

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CASTRO VALLEY UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015110947

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AMENDED DECISION<sup>1</sup>

The Castro Valley Unified School District filed a request for due process hearing with the Office of Administrative Hearings on November 23, 2015, naming Parent on behalf of Student.

Administrative Law Judge Charles Marson heard this matter in Castro Valley, California, on December 17, 2015.

Melanie D. Seymour, Attorney at Law, appeared on behalf of Castro Valley. Suzy Williams, Castro Valley's Director of Special Education, was present throughout the hearing.

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<sup>1</sup> This decision is amended to address Mother's closing argument, the filing of which was internally delayed within OAH. The amended decision responds to Student's motion to vacate the original decision filed on January 22, 2016 and supercedes the original decision in all respects.

Mother represented Student. Student was not present.

On December 17, 2015, the matter was continued to January 7, 2016, for the filing of written closing arguments. Castro Valley and Student filed closing arguments on January 7 and 8, 2016, respectively. The record was closed on January 8, 2016, and the matter was submitted for decision.

## ISSUE

May Castro Valley conduct a comprehensive reassessment of Student, pursuant to its September 29, 2015 assessment plan, without parental consent?

## SUMMARY OF DECISION

This Decision holds that Castro Valley's September 29, 2015 assessment plan complies with all applicable statutory requirements, that the assessors it proposes to use are competent to perform the assessments, and that the notice of the plan given to Mother was proper. It also holds that the assessments Castro Valley proposes are warranted because Student has not been assessed since 2009, his individualized education program is obsolete, and Castro Valley cannot adequately create a new program for him without the information the assessments are designed to provide. Although Mother believes that the assessments are too numerous to be conducted within the proposed 60-day period, Castro Valley proved that it can reasonably conduct the assessments within that period. Student's failure to attend school at present, because of an unrelated dispute between Mother and Castro Valley over transportation, does not justify denying Castro Valley's right to assess. Therefore, Castro Valley may assess Student pursuant to the September 29, 2015 plan, without Mother's consent.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a 17-year-old male who resides with Mother, the sole holder of his educational rights, inside the geographical boundaries of Castro Valley. He has multiple disabilities and is eligible for special education in the primary category of intellectual disability and the secondary category of visual impairment. He is enrolled in the 11th grade at Castro Valley High School in a special day class for students with moderate to severe disabilities.

2. Castro Valley last assessed Student in February 2009. In the 2009-2010 school year, when Student was in the fifth grade, the parties could not agree on an IEP for him. After a due process hearing in June 2010, OAH determined that Castro Valley could implement its proposed IEP without parental consent.<sup>2</sup> Student did not return to Castro Valley's schools for the 2010-2011 school year and for several school years thereafter.

3. In early March 2015, Mother enrolled Student in the District's Castro Valley High School. Castro Valley placed Student in a special day class, began implementing the 2010 IEP, and requested that Mother consent to reassessments so that a new IEP could be written. Mother has declined that consent.

### NEED FOR REASSESSMENT

4. Student's disabilities are complex and severe. He had a traumatic birth, during which he was deprived of oxygen and suffered substantial brain damage. As a result he is cortically blind, has a cognitive capacity equivalent to that of a child six to 18

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<sup>2</sup> Official notice is taken of the decision in *Castro Valley Unified School Dist. v. Student* (OAH, July 26, 2010, No. 2010050546).

months of age, and has cerebral palsy, which renders him quadriplegic. He must rely on the assistance of others in all basic activities. It is not known how much language Student understands. He is nonverbal and communicates primarily by movement, body language, and various vocalizations. He has no concept of print, colors, or numbers. He uses a wheelchair and an able-gaiter stander-trainer at school. He requires assistance in sitting, eating, toileting, and moving from class to class. An IEP that provides him a free appropriate public education must contain a wide variety of accommodations, modifications, special education and related services carefully tailored to his disabilities.

5. When Student reappeared in March 2015, Castro Valley had not served him since June 2010, when he was 11 years old and in fifth grade. In the intervening years, it frequently attempted to communicate with Mother about Student, and annually invited Mother to an IEP team meeting to decide upon an IEP for Student, but Mother did not respond. Since March 2015, Castro Valley has repeatedly asked Mother for information about Student's activities and education during recent years, in order to obtain information from any school in which he may have been placed, so it could determine his present levels of academic and functional performance. Mother has declined to provide that information. As a result, Castro Valley knows nothing about Student's educational or functional performance from fall 2010 to March 2015.

6. Jennifer Muranjan is Student's teacher in the special day class in which he is enrolled. Ms. Muranjan is a 2006 graduate of University of California at Santa Cruz and is three classes away from her master's degree as an education specialist. She has a level one teaching credential and a credential for teaching students with moderate to severe disabilities. She taught disabled students at the Spectrum Center in Oakland from 2007 to 2010, when she was hired by Castro Valley. She is the case carrier for all her students, and the co-chair of Castro Valley High School's Special Education Department. Among her duties is mentoring new teachers in mild-to-moderate and moderate-to-severe

special day classes. Ms. Muranjan's testimony at hearing was thoughtful and well-informed, and she displayed considerable familiarity with Student and his history. She was a credible witness, and her testimony is given substantial weight here.

7. Ms. Muranjan established that Student's 2010 IEP is obsolete. The equipment it provides for no longer fits Student, who is much larger than he was in 2010. His goals were written when he was in fifth grade. He has accomplished some of them; others are now inappropriate. Student's triennial assessment is three years overdue, and the present levels of performance upon which his goals are based are more than six years out of date. Student's needs for accommodations, modifications and related services are likely to have changed considerably since 2010.

8. Ms. Muranjan also established that Castro Valley cannot obtain the information required to bring Student's IEP up to date and to provide him a FAPE without assessing him. For example, the IEP team cannot determine his curriculum or write adequate educational goals for him without establishing his current needs. It cannot determine what kind of occupational and physical therapy interventions Student now needs without assessing his needs in those areas. It cannot adequately provide for his mobility on campus without knowing his present skills and capacities with his wheelchair.

9. For the foregoing reasons, Castro Valley correctly determined in March 2015 that Student's educational and related service needs, including improved academic achievement and functional performance, warrant a reassessment.

#### THE SEPTEMBER 29, 2015 ASSESSMENT PLAN

10. Castro Valley proposes to assess Student in the following areas: academic achievement; health; intellectual development; language/speech communication development; motor development; social/emotional status; adaptive behavior; occupational and physical therapy needs; assistive/augmentative communication needs;

adaptive physical education; orientation and mobility; and functional vision. Each of these areas is related to Student's known or suspected disabilities, and his previous IEP's have provided accommodations or services in nearly all of them. The plan identifies by title the professional who will conduct the assessment in each area.

11. The September 29, 2015 assessment plan was sent to Mother on that date, accompanied by a notice of parental procedural rights. Student's and Mother's native language is English, and the assessment plan was in English. The assessment plan was written clearly, in language easily understood by the general public, and advised Mother that no IEP would result from the assessment without her written consent.

#### QUALIFICATIONS OF PROPOSED ASSESSORS

12. Maureen Kennedy is the program specialist who oversees Student's IEP. She has single subject and multiple subject (K-12) teaching credentials and is certified as a resource specialist. She has taught both general and special education students in public and private schools since 1974, worked as a resource teacher, and supervised other special education teachers. She has been a program specialist for Castro Valley for 13 years. Her testimony at hearing was careful and precise, was consistent with contemporaneous documents, and was not undercut by cross-examination. She was a credible witness, and her testimony is also given substantial weight here.

13. Ms. Kennedy established that each of the assessments contemplated by the September 29, 2015 assessment plan, will be conducted by qualified personnel. Each is assigned to a staff member who, by licensure and training, is capable of conducting an assessment in the assigned area and evaluating the results, and is knowledgeable about the disability the assessment addresses. The academic assessment, for example, will be performed by Ms. Muranjan, who has a moderate-to-severe special education

teaching credential. A registered nurse will conduct the health examination.<sup>3</sup> State-licensed occupational and physical therapists will conduct assessments in those areas. The vision assessment will be conducted by a credentialed vision specialist who has worked at the California School for the Blind. Similarly licensed and qualified professionals will conduct the remaining assessments. As Ms. Kennedy persuasively testified, all the assessors Castro Valley intends to use for the assessments are qualified to perform them. Mother does not challenge this conclusion.

#### CASTRO VALLEY'S ATTEMPTS TO OBTAIN CONSENT TO THE ASSESSMENT PLAN

14. Castro Valley made many attempts to persuade Mother to consent to the proposed assessments before it sought a due process hearing. Its efforts began on March 3, 2015, when Ms. Kennedy wrote to Mother welcoming Student's return; the letter listed the assessments Castro Valley hoped to conduct in order to write a new IEP.<sup>4</sup> Ms. Kennedy sent a similar letter on March 26, 2015, listing the desired assessments and enclosing an assessment plan form. Mother requested more information about the assessments proposed, and Ms. Kennedy responded by gathering a writing from each of the principal proposed assessors setting forth the details of most of the proposed assessments. She sent this package of documents to Mother twice in April 2015, and

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<sup>3</sup> Ms. Kennedy established that Castro Valley needs to assess Student's health not just because of his known conditions, but also because on his first day of school in March 2015 he exhibited possible symptoms of seizure.

<sup>4</sup> The assessment plan at issue has evolved slightly over time, but has always proposed essentially the same comprehensive group of assessments listed in the September 29, 2015, assessment plan. The minor changes to it are unrelated to Mother's objections to assessment.

again in May.<sup>5</sup>

15. Mother wrote Ms. Kennedy on May 15, 2015, asking questions about the assessments and requesting that the assessors use specific assessment tools and methods not contemplated by the assessors' descriptions that Ms. Kennedy had sent. Ms. Kennedy gave Mother notice of an IEP meeting at which the assessments could be discussed, to be held on June 2, 2015, a date on which Mother had stated she was available by telephone. When that meeting was held, the Castro Valley members of the IEP team repeatedly attempted to reach Mother, but she did not answer, and her telephone mailbox was full and would not accept messages.

16. The June 2, 2015 IEP team, which did not include Mother, produced an extensive description of the assessments to be conducted and mailed it to Mother. Mother did not respond.

17. On September 8, 2015, Ms. Kennedy sent Mother another copy of the assessment plan, requesting her signature. Mother responded on September 18, 2015, stating that she would agree to assessments only with numerous conditions. These included specifying particular assessment tools and methodologies to be used for several of the assessments, and requiring an outside assessor from California Children's

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<sup>5</sup> Castro Valley has had extreme difficulty in communicating with Mother about Student. Mother will supply only a telephone number and mailing address, will not pick up certified mail, and frequently will not answer her door. Her telephone mailbox is usually full, making it impossible to leave messages. Communications sent home in Student's backpack are generally ignored. Mother sometimes denies receiving properly addressed United States mail. These difficulties have characterized Castro Valley's communications with Mother since 2006. (See *Castro Valley Unified School Dist. v. Student, supra*, Factual Findings 7-8.)



Services to evaluate Student's equipment. However, Mother refused to authorize direct contact with that proposed assessor. Mother stated further that she would not furnish medical information; she would not authorize a psychological assessment; and that she wanted only four assessments to be conducted and discussed at an IEP team meeting, at which the need for other assessments would then be determined.

18. Ms. Kennedy responded by mail on September 29, 2015, declining to accept Mother's conditions and treating her September 18, 2015 letter as a refusal of consent to assessment. Ms. Kennedy enclosed the final version of the September 29, 2015 assessment plan and again requested Mother's signature. This letter also enclosed a copy of a notice of Mother's procedural safeguards, as had several of Ms. Kennedy's previous communications. Mother did not consent to the plan.

#### MOTHER'S OBJECTIONS TO THE ASSESSMENT PLAN

##### Adequacy of Time to Complete Assessments

19. Castro Valley proposes to conduct the assessments and hold an IEP team meeting to discuss their results within sixty days of obtaining consent to assess, as the law requires. Mother expressed the opinion at hearing that the assessments are too numerous to complete within that time and, due to their number, will be unduly disruptive to Student's education if confined to a 60-day period. No other evidence supported her opinion.

20. Ms. Muranjan persuasively opined that the assessments could be appropriately completed within the 60-day period. She explained that most of the assessment process would involve the interaction of adults; other than simply attending school where he could be observed, Student's direct involvement would be infrequent. He would not be directly involved in obtaining health information, for example; Mother would be given a form to fill out and the nurse would observe Student in class. Ms.

Muranjan established that, because of his cognitive capacity, Student would not be required to take a substantial battery of tests. Her academic testing, for example, would involve two “inventory-based” measures that rely on her, as Student’s teacher, to make inventories based on her observations. For similar reasons, Ms. Kennedy also testified credibly that all the assessments could be completed within the 60-day period with a minimum of disruption to Student’s schedule.

21. Both Ms. Muranjan and Ms. Kennedy testified persuasively that to separate the assessments into groups, and have IEP team meetings after each group (as Mother advocates), would interfere with the IEP team’s ability to gain a complete picture of Student in order to write an IEP for him, and deprive school staff of the ability to work with him effectively in all his areas of need.

#### Student’s Failure to Attend School

22. Mother also argues that the assessments should not be authorized because they cannot be done adequately unless Student is in school, and at present he is not attending school. The parties are engaged in a dispute over Student’s transportation to and from school, which since March 15, 2015, has been accomplished by a wheelchair bus operated by Durham School Services. Student’s transportation was without incident until September 2015, when Durham was late twice in arriving at Mother’s home after school. Since that time, Mother has demanded that Castro Valley employ a different transportation provider for Student, and Castro Valley has declined to do so. Since mid-September 2015, because of this dispute, Mother has refused to send Student to school.

23. Ms. Kennedy investigated the two incidents in which Durham’s bus was late and described them at hearing. She explained that at the beginning of the school year, the bus schedules are sometimes uneven because the drivers are getting acclimated to their routes, as students are being added to or subtracted from their

loads. On September 9, 2015, the bus arrived at Mother's home at 4:05 p.m., a few minutes late but still within the 90-minute "window" of time Student is expected home from school. Mother was home but refused to open the garage door (where Student gets into the house), or to respond to telephone calls and other attempts at communication, for approximately one-half hour. On September 16, 2015, the bus arrived at 4:20 p.m. because it had a larger load of passengers than usual, another bus having broken down. Again Mother was home but refused to open the door or respond to communications. Because another student was still on the bus, the driver took that student home and then came back with Student at 5:05 p.m. In neither case was there any danger to, or adverse effect on Student except a delay in getting into his house. From the correspondence exchanged by the parties it appears that these two incidents were inconvenient for Mother.

24. Since mid-September 2015, Castro Valley has continued to make transportation available to Student. Every school day, the Durham bus arrives at Mother's home prepared to receive Student as a passenger, and its presence is announced, but Mother will not open the door or cooperate in the process of putting Student on the bus.

#### Receipt of Documents Mailed by Castro Valley

25. In her closing argument, Mother argues for the first time that she did not receive numerous communications from Castro Valley that Ms. Kennedy testified had been mailed to her. Mother did not testify to that effect at hearing. Ms. Kennedy, in her testimony, credibly described the process by which she communicated with Mother through the United States Mail, giving details of the practices of internal pickup by Castro Valley staff of letters to be mailed, the placement of postage on the letters, and the placement of letters in the mail. All the documents described herein as having been mailed to Mother were mailed to Mother's correct address. Those documents include,

but are not limited to, Ms. Kennedy's letters of March 3 and March 26, 2015; the packet of additional information about the assessments mailed twice in April and once in May 2016; the notes of the June 2, 2015 IEP team meeting; and Ms. Kennedy's letters of September 8 and 29, 2015, enclosing the assessment plan. The evidence supported the conclusion that the documents described herein as having been mailed to Mother were correctly addressed and properly mailed.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>6</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)<sup>7</sup>; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal.

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<sup>6</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>7</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Castro Valley, as the filing party, had the burden of proof on all issues here.

#### ISSUE: MAY CASTRO VALLEY ASSESS STUDENT ACCORDING TO THE SEPTEMBER 29, 2015 ASSESSMENT PLAN WITHOUT PARENTAL CONSENT?

4. A local educational agency must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381,

subd. (a)(2).) The agency must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

5. If parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

6. Parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

#### Is the Assessment Notice Proper?

7. Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3),(c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the student; explain the types of assessments to be conducted; and notify parents that no IEP will result from the assessment without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4); see also 34 C.F.R. § 300.9(a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

8. On September 29, 2015, Castro Valley provided the proposed assessment plan to Mother with a copy of her procedural rights. Castro Valley had previously sent several letters explaining and discussing the plan, and enclosing earlier versions of it. After September 29, 2015, Castro Valley gave Mother more than 15 days to approve the plan. The assessment plan was in Student's and Mother's native language of English. It adequately identified the assessments that Castro Valley proposes to conduct. The assessment plan also explained that no IEP would result from the assessment without Mother's consent. Castro Valley also provided to Mother materials describing the assessment tools and methodologies the principal assessors intended to use, though it was not obliged to do so. (See Ed. Code, § 56321, subd. (b)(3)[plan must explain "types" of assessments].) The evidence established that Castro Valley made reasonable efforts to obtain Mother's consent to the assessment plan; that it provided her at least 15 days to review and sign it; and that she was fully informed of the contents of its proposal. All statutory requirements of notice were met, and the assessment plan itself complied with the applicable statutes.

Did Mother receive documents mailed to her?

9. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (See Evid. Code, § 641.) As found above, all of the documents described above as having been mailed to Mother were correctly addressed and properly mailed, and are therefore presumed to have been received. Mother did not testify to the contrary at hearing. Her new representations in her closing argument that she did not receive various documents do not refute the presumption because they are not sworn and because Castro Valley had no opportunity to refute them. The evidence showed that Mother received those documents.

## Is Reassessment of Student Warranted?

10. The circumstances warrant the reassessment of Student in all the areas identified in the September 29, 2015 assessment plan. He has not been assessed since 2009, and his triennial assessment is three years overdue. Until March 2015, he had not even been seen by Castro Valley since June 2010. Castro Valley has no information about Student's educational experiences, if any, from June 2010 to March 2015. Without new assessments, it has no information that will allow it to determine Student's present levels of academic and functional performance for the purpose of writing goals in a new IEP. Those levels and goals are required in Student's next IEP. (20 U.S.C. § 1414(d)(1)(A)(I), (II).)

11. Castro Valley proved that Student's current IEP is obsolete. It was written in 2010, when he was 11 years old and in the fifth grade, and its present levels of performance were based on assessments conducted in 2009. It specifies equipment for him that no longer fits him. Its goals are no longer appropriate for him; some have been reached, while others no longer matter. His needs for accommodations, modifications and related services have almost certainly changed considerably since 2010. His current IEP cannot be adequately rewritten to provide Student a FAPE without the information the assessments are expected to obtain.

12. Student has an unusually complicated set of disabilities, so Castro Valley requires information in a wide variety of areas in order to provide him a FAPE. It is obliged by law to assess him in all areas of suspected disability. (20 U.S.C § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) Each of the assessments proposed in the September 29, 2015 assessment plan is in an area in which Castro Valley has reason to believe Student is disabled, or in which he has previously received special education, accommodations, related services, or some combination thereof. It is highly likely that any new IEP for Student will have to address each of the proposed assessment areas. Each of the



proposed assessments is therefore required for Castro Valley to provide Student a FAPE.

13. For the foregoing reasons, starting in March 2015, Student's educational and related service needs, including improved academic achievement and functional performance, warranted a reassessment, and Castro Valley's conclusion to that effect was correct.

#### Will the Proposed Assessments be Conducted by Competent Persons?

14. Reassessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any psychological assessments of pupils shall be made in accordance with Education Code Section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).) Similar requirements apply to health examinations, which must be performed by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

15. All the assessments proposed by Castro Valley will be conducted by persons competent to conduct them. As Ms. Kennedy established, each assigned assessor has the licensure and training required to conduct the assessment to which he or she is assigned. Each is knowledgeable of the disability to which his or her assigned assessment relates. For example, the psychological assessment will be performed by a credentialed school psychologist, and the health assessment by a credentialed and registered nurse. The qualifications of the proposed assessors comply with legal requirements and are not in dispute.

#### May Castro Valley Treat the Conditions Mother Has Placed on Her Consent to Assessment as a Refusal to Consent?

16. As long as the statutory requirements for assessments are satisfied,

parents may not put conditions on assessments; "selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous* (OSEP 1993) 20 IDELR 542.)

17. Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent. In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, *affd.* (11th Cir. 2012) 668 F.3d 1258, for example, parents purported to agree to a comprehensive triennial reassessment similar to the one Castro Valley proposes here. However, they attached significant conditions to their approval, including requiring particular assessors, agreement to meetings with parents before and after the assessments, a preview of the assessments before an IEP team meeting, and limitations on the use of the assessments. The ALJ deemed this a refusal of consent, and the District Court agreed, noting: "With such restrictions, Plaintiffs' purported consent is not consent at all." (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit observed that parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process . . ." (*Id.*, 668 F.3d at p. 1264.)

18. The same result was reached in *Student R.A. v. West Contra Costa Unified Sch. Dist.* (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.]. There a parent approved an assessment only on the condition that she be allowed to see and hear the assessment being conducted. The District Court upheld the ALJ's determination that this condition amounted to a refusal of consent: "[t]he request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate." (*Id.* at p. 13.)

19. Mother's argument that parents have the right to require that a school district "explain" assessments to be conducted overstates the law. (See Ed. Code, §

56321, subd. (b)(3)[plan must explain “types” of assessments].) Moreover, Castro Valley did explain most of the assessments to Mother in a supplemental package of material that Ms. Kennedy established she mailed to Mother twice in April 2015 and again in May.

20. Mother argues that under Education Code section 56329, subdivision (b), she had the right to demand that Castro Valley allow a therapist from California Children’s Services to assess Student’s need for physical equipment. That subsection, however, allows a parent to obtain an independent educational evaluation only “if the parent or guardian disagrees with an assessment obtained by the public education agency . . .” It has no application here because Mother has not permitted any assessment with which she could disagree since 2009.

21. Because Mother lacked the power to place conditions on Castro Valley’s assessments, Castro Valley properly treated her response as a refusal to consent to reassessment. (*G.J. v. Muscogee County Sch. Dist.*, *supra*; *Student R.A. v. West Contra Costa Unified Sch. Dist.*, *supra*.)

#### Is 60 Days Enough Time to Complete the Assessments?

22. Normally, a district has 60 days from receiving parental consent to an assessment to conduct it and hold an IEP team meeting to discuss its results. (See Ed. Code, §§ 56043, subds (a), (b); 56321, subd. (a); 56344, subd. (a).)

23. In her closing argument, Mother asserts for the first time that conducting the assessments in 60 days is inconvenient to her rather than to Student. She argues that it is unfair “to be forced to read 11 reports in 2-3 days before the telephone conference IEP.” However, this assumes both that Castro Valley will deliver all the assessment reports at the same time, and that it will insist on making decisions concerning them at a meeting within two or three days of their delivery. Neither assumption is warranted by the record or the law. Castro Valley may deliver the reports

at different times. Mother may request early delivery of some of the assessment reports, a delay of the IEP team meeting at which the reports will be discussed, or an additional IEP team meeting at a later date if she is unprepared to participate in the earlier meeting. It will not be assumed here that Castro Valley would deny those requests.

24. Castro Valley proved that it can adequately assess Student within 60 days pursuant to the September 29, 2015 assessment plan. Although the assessments are numerous, they will primarily involve the interaction of adults in reviewing records and questioning people. Because of his cognitive capacity, Student's direct involvement will rarely be required; for most purposes his presence at school is enough to facilitate the assessments. Accordingly, his education will not be disrupted by the assessment process if conducted within 60 days.

Is Student's Absence From School a Valid Reason Not to Authorize the Assessments?

25. This Decision is not intended to resolve the ongoing dispute between Mother and Castro Valley about replacing the transportation provider Castro Valley has selected to transport Student to and from school. Either party may seek to resolve that dispute by requesting a due process hearing under the IDEA. However, the existence of that dispute does not justify Mother's refusal to send Student to school, in apparent violation of California's truancy law. (See Ed. Code, § 48200.) There was no evidence that the two instances in which the bus was late involved any danger, discomfort, or other adverse consequence to Student himself, except that he could not enter his home on arrival. The dispute appears to concern only the inconvenience to Mother of Student's late arrivals home. Student's absence from school at present is solely the consequence of Mother's unjustified unilateral act in refusing to send him to school, and is not a valid reason to refuse Castro Valley permission to assess. Much of the assessment process requires observation of Student in the school environment.

26. Mother's closing argument contains numerous assertions of wrongdoing by Castro Valley that she did not make at hearing. They range from allegations that Castro Valley failed to hold some IEP team meetings and failed to give adequate notice of IEP team meetings, to a criticism of the effectiveness of Student's transportation. Mother also includes a request for reimbursement of expenses. None of this material was available to Castro Valley at hearing or before its closing argument was filed, and therefore none of it may be considered here.

27. Castro Valley established that the September 29, 2015 assessment plan complies with all applicable statutory requirements and that the notice of the plan it gave Mother was proper. It also established that the assessments are warranted and that the assessors it proposes to use are competent to perform the assessments. Therefore, Castro Valley may assess Student without Mother's consent.

## ORDER

1. Castro Valley is entitled to reassess Student according to its September 29, 2015 assessment plan, without Mother's consent.

2. Castro Valley shall notify Mother, within 10 business days of the date of this decision, of the days, times, and places Mother is to present Student for assessment, and Mother shall reasonably cooperate in presenting him for assessment on those days and times, and in those places. Throughout the time that the assessments are being conducted, Mother shall cooperate with the District's selected transportation provider by assisting Student onto the bus on every school day morning he is scheduled to attend school, so that he can be observed in the educational environment for the purpose of the assessments, and admitting him on his arrival home. Or if Mother prefers, she may timely transport Student to and from school by herself, or arrange for his timely transportation by other means at her own expense.

3. If Student is unable to attend school on any school day during the

assessments, by reason of illness or other cause unrelated to the parties' dispute over transportation, Mother shall promptly communicate this fact to Castro Valley and the parties shall mutually agree on days and times for the assessments to be conducted that are no more than 30 days from the dates that Castro Valley originally proposed. Any delay due to this will toll the 60 day timeline for assessment.

4. Mother shall timely complete and return any documents reasonably requested by Castro Valley as a part of the assessments.

5. If Mother does not present Student for assessment as specified above, or does not complete and return any documents as specified above, Castro Valley will not be obligated to provide special education and related services to Student until such time as Mother complies with this Order.

## PREVAILING PARTY

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

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: February 16, 2016

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/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings