May 18, 2009. The independent home study contract required that 24 school days be devoted to independent study within the specified time period. As part of the independent home study contract, Student was required to work on reading, writing, math, science and social studies in a home study classroom at Maryvale between 8 a.m. and 2 p.m. utilizing a variety of resources including video, audio, books, and computers. Progress would be reported weekly or bi-weekly to the District by a Maryvale administrator. Maryvale personnel monitored the home study classroom. It was unclear what criteria was used to select the material, but Student informed the home study monitor that she had already learned the material and it was much too easy for her.

THE ASSESSMENT PLAN

18. On April 20, 2009, Logsdon School, a non-public school (Logsdon NPS), located adjacent to Maryvale, prepared an assessment plan for Legal Guardian's consent. Logsdon NPS utilized the form assessment plan used by the District. The assessment plan was limited to an assessment of Student's current levels of academic performance in the areas of reading, written language, and mathematics (Logsdon's academic assessment plan). Logsdon is a special education-only campus. It provides special education placement for many school districts, including District, for pupils that require small classes, a high staff-to-student ratio, and behavioral services.

19. Logsdon NPS's staff testified that Logsdon's academic assessment plan was mailed to Legal Guardian but that Legal Guardian never signed and returned the academic assessment plan. Logson NPS's staff further testified that she contacted Legal

Guardian by telephone at which time Legal Guardian verbally consented to Logsdon's academic assessment plan. It is the practice of staff at Logsdon NPS to memorialize their communications with parents on a document entitled "Parent Contact Log." The Parent Contact Log did not indicate that the academic assessment plan was discussed with Legal Guardian. Legal Guardian didn't recall receiving an academic assessment plan or speaking with anyone about an academic assessment plan. Without written documentation verifying Legal Guardian's consent to Logsdon's academic assessment plan, the only conclusion that can be reached is that Logsdon NPS did not obtain the Legal Guardian's consent to proceed with Student's academic assessment.

20. Other than Logsdon's academic assessment plan, there was no evidence that an assessment plan was developed for other standardized tests, measurements or observations that would be part of an initial psychoeducational assessment of Student. According to testimony of District's administrator responsible for Student's IEP, Ted Saulino (Mr. Saulino), District was not required to obtain the written consent of Legal Guardian before beginning an assessment, but could obtain written consent at a later time. Here, only one assessment plan for academic achievement was prepared by Logsdon NPS, and Legal Guardian was never provided with any assessment plan.

21. Logsdon NPS had a contract with District to provide special education and related services for District pupils. It also provided assessments on behalf of District for pupils enrolled in the NPS. It was not contractually obligated to conduct assessments on behalf of District for pupils prior to their enrollment at Logsdon NPS. However, pursuant to informal guidelines established in collaboration with District, Logsdon and Maryvale, Logsdon conducted academic testing during the intial time period after admission of a new resident at Maryvale, whenever the new resident was being "home schooled" at Maryvale.

MARYVALE'S CLINICAL EVALUATION OF STUDENT

22. On April 30, 2009, and May 5, 2009, Maryvale conducted a psychological evaluation of Student. Maryvale's psychological evaluation of Student was one piece of Maryvale's comprehensive clinical evaluation.

23. Vincent Castro, Ph.D. (Dr. Castro), a licensed clinical psychologist and Vice President of Programs at Maryvale, testified. He did not assess Student. He testified about Maryvale's policies and practices regarding its admissions and evaluation process, its obligations to DCFS and school districts, and its privacy obligations to its residents. Dr. Castro refused to testify specifically about Student because it was Maryvale's practice to obtain authorization from its residents' Juvenile Court-appointed attorney before it released information about its residents. Despite his refusal to comment specifically about Student without the authorization of her Juvenile Court-appointed attorney, he was in a position at Maryvale to understand its practices and procedures, and demonstrated a depth of understanding about Maryvale's practices. His demonstrated lack of bias at the hearing also added to the reliability and credibility of his testimony.

24. Maryvale's clinical evaluations were administered for the purpose of developing a comprehensive mental health treatment plan to be administered during the residents' tenure at Maryvale. Maryvale's comprehensive clinical evaluations generally included reports from the residents' CSW, evaluations prepared by the new residents' psychiatrists, mental health professionals working with the new residents, including the new residents' therapists and residential counselor, and a psychological evaluation that generally included psychological and academic testing. In addition, whenever the information was available, the clinical evaluation included consultation with its residents' prior schools. After the evaluations were prepared, meetings of all the evaluators were held to discuss and prepare comprehensive treatment plans. The clinical evaluations and meetings were not related to the IEP process and Maryvale did not

consult with District or Logsdon NPS when it developed or administered its evaluations. Maryvale did not prepare an assessment plan.

25. Maryvale cooperated with District by providing psychological testing and evaluation information to assist District in determining the appropriate educational placement for its residents. The testing and evaluation information it shared with District about Student was contained in a report entitled "Confidential Psychoeducational Evaluation."

26. Maryvale contracted with a licensed clinical psychologist, Rosa Maria Zapata, Psy. D. (Dr. Zapata), to prepare a psychological evaluation of Student. Dr. Zapata possessed all the necessary qualifications to conduct psychological testing and prepare a clinical evaluation of Student. In addition to psychological testing, Dr. Zapata provided direct clinical services for Maryvale's youngest residents, and in-service training for Maryvale's residential and clinical staff.

27. Dr. Zapata had never been a school psychologist. She never attended an IEP team meeting. She was not familiar with an assessment plan and had never used one.

28. Dr. Zapata's testimony was consistent with Dr. Castro's testimony. Like Dr. Castro, she would not testify at the hearing specifically about Student because Student's Juvenile Court-appointed counsel would not authorize her testimony. Also like Dr. Castro, Dr. Zapata spoke of her general practices regarding assessments. She conceded that Student's assessment did not depart from her general practices. Consistent with Dr. Castro's testimony, Dr. Zapata confirmed that she created a report containing confidential medical and psychological treatment information that were not made part of her clinical evaluation report which was entitled "Confidential Psychoeducational Evaluation."

29. Dr. Zapata prepared a "Confidential Psycheducational Evaluation" of Student. She maintained that the report was labeled that way at the request of Maryvale. The report contained a sub-heading entitled "Special Education Determination," and under the section entitled "Recommendations" a special sub-section for "Educational Recommendations" was included. Despite the label, the internal sub-headings, and the recommendations, Dr. Zapata insisted that her evaluations were not designed as special education evaluations. Dr. Zapata insisted that her evaluations were by necessity preliminary clinical evaluations due to the somewhat dire circumstances of the residents at the time of their admission to Maryvale. According to Dr. Zapata, due to the unsteady emotional state of Maryvale's residents at the time of her evaluations, and the absence of complete records about residents when they arrived, her evaluations assisted in developing the initial treatment plan, but were not intended as an accurate profile of residents after they settled into their new environment and became more emotionally stable.

30. Although not designed as special education evaluations, Dr. Zapata conceded that she was aware that Maryvale could exercise its discretion to share her evaluations with District's IEP team. Dr. Zapata did not expect IEP teams to rely exclusively upon her evaluations to make determinations as to whether Maryvale's residents were eligible for special education, and the basis of their eligibility. She expected the IEP teams to conduct all relevant assessments, and assumed that the determination of eligibility would based on input from a multi-disciplinary team of professionals. She assumed that IEP teams would conduct additional evaluations, where necessary, and have other sources of information. Nevertheless, in direct conflict with her testimony at the hearing, in the section entitled "Special Education Determination," Dr. Zapata opined that Student "may benefit" from special education placement "at this time." She further indicated from the results of her evaluation that Student "may be"

emotionally disturbed based upon provisions of the applicable special education statute which supported eligibility due to "an inability to maintain satisfactory interpersonal relationships," "inappropriate types of behavior and feelings under normal circumstances," or a "general pervasive mood of unhappiness or depression."

31. As described in Dr. Zapata's written clinical evaluation of Student, she relied upon her clinical interview with Student, a review of unspecified records, and the background intake questionnaire from Maryvale. In a section entitled "educational information," Dr. Zapata referred to her clinical interview with Student. Student testified at the hearing. Student's testimony about her academic and behavioral challenges at school was consistent with what Dr. Zapata attributed to her interview with Student. In her interview with Student, Dr. Zapata asked about her family, her school history and performance. Student told Dr. Zapata that she had always had good grades but that they had dropped in the last two years from Bs to Ds and Fs. Student also reported difficulty controlling mood swings and aggression toward others. Student told Dr. Zapata that sometimes she talked too much in class, blurted things out without raising her hand and being called on by the teacher, got into arguments, and had problems sitting still. Dr. Zapata did not ask her if she had any friends. At the hearing, Student testified that prior to her hospitalization a good friend had died. In addition to her interview with Student, Dr. Zapata referred to unspecified records which in her view indicated that Student had satisfactory academic achievement, but exhibited disruptive behavior in the classroom. Other than Maryvale's intake questionnaire, it is unknown what records Dr. Zapata had in her possession at the time of her evaluation.

34. As part of Student's evaluation, Dr. Zapata also administered a limited number of standardized tests. She administered the Bender Gestalt-II, a standardized measure of visual-motor integration. The Bender-Gestalt II required Student to reproduce 12 geometric figures accurately first by copying, and then from memory. She

performed within the average range on the Bender-Gestalt II. She also administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II). The WIAT-II measured academic achievement. Student performed in the average range on overall math skills and written language skills. She presented a diverse set of oral language skills. Her overall oral language score was high average. Within the oral language score there was a discrepancy between her very superior oral expression subtest score where she exceeded 99 percent of the pupils her age, and her low average listening comprehension score where she was within the 25th percentile of pupils her age.

35. Dr. Zapata also used projective measures including: Draw-A-Person Projective Test; House-Tree-Person; Family Kinetic Drawing; and Sentence Completion Test. She used the projective measures to understand Student's social-emotional functioning. She also noted Student's "poor planning, low frustration tolerance, and anxiety" during the Bender-Gestalt II test.

37. Dr. Zapata's failure to take responsibility for the labeling of her report and the failure to disclose within the report its limitations as a special education assessment, undermined her credibility. Dr. Zapata was aware of the distinction between a clinical evaluation and an educational evaluation. She was also aware that her primary objective was to participate with other mental health professionals in the development of a comprehensive treatment plan for Student. As a result, where her testimony conflicted with the testimony of Student's expert, her testimony was given less weight.

LOGSDON NPS'S ACADEMIC ASSESSMENT

38. On May 8, 2009, Logsdon NPS administered to Student the Woodcock-Johnson, Third Edition (WJ-III), a standardized test of academic achievement. Student was administered tests measuring her academic achievement in written expression, broad written language, broad reading, math calculation skills, and broad math.

39. Student's overall written language achievement score on the WJ-III was much higher than on the WIAT-II. Written expression measured fluency of production and quality of expression. Her standard score in written expression was within the superior to very superior range. Broad written language measured spelling ability, writing fluency and quality of expression. Her standard score in broad written language was within the superior range.

40. Student measured average in other academic areas of the WJ-III. Broad reading measured reading decoding, reading speed, and comprehension of connected discourse. Her standard broad reading score was in the average range. Math calculation skills measured computational skills and basic math facts. Her standard score was in the average range. Broad math measured mathematics reasoning and problem solving, number facility, and automaticity. Her standard score in broad math was in the average range. Overall, when compared with others in her grade level, the Logsdon NPS assessor concluded that Student's academic skills, her ability to apply those skills, and her fluency with academic tasks were all within the high average range. When compared to her peers, Student was superior in written expression, and written language, and average in broad reading, mathematics and math calculation skills.

THE IEP MEETING

41. On April 27, 2009, Logsdon NPS sent Legal Guardian District's form notice of an individualized education plan (IEP) meeting. The IEP team meeting was scheduled for 10 a.m., May 18, 2009, at Maryvale.

42. On May 2, 2009, Legal Guardian consented in writing to the IEP team. She checked the section of the form which provided that she would not be able to appear. In the same section of the form where Legal Guardian indicated that she would not be appearing, a statement was included confirming Legal Guardian's understanding that the results of the meeting would be sent to her, that no initial placement or service

would begin without her written informed consent, and that she should be contacted by telephone to discuss the results. Legal Guardian also checked the section of the form which stated "my son/daughter will participate in the conference."

43. On May 14, 2009, the Logsdon NPS staff member coordinating the IEP team meeting contacted Legal Guardian by telephone regarding the IEP meeting scheduled for May 18, 2009. Legal Guardian informed her that she would like to participate by telephone. The Logsdon NPS staff member memorialized Legal Guardian's request to appear by telephone in Logsdon NPS's Parent Contact Log.

44. On the morning of May 18, 2009, just prior to the commencement of the IEP team meeting, District was told by the Logsdon NPS administrator that Legal Guardian did not want to be involved in the IEP team meeting. He also informed District that it was his understanding that Legal Guardian did not want any further involvement with Student. The Logsdon NPS administrator had not spoken directly with Legal Guardian. At the hearing, Legal Guardian confirmed that she did inform someone that she could not participate in the meeting by telephone because she had a conference at work that day which conflicted with the IEP team meeting. She testified that she was asked if she would mind if someone would sit in her position at the IEP. Legal Guardian knew that her sister, Student's co-legal guardian, was also unavailable, so she approved of someone sitting in her position at the IEP. Legal Guardian testified that she didn't recall whether she was informed about whether she would be contacted after the IEP to confirm a decision about Student's IEP; however, she stated that she understood and was "fine" with having another person make decisions about Student's educational placement. She testified that she knew what occurred at an IEP team meeting because she had been to one before on behalf of Student. She knew that the assessment was part of the IEP. Legal Guardian was the only witness with direct and personal knowledge of her telephone conversation. Accordingly, the testimony of Legal Guardian about her

conversation regarding her unavailability to attend the IEP telephonically was given deference.

45. No evidence was presented of any discussion with Legal Guardian about withdrawing her request for Student to attend the IEP. Prior to the IEP team meeting, Student also notified her therapist that she wanted to attend the IEP team meeting and the therapist informed her that she could go to the IEP team meeting. Student told her therapist that she wanted to tell the IEP team that she needed to go to public school because she needed more challenging, grade-level work than she had been given in independent study, which was already work she had learned. The IEP team did not include Student in the IEP team meeting.

46. Mr. Saulino, District administrator, determined that it was important to go forward with the IEP as scheduled so that Student's assessment could be reviewed and she could be placed. Mr. Saulino testified compassionately about the pupils from Maryvale. He clearly cared about them and believed he was helping them. However, the weight of his testimony was negatively impacted by his allegiance to certain District policies and practices which were in direct conflict with special education procedures.

47. Mr. Saulino appointed Maureen Bateman (Ms. Bateman) as Student's surrogate. Ms. Bateman was at Maryvale attending an IEP team meeting for another District pupil residing at Maryvale, when she was asked to attend Student's IEP as her surrogate. Maureen Bateman was a qualified and experienced surrogate. She was a former District teacher, gifted and talented education (GATE)coordinator, assistant principal, and administrator. At the time she was appointed as Student's surrogate, she had been a surrogate for three years. She received all the necessary training to be a surrogate. She regularly served as a surrogate for Maryvale residents who did not have anyone responsible for making educational decisions on their behalf. She usually

attended two or three IEP team meetings a month. Each IEP team meeting lasted about 45 minutes, and Student's IEP was no different.

48. Both Mr. Saulino and Ms. Bateman described the circumstances of her appointment as Student's surrogate as an "emergency." At the time Ms. Bateman was appointed, she knew that Student had a legal guardian and that her legal guardian held educational rights. Ms. Bateman understood that she was Student's surrogate for the IEP only because Legal Guardian could not attend the meeting. Ms. Bateman was not told anything else about Legal Guardian.

49. Ms. Bateman never spoke with Student. She did not make any attempt to speak with Student prior to the IEP team meeting, or at anytime afterward. Ms. Bateman was not aware that Legal Guardian and Student requested that Student attend the meeting. Ms. Bateman had spoken to other pupils and residents at Maryvale prior to their IEP team meetings, but she did not consider these conversations productive because pupils generally wanted to exact a promise from her that she would help place them in a District general education campus, whether or not the placement was appropriate for them. She conceded if she had met with Student before the meeting, she would have been able to make her interests known to the IEP team, although she maintained that any information about Student's interests was most likely already available to team members.

50. On May 18, 2009, the IEP team met. The IEP team was comprised of: Mr. Saulino, the District administrator, District's school psychologist, Ms. Bateman, Logsdon NPS's principal, a District general education teacher, a special education teacher from Logsdon NPS, a behavior specialist, Student's Maryvale therapist, and an educational therapist that was assigned to work with Maryvale's pupils.

51. District's school psychologist had been with the District for 15 years and had the educational background and the necessary credentials for his position. He

testified candidly about the assessment process and his contribution to the IEP team. District had not directed its school psychologist to develop an assessment plan for Student or to conduct a psychoeducational assessment of Student. District's school psychologist had never conducted a psychoeducational assessment for any pupil that resided at Maryvale. District's school psychologist understood that, as the school psychologist member of Student's IEP team, his role was to explain the results of Dr. Zapata's clinical assessment to the IEP team, and assist the IEP team in reaching a determination of eligibility and placement for Student. District's school psychologist received the assessment about a week before the IEP team meeting, but he did not consult with Dr. Zapata, or conduct his own interviews, observations, or records review prior to the IEP team meeting.

52. District's school psychologist testified that a multi-disciplinary team was assembled at the IEP to make a determination of Student's eligibility. In addition to District's school psychologist, Student's Maryvale therapist was available to discuss her observations and information about Student. The IEP team referred to the assessment and considered the observations of Student's Maryvale therapist. Student's educational records were available at the IEP team in a notebook for review. From the testimony of District's school psychologist, it appeared that the IEP team reviewed the educational records to verify that Student's grades had dropped, and that she had behavior incidents. District's school psychologist was confident that the assessment supplemented by input from other team members, particularly Student's Maryvale therapist, and Student's school records, provided a sound foundation for the District's determination of Student's eligibility for special education as a pupil with an emotional disturbance.

53. The results of Logsdon NPS's academic assessment were presented for the first time at the IEP team meeting. The Logsdon NPS's special education teacher

reviewed the WJ-III results and, based on Student's performance in the WJ-III, the Logsdon NPS's special education teacher presented goals and objectives for the team's approval.

54. Ms. Bateman participated at the IEP team meeting, mainly in the development of Student's academic goals to make sure the goals reflected her more advanced academic ability. Due to Ms. Bateman's last-minute assignment as Student's surrogate, she had not had the opportunity to review the assessment prior to the meeting, as she usually does in her surrogacy role for other pupils, or any other information about Student. Ms. Bateman generally deferred to the other members of the IEP team on eligibility and placement issues, and she did so here. She has never disagreed with District's eligibility or placement recommendations; however, she insisted that she was independent minded and would speak up if she thought Student should be placed somewhere else.

55. The IEP team made Student eligible for special education under the category of emotional disturbance and placed her at Logsdon NPS. In the section requiring justification for Student's placement recommendation, the IEP team referred to her social-emotional issues as the principal justification for its placement decision. In addition to goals and objectives, the IEP team developed a behavior support plan for Student. The IEP team also referred Student to the Department of Mental Health for a mental health assessment.

56. Ms. Bateman signed her consent in the place reserved for Legal Guardian. Even though she consented in writing to the IEP, it was Ms. Bateman's understanding that Legal Guardian would be sent the IEP for her approval and signature. Ms. Bateman understood that she would not continue as Student's surrogate after the meeting. Ms. Bateman did not retain a copy of the IEP or perform any other act as Student's surrogate after the IEP team meeting.

57. District never sent the IEP document to Legal Guardian. Legal Guardian never reviewed the IEP or executed her consent. Legal Guardian testified that at some point she was told by the therapist that the Student was placed at Logsdon NPS. She thought the placement was similar to what she had since she arrived at Marysvale and was fine with it. Her main concern was that Student was being helped.

TERMINATION OF LEGAL GUARDIAN'S EDUCATIONAL RIGHTS

58. At the hearing, Legal Guardian clearly recognized that she remained responsible for Student until the Juvenile Court terminated her guardianship. Legal Guardian held educational rights until June 18, 2009, at which time Student's biological father (Father), was designated by the Juvenile Court as the individual responsible for making educational decisions on Student's behalf.

59. Student attended Logsdon NPS from May 19, 2010, until mid-February 2010. She achieved top academic grades at Logsdon NPS. No evidence was presented that the material she was provided was below grade-level or below her academic ability. Student withdrew from Logsdon NPS at the time she left Maryvale to live with her father in another school district. Father enrolled Student in general education at a public school campus. No evidence was presented that Student received special education or related services at her new school. Student maintained that she was doing well at her new school. No other evidence about Student's current educational program was submitted.

STUDENT'S CRITIQUE OF MARYVALE'S CLINICAL EVALUATION

60. Ann Simun, Psy. D. (Dr. Simun), Student's expert witness, testified that Dr. Zapata's clinical evaluation was deficient as a special education assessment in general, and for a suspected disability of emotional disturbance, in particular. Dr. Simun is a clinical neuropsychologist, licensed by the states of California and North Dakota. She

was also employed and licensed as a school psychologist for over seven years in California school districts. She has administered over 1,000 assessments, of which about ten percent were assessments for emotional disturbance. She has taught psychology courses as an adjunct faculty of Pepperdine Graduate School of Education and Psychology. She has obtained a wealth of professional experience in psychological testing and assessment during her twenty-year career. She currently is affiliated with Neuropsychology Partners Inc., and also provides neurspsychological services for St. Mary Medical Center in Long Beach, California. District's school psychologist disagreed with Dr. Simun's opinion that Dr. Zapata's assessment was deficient as a psychoeducational assessment of a suspected social-emotional disability. However, as to matters material to a determination of the issues in Student's complaint and agreed to by the parties at the prehearing conference, Dr. Simun's testimony was more persuasive in that she examined in great detail the deficiencies in Dr. Zapata's assessment by comparing the measures used by Dr. Zapata to measures more appropriate to a psychoeducational assessment of a suspected social-emotional disability. [2] Moreover, application by District's school psychologist of Student's WIAT-II and WJ-III achievement test scores to estimate Student's cognitive ability, assessments which were not validated for that purpose, raised questions regarding the rigor with which District's school

[2] This decision focuses only on the appropriateness of Dr. Zapata's clinical evaluation as a psychoeducational evaluation for a suspected social-emotional disability of emotional disturbance. Accordingly, this decision does not address the expert testimony of either Dr. Simun or District's school psychologist regarding assessments appropriate to other suspected disabilities such as SLD.

psychologist reviewed Dr. Zapata's measurements.[3] Finally, as established by their respective testimonies, Dr. Simun had more experience in conducting assessments for the suspected disability of emotional disturbance than District's school psychologist.

61. Dr. Simun criticized the validity of Dr. Zapata's clinical evaluation as a psycheducational evaluation of Student for emotional disturbance. Dr. Simun persuasively and in great detail found that Dr. Zapata's assessment lacked formal or standardized measures to determine Student's social and emotional needs. Dr. Simun also convincingly demonstrated that Dr. Zapata suggested that Student may qualify for special education as a pupil with emotional disturbance without fully examining Student's declining grades and behavioral challenges, including her tendency to be "bossy."

62. Dr. Zapata observed Student but did not use scientifically valid observation measurements. Dr. Zapata's observations of Student were limited to her interview with Student and her observation of her behavior during the administration of the Bender–Gestalt II and the projective tests. According to Dr. Simun, scientifically-valid observation measurements of Student's social-emotional behavior were crucial to an assessment for special education eligibility under the category of emotional disturbance, but were not utilized in Dr. Zapata's clinical evaluation. Dr. Simun explained that psychology is the

[3] Student's heritage is African-American, Hispanic and Caucasian. Consistent with the ban against administering standardized cognitive assessments for African American pupils like Student, Student's cognitive ability was not measured. As a practice, District does not administer cognitive tests. District's school psychologist conceded that there are cognitive measures that were not banned by the Department of Education. However, instead of administering cognitive tests, District and its IEP team members generally derived Student's cognitive ability from her achievement test results.

science of behavior, and similar to other sciences, the validity of the findings made in psychological assessments are measured by the degree to which the data collected can be cross-validated with data from a variety of sources. Standardized assessment tools compare Student's behavior to that of her same-aged peers, and are a reliable way to measure whether her behavior is within the normal range of behavior for her age.

63. Dr. Simun provided examples of scientifically-valid observation measurements commonly used in assessments of pupils' social-emotional status. Commonly-used standard measures include the Woodcock Johnson standardized observation system and the Behavior Assessment System for Children, Second Edition (BASC-2) rating scales. These standardized observation measurements should have been completed by Student's teachers from her previous public school placement. Ideally, each academic teacher would have completed the observation assessment or rating scale; at a minimum, the standardized measure would have been completed by the teacher of the academic subject where Student excelled and the teacher of the academic subject where Student struggled. In addition, Legal Guardian should have been provided with a standardized observation measurement.

64. Dr. Zapata's interview with Student was useful, but it was subject to her interpretation, and was not a standardized measurement. Dr. Simun maintained that data obtained from the interview should have supplemented the standardized measurements. In particular, Student should have been provided with a standardized self-reporting rating scale to complete such as the BASC-2 self-report. Student's BASC-2 self-report of her social, emotional and behavioral status, would have provided a standardized measurement of how Student viewed herself socially and emotionally, in a variety of contexts, compared with her same-aged peers. From a self-reporting rating scale, Dr. Zapata could have identified if, and where, Student fell outside the norm. In addition to Student's self-report, Dr. Zapata could have utilized the "Roberts" test, a

well-accepted standardized measurement, which includes a detailed scoring guide to assess Student's resolutions to hypothetical social situations.

65. Dr. Zapata's projective tests which required the test-taker to draw or fill-in pictures, or complete sentences, were not standardized or scientifically-valid social-emotional measurements. None of these measures constitute scientifically-valid measures to determine eligibility for special education under the category of emotional disturbance. None of these tests utilized standardized test administration procedures, or standardized scoring methods to compare the Student to her same-aged peers. As a result, these tests were not tests, but techniques, which did not provide scientifically-valid measures of determining whether Student's emotional status was within normal or abnormal ranges, as compared with her same-aged peers.

66. According to Dr. Simun, the built-in deficiencies to these techniques were compounded by Dr. Zapata's failure to disclose what directions she gave to Student. The Draw-A-Person Projective Test has been used by psychologists to elicit the social-emotional status of very young children, or as an "ice breaker" to make children comfortable with the assessor. It has had some scientific acceptance in measuring cognitive ability in very young children, but had not been validated as a measurement of the social-emotional status of pupils like Student. The House-Tree-Person and the the Family Kinetic Drawing techniques were equally deficient. The Sentence Completion Test required Student to complete a sentence stem such as "I am really afraid of (blank)" with the rationale that the completed sentence provides clues of Student's emotional and personality status. Although some questions were published, psychologists often created their own questions, and Dr. Zapata did not disclose which sentences she used. Like the other techniques, there was no scoring method to the Sentence Completion Test and and the technique was not standardized.

67. Dr. Zapata's failure to fully examine Student's ability to function with typical peers was also a fatal defect of her clinical evaluation. Maryvale's residents were not as a group typical. Dr. Simun testified that Dr. Zapata's reference to Student's academic record and classroom behaviors was inadequate to understand Student's social-emotional functioning with typical peers in a school setting, and to support a finding of special education eligibility under the category of emotional disturbance. Dr. Zapata did reference Student's declining academic grades and behavioral issues, but did not examine the cause of any decline in grades, or the relative significance of behaviors which manifest in the school setting. Dr. Zapata did not interview her teachers or her counselor to determine her functioning in the classroom, and the significance, if any, of incidents recorded in her school records. Dr. Zapata did not find out whether Student had at least one friend which, according to Dr. Simun, would have provided information about her ability to function with typical peers.

68. Dr. Simun reviewed Student's previous grade reports and from the reports alone, without consultation with Student's previous teachers or counselor, she could not reach any conclusions about Student's social or emotional status. Dr. Simun reviewed the attendance record for 2008-2009. Student's attendance was excellent until her hospitalization in January 2009. Student returned to public school after the hospitalization and left the school in March 2009. Her absences would have affected her grades. Dr. Simun reviewed the discipline record from Student's previous public school beginning in November 2008. In her opinion, the discipline incidents were very minor and the comments reflected typical behavior of a middle school pupil, with the exception of the hospitalization. On one occasion, Student was suspended for writing on a locker door "your locker is now 1409." On another occasion, she called another pupil names. After her hospitalization in January 2009, Student's discipline record indicates that she sought intervention from the counselor on two occasions where she was having

conflicts with her peers. Dr. Simun thought that was a good sign that Student was taking initiative to resolve her disputes through conflict resolution with the school counselor. On one occasion, she was not invited to a party, and on another occasion she was having difficulty with a male pupil when they exchanged threats after he rejected her advances. On both occasions, she requested the intervention of the school counselor to conduct conflict mediations. Interviews with her teachers and counselors would have been important to fully understand the discipline record. It would have been important to know whether she had at least one friend.

69. Dr. Simun maintained that, as part of an initial psychoeducational assessment, an assessment of Student's academic ability should not be restricted to the standardized achievement tests like the WIAT-II. To understand Student's ability, it would be important to review her performance on school-wide performance tests, and conduct curriculum-based assessments by also interviewing Student's teachers or having them complete a brief questionnaire.

70. Dr. Simun also noted that absent from Dr. Zapata's clinical evaluation was a complete medical and diagnostic history of Student. Dr. Zapata failed to fully and specifically describe the medical information she relied upon. Student was prescribed medication and Dr. Zapata did not detail the purpose of the medication. Student was hospitalized for suicidal ideations, but no explanation of the basis for the ideations was provided. According to Dr. Simun, it was "crucial" to know any medical or psychological diagnosis to understand whether Student's behaviors were the result of a long-term condition that would adversely affect her access to education.

71. Dr. Simun also commented on Logsdon NPS's administration of the WJ-III achievement test. She did not see a rationale for Lodgdon NPS's administration of the WJ-III achievement test as part of an initial assessment because Dr. Zapata had

administered the WIAT-II achievement test. It was not standard practice to conduct two achievement tests.

LEGAL CONCLUSIONS

1. As the petitioning party in a special education due process hearing, Student has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUE ONE: THE VALIDITY OF DISTRICT'S INITIAL ASSESSMENT AND DETERMINATION OF ELIGIBILITY FOR SPECIAL EDUCATION

2. Student requests a determination that District's initial assessment of Student and determination of eligibility for special education was invalid because it was conducted without an assessment plan and without the consent of an individual that was authorized to make educational decisions on behalf of Student. Student contends that District failed to obtain informed consent from Legal Guardian to make her eligible for special education by failing to make reasonable efforts to secure her attendance at the IEP team meeting and by improperly appointing a surrogate to take her place at the IEP team meeting. Further, Student contends that the surrogate appointed didn't fulfill her duty as a surrogate when she failed to meet the Student as required. Student contends that District's procedural violations significantly infringed upon Legal Guardian's right to participate in the IEP process, and in doing so, denied Student a FAPE. As a consequence of District's procedural violations, Student requests a finding that Student's initial assessment and determination of eligibility for special education were invalid.

3. District maintains that it obtained the required consent to conduct the initial assessment from Legal Guardian, the individual authorized to make educational decisions for Student. In its closing brief, District concedes that Legal Guardian never

signed an assessment plan. However, District maintains that Legal Guardian verbally approved of the assessment plan prepared by Logsdon NPS in the area of academic achievement. In addition, District posits that Legal Guardian impliedly consented to Dr. Zapata's assessment when she agreed to having the surrogate replace her at the IEP team meeting because she understood from her past experience as a participant in an IEP team meeting for Student that an assessment would be reviewed. Furthermore, District maintains that it wasn't required to obtain the consent of Legal Guardian for the assessment conducted by Maryvale because parental consent was not required to review existing data and Dr. Zapata's assessment constituted existing data reviewed by the IEP team in making its determination of eligibility.

4. District further maintains that it obtained the required consent of the individual authorized to make educational decisions for Student, to consent to the IEP team's determination that Student was eligible for special education, and to consent to the May 18, 2009 IEP. District maintains that Legal Guardian consented to the appointment of a surrogate at the time of the IEP team meeting to make educational decisions on behalf of Student in her place. Further, District maintains that at the time of the IEP team meeting, it was District's duty to appoint a surrogate because the appointment was necessary. Overall, District argues that any procedural violations that did occur did not result in the denial of a FAPE because Legal Guardian indicated that she understood what would happen at the IEP and did not object. Finally, District suggests that Student's allegations of procedural violations arising from the absence of parental participation is without merit, because the allegations were raised by Father, not Legal Guardian, the educational rights holder during the relevant time period. District fails to provide any supporting authority for the proposition that only Legal Guardian may raise this argument.

5. For the reasons set forth below, Student has met her burden of proof that District's initial assessment, determination of eligibility for special education, and the May 18, 2009 IEP were developed without the consent of the individual authorized to make educational decisions for Student and without parental participation. As a consequence, Student's initial assessment, determination of eligibility, and IEP were invalid.

6. A FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of emotional disturbance. (20 U.S.C. §1401(3)(A)(i) and (ii); Cal. Code Regs., tit. 5, § 3030.)

7. Before an initial placement of a pupil in special education can be made, the school district must conduct an individual assessment of the pupil's educational needs. (Ed. Code, § 56320.)

8. School districts proposing to conduct an initial assessment to determine if the pupil is eligible for special education shall make a reasonable effort to obtain informed consent from the pupil's parent before conducting the assessment. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(a)(ii) and (c) (2006); Ed. Code, § 56321, subd. (c)(1).) School districts are required to obtain parental consent from those individuals that have been designated by the courts as legal guardians authorized to act as the child's parent, or authorized to make educational decisions for the child in accordance with Sections 361 and 726 of the Welfare and Institutions Code. (Ed. Code, § 56028, subd. (a).)

9. Not all aspects of the initial assessment require parental consent. Consent is not required before reviewing existing data, or before administering a test administered to all pupils. (Ed. Code, § 56321, subd. (e).) For all other aspects of the

initial assessment, the school district is required to provide the parent or guardian of the pupil, in writing, a proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The information required to be set forth in the assessment plan is specified in federal and state law and must be included in the notice to parents. Among other things, the assessment plan must explain the types of assessments to be conducted and state that an IEP will not result from the assessment without parental consent. (Ed. Code, § 56321, subd. (b).) Parents or guardians have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c) (4).) The assessment may begin immediately upon receipt of parental consent. (*Ibid.*)

10. School districts are discharged from their obligation to provide a FAPE to pupils where they cannot obtain parental consent for the initial assessments. School districts are not compelled to conduct an initial assessment without parental consent. School districts are not responsible for providing special education services where parents fail to respond to a request to provide consent, or do not provide consent for the initial assessments. (Ed. Code, § 56321, subd. (c) (2)(3).) Alternatively, school districts may file for due process to obtain an order allowing them to conduct an initial assessment without the required parental consent. (*Ibid.*)

11. Parental consent is also required before pupils can be initially placed in special education. (Ed. Code, § 56321, subd. (a).) Parental consent for the initial assessment shall not be construed as consent for initial placement or services. (Ed. Code, § 56321, subd. (d).) The school district is required to obtain parental consent for the initial provision of special education and related services. (34 C.F.R. § 300.300(b)(2) (2006).)

12. Parental consent must be informed consent to be valid. Consent is informed when the parent understands the activity for which consent is sought, the activity is described, any records that will be released and the individuals to whom the

records are to be released are identified, and parent agrees in writing to the activity for which consent is sought. (34 C.F.R. § 300.9 (2006).)

13. Parents are required members of the IEP team. (34 C.F.R. § 300.321(a)(1) (2006).) As part of the IEP team, parents participate in the determination of eligibility, placement and services. (34 C.F.R. §§ 300.501(c) and 300.306 (a)(1) (2006).) Parents are entitled to invite other individuals to the IEP meeting who have knowledge and expertise regarding the pupil. (34 C.F.R. § 300.321 (a)(6) (2006).)

14. School districts convening an IEP team meeting must take steps to ensure parental participation from at least one of the parents or guardians of the pupil. (Ed. Code, § 56341.5, subd. (a).) School districts must schedule the meeting at a mutually-agreed-upon time and place, and if the parent cannot attend, must provide alternative methods of parental participation, including individual or conference telephone calls. (Ed. Code, § 56341.5, subd. (g).) School districts may conduct the IEP team meeting without a parent if the school district is unable to convince the parent to attend, but must maintain a record of all its attempts to arrange a mutually-agreed-upon time and place, such as detailed records of telephone calls, copies of correspondence and responses, if any, and the provision of a copy of the IEP. (Ed. Code, § 56341.5, subd. (g).)

15. A pupil's interests and concerns must be considered by the IEP team. Whenever appropriate, the pupil should be part of the IEP team meeting. (34 C.F.R. § 300.321(a)(7) (2006).) It is also within the parent's discretion to invite a child to an IEP team meeting as an additional participant with knowledge of the child. (See 34 C.F.R. § 300.321(a)(6) (2006).) As a participant invited by the parent, the IEP team should not disinvite the pupil without parental consent. (See 34 C.F.R. § 300.321(e)(2) (2006).) At a minimum, if the pupil does not attend the IEP team meeting, the school district must take other steps to ensure that the pupil's preferences and interests are considered. (34 C.F.R. § 300.321(b)(2) (2006).)

16. The definition of "parent" under the governing federal and state statutes and regulations is broad. Parents may include:

(1) Pupils' biological or adoptive parents;

(2) Foster parents if the authority of the biological or adoptive parents to make educational decisions on behalf of the pupil has been limited by court order;

(3) Guardians generally authorized to act as pupils' parents, or authorized to make educational decisions for the pupil, inclusive of responsible adults appointed by the court in accordance with Sections 361 and 726 of the Welfare and Institutions Code;

(4) Relatives, or other individuals who are legally responsible for the pupil and with whom the pupil lives, acting in the place of the biological or adoptive parents; or

(5) Surrogate parents appointed pursuant to Section 7579.5 or 7579.6 of the Government Code, and in accordance with Section 300.519 of Title 34 of the Code of Federal Regulations and Section 1439(a)(5) of Title 20 of the United States.

(Ed. Code, §§ 56028, subd. (a)(1)-(5) & 56050, subds. (a) and (b); see also 20 U.S.C. § 1401(23); 34 C.F.R. § 300.30 (2006).)

17. A school district's appointment of a surrogate is limited by statute. Where a judicial decree or order has specified the parent responsible for making educational decisions on behalf of the pupil, pursuant to Education Code section 56028, subdivision (a)(1) to (4), the school district cannot appoint a surrogate parent. (Ed Code § 56028, subd. (b)(2).) Only the court can modify its own judicial decree or order specifying the parent. School districts must consider the legal guardian, as the pupil's parent, whenever a judicial decree or order authorizes a guardian to make educational decisions on behalf of the pupil. (*Ibid.*)

18. When a school district is required to appoint a surrogate, it must make reasonable efforts to appoint a surrogate parent not more than 30 days after there is a determination that a pupil needs a surrogate, including where the juvenile court is unable to appoint a "responsible adult" to make educational decisions for the pupil and the court refers the pupil to the school district for appointment of a surrogate parent. (Welf. & Inst. Code, §§ 361, subd. (a)(5) & 726, subd. (b)(5); Gov. Code, § 7579.5, subd. (a)(1).) The school district shall also make reasonable efforts to ensure the appointment of a surrogate parent not more than 30 days after it determines that a surrogate is needed, where the parent for the pupil cannot be identified or, after reasonable efforts to find the parent, cannot be located. (Gov. Code, § 7579.5, subd. (a)(1)(a).)

19. When a school district is authorized to appoint a surrogate, it can select a surrogate parent in any way permitted by state law. (34 C.F.R. § 300.519 (2006).) However, California law provides that the school district as "first preference" shall select a relative caretaker, foster parent, or court-appointed special advocate, if any of these individuals exits and is willing and able to serve. (Gov. Code, § 7579.5, subd. (b).) The school district may only select the surrogate parent of its choice, if none of these individuals exists or is able to act as a surrogate parent. (*Ibid.*) The school district's obligations with regard to the appointment of a surrogate are not intended to prevent a parent or guardian from designating another adult individual to represent the interests of the pupil for education and related services. (Gov. Code, § 7579.5, subd. (n).)

20. A properly appointed surrogate parent has the same rights as a parent and may represent the pupil in all matters relating to special education and related services, including the identification, assessment, instructional planning and development, educational placement, reviewing and revising the IEP, and the provision of written consent to the IEP. (Gov. Code, § 7579.5, subd. (c).) The surrogate parent is required to meet with the pupil at least one time, and may also meet with the pupil on additional

occasions. (Gov. Code, § 7579.5, subd. (d).) Surrogate parents may resign from their appointment only after giving notice to the school district. (Gov. Code, § 7579.5, subd. (g).)

21. *In Hendrick Hudson School District Board of Education. v. Rowley* (1982) 458 U.S. 176 [192 S.Ct. 3034, 73 L.Ed.2d 690], the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at pp. 205-06.) *Rowley* identified two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the school district has complied with the procedures set forth in the IDEA. (*Id.* at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures provided a pupil access to specialized instruction and related services designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of a FAPE only if it:

(A) Impeded the child's right to a free appropriate public education;

(B) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(C) Caused a deprivation of educational benefits.

22. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to the public agency involved in any decisions regarding a pupil. (Ed. Code, § 56501, subd. (a).) A party has the right to

present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child].) The IDEA contemplates that parents will be the parties bringing the administrative complaints, and also grants parents independent, enforceable rights. (Winkelman v Parma City School District (2007) 550 U.S. 516, 527 (127 S.Ct. 1994].)

23. Here, the weight of the evidence established that District failed to provide Legal Guardian an assessment plan that included the so-called initial psychoeducational evaluation conducted by Maryvale. The evidence established that District intended to substitute the clinical evaluation prepared by Maryvale for what should have been done, i.e. District's own psychoeducational evaluation pursuant to a properly consented-to assessment plan. There is no evidentiary or legal support for District's position that it was not required to develop an assessment plan because Maryvale's evaluation constituted data for review by the IEP team for which parental consent was not required. The clinical evaluation was not limited to a review of school records, or teacher reports. (Legal Conclusions 7-11; Factual Findings 20, 22-37, 52.)

24. The evidence also established that Legal Guardian did not consent to Logsdon NPS's academic assessment. As indicated in Logsdon NPS's Parent Contact Log, and confirmed by Legal Guardian, Legal Guardian never provided written or verbal consent to proceed with Logsdon's academic assessment. (Factual Findings 18-21.)

25. Student met her burden of proof that the failure to prepare and obtain a signed assessment plan constituted the denial of a FAPE because it infringed on Legal Guardian's right to participate in the process. District maintains that, at a minimum, Legal Guardian impliedly consented to the assessment during the telephone call where

she authorized the appointment of the surrogate. (Factual Finding 44.) However, the understanding of Legal Guardian that an assessment would be discussed at an IEP was not equivalent to the informed consent required before an initial assessment can be performed. The requirement that informed parental consent be provided is absolute, and it cannot be guaranteed without adherence to the procedural requirement of a valid assessment plan. (Legal Conclusions 6, 12, 21.)

26. In sum, Student met her burden of proof that Student's assessments and District's determination of her eligibility, were invalid because the assessments were administered without informed parental consent to the assessment plan. It follows that a parent who did not know what assessments had been done, could not fully participate as an IEP team member. (Legal Conclusions 1, 6-13, 21; Factual Findings 17-37, 52.)

27. Student also met her burden of proof that District's determination of eligibility was invalid on the separate and independent ground that District failed to secure informed consent of Legal Guardian to the IEP, including its determination that Student was eligible for special education as a pupil with an emotional disturbance.

28. First, District was not authorized by statute to replace the Juvenile Court's appointed educational decision-maker with one of its own choosing. Legal Guardian was appointed by the Juvenile Court to make educational decisions on behalf of Student. Under these circumstances, District was not authorized to replace the Juvenile Court's appointed educational decision-maker because the Legal Guardian was unavailable at the time of the IEP team meeting. Similarly, District could not justify its appointment of a surrogate based upon Legal Guardian's consent. Legal Guardian was not authorized by statute to discharge her responsibilities to make educational decisions for Student without the consent of the Juvenile Court. While it is true that District's authority to appoint a surrogate does not prevent a parent or legal guardian from designating another adult individual to represent the interests of the pupil for education

and related services, (Gov. Code, § 7579.5, subd. (n)), this provision was not intended to supplant the Juvenile Court's authority to appoint the educational decision-maker for children within its jurisdiction. When reviewed in the context of the statutory scheme for appointing surrogates, this section was meant to limit the wholesale authority of school districts to choose a pupil's representative. Legal Guardian's testimony was consistent with this interpretation of the statute. She was "fine" with the IEP team moving forward without her and with another person in her place, but she acknowledged that she remained responsible for Student's education until her guardianship was terminated. Therefore, at a minimum, District was required to obtain the written consent of Legal Guardian to the IEP, which encompassed its determination that Student was eligible for special education as a pupil with an emotional disturbance. (Legal Conclusions 16-19; Factual Findings 1-3, 41-47, 56-58.)

29. Second, there was insufficient evidence that District made reasonable attempts to secure Legal Guardian's attendance. There was only one written confirmation of a May 14, 2009 conversation between Legal Guardian and the coordinator of the IEP team where Legal Guardian indicated that she would participate by telephone. At some point later, Legal Guardian realized she had a scheduling conflict at work which prevented her from participating by telephone. At no time did District speak directly to Legal Guardian and attempt to schedule the IEP at another time. In short, District failed to make a reasonable effort to reschedule the IEP team meeting so that Legal Guardian could attend. (Legal Conclusion 14; Factual Findings 41-44.)

30. Third, District failed to provide any authority that would justify an "emergency" surrogate appointment that would render District's absence of sufficient contact with Legal Guardian prior to its appointment of a surrogate reasonable, or excuse District's exercise of due diligence in its appointment of a surrogate for Student. Although District personnel were undoubtedly well-meaning in their intentions, District

failed to point to any "emergency" that required it to move forward with the IEP without a valid parent. The only event that was imminent was the expiration of Student's independent study contract on the same day as the IEP. District had available substantial resources to confirm Legal Guardian's status or obtain direction from the Juvenile Court or from DCFS, the entities overseeing Student's overall welfare. The IEP team meeting was held at Maryvale and Student's therapist and counselor were in attendance. Maryvale reports to DCFS and cooperates with District. If Legal Guardian, or her co-legal guardian, were not available on May 18, 2009, at most, Student's IEP would have been delayed approximately one month until Father was appointed by the Juvenile Court as the individual responsible for making educational decisions on Student's behalf. (Legal Conclusions 14, 16-19; Factual Findings 14, 16 -17, 25, 41, 46, 48, 50 58.)

31. Fourth, even assuming District was authorized to appoint a surrogate to replace Legal Guardian, it failed to appoint a surrogate that was empowered to make educational decisions for Student. The weight of the evidence established that Ms. Bateman was a surrogate in name only. She did not intend to, nor did she, fulfill the requirements of a surrogate parent. By her own admission, Ms. Bateman was appointed as a space-saver. Ms. Bateman understood at the time of the IEP meeting that Legal Guardian was responsible for making educational decisions for Student. Although she signed the IEP, she signed it with the understanding that the IEP would be sent to Legal Guardian for her written consent. Contrary to the role of a surrogate as a parental substitute in the educational arena, Ms. Bateman's responsibilities lasted for the 45-minute duration of the IEP team meeting. Ms. Bateman did not retain a copy of the IEP or the assessment. She never met with Student or contacted her after the IEP. Contrary to Ms. Bateman's understanding of the limitations of her so-called surrogacy appointment, District relied exclusively upon Ms. Bateman as a surrogate, not as a

space-saver, and never sent the IEP to Legal Guardian for her written consent. (Legal Conclusion 20; Factual Findings 47, 54, 56-58.)

32. Fifth, Ms. Bateman failed to fulfill her obligation as a surrogate to interview Student. Ms. Bateman did not interview Student at any time. Her failure to consult with Student was a profound omission given her complete lack of familiarity with Student's case prior to her appointment. Her assumptions regarding Student's desires notwithstanding, she had a duty to meet with Student to better understand her unique needs. Under the unique circumstances of this case, District's failure to constitute an IEP team with individuals designated by Legal Guardian prevented Ms. Bateman from fulfilling her duties as a surrogate. In the form provided to her by District, Legal Guardian requested that Student attend the IEP. She never withdrew her request. Ms. Bateman would have had an opportunity to speak with Student and understand her needs if District respected Legal Guardian's request and Student attended the IEP. (Legal Conclusions 13, 15, 20; Factual Findings 42, 49.)

33. Finally, District's suggestion that Student and her Father cannot now challenge her assessment and determination of eligibility for special education on the ground that District failed to obtain parental consent is without merit. Challenges to District's identification of a pupil for special education can be made by Student and/or her Father. District provides no support for its suggestion that the right to challenge District's failure to obtain parental consent was exclusive to Legal Guardian because she held parental rights during the relevant time period. (Legal Conclusion 22.)

34. For all the foregoing reasons, Student met her burden of proof on Issue One that District's initial assessment and determination of Student's eligibility for special education were invalid because it failed to obtain consent from an individual authorized to make educational decisions on behalf of Student. For these same reasons, Student's May 18, 2009 IEP was invalid. District's failure to obtain informed parental consent

resulted in the denial of a FAPE, as it eliminated parental participation in the IEP process. (Legal Conclusions 1-22; Factual Findings 1-59.)

ISSUE TWO: APPROPRIATENESS OF ASSESSMENT

35. Alternatively, Student contends that she was inappropriately identified as a pupil with emotional disturbance because Dr. Zapata's clinical evaluation was insufficient to determine elgibility for special education on the basis of emotional disturbance. District maintains Dr. Zapata's assessment was sufficient because it included a range of standardized measures and observations, and because it was supplemented by input from a multi-disciplinary team which included District's school psychologist and Student's Maryvale therapist. As set forth below, Student met her burden of proof that Dr. Zapata's assessment was inappropriate as a psychoeducational assessment for the suspected disability of emotional disturbance.

36. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds.(e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306 (2006).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) No single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414(b)(2) & (3); Ed. Code, § 56320, subds. (e) & (f).) The school district must use a

variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the pupil, including information provided by the parent, that may assist in determining whether the student is a child with a disability, and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

37. School districts are required to utilize the services of a credentialed school psychologist to conduct any psychological assessment of pupils. (Ed. Code, § 56324, subd. (a).) Individual tests of intellectual or emotional functioning must be administered by credentialed school psychologists. (Ed. Code, § 56320, subd. (b) (3).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).)

38. Where African-American children are suspected of being emotionally disturbed, the IDEA acknowledges that "[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities." (20 U.S.C. § 1400(c)(12)(A).) The IDEA expressed concern that "African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts." (*Id.* at § 1400(c)(12)(C).) Overall, the IDEA cautioned against the over-identification of minority children as eligible for special education. (*Id.* at § 1400(c)(12).)

39. In addition to the reasons set forth in Issue One, above, Dr. Zapata's assessment failed as an initial psychoeducational assessment.

40. First, Dr. Zapata was not a school psychologist and a school psychologist was required to conduct an assessment of Student which focused on her intellectual and social-emotional functioning. (Legal Conclusion 37; Factual Finding 27.)

41. Second, both Dr. Castro and Dr. Zapata established that the purpose of the clinical evaluation was to develop a treatment plan, and was not conducted for the primary purpose of supporting a determination of eligibility for special education. (Legal Conclusions 36-37; Factual Findings 22-26, 28-37.)

42. Third, as Dr. Simun persuasively established, Dr. Zapata's report did not contain a range of standardized observation measurements to determine whether Student's social-emotional issues interfered with her access to regular education, including rating scales from a variety of people, such as Student's public school teachers, her Legal Guardian and Student. Instead, Dr. Zapata relied primarily upon her interview with Student's therapist and Student, and her observations during her administration of Student's assessment. Dr. Zapata's interviews resulted in an incomplete profile of Student. The omission of input from Legal Guardian and Student's counselor was significant. Legal Guardian provided insight about Student's behaviors, testifying that Student's behaviors spiked after she reached puberty. She also knew that Student functioned well in a new classroom setting. Significantly, Student's counselor placed Student's school records in context, testifying that Student's academic and behavioral records were not out of the ordinary for a pupil her age. In addition, there was no indication from Student's school records or Student's counselor that Student disrupted the classroom, or could not function in the general education classroom. Teacher's reports focused on her absences and missed work. Objective measurements were particularly important given the policy against over-identification of African American pupils as emotionally disturbed. (Legal Conclusions 36-38; Factual Findings 60-71.)

43. Fourth, Dr. Castro and Dr. Zapata admitted withholding information from the psychoeducational report that constituted confidential medical and therapeutic information which could have provided needed information about the source of Student's social-emotional issues and whether she suffered from a long-term medical or psychological condition that would by definition impede her access to education. (Legal Conclusions 36-38; Factual Findings 1-12, 15, 22, 60-71.)

44. District's attempt to cast Dr. Zapata's assessment as one element considered by a multi-disciplinary team assembled at the IEP was not convincing. As provided by statute, an appropriate initial assessment is the basis for determining eligibility for special education and the provision of special education services. District cannot satisfy its obligation to conduct an initial psychoeducational assessment by borrowing Maryvale's clinical evaluation, repackaged as a psychoeducational assessment. Nor can it compensate for its failure to complete its own psychoeducational evaluation by skimming through Student's school records and speaking with Student's therapist during a 45-minute IEP team meeting that addressed not only Student's initial eligibility, but her goals and objectives, behavior support plan and placement. (Legal Conclusions 36-38; Factual Findings 47, 51-55.)

45. In sum, in addition to the reasons set forth in Issue One above, Student met her burden of proof that Dr. Zapata's initial assessment of Student was inappropriate and invalid as an initial psychoeducational assessment for determining Student's eligibility for special education. For these alternative reasons, Student's eligibility for special education as a pupil with emotional disturbance was without sufficient foundation and therefore invalid. (Legal Conclusions 1-44; Factual Findings 1-71.)

REMEDIES

46. Student requested that OAH order District to: expunge the clinical evaluation of Dr. Rosa Maria Zapata from Student's educational record; expunge from Student's educational record its identification of her as a student with emotional disturbance; notify Student's current school district that Student's educational records have been expunged; fund a comprehensive independent assessment of Student by a qualified assessor of Student's choosing; and as compensation for its failure to provide parental participation, provide 50 hours of pro-social activity of Student's choosing, and fund 96 hours of specialized academic tutoring for gifted pupils.[4] District maintains that it provided Student a FAPE, and denies that Student requires remediation. District further questions Student's request for an independent assessment as inconsistent with Student's allegation that Student should not have been made eligible for special education. The remedies set forth herein are based upon a consideration of the above Legal Conclusions and Factual Findings.

47. When a school district fails to provide a pupil a FAPE, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1996) 471 U.S. 359, 369-371 (*Burlington*).).; 20 U.S.C. § 1415(i)(2)(3).) ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*Burlington, supra*, at p. 370); *Parents of Student W. v. Puyallup School District*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

[4] Student also requested that OAH order District to update its procedures manual for the enrollment of children from Maryvale to be consistent with state and federal law. This remedy addresses issues beyond the scope of the Student's due process hearing and, accordingly, was not addressed in this decision.

48. Compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunities. (*Puyallup, supra,* at p. 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*) An award of compensatory education must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

49. Student's request that District fund an independent assessment does not have a rational relationship to Student's claims and is inappropriate under the unique circumstances of this case. Student contends that District's designation of Student as a pupil eligible for special education as emotionally disturbed was invalid. Student requested that her records be expunged. Student did not present any evidence that she is currently enrolled in a special education program or requires special education services. On the contrary, Student is currently participating as a general education pupil in another school district. When and if Father believes that Student requires special education or related services, he can initiate a referral for an initial assessment with the new school district.

50. Student's request that her record be expunged is reasonable and justified by the evidence. Without a mechanism to strike from Student's records District's invalid identification of Student as a pupil with emotional disturbance, this label will follow her throughout her education. As recognized by the IDEA, the inappropriate identification of pupils, like Student, has negative consequences. The determination of Student's eligibility for special education was part of an invalid IEP. For these reasons, Dr. Zapata's clinical evaluation, District's May 18, 2009 IEP, and any documents containing references to Student as a special education pupil or a pupil with emotional disturbance should be

expunged from Student's educational record. Clearly, Maryvale and DCFS must follow their distinct record-keeping procedures. However, District must not retain in its records any reference to Dr. Zapata's clinical evaluation, Student's eligibility for special education, or the May 18, 2009 IEP. Student also conclusively established that District and Logsdon NPS had an agency relationship, by contract and by collaboration. Based upon their agency relationship, District is ordered to expunge any Student records maintained by Logsdon NPS. As further protection against disclosure of Student's invalid eligibility determination, District must also ensure that it collects and expunges Student's educational records held by any other of its agents, including its personnel or contractors.

51. Finally, Student failed to meet her burden of providing evidence that justifies an award of compensatory education of any nature. Student challenged her eligibility for special education. A request for compensatory education presumes an eligibility for special education. Further, Student provided insufficient evidence that Student was denied grade-level education at Logsdon NPS, or education befitting a pupil with her advanced academic capabilities. Student failed to provide any evidence that her time at Logsdon NPS resulted in a social skills deficit, or that she required social skills training. At the time of the hearing, Student had just transferred to a general education program in another school district. She testified that she was happy at her new school. She did not indicate that the material was too difficult, or that she had trouble adjusting socially. For these reasons, Student's request for compensatory education is denied.

ORDER

1. Dr. Zapata's clinical evaluation was invalid as an initial psychoeducational assessment of Student for special education.

2. Student's eligibility for special education and identification as a pupil with emotional disturbance was invalid.

3. Student's IEP of May 18, 2009 was invalid.

4. District shall expunge from Student's educational records, Student's IEP of May 18, 2009, Dr. Zapata's clinical evaluation, and Student's identification as a pupil with emotional disturbance. District's expungement of Student's educational records as set forth herein also includes all references to Dr. Zapata's clinical evaluation and Student's identification as a pupil with emotional disturbance. District's obligations under this paragraph extend to Student's educational records which are physically located at District and Student's educational records which are maintained by its agents, including, but not exclusive to, Student's educational records maintained by Lodgsdon NPS, District's employees, consultants and contractors.

5. District shall notify Student's current school district and Student through her counsel that Student's educational records, including Student's IEP of May 18, 2009, Dr. Zapata's clinical evaluation, and Student's identification as a pupil with emotional disturbance, have been expunged from Student's educational records in compliance with this Decision and Order thereon.

6. District shall comply with this Order immediately.

PREVAILING PARTY

Pursuant to 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 was the prevailing party against District on both issues presented.

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: May 12, 2010

_____/s/_____

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings