

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No.2016090104

DECISION

Newport-Mesa Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 30, 2016, naming Parent on behalf of Student as respondent. The matter was continued for good cause pursuant to a request by Newport-Mesa on September 19, 2016, and pursuant to a joint request of the parties on November 29, 2016.

Administrative Law Judge Penelope Pahl heard this matter in Costa Mesa, California, on February 28, 2017.

Courtney Brady, Attorney at Law, represented Newport-Mesa. Maureen Cottrell, Newport-Mesa's Special Education Director for Resolutions, was present at all times during the hearing.

No appearance was made on behalf of Student. Student's mother had been notified of the date and location of the hearing on three occasions: in the Prehearing Conference order dated November 29, 2016, in the Prehearing Conference order dated February 17, 2017, and in the Prehearing Conference Order dated February 24, 2017. Student did not contact either OAH or Newport-Mesa indicating an inability to appear at the hearing which was scheduled to begin at 9:30 a.m. on February 28, 2017. The ALJ waited to ensure that

Mother was not just running late and convened the hearing at 10:00 a.m.

Upon conclusion of the testimony on February 28, 2017, the matter was continued until March 20, 2017, to allow Newport-Mesa the opportunity to submit a closing brief. Newport-Mesa timely filed its closing brief and the matter was submitted.

ISSUE

Did Newport-Mesa's May 23, 2016 initial assessment of Student meet all legal requirements such that Student is not entitled to an independent educational evaluation at Newport-Mesa's expense?

SUMMARY OF DECISION

Newport-Mesa seeks an order that its assessment of Student met all legal requirements and, thus, it is not required to fund the independent evaluation requested by Mother. Newport-Mesa did not prove by a preponderance of evidence that its assessment met all legal requirements. Newport-Mesa failed to file for a due process hearing without undue delay, waiting 80 days before requesting a review of the assessment without explanation. Newport-Mesa also failed to hold an individualized education program team meeting to explain and discuss the assessment in a timely manner. When Newport-Mesa did hold the IEP team meeting, it did not include Mother, who is the sole educational rights holder and a required participant.

Additionally, Newport-Mesa's assessment and report did not meet required state and federal legal standards. Newport-Mesa's assessment report is fraught with errors which made it confusing and which rendered the conclusions questionable. Ratings were inaccurately presented, data was inaccurately summarized and conclusions were not adequately explained or supported by the data in the report. Some information provided by Mother regarding Student's health concerns was disregarded without explanation. Finally, the Newport-Mesa assessors inappropriately relied on data collected from Father, who had

only recently had his contact with Student restored after a restraining order was lifted; and who was prohibited by court order from communicating with the school for any reason other than to secure records regarding Student. The procedural violations, coupled with the inaccuracies and unsupported findings of the assessment report, result in Student being entitled to an independent assessment at public expense. Newport-Mesa shall provide Student an independent health, academic, psycho-educational, and speech and language assessment.

FACTUAL FINDINGS

JURISDICTION

1. Student is a seven-year-old boy who has resided within the geographical boundaries of Newport-Mesa at all relevant time periods. He attended a general education kindergarten class at Andersen Elementary School for the 2015-2016 school year through April 1, 2016. Beginning in April 2016, through the time of hearing, Student attended a local private school. The parties dispute whether Newport-Mesa's initial assessment in spring 2016 appropriately evaluates Student's need for special education and related services.

ASSESSMENT PROCEDURAL OVERVIEW

2. In March of 2016, Mother requested that Student be assessed for special education services. Mother had concerns that Student showed deficits in attention, speech, and emotional well-being, and that his health concerns were impacting his education. On March 28, 2016, Michelle Pethtel, Newport-Mesa's school psychologist, prepared an assessment plan and presented it to Student's Mother in her native language of English. The plan proposed assessments of Student's academic achievement, speech and language, intellectual development, social-emotional and adaptive behavior, perceptual processing and health including gross and fine motor development. The assessment plan proposal included a notice to Mother that neither assessments nor special education or related

services could be provided without her consent and further that a notice of Special Education Parent Rights and Procedural Safeguards was enclosed with the plan. Mother provided signed consent to Newport-Mesa's assessment plan on March 30, 2016.

3. Newport-Mesa conducted the assessments of Student in April and May of 2016, and convened two IEP team meetings: one on May 26, 2016 which Newport-Mesa termed a "meet and adjourn" and the second on June 17, 2016. On June 17, 2016, Mother requested an independent assessment of Student. On July 8, 2016, Newport-Mesa sent a letter to Mother refusing to fund the requested independent evaluation and stating that it would request a due process hearing to have the appropriateness of its assessment determined.

4. On September 5, 2016, Newport-Mesa filed a Request for Due Process Hearing with the Office of Administrative hearings seeking a determination that the assessments and the report of May 26, 2016, met legal standards. This was 80 days after Mother requested an independent education evaluation.

COURT ORDERS PERTAINING TO FATHER

5. Newport-Mesa sent Father various questionnaires regarding Student's academic abilities, personal care and social-emotional well-being as a part of the assessment process. These same requests were also sent to Mother. The school nurse personally interviewed Father, as well as Mother as part of her health assessment.

6. As of the date of the hearing, Mother and Father had been embroiled in a bitter custody battle for an extended period of time. The Orange County Superior Court had ruled that Mother had sole legal and physical custody of Student. Mother was, therefore, the only person who held educational rights. The court issued an order on September 1, 2015, limiting Father's communications with Newport-Mesa personnel to those communications necessary to "obtain [Student's] records." At the time the assessments were completed, Newport-Mesa had a copy of this order.

7. On March 11, 2016, the superior court granted Father joint physical custody of Student. Prior to March 11, 2016, a restraining order had prohibited contact between Student and Father. Effective March 16, 2016, Father was allowed custody on the first, third, and fifth weekends of each month and on Wednesdays, from the time school ended to the time it began the next school day. If school was not in session, father was to have the children from 3:00 p.m. on the first day of the visitation period to 8:00 a.m. on the last day of the visitation period.¹ Father had no custody rights during school hours as Mother was granted custody "at all other times not specified" in the order. When school was not in session, drop-offs and pick-ups of Student and his sibling were to be conducted at the local police station as a restraining order prohibiting Father from being within 100 yards of Mother remained in place. The restraining order also prohibited Father from any contact with Mother, "either directly or indirectly, by any means including but not limited to contact by telephone, mail, email or other electronic means." The restraining order expires on February 27, 2018.

8. The order granting Father joint physical custody did not change the legal custody status regarding Student. Mother retained sole legal custody of Student, and as of the date of the hearing, Father had no educational rights. His limited right, according to the September 1, 2015 order from the Orange County Superior Court, and emphasized by the court's inserted handwritten addition to the order, was to communicate with the school as necessary to secure copies of records pertaining to Student.

9. Maureen Cottrell is the Newport-Mesa's special education director for resolutions. Ms. Cottrell testified that she was aware of the restraining and custody orders and that Mother was the sole educational rights holder. She had also read and considered a

¹ Alternate holidays and two weeks of summer were also allotted but those opportunities had not arisen at the time these assessments were completed.

letter from Father's attorney stating that "the restraining order has been amended to remove the children so there is no restriction that [Father] be present at the children's school." She testified that based on the orders and letter, she believed her staff was "able to answer questions from Father verbally or via email and they had the right to give him information about the student's well-being in school" and instructed her staff commensurate with that understanding. However, Ms. Cottrell's testimony as to her conclusions regarding the school's ability to communicate freely with Father lacked credibility. Her conclusions and instructions to her staff contradicted the court order that prohibited Father from communicating with school personnel for any purpose other than to obtain copies of Student's records. Newport-Mesa had no basis for including Father in the assessment process, and it should not have solicited or considered his input.

10. At the time the assessment process began in April of 2016, the new visitation order had been in place only a few weeks. There was no evidence of the extent of Father's contact with Student as of the time he completed his rating scales. If the court ordered visitation schedule had been followed, Student had spent time with his father on approximately 16 different days as of the last date of assessment noted on the report which was May 6, 2016. Some of the counted days would have begun at 3:00 p.m. and some would have ended at 8:00 a.m..

11. The March 11, 2016 court order stated that the court would particularly consider any evidence of inconsistent school attendance in evaluating further redistribution of custodial times during the school week. The court order also declared that there should be no tardies and required a doctor's note for any absences.

ASSESSMENTS CONDUCTED

12. The assessments were conducted in Student's native language of English. A variety of assessment instruments and tools were utilized to evaluate Student's eligibility for special education and related services. Assessments were conducted by qualified personnel.

The school psychologist conducted the testing of Student's intellectual functioning, auditory, sensory-motor and visual processing, and memory, and evaluated ratings of Student's attentional processing, adaptive behavior and social-emotional functioning. Julianne Smith, Newport-Mesa's speech pathologist, assessed Student's speech and language capabilities. Andersen resource specialist Ashley Puffer conducted the assessment of Student's academic ability and school nurse Andrea Jackson assessed Student's health. All ratings contributed by Betsy Rovzar, Student's kindergarten teacher, were completed while Student was still enrolled in her class at Andersen.

13. Newport-Mesa asked Mother for releases of information to allow its staff to contact Student's private school for information regarding his transition and current performance. Mother refused. At the time the assessments were completed, Student had been attending the private school for approximately three weeks.

14. The psycho-educational assessment was conducted by Michelle Pethtel, Newport-Mesa's school psychologist. Ms. Pethtel has a bachelor's degree in social ecology and a master's degree in marriage and family therapy and school psychology. She holds a California credential in pupil personnel services for preschool through 12th grade and has worked as a school psychologist for the Newport-Mesa district for the past 10 years. Ms. Pethtel estimates that she has conducted approximately 300 multidisciplinary assessments of students during that time, all of which evaluated eligibility for special education and related services. Ms. Pethtel had limited knowledge of Student prior to conducting his assessment.

15. Ms. Pethtel conducted assessments of Student's cognitive abilities, auditory processing, attentional processing, his adaptive behavior and his social-emotional functioning and behavior. Ms. Pethtel also evaluated Student's visual-motor integration, memory and gross-motor skills.

Errors and Omissions Rendering the Assessment Report Unreliable

16. The assessment report has many errors such that its reliability is called into question on this basis alone. Newport-Mesa's multidisciplinary assessment report included errors regarding which tests were administered, the meanings of numerical ratings, missing or erroneous rating scale attributions, and obvious factual errors rendering it untrustworthy.

17. It is unclear which tests were administered in some instances and/or whether the reported scores pertained to testing administered to Student. The list of assessments given at the front of the report indicates that the Behavior Assessment System for Children, Third Edition was administered to Student. Yet the report summary regarding social emotional functioning and behavior provides a detailed description of the Behavior Assessment System for Children, Second Edition. Similarly, there is no indication in the list of instruments used that the Kaufman Assessment Battery for Children, Second Edition, was administered. Yet in describing testing conducted for working memory, after showing a table referring to the Wechsler Intelligence Scale for Children, Fifth Edition, Ms. Pethtel states, "according to the KABC-2 [Student] performed within the average range with consistently solid scaled scores on each of the subtests." While one reference to the wrong instrument might be attributed to a typographical error, a second reference to the results of the "KABC-2" is seen in the "Analysis" section pertaining to possible eligibility on the grounds of specific learning disability. It is unclear which instrument was actually administered, which, at the very least, shows a lack of attention to detail.

18. Inaccuracies in the correlation between the ratings scores (numerical numbers) and descriptors (i.e. low or average) listed on tables area frequent problem in this report. Moreover, the rating table for attentional processing includes no rating scale explaining what numerical score correlates with what descriptor. Of the six scores listed, four are listed as average, but, if the scale pertinent to these subtests aligns with the other rating tables shown, would usually result in "low" ratings, not average. The sole comment attached to these ratings is that "[Student's] previous teacher, Mother and Father all rated him in the

average range in the areas of hyperactivity and attention problems in the school and home setting."This is not consistent with the numbers presented. It is unclear whether the numerical rating is incorrect, or the descriptor, or both. Newport-Mesa did not meet its burden to show that the attentional processing of this part of the assessment was completed in accordance with the manufacturer's directions or that the data in the report was correct as reported.

19. Similar errors in rating reporting are present in social-emotional functioning and behavior rating tables, and in the adaptive behavior rating table, both of which display ratings provided by Mother, Father and Ms. Rovzar from the Behavior Assessments for Children. In the social-emotional rating table it is unclear which rating scale applies to the different sections of the results. Two tables are set forth discussing different sets of data. In addition both sets of scores show descriptors of "average" when the numerical equivalents are in fact "low" or "high." This leaves the reader with questions as to the meaning and validity of the data and the conclusions drawn from the data.

20. In the section of the report that discusses attentional processing, the Conner's Rating Scale is described. In the description, the reader is told, "Also included is a self-report measure completed by the student, reflecting on her/her [sic] own personal behavior in a social and school setting." However, no data regarding Student's self-measure was included in this assessment report. Such errors undermine the reliability of the report.

21. Father is attributed as the source of data related to Student's school attendance prior to attending Andersen. The assessment relies on this information without examination despite the court order indicating that future custody determinations might rest on evidence of poor school attendance. For instance, on multiple occasions, the assessment report quotes Father as noting limited preschool and no school attendance in 2014 yet no information or analysis were included in the report regarding any requirement for Student to have attended school in the 2014 school year. Student was in kindergarten in the 2015-2016 school year. No evaluation of the motivation for Father's statements or his

lack of access to Student was conducted. Examples of data that should have been examined more closely include Father's recitations of "No developmental concerns. [Student] does not attend school" after each comment regarding any concerns he might have had regarding Student's academics. Father also described Student's attendance at Andersen as "atrocious" and claimed that Student had not been enrolled or properly involved in schooling. No factual support is offered for this assertion and the lack of factual support is not noted in the assessment report. Further, the report does not reconcile Father's comments with Student's actual attendance. Father's information forms the basis for the ultimately unsupported conclusion that "Lack of educational exposure and inconsistent attendance may have negatively impact [sic] [Student's] ability to access the general education curriculum and maintain grade level standards (according to Father's input at his new school.)" Including Father in the assessment process without analyzing the possible impact on his ratings of his limited interaction with Student coupled with the ongoing custody dispute and history of court ordered prohibition of contact with Student demonstrated a lack of thorough consideration of the data on the part of Newport-Mesa assessors.

22. Finally, nowhere is the issue of Student's age discussed in relation to his grade level in school, academic performance or his speech and language deficits. Student was nearly seven years old but still in kindergarten at the time the assessments were conducted. Typically, that would be considered a grade level behind others his age. No explanation of why Student was enrolled in kindergarten during the 2015-2016 school year was included in the report. The only information regarding Student's educational history was incomplete, anecdotal evidence provided by Father who was prohibited from having contact with Student prior to March 2016, and who was involved in a contentious custody battle at the time the information was offered. The lack of information as to whether Student was held back from starting kindergarten and, if he was, the reasons why, renders the assessment incomplete and unreliable.

Psycho-educational Testing

COGNITIVE ABILITY TESTING

23. Cognitive functioning skills were assessed by Ms. Pethtel using the Wechsler Intelligence Scale for Children, Fifth Edition. The Wechsler Intelligence Scale is an individually administered, comprehensive clinical instrument for assessing the intelligence of children ages six years, 0 months through 16 years, 11 months. The Wechsler provides subtests and composite scores that represent intellectual functioning in specific cognitive domains which include verbal comprehension, visual spatial function, fluid reasoning, working memory, and processing speed as well as providing a composite score that represents general intellectual ability, usually referred to as a full scale intelligence quotient or "full scale IQ."

24. Student's full scale IQ score was 103. This is considered Student's basic ability score for purposes of determining whether Student has a specific learning disability. Regarding Student's conduct during the testing, Ms. Pethtel noted, "[Student] had some difficulty sitting still in his seat and therefore chose to stand during some of the testing or would swing the chair back and forth; however, it did not appear to impact his testing ability." No further evidence was offered to support that conclusion, thus it lacks credibility especially in light of the disparity in comparisons of ability scoring to academic achievement scoring.(See Academic Achievement Testing, below).

AUDITORY PROCESSING

25. Ms. Pethtel assessed Student's skills of processing auditory information with the same Wechsler Intelligence Scale verbal comprehension index subtest results used to measure cognitive ability. Student was reported to have achieved average scores on each subtest. The report does not explain why or how these instruments were used to test Student's auditory processing, or whether these subtests are meant to be used for this purpose.

26. Ms. Pethtel also considered the results of the listening comprehension subtest of the Wechsler Individual Achievement Test as administered by Ashley Puffer, Andersen resource specialist, which measures listening comprehension at the level of the word, sentence and discourse. This evaluation is completed by having Student point to words that correlate to pictures he is shown and then answer questions based on passages read to him. Student performed within the above-average range on the subtest. However, Ms. Pethtel did not establish that the combination of these instruments thoroughly measure auditory processing. No evidence was presented as to which potential auditory processing deficits were being assessed using the data from the two instruments and no information was provided regarding what an average or above-average score meant in relation to an assessment of possible auditory processing deficits.

27. Ms. Rovzar provided teacher ratings on the Burke's Behavior Scale. The Burke's Behavior Rating scale is described as identifying behaviors and the extent to which they are observed. Ms. Rovzar's ratings specified that Student, to a considerable degree: repeats himself and lacks a variety of responses; seems confused and apprehensive about the rightness of his responses, and is indecisive; and that, to a slight degree, he is confused in following directions; and gives illogical responses. These types of concerns warrant an assessment of all aspects of potential auditory processing deficits. No evidence was presented that the verbal comprehension index or the listening comprehension subtest are designed to evaluate the full range of potential auditory processing deficits. Therefore Newport-Mesa has not met its burden of establishing that it chose appropriate instruments to thoroughly evaluate this suspected area of disability.

ATTENTIONAL PROCESSING

28. Ms. Pethtel used rating composites from the Behavior Assessment for Children to evaluate Student's attentional processing. The Behavior Assessment System for Children is described as an integrated system designed to facilitate the differential diagnosis and

classification of a variety of emotional and behavioral disorders in children and young adults using a four-point scale of frequency of behaviors from “never” to “almost always”. The assessment report states that “at-risk” scores are described as indicating a significant problem that should be monitored to determine necessary strategies for intervention or strategies to assist the student. “Clinically significant” ratings are described as suggesting a high level of maladjustment that might warrant concern and require formal treatment.

29. The report concludes that, “On the BASC-3 [Student’s] previous teacher, mother and father all rated him in the average range in the areas of hyperactivity and attention problems in the school and home setting.” However, this is not true given that four of the scores are below 40, placing them in either the “low” or “at risk” range. Because the report failed to include a scoring scale, this cannot be determined by the report. Adding to the confusion is the lack of clarity regarding which edition of the test was actually administered, as discussed above.

30. Ms. Pethel also considered results from the Conner’s Rating Scale in assessing attentional processing. The Conner’s is an assessment tool used to obtain the parent and teacher’s observations about student’s behavior in a social and school setting and is designed to assess Attention Deficit/Hyperactivity Disorder and its most common co-morbid problems in children and adolescents aged six to 18 years old. These ratings were gathered from Mother, Father and Ms. Rovzar. The description of the instrument states, “When used in combination with other information, results from the Conner-3 can provide valuable information to guide assessment decisions.” No information is provided in the report regarding what, if any, additional information was considered in combination with the ratings provided.

31. The reporting of the Conner’s results is incomplete and confusing. To begin with, the report states that a Conner’s self-assessment was completed by Student; however, no information from a student self-assessment was reported. This narrative is followed by two tables: one with a series of scores and one with two columns labeled “scale” and

"Common Characteristics of High Guideline Scorers." These two tables are preceded by a comment that says: "*** Caution: The following section summarizes areas of concern based on ratings on the Conner 3. Note that areas that are not a concern are not reported in this summary." This comment is not explained and no explanation of the definition of a "T-Score" is provided. No information about other "areas" considered is discussed. No basis for determining what is or is not a concern is explained.

32. No scale is provided to interpret the scores that are listed in the table reporting the Conner's outcomes so one could not know whether the score listed raises concerns. However, given that an entire table devoted to an explanation of high scorers is included, one would be led to conclude that some of the scores are high. While all of the numbers in the table of scores are associated with a range labeled "Average," there have been so many mistakes in similar tables throughout the report that it is impossible to accept this representation without at least a scale to verify the scores fall within their denoted range. Furthermore, while some additional narrative follows the tables, it is not attributed to a source; much of the information does not appear to relate to attentional processing and there is no explanation of why it is included. The section on attentional processing then concludes, "It should be noted that the rating scales completed by both parents and previous teacher are consistently found within the average range in all areas. This indicates that no problems are reported across setting/environments." This is inconsistent, however, with reporting of Student's behavior elsewhere in the assessment.

33. Comments from multiple assessors regarding Student's attention difficulties indicate concerns regarding attentional processing. No testimonial evidence was provided by Student's teacher to corroborate the conclusion that his attentional processing was average. Although the report summarizes interview comments from Ms. Rovzar that she deemed Student's attention span, concentration and task organizational skills "age appropriate," data from Ms. Rovzar in other contexts does not support that conclusion. Student's kindergarten report card notes problems with his attention to tasks. The teacher's

ratings on the Burke's indicate Ms. Rovzar saw Student as being "slightly": erratic, flighty or scattered, easily distracted, lacking in continuity of effort and perseverance, upset by changes in routine and confused in following directions. Ms. Rovzar also noted a slight proclivity towards giving illogical responses and to have comments that are "off the track or peculiar."²

34. Other assessors also noticed distinct difficulties with Student's ability to stay on task. Ms. Puffer, the Newport-Mesa resource specialist who conducted the academic ability testing, reported that during the Oral Discourse Comprehension test "[Student] was standing and playing with his pencil"; during the Early Reading Skills subtest, Student made "off topic comments ..." during the Spelling subtest "[Student] was playing with his finger during the subtest and asked for a break near the end of the subtest." In summary, Ms. Puffer stated, "[Student] was able to attend, however he was wiggly and stood for most of the assessment."

35. Ms. Smith, the speech pathologist, reported that "[Student] exhibited movement throughout the evaluation and took several short breaks. [Student] sat in a revolving chair and proceeded to spin around and answer questions in this manner. The movement did not hinder [Student's] performance." As with Ms. Pethtel's similar conclusion regarding Student's cognitive testing, no evidence supporting the lack of impact on the testing was offered resulting in an assessment that is inconsistent and incomplete.

² Text immediately following the report of the interview with Ms. Rovzar set forth what appear to be five random statements. While those familiar with the Burke's Behavior Ratings might recognize the listed phrases as being the differentiations between Burke's ratings of observed behaviors, someone unfamiliar with the instrument, such as Parent, might not. The phrases are not explained or specifically associated with the narrative in any way. This is just another example of lack of care in reporting that adversely impacts the reliability of the results in this assessment.

36. Due to the numerous errors and inconsistencies, Newport-Mesa has failed to meet its burden to show the assessment yielded accurate and reliable information regarding Student's attentional processing.

ADAPTIVE BEHAVIOR

37. Adaptive behavior is the ability to manage and adapt one's behavior to achieve personal, social and community expectations for personal independence, physical needs and interpersonal relationships. This includes the ability to cope with the demands of one's environment, devise methods of self-help, communicate effectively and interact with others successfully.

38. Ms. Pethel analyzed ratings from the Behavior Assessment for Children and concluded that adaptive behavior was not an area of concern for Student. The difficulty with this conclusion is that the report presents the data with so many errors it is impossible to determine whether the information in the report is accurate or not. Scores do not match descriptors, leaving the reader to wonder which is the incorrect entry as discussed in paragraph 18 above (pg. 6). Newport-Mesa has not met its burden of demonstrating that the information relied upon in the report is accurate. Thus, it remains unknown whether problems exist for Student in the area of adaptive behavior.

SOCIAL-EMOTIONAL FUNCTIONING

39. Ratings from the Behavior Assessment for Children were also used to assess Student's social-emotional functioning and behavior. The uncertainties regarding the reliability of the Behavior Assessment outcomes and reporting, including confusion regarding the edition used and inaccurate correlation between scores and descriptors discussed above, also apply to the assessment of Student in the area of social-emotional functioning and behavior. The lack of clarity in the report results in Newport-Mesa failing to establish that the instrument used produced accurate, reliable results.

RECOMMENDATIONS REGARDING ELIGIBILITY FOR SPECIAL EDUCATION

40. In considering eligibility under the categories of Other Health Impairment, attendance information was discussed. Ms. Pethtel notes that Andersen school records show Student was absent nine days out of 126 school attendance days from September 2015 to April of 2016 and also that Student was picked up early 13 days, was tardy nine days and "late tardy" (more than 30 minutes) two times. There is no evidence as to whether Student was tardy two minutes or 20 or whether he was excused five minutes early or 15. No evidence was presented regarding whether any absences, tardies or early dismissals were excused. The evidence did not clearly state whether the absences listed occurred while Student was still attending Andersen or whether they accumulated during the period Student was transferring to his new school as the assessment report notes that proper paperwork for the transfer was not completed and thus Student was marked truant in school records for the week of April 11, 2016. Most importantly, the assessor fails to note any connections between absences, tardies or early excusals, and academic or other deficits.

41. In highlighting this attendance information and relying on Father's unsupported, conclusory statements, Ms. Pethtel's conclusion that Student's "limited school exposure" defeats special education eligibility lacks objectivity and credibility. Asserting that any need for special education and related services is due to limited education exposure without adequate supporting evidence results in Newport-Mesa failing to meet its burden of demonstrating the assessment is accurate and reliable.

42. Mother's ratings are dismissed when the assessor evaluates possible eligibility under the category of emotional disturbance. The assessment concludes that "inappropriate types of behavior or feelings under normal circumstances" are "not observed" without any comment regarding Mother's at risk ratings for depression, withdrawal or anxiety or her clinically significant ratings in the areas of somatization and internalizing problems. The report also does not acknowledge Ms. Rovzar's "at risk" rating of Student in the area of a typicality, where she identifies concerns including that he "sometimes seems out of touch

with reality” and “sometimes acts strangely”. The summary of the follow-up interview with the teacher regarding these comments does not dispel the questions raised by the ratings. Ms. Rovzar is reported to have explained the ratings by stating that Student “liked to play with objects in his desk from time to time, has a strong imagination and occasionally made off-topic or unrelated comments.” The ratings and the interview report do not align and that disparity was not discussed in the report.

43. Ms. Rovzar’s Burke’s rating noting that Student is observed “to a slight degree” to be generally unhappy is also overlooked when analyzing whether Student exhibits a general pervasive mood of unhappiness or depression. Mother’s ratings are noted and then dismissed with the report concluding that the concern was “Not observed or reported by teacher or Father”, resulting in the conclusion that the problem is “not observed across settings”. The evaluation of possible eligibility under the emotional disturbance category was also based on the Behavior Assessment ratings and also ignores Student’s observed tendency to pick at his own skin which was so pronounced the Health Assessment acknowledges he went to the doctor for the problem. It also ignores Student’s documented problems with motor tics which resulted in an evaluation by a neurologist. Due to the numerous errors throughout the report, and the incongruity between the teacher ratings and the assessor’s summary of the teacher’s comments, the reliability of the assessment is compromised.

44. Similarly, in considering whether to recommend eligibility under the category of other health impairment, the assessor concludes that a tendency to develop physical symptoms or fears associated with personal or school problems is “not observed across settings.” In coming to that conclusion, the report declares, “Records review does not indicate [Student] attending the nurse’s office while at Andersen.” This is directly contradicted by Newport-Mesa’s evidence of detailed notes regarding four visits to the nurse’s office by Student between the time he began attending Andersen in September of 2015 and the time he left in April of 2016. Mother’s Behavior Assessment ratings of clinically

significant scores in the areas of internalizing problems and somatization, and at-risk scores in the areas of depression, withdrawal and anxiety and her report that Student is “often sick and often complains about health” are dismissed on the basis that “both father and teacher did not report or observe any tendency to develop physical symptoms or complain of physical ailments.” The Health Report noting visits to a neurologist for motor tics and to the pediatrician for picking at his own skin and stomach aches is not considered. The practice of failing to analyze and reconcile data that is contrary to the report’s conclusion results in Newport-Mesa failing to establish that the assessment instruments were administered and evaluated according to testing instructions and protocols.

Academic Performance

45. Ms. Puffer, Newport-Mesa’s resource specialist, administered the Wechsler Individual Achievement Tests, Third Edition, to test Student’s academic abilities. Ms. Puffer has a bachelor’s degree in psychology and social behavior with a minor in education and a master’s degree in special education. She is a credentialed, level II education specialist who has been working for Newport-Mesa for the past 12 years. In her position as a resource specialist, Ms. Puffer assesses students in kindergarten through sixth grade to identify unique needs, helps to develop individual education programs and provides specialized academic instruction. She estimates that she has conducted between 150 and 180 assessments of eligibility during her tenure with Newport-Mesa.

46. Ms. Puffer assessed Student based on his age. However, since he had only been exposed to the kindergarten curriculum, she also compared his skills to others in his grade. He was average to above-average in all areas for grade and average with a few areas of above-average performance for his age.

47. The listening comprehension subtest contains receptive vocabulary and oral discourse comprehension components. This test measures listening comprehension at the level of the word, sentence and discourse. The student listens to vocabulary words and

points to a picture that illustrates each word, and then listens to passages and answers questions about each one. Student scored a 106 on the Receptive Vocabulary test which is an average range score. Student scored a 124 on the Oral Discourse Comprehension test which is an above-average score. Ms. Puffer noted that Student was standing and playing with his pencil during the time he took the Oral Discourse Comprehension test as discussed in the section, above, regarding attentional processing.

48. The Oral Expression Index of the Wechsler achievement test measures skills and competencies that are important for effective oral expression and that underlie written language skills. The index is comprised of three subtests: The Expressive Vocabulary test, the Oral Word Fluency test and the Sentence Repetition test. Student is shown pictures and is asked to name the concept shown in each picture. Student is then asked to say words from a given category and repeat sentences. Student scored in the above-average range on the Oral Word Fluency and the Sentence Repetition subtests and in the average range on the Expressive Vocabulary subtest. His composite score for this index was 123.

49. The Early Reading Skills subtest of the Wechsler achievement test measures skills deemed important for developing reading skills. Student is asked to name the letters of the alphabet, identify words that rhyme, identify words that begin or end with the same sounds, blend sounds together to form words, match sounds with letters and match written words with pictures. Student's score of 107 fell within the average range of scores.

50. Student achieved a score of 119 on the Wechsler numerical operations test and a score of 123 on the math problem solving assessments. The report states these are above-average scores. However, the report then states that Student was not able to add basic facts. In the next sentence the report then states the opposite: that Student was able to add basic facts. This inconsistent reporting is indecipherable and leaves the IEP team without accurate information on which to base a determination of whether Student requires special education or related services.

51. Ms. Puffer examined reports of Student's classwork to further evaluate his academic performance. Student's kindergarten report cards showed he demonstrated early intermediate to intermediate skill levels in English language and math development; however, there were some areas of regression between the first and second quarters, specifically, in his ability to understand proper capitalization and to describe and compare measurable attributes of data. Student was having difficulty with phonics and other pre-reading skills. At the end of the first reporting period, the teacher noted that Student's letter, sounds, and phonic skills were below average and that Student was receiving one-to-one help to catch up. Student was included in a small group "Systematic Instruction in Phoneme Awareness, Phonics and Sight Words" program to help him with his reading. Ms. Rovzar's Burke's ratings noted that "to a considerable degree" Student's reading was poor. These facts were not analyzed by Ms. Puffer in her assessment.

52. Test results that were not explained were included in the academic performance section of the assessment report. A graph, which may be an attempt to display results from the Wechsler Individual Achievement test, was neither labeled nor explained. DIBELS testing results are included that are similarly vague as neither the acronym nor the purpose of the test is explained, the scale is not detailed and the reproduction is poor making the graph nearly impossible to read. A list of scores that were said to relate to classroom math scores and reference the acronym SWUN were also set forth without explanation.

53. Student's standardized academic performance scores are markedly higher than his full scale IQ from the intelligence testing. This is a significant anomaly given that the scores would typically be expected to be fairly close in range. When academic performance scores are significantly lower than ability score, there is usually an evaluation of whether Student has a specific learning disability. In this case, the disparity is reversed. The assessment report fails to address this anomaly. Although the academic performance section of the report states that, "Academic skills are assessed in basic subject areas and compared

to age norms, ability level and grade level expectancies," comparison to ability level did not occur here.

54. Without analysis of the disparity between the academic and cognitive scores, or Student's struggles with reading, the report states Student is in the "Average to above average" range for everything – both academically and cognitively. However, given the marked disparity between cognitive and academic scoring results, the intelligence testing may not have produced an accurate result. Student was noted by the school psychologist to have had difficulty sitting still during his intelligence testing to the point that he was swinging a chair back and forth during the testing which was not discussed in analyzing Student's performance.

55. Instead of fully evaluating the juxtaposition between ability and academic testing results, the assessment report focuses on Student's attendance in the section considering specific learning disability as a possible category of eligibility. Student's attendance was noted as having resulted in "limited school exposure" but no connection is drawn between the absences, tardies and early dismissals noted and Student's academic performance. The score differentials should have resulted in further testing or at least an analysis of the anomaly. Absent that, Newport-Mesa has failed to meet its burden of proving that either Student's cognitive function assessment or his academic performance assessment produced accurate, reliable results.

Speech and Language Assessment

56. Student's speech and language capabilities were assessed by Julianne Smith. Ms. Smith has a master's degree in speech pathology. She is licensed by the state of California and holds a state credential as a speech pathologist. Ms. Smith has worked for Newport-Mesa for the past 14 years conducting speech and language assessments and providing treatment for students with speech and language impairments. In that time she has conducted approximately 30 speech and language evaluations each year with

approximately half of those being completed for initial special education eligibility assessments.

57. The assessment of Student's articulation abilities raises substantial concerns that were not adequately analyzed by Newport-Mesa's assessment. The Goldman-Fristoe Test of Articulation, Third Edition is used to measure speech sound abilities in the area of articulation in children, adolescents and young adults from 2 years, 0 months through 21 years 11 months. The "Sounds-in-Words" test was administered to Student. The "Sounds-in-Words" test consists of 47 picture stimuli and 60 target words used to elicit the production of 23 consonant sounds in the initial, medial and final position of words and 15 consonant clusters in the initial, one in the medial and one in the final position of words. Student achieved a standard score of 81, which places Student in the 10th percentile of results for age and gender matched peers This identifies Student as having an articulation age equivalency of 4 years, 6 months to 4 years, 7 months old. Student was 6 years, 11 months old at the time the test was administered.

58. In describing the assessment of speech and articulation, the report states, "Articulation is delayed when it is at least one year below a child's mental or chronological age according to the developmental norms ..." In Student's case, tests of his articulation result in a score demonstrating that he is approximately two and a half years delayed. Yet the report fails to address the disparity between Student's age and the age equivalent articulation result. It is simply noted that Student has a frontal lisp with the production of the /s/ sound and goes on to assert, "Acquisition of the /s/ phenome is developmentally acquired by age eight" referring the reader to a graph that is neither labeled nor explained.

59. It is troubling that the report characterizes the two-plus year age difference in articulation ability as demonstrating articulation "within normal limits." The report does not discuss whether this significant articulation difficulty adversely affected Student's educational performance. No mention was made of any impact of articulation on Student's reading difficulties. Without analysis, the IEP team is unable to evaluate Student's speech

and language deficits and their impact. Student's speech capabilities were a particular concern for Mother. Articulation more than two years behind his peers should not be dismissed as unimportant without complete analysis. The assessment is incomplete. Therefore, Newport-Mesa has not met its burden of proving it provided reliable or accurate results in the area of articulation in the speech and language assessment.

Health Screening

60. Andrea Jackson, R.N. is the school nurse for Newport-Mesa and oversees three Newport-Mesa elementary schools: Andersen, Lincoln and Newport-Coast. Ms. Jackson has a bachelor of science in nursing, and is a certified audio metrist. Ms. Jackson holds a temporary school nurse credential. She has been a nurse since 1998 in a variety of nursing positions. Ms. Jackson began her position as a school nurse with Newport-Mesa approximately three years ago. Ms. Jackson's school nursing duties include conducting hearing and vision screenings, training staff and health assistants, and caring for diabetic children and children with other health issues requiring management at school. She has conducted approximately 40 health evaluations for special education assessments each year since beginning her work at Newport-Mesa.

61. Ms. Jackson conducted Student's health assessment. In doing so, she gathered written information via questionnaires from Mother and Father and personally interviewed them on different days. She also reviewed school records regarding Student. She was unable to obtain consent from Mother to review Student's medical records from his pediatrician or his neurologist which concerned her in light of Student's history of motor tics, anxiety, constipation, upset stomach, and hyperglycemia. However, there was no request from Newport-Mesa to conduct their own assessment for these issues. Student was noted to be attending counseling.

62. No evidence was presented as to when the health assessment of Student was completed, nor was there evidence that Student was personally examined by Ms. Jackson.

The report only states, "Health assessment and developmental history was obtained from school records, parent and/or direct assessment of student by School Nurse Andrea Jackson." Ms. Jackson did not testify to any personal examination of Student. The report notes that Student passed vision and hearing screenings in November of 2015. No new screenings were completed for purposes of this assessment. Mother reported that Student had an episode of hyper glycemia. Ms. Jackson agreed with Mother that this was concerning given Student's family history of diabetes. However, there was no indication this was an ongoing issue as there were no school reports that Student had demonstrated any symptoms of hyper glycemia such as increased hunger, thirst or urination. Mother reported that she was seeking a new pediatrician to follow up.

63. Andersen's "SNAP"³ health center records indicate Student visited the nurse four times during the 2015-2016 school year. All visits occurred between January of 2016, and the beginning of April 2016, when he left Andersen. All notes are entered by nurse Caren P. Weir with the exception of the visit in January for which notes were entered by Ms. Jackson. The first two visits in January and March of 2016 were for common ailments. Once Student was sent home and once he was not. The last two visits were on March 16, 2016, and March 21, 2016. Both of those visits were for stomach aches with no fever. Although both of these occurred the week the custody order changed, and despite the fact that Mother rated Student as "clinically significant" in the area of somatization, in her Behavior Assessment ratings, these stomach aches were not addressed in the assessment report. Despite the report detailing Student's visits to the school nurse, in the section discussing possible eligibility under the category of emotional disturbance, the assessment report states, "Records review does not indicate [Student] attending the nurse's office while at Andersen Elementary."

³ Ms. Jackson was unable to define the acronym "SNAP" but testified this is the reporting program used by Andersen's health center.

64. Overall, the health assessment was superficial. Ms. Jackson's conclusion that "Student has no new, unique health concerns potentially impacting learning" is inconsistent with her acknowledgment of Student's doctor visits regarding motor tics, for picking at his own skin and for stomach aches, and his ongoing counseling at such a young age. Although evidence of student visits to the school nurse for stomach aches was presented at hearing, those visits were denied in the assessment report indicating an incomplete review of records for purposes of assessing Student's health.

THE IEP TEAM MEETINGS

The May 26, 2016, IEP Team Meeting

65. Newport-Mesa provided the results of the Student's assessments to Mother and Father on May 25, 2016. That same day, Mother informed Newport-Mesa that she was unable to attend the IEP meeting to explain and discuss the assessment results scheduled for May 26, 2017. The meeting was not rescheduled. Instead, a "meet and adjourn" was scheduled. A "meet and adjourn" is Newport-Mesa's label for a meeting convened for the purposes of complying with a prescribed statutory deadline. Ms. Cottrell testified that the purpose for such a meeting is "to document willingness to proceed" and the intention was to convene another meeting on a date when Mother was available. Present at the May 26, 2016 meeting were Father, by telephone, Ms. Rovzar, Ms. Pethtel, Ms. Smith, Ms. Puffer, Ms. Jackson and Ms. Cottrell. The meeting lasted 15 minutes. The evidence is unclear as to what was discussed at the May 26, 2016 meeting. The IEP documents included detailed notes reporting the assessment results which preceded notes of the May 26, 2016 meeting. However, the notes are undated so it is unclear which meeting date the notes memorialized. There is no legal provision that allows a school district to satisfy the statutory deadline for holding a meeting to explain and discuss an assessment by convening a meeting without all required participants and without any intention of conducting a substantive discussion.

The June 17, 2016 IEP Team Meeting

66. The meeting to explain and discuss Student's assessment was rescheduled to June 17, 2016, to immediately follow a meeting regarding Student's sibling. Attending the first meeting were Mother, Ms. Cottrell, Ms. Pethel, Ms. Puffer, Ms. Smith, Ms. Jackson, and Ms. Rovzar. Father attended the meeting via telephone, pursuant to an invitation from Newport-Mesa. Both the meeting regarding Student's sibling and the meeting regarding Student were audio recorded by Newport-Mesa at Mother's request.

67. At the sibling's meeting, which was held first, Mother objected to Father being allowed to participate in Student's IEP team meeting. Mother expressed concern about Father's opinions being elicited and Father having undue influence on the process. Mother informed Newport-Mesa that she did not want to have any proximity to or communication with Father because of the custody dispute.

68. Ms. Cottrell was aware of both the restraining order in place pertaining to Mother and of the order limiting Father's communications with the school but she had interpreted the orders to allow Father to participate in the IEP team meeting because of the recent court order allowing shared physical custody of the children. Ms. Cottrell's testimony lacked credibility. She was aware of the longstanding, specific order of the court prohibiting any contact between Mother and Father, including telephone contact, and was aware of the order limiting Father's contact with school personnel to those communications necessary to obtain copies of records. Ms. Cottrell knew that Mother was the sole educational rights holder. There was no indication in the custody order or in the modified restraining order that being allowed to pick the children up from school in any way changed the limitation on Father's interactions with school personnel.

69. When Ms. Cottrell refused to require Father to discontinue his telephone connection to the first IEP team meeting on June 17, 2016, Mother stated that she could not participate. She requested an independent education evaluation for Student and left the meeting. Mother reiterated her request for an independent education evaluation regarding

Student in an email later in the day on June 17, 2016.

70. Newport-Mesa continued with the June 17, 2016 IEP team meeting regarding Student without Mother. All other participants remained for the meeting regarding Student. Newport-Mesa did not attempt to resolve the dispute regarding Father's participation or to reschedule the meeting. Father was allowed to participate in the meeting despite having no legal rights pertaining to Student and despite the court order prohibiting his presence.

71. During the June 17, 2016 meeting, assessment results were explained by the school nurse, the school psychologist, the speech pathologist and the resource specialist. The IEP team members present concluded that "Student did not meet the education code criteria as a student with a disability and did not require special education."

72. Over the course of the meeting, questions and comments were accepted from Father. Ms. Cottrell testified that Father "gave his input when solicited" but that he did not play a role in the eligibility determination. However, Father's contributions to the assessment process, and Newport-Mesa's reliance on his input as reflected in the assessment report, refutes her testimony.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

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 (2006)⁵ et seq.; 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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 version.

with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for 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. 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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501,56502,56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20U.S.C. §1415(f)(3)(B);Ed. Code, § 56502, subd. (i).) 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.) In this case, Newport-Mesa, as the complaining party, bearst he burden of proof.

COMPLIANCE WITH PROCEDURAL REQUIREMENTS

Assessment Notice

3. To obtain parental consent for an assessment, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. § 1414(b)(1); 20U.S.C. § 1415(b)(3),(c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).)The assessment plan must be in a language easily understood by the public and the native language of the parent; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent.(Ed. Code, § 56321, subd.(b)(1)-(4).)

4. Newport-Mesa’s assessment plan was given to Mother and there was no

allegation that she did not receive a copy of the procedural rights at the same time. The assessment plan was provided in Mother's native language of English using wording easily understood by the public, explained the types of assessments to be conducted, and indicated that no educational placement or services would result from the assessment without the consent of the parent. All statutory requirements of notice and assessment plan compilation were met. A consent to the assessment plan, signed by Mother, was returned to Newport-Mesa on March 30, 2016.

Undue Delay in Responding to Request for Independent Education Evaluation

5. When a student requests an independent educational evaluation (IEE), the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, §56329, subd. (c).) If it fails to do either, the student is entitled to the IEE whether the district's assessment was appropriate or not. (*J.P. v. Ripon Unified School District* (E.D. Cal. April 14, 2009, No 2:07-cv-03084)2009 WL 1034993; *Pajaro Valley Unified School District v. J.S.* (N.D. Cal Dec. 15, 2006, C-06-0380)2006 WL 3734289.)

6. Mother asked that Newport-Mesa fund an independent education evaluation for Student twice on June 17, 2017: once when Newport-Mesa refused to conduct the IEP team meeting regarding the assessment report without Father and later that same day via email. Eighty days passed between the date Mother requested an independent educational evaluation and the date Newport-Mesa filed their due process complaint seeking a ruling as to the legal adequacy of its assessment of Student.

7. Whether or not unwarranted delay has occurred must be determined given the facts of each particular case. *Pajaro Valley Unified School District v. J.S, supra*, 2006 WL 3734289 at 3. In the *Pajaro Valley Unified School District* case, delay of nearly three months was found to be unreasonable because neither the reason for the delay nor why a delay

could be seen as “necessary” was explained by Pajaro Valley. In the case of *J.P. v. Ripon Unified School District* (E.D. Cal. April 14, 2009, No 2:07-cv-03084)2009 WL 1034993, a delay of just over two months was not considered an undue delay because the parties had continued to discuss provision of an IEE over several weeks and did not come to a final impasse until approximately three weeks prior to Ripon filing a due process hearing request. The court in the *Ripon* case also noted that winter break had begun shortly after J.S.’s request for an IEE and declared that to be a factor the must be considered in determining the timeliness of the District’s due process request.

8. This case falls squarely in between the *Ripon* and *Pajaro Valley* scenarios. In this case, the request for an IEE was made at the beginning of the summer holiday. However, there is no indication that the administrative offices were closed for an extended period of time. The letter refusing to fund the requested independent evaluation was sent on July 8, 2017. No evidence of negotiations regarding the provision of an independent assessment was submitted. In the July 8, 2017 letter, Newport-Mesa stated its intent to file a request for a due process hearing to defend its assessment of Student. Despite that representation, no filing was made until September 5, 2016. Newport-Mesa produced no evidence of why such a substantial delay occurred nor did they assert that a delay was necessary.

9. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (“*Rowley*”), the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, 458 U.S. at pp. 205-206.) Here, the failure to file a request for due process for 80 days was an undue delay and contributed to Student not having a completed assessment in the 2016-2017 school year. Newport-Mesa failed to demonstrate any justification for the extended delay between Mother’s request and the due process filing. Therefore, Student is entitled to a multidisciplinary independent educational evaluations that include social-emotional, speech and language, academic and health assessments. The *Pajaro* court found that an unexplained, unnecessary delay waived the District’s right to contest Student’s

request for an independent educational evaluation at public expense. (*Pajaro Valley Unified School District v. J.S.*, *supra*, 2006 WL 3734289 at p. 3.) Similarly, Newport-Mesa's unnecessary, unexplained delay was enough, on its own, to award the remedy of the IEE funded by Newport-Mesa. In this matter, there were other procedural and substantive violations, which taken individually require the award of an IEE funded by Newport-Mesa and when taken together make an even more compelling case.

Procedural Requirements for IEP Team Meetings Regarding Assessments

10. Upon completion of an assessment, an IEP team meeting must be scheduled that includes all required participants specified in Education Code section 56341. (Ed. Code § 56329, subdivision (a)(1)) The meeting must take place within 60 days of receiving parental consent for the assessment. (Ed. Code § 56302.1) The purpose of this meeting is to explain the assessment report and discuss the conclusions of the report.

11. IDEA and California state law explicitly require that student's educational rights holder be part of any IEP team meeting which is charged with developing and implementing a student's IEP. (20 U.S.C. §§1401(14), 1414(d)(1)(B)(i); Ed. Code, § 56342.5.) Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the special education process is the cornerstone of the IDEA. (*Winkelman v. Parma City School District*. (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Recently, the United States Supreme Court reemphasized this declaring, "The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue".

Andrew F. v. Douglas County School District (2017) Slip Opinion, No 15-827, Decided March 22, 2017.

12. California law acknowledges that court orders may change a biological parent's educational rights and, as such, defines the term "parent" with reference to a court's order. "If a judicial decree or order identifies a specific person to act as the parent of a child or to make educational decisions on behalf of a child, then that person shall be determined to be the parent for purposes of the special education law." (Ed Code, § 56028 subd. (b)(2).) Pursuant to court order, the only "parent" for purposes of the legal requirements regarding meetings and assessments related to Student was Mother.

13. As the sole educational rights holder for Student, Mother was a required participant in the May 26, 2016 IEP team meeting that was convened without her. Certain attendees are required at any IEP team meeting in order for it to meet legal requirements. One of those people is the educational rights holder. Father's attendance does not meet the requirement of Education Code section 56329, subdivision (a)(1) as he had no education rights per court order. Moreover, the court had ordered him to have no communication with school personnel other than that necessary to secure copies of records. Newport-Mesa's May 26, 2016 gathering of IEP team members and Father to announce a meeting was convened, sign a sign-in sheet and then announce the meeting was adjourned was not an IEP team meeting. If substantive discussion of any type did occur, the meeting violated Education Code section 56329, subdivision (a)(1), requiring Mother to be in attendance. Newport-Mesa's May 26, 2016 "meet and adjourn" meeting did not satisfy the statutory requirement that a meeting to discuss Student's assessment would be held within 60 days of consent to assessment.

14. The June 17, 2016 IEP team meeting also failed to meet legal requirements. Mother did not attend because Newport-Mesa had made arrangements for Father to participate via telephone. Newport-Mesa ignored court orders limiting Father's school communications and restraining him from having any contact with Mother. Mother was then

sent a copy of the proposed IEP document denying eligibility in the mail following the meeting. Ms. Cottrell's decisions to allow Father to participate in the meeting and to proceed with the June 17, 2016 meeting, despite Mother's absence, were violations of state and federal law.

15. The Ninth Circuit has found that school districts must make every attempt to secure the presence of a student's parents at IEP team meetings. In *Shapiro v. Paradise Valley Unified School Dist.* (9th Cir. 2003) 317 F.3d 1072, 1077, *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B) (*Shapiro*), the Ninth Circuit noted that "[t]he importance of parental participation in the IEP process is evident." In *Shapiro*, the school district refused to reschedule the child's IEP meeting to a date requested by the parent who was not available on the date convenient to the district. The court in *Shapiro* held that the failure to reschedule the meeting constituted a procedural violation that amounted to a denial of FAPE. (*Id.* at p. 1075). The court further held that the fact that the school district subsequently sent the IEP document to the parent for approval did not cure the violation. The court declared that after-the-fact parental involvement was not sufficient given that IDEA contemplates participation of the parent in the process of creating a plan to provide special education and related services. (*Id.* at p. 1078.) The Ninth Circuit reiterated its ruling in *Shapiro* in the case of *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*), where a parent was unable to attend a scheduled IEP team meeting.

16. Courts have repeatedly held that educational agencies cannot excuse their failure to satisfy IDEA's procedural requirements by blaming the parents. (*Anchorage School District v. M.P.* (2012) 689 F. 3d 1047, 1055; *Doug C., supra*, 720 F.3d 1038, 1045.) Federal regulations specifically place affirmative obligations on the educational agency to prioritize parental participation in an IEP meeting. The regulatory framework emphasizes parental participation to such a degree that that a meeting may only be conducted without a parent if "the public agency is unable to convince the parents that they should attend." (34 C.F.R. §

300.322(d).) In that circumstance, the agency must keep a detailed record of its attempts to include the parent. (34 C.F.R. §§ 300.322(c) and (d); 34 C.F.R. § 300.328.)

17. In this case, per court order, Mother's status as the sole educational rights holder for Student makes her the sole "parent" for all legal purposes. Newport-Mesa violated the court order protecting Mother, thereby putting her in the difficult position of having to refuse to participate in Student's IEP team so that she did not have to be subjected to contact with Father, in violation of the restraining order. Mother should not have had to make such a Hobson's choice and forcing her to do so was a denial of her right to meaningful participation in the meeting where the assessment was explained. Newport-Mesa, failed to make any attempt to reconvene a meeting to discuss the assessment that included Mother. Newport-Mesa could also have chosen to have separate meetings if they believed they should be in communication with Father. However, in refusing to exclude Father from the meeting at which Mother was a required participant, and further in failing to make any attempt to reconvene a meeting that included Mother, Newport-Mesa violated the requirements under state and federal law that Student's educational rights holder be present at the meeting to discuss the assessment. This denied Mother the right to meaningfully participate in the discussion of the assessment, to ask questions about the testing results or conclusions drawn in the assessment and to offer additional insights which might have impacted the final recommendations of the IEP team.

18. Additionally, California law requires that the assessment report must be provided to the parent at the IEP team meeting regarding the assessment to allow for discussion and explanation. (Ed.Code, § 56329, subd.(a)(1).) This duty cannot be discharged by providing the report to a person with no legal rights to make educational decisions regarding Student. Father was neither able to sign an IEP or make a decision regarding whether an independent educational evaluation would be requested. Therefore, Newport-Mesa failed to meet the requirement of Education Code, section 56329, subdivision(a)(1), as simply providing a copy of the report to Mother after the meeting, without giving her an

opportunity to hear explanations of the assessments and ask questions about the report, did not meet the legal obligations imposed by that code section. (See also, *Shapiro, supra*). By insisting on including Father, who not only had no legal right to be there but who was legally prohibited from participating, and by failing to schedule another meeting with Mother, Newport-Mesa foreclosed Mother from any opportunity to ask questions about the assessment report, clarify the inconsistencies, or to offer additional insights, any of which may have changed the IEP team's final determination regarding whether Student was eligible for services. Newport-Mesa's procedural failures constituted a serious infringement on Mother's right to meaningfully participate in the IEP team meeting where the assessment was reviewed and explained. Mother's requests for an IEE were properly made pursuant to California Code of Regulations, title 5, section 300.502. As a result, Student is entitled to an independent multidisciplinary evaluation including a psycho-educational assessment, a speech and language assessment, a health assessment and an academic assessment at Newport-Mesa's expense.

SUBSTANTIVE VALIDITY OF INITIAL ASSESSMENT

Purpose of an Assessment

19. In addition to the procedural violations discussed above, the numerous questions left unanswered by the assessment support the order of an independent education evaluation for Student as well. The purpose of an assessment is to explain to the IEP team, and particularly to a parent, what the assessment demonstrates Student's present levels of performance and areas of strengths and weaknesses are, and what, if any, deficits exist that are impacting Student's ability to learn. Assessment tools and strategies that provide relevant information to assist the IEP team in determining the educational needs of the child are required. (34 C.F.R. §300.304(c)(7).) Once those evaluations have been made, strategies can be developed to address any deficits impacting the student's ability to learn.

The Assessment Met Some but Not All of the Legal Requirements

20. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be racially, culturally or sexually discriminatory; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §1414 subds. (b)(3);Ed. Code § 56320, subds. (a) &(b).)

21. Newport-Mesa's administration of Student's multi disciplinary assessment met some but not all of the applicable legal standards. The instruments were provided in Student's native language. The assessments were administered by trained personnel and were not administered in a manner that was racially or culturally biased, or sexually discriminatory. The assessment did not rely only on a single criterion for determining whether Student had a disability. Newport-Mesa used a variety of assessment tools and strategies to gather relevant information. Critically, however, the assessment failed to meet legal standards in several areas including accuracy, reliability and validity.

Lack of Accuracy in the Report

22. In this case, the assessment report is fraught with errors. Numerous inaccuracies in ratings and/or descriptors are listed on tables throughout the reporting of ratings raising questions as to whether any of the data in the various tables is reported

accurately. The report also identifies two different editions of the Behavior Assessment for Children as being used to assess Student. The report cites results from the KABC-2 in two different sections of the report despite never describing that instrument as being administered. This renders the report confusing and unintelligible in places. As a result, Newport-Mesa failed to meet its burden of proving the assessments conducted provided accurate, reliable information.

23. Additionally, the report refers to assessments and interviews but does not present specifics as to the data considered. For instance, the report refers to a self-measure from Student that is not included. The report also refers to "interviews/consultations with District personnel" but describes only one interview with Ms. Rovzar. If conversations with other District personnel were considered in reaching conclusions regarding this assessment, that information should be clearly set forth so it can be evaluated by the IEP team. Failing to do so results in the assessment report being incomplete and lacking transparency. As a result, Newport-Mesa is unable to establish that it met its burden to produce a report that includes all bases for making the decisions contained in the report. (Ed. Code § 56327 (b)).

Failure to analyze key facts

24. The assessment report fails to analyze the fact that Student is a year behind typical kindergarten students. Student was nearly seven years old at the time the assessments were conducted. Passing references are made to information about student's educational background collected from Father who had been prohibited from contact with Student prior to March 16, 2016. The data from Father focused on Student's asserted lack of school attendance in preschool. Preschool attendance is not mandatory in California. (Ed. Code § 48200). The reason that Student was a year behind the typical age of a kindergarten student was never examined in relation to Student's academic deficits or articulation difficulties resulting in the conclusion that the report was not thorough or reliable.

25. Similarly, the report fails to analyze the impact of the difficult family dynamic.

This is not mentioned in the health report when Student's physical ailments are listed; it is not discussed in the social-emotional function section of the report in relation to Mother's concerns regarding somatization and it is not discussed in the section of the report analyzing possible eligibility categories such as other health impairment. In the section where the issue would have been expected to be examined thoroughly, that of "effects of environmental, cultural, economic disadvantage, if any" the assessment report ignores the family situation. Instead, it describes this unusually contentious divorce, which included prohibition of contact by Father via restraining orders pertaining to Student's entire family, required exchanges of the children at the police department when they are not picked up and dropped off directly at school, and sole legal custody to one parent as a "long on going custody agreement" [sic]. The report then quotes Father regarding Student's attendance prior to coming to Andersen, along with details regarding Student's absences and tardies during his time at Andersen and blaming that for the "negative impact" on Student. Ignoring the impact on Student of the unusually highly charged family dynamic, when Mother raised concerns about depression, withdrawal, anxiety, internalizing problems and somatization and Ms. Rovzar identified concerns about Student being "out of touch with reality," acting "strangely" and being slightly "generally unhappy" is inexplicable. Such a major omission results in the assessment being unreliable.

26. Finally, despite comments by nearly all assessors regarding Student's constant movement, Student's attentional processing is reported as "average." The conclusion that Student's lack of ability to sit still "doesn't appear to impact his testing ability" is unsupported. This is a particular concern when overall results show that Student's academic achievement scores significantly exceed his ability score. Such a result begs the question of whether Student might have been able to achieve a higher ability score had he been able to focus more intently on the testing.

Unreliable Testing Data

27. There is a tendency throughout the report to describe everything as “average” even when the data shows results that are not average. In some instances, the acknowledgement that a score is not “average” but rather “low” would not necessarily change the conclusion presented. However, presenting so many instances of erroneous attributions of descriptors to scores results in the accuracy of all of the data provided being questionable. If the scores are incorrect, all of the conclusions are doubtful. If not the scores, then the descriptors are wrong. Tables are created to offer a means of summarizing data quickly but are only useful to the IEP team if they are accurate. The lack of accuracy calls the entire report into question.

28. Newport-Mesa invited Father to submit information as part of the assessment process and included it in the evaluation without any discussion of the potential lack of objectivity of that information. Data from a parent who had only recently been granted joint physical custody allowing visitation with Student after an extended period of contact being prohibited and who is currently involved in a custody dispute should have at least been analyzed for possible bias. Newport-Mesa relied on Father’s assertions about Student’s lack of school attendance but offered no corroborating evidence of how the missed days and tardies impacted his academic performance. Multiple repetitions of the phrase “[Student] does attend school” and unsupported comments such as “[Student] simply [has] not been enrolled or involved in schooling as [he] should be,” lacking any further detail, should have raised a red flag especially in light of the March 11, 2016 order stating that proof of lack of attendance would persuade the judge to consider a reallocation of the custody division.

29. Had the assessors acknowledged that the custody dispute might have colored the information provided and discussed why they thought the information was sufficiently reliable to consider, they would have dispelled concerns. As presented, the report does not meet the burden of proving it is reliable and accurate.

30. Finally, use of Father’s data is a violation of court order. Courts do not issue

long-term restraining orders without a solid reason. Nor do they make determinations stripping a parent of legal custody lightly. There was no evidence presented that the September 1, 2015 order strictly limiting Father's communications with the school to that necessary to obtain records was ever rescinded. For all of these reasons, Newport-Mesa has failed to meet its burden of proving the assessments were accurate and reliable.

31. In their closing brief, Newport-Mesa asserts that the September 1, 2015 order limiting Father's communications with the school to only those communications necessary to obtain records was made pursuant to Family Code section 3025 which "addresses the rights of a non-custodial parent." Newport-Mesa argues that, upon granting joint physical custody, the September 1, 2015 order was "no longer relevant or applicable" because following the March 11, 2016 order, Father is a "custodial parent." Newport-Mesa further argues that the March 11, 2016 order "imposed no restriction on his communication with Student's school." Newport-Mesa raises this point for the first time in closing argument and submitted no evidence in support of their assertion. The argument is not persuasive. There is no evidence the March 2016 order rescinded the September 2015 order limiting Father's school communications. Further, the argument fails to account for the fact that Father had no legal custody of Student; no right to make educational decisions; and that he was restrained from having any contact with Mother.

32. Family Code section 3025, in its entirety, provides as follows:

"Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental and school records, shall not be denied to a parent because that parent is not the child's custodial parent."

33. Simply put, this code section states that, at the very least, a noncustodial parent will have access to records regarding their child. It does not provide for a change in a

parent's right to information when a custody order changes. While Father's access to Student may have changed, under the March 11, 2016 order, additional participation in Student's education did not automatically ensue and, in fact, the issue of who had the right to direct Student's education was clearly specified by the court's continued grant of sole legal custody to Mother. Sole legal custody results in Mother having the sole "right and responsibility to make decisions relating to the health, education and welfare of a child." (Family Code §3006.)

34. The September 1, 2015 court order acknowledged Father's right to obtain copies of Student's records pursuant to Family Code section 3025, then emphasized, by handwritten addition to the September 1, 2015 order, that Father's communications with any school Student was attending was limited to those communications necessary to secure records. The September 1, 2015 order was made in the context not only of a restraining order prohibiting contact with the children but also the orders prohibiting contact, direct or indirect, with Mother and granting sole legal custody to Mother.

35. Newport-Mesa has failed to prove that the March 11, 2016 order granting shared physical custody superceded the limitations on access to information ordered on September 1, 2015. In continuing the grant of sole legal custody to Mother on March 11, 2016, the court was reiterating its prior decision that Father has no educational rights. Given the facts of this case, Newport-Mesa did not establish that Father had the right to be a part of Student's IEP team at all much less to the exclusion of Mother. Nor did Newport-Mesa establish Father had the right to contribute information during an IDEA assessment process.

36. Federal appellate courts have addressed whether parents without legal custody may insert themselves into the IDEA process. In *Navin v. Park Ridge School District* (7th Cir. 2001)270 F.3d 1147 (*Navin*), an Illinois father attempted to appeal the order of a district court upholding the hearing officer's dismissal of a case he had filed pertaining to his son's special education services. The father was divorced from the student's mother and the mother had custody of the child including the right to make educational decisions. In

evaluating the competing rights of the parents, the court declared, “Nothing in the IDEA overrides states’ allocation of authority as part of a custody determination. If the decree had wiped out all of [Father’s] parental rights, it would have left him with no claim under IDEA” (*Navin v. Park Ridge School District, supra*, 270 F.3d at 1149.) The court determined that the divorce decree retained some important rights to the father, including the opportunity to be informed about and remain involved in, the education of the child. However, the divorce decree reserved ultimate decision making to the mother in case of a dispute. The court of appeals remanded the case to determine whether the father’s claims were incompatible with the mother’s rights pursuant to the divorce decree.

37. In *Newdow v. U.S. Congress* (9th Cir. 2002) 313 F. 3d 500, a student’s father wanted to bring suit to prohibit a school from forcing his child to say the pledge of allegiance. The mother had sole legal custody. Citing *Navin*, the *Newdow* court declared that the child’s father could not be allowed to disrupt the legal custody holder’s choices regarding the child’s education and could not, against the legal custody holder’s wishes, name the child in a lawsuit.⁶ (*Newdow v. U.S. Congress, supra*, 313 F. 3d at 505.)

38. In this case, the court orders in evidence state that Mother shall have complete control over Student’s education. While the March 11, 2016 order provided for joint physical custody with visitation by Father, and discontinued the physical restraining order as to Student, no additional rights were granted. The March 11, 2016 order only allowed Father to pick up and drop off Student at the school, at specified times. The order declared that Mother would have the custody of Student “at all other times not specified” which means she had custody at all times Student was at school. The volatility of the interactions between

⁶ However, the court concluded that the father retained his right pursue a case in his own right challenging what he believed was an unconstitutional state action and that even a parent with sole legal custody had no power to insist that her child be subjected to unconstitutional state action.

Mother and Father, and the continuation of the restraining order prohibiting Father from being within 100 yards of Mother, required that all drop-offs and pick-ups of Student, when school was not in session, had to be conducted at the local police office. As well as continuing Mother's sole legal custody, the March 11, 2016 order acknowledged that the other elements of the restraining order, specifically those prohibiting contact with Mother, would remain in place until February 27, 2018.

39. Although the March 11, 2016 order lifted the restraining order prohibiting contact with Student, it did not grant any additional decisional rights to Father with regard to Student's education and no evidence was admitted indicating that any decisional rights previously assigned in a divorce decree were resurrected by virtue of the grant of joint physical custody. Newport-Mesa had no basis upon which to invite the father to IEP team meetings or to participate in the assessment process. Father had only very recently been granted contact with Student so his observations of him were of questionable reliability. Comments from Father in emails, accompanying the ratings and in his interview with the school nurse indicate that his interest was less in contributing to the evaluation of Student and more to criticizing Mother's parenting, perhaps with an eye towards attempting to further challenge custody. Father had no educational rights. Per *Newdow*, Father had no right to disrupt educational choices committed to the parent with sole legal custody and Newport-Mesa should not have facilitated Father's attempts to do so.

Health Assessment

40. The health assessment was superficial at best. No evidence was presented as to when the health assessment of Student was completed. Nor was there evidence that Student was personally examined by Ms. Jackson. The report notes that Student passed vision and hearing screenings in November of 2015 and Ms. Jackson testified that those were relied on for this report. The conclusion that "Student has no new, unique health concerns potentially impacting learning" is inconsistent with Ms. Jackson's acknowledgment

of Student's doctor visits regarding motor tics, and his ongoing counseling at such a young age. The health assessment also fails to discuss Student's visits to the school nurse for stomach aches twice the week the custody order changed. Had Ms. Jackson interviewed student, she would have been able to ask him about his stomach aches and other health issues and whether these were impacting his ability to work in class. She could have also asked him whether he was experiencing any impact from the combative family dynamics to evaluate whether stress might be impacting Student's learning. Newport-Mesa has failed to meet its burden to show the assessment provided was accurate and reliable results.

Speech and Language Assessment

41. A pupil has a language or speech disorder when he demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his educational performance and cannot be corrected without special education and related services. (Ed. Code §56333.) A pupil is defined as having an articulation disorder is the pupil displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention. Significant interference in communication occurs when the pupil's production of single or multiple speech sounds on a developmental scale of articulation competency is below that expected for his or her chronological age or developmental level, and which adversely affects educational performance. (5 C.C.R § 3030 (11)(A).)

42. In this case, Student scored in the 10th percentile of results for age and gender matched peers on the Goldman-Fristoe test of articulation. This result has an age equivalency of 4 years, 6 months to 4 years, 7 months old. Student was 6 years, 11 months old at the time the test was administered.

43. The test examined Student's ability to articulate 23 consonant sounds in the initial, medial and final position of words and 15 consonant clusters in the initial, one in the medial and one in the final position of words. Yet despite his extremely low score, the only

conclusion drawn was that Student was noted to have a frontal lisp with the production of the /s/ sounds. The description of the test immediately raises questions as to how the inability to articulate a single sound could have resulted in such a low score. Perhaps there is an explanation for these discrepancies. The fact is, however, that the disparities have not been explained. In describing how articulation is assessed, the report states, "Articulation is delayed when it is at least one year below a child's mental or chronological age according to the developmental norms ..." Yet the report fails to discuss the gap between Student's age and the age equivalent articulation result. Instead, it simply states that "acquisition of the /s/ phenome is developmentally acquired by age eight" and refers the reader to a graph that is neither labeled nor explained.

44. The Goldman-Fristoe instrument has already adjusted for age expected differences in articulation. Therefore, dismissing the two-plus year age difference in articulation ability as demonstrating articulation "within normal limits" is inaccurate. Additionally, Newport-Mesa failed to address whether Student's articulation deficits adversely affected his educational performance. Student's teacher noted that his reading was poor in her Burke's ratings. It is possible that articulation difficulties could impact Student's ability or willingness to read out loud in class thus impeding his progress in this area. Without discussion of the issue, the IEP team is left without information to evaluate this important aspect of this assessment. Newport-Mesa failed to establish that its assessment of speech and language was thorough and accurate. Therefore, the assessment does not provide adequate information to evaluate Student's eligibility for special education pursuant to the category of speech or language impairment. The assessment does not meet the legal requirement that it be accurate and reliable.

Academic Performance Assessment

45. The academic performance section of the report includes numerous errors rendering it confusing. Several pieces of scoring information, including DIBELS and SWUN

scores, are presented without labeling or description. Student is described as both being unable to add basic numbers and being able to do so.

46. More critically, the academic performance assessment fails to consider all of the information from the assessments in evaluating Student's academic performance. The assessment concludes that Student is average to above-average in all areas yet fails to reconcile that conclusion with teacher's comments regarding Student's academic deficits, specifically his poor phonics and reading ability, or his need for targeted intervention in reading. The possible impact on outcomes of Student's difficulty focusing, including declaring that he did not like the early reading test, making off-topic comments and stating that, although he knew the answer, he was not going to tell the assessor what it was, were never discussed rendering the conclusions of the assessor in this area incomplete. Finally, the academic assessment fails to compare standardized testing results to Student's ability score. The fact of the marked difference between Student's low ability in comparison to his high test scores requires an examination. Making a sweeping conclusion that Student is "average to above-average in all areas" without addressing these clear concerns results in the conclusions regarding Student's academic performance being suspect as a whole. This coupled with garbled information regarding testing outcomes results in Newport-Mesa having failed to meet its burden of showing that its assessment produced accurate and reliable results.

Psycho-educational Assessment

47. The inaccuracy of reporting throughout the psycho-educational assessment was particularly troubling. It was here that the report misidentified assessment instruments, inaccurately summarized data in tables showing scores that did not match descriptors and failed to include or misplaced scales for tables. These errors confuse the reader and render the outcome of the evaluation unreliable.

48. The psycho-educational report also relied heavily on data from Father without

examination of potential bias or motivation driving his comments and without consideration of the minimal interaction he had been allowed with Student leading up to the assessment. The report then grouped Father and Ms. Rovzar's ratings, sometimes inaccurately aligning their positions, and dismissed Mother's ratings and comments. Having her contributions summarily dismissed without an appropriate basis for doing so denied Mother the right to meaningfully participate in the assessment process.

SOCIAL-EMOTIONAL AND ADAPTIVE BEHAVIOR

49. The numerous errors in the reporting of the ratings regarding Student's social-emotional function, result in Newport-Mesa failing to meet their burden of demonstrating that the assessment produced accurate, reliable data. However, even absent those errors, there would be concerns about the assessment in this area. The report fails to address Mother's behavior rating reports that Student "often" says that he "can't do anything right" and is "often sad." The report further fails to address the significance of Mother's behavior ratings which result in clinically significant scores for internalizing problems and somatization and at risk scores for anxiety, depression and withdrawal. Considering that Ms. Rovzar observed Student to be "slightly" generally unhappy, Mother's ratings indicating concern regarding depression and withdrawal, internalizing problems and somatization should have been addressed. The report also failed to explore the Ms. Rovzar's "at risk" rating for a typicality which resulted from observations that Student sometimes seemed out of touch with reality, sometimes acted strangely and sometimes said things that made no sense, dismissing these stated concerns with a summary of an interview with Ms. Rovzar that was said to have explained the comments by saying Student sometimes played with objects on his desk or had a strong imagination. The incongruity between the observations and explanations required more examination. Given the numerous errors in summarization of data throughout the report, without additional information, this explanation of Ms. Rovzar's ratings is not reliable.

50. In evaluating Student's social-emotional function, the report also fails to include any mention of his physical manifestations of stress, including the motor tics, picking at his own skin (which was also observed by Ms. Rovzar) and his repeated trips to the pediatrician and to the school nurse. The latter are denied, the report declaring, "Records review does not indicate [Student] attending the nurse's office while at Andersen Elementary." The fact that these important aspects of Student's social-emotional behavior are not analyzed indicates that the assessment was not thorough. Finally, the report relies heavily on data collected from Father. As discussed in detail above, Father's data has not been evaluated for possible bias and, despite its self-serving slant, tends to be used as a tie-breaker by the assessment. This indicates a lack of objectivity in the report. For all of these reasons, Newport-Mesa has failed to meet its burden of proving the assessment met legal standards in the areas of accuracy and reliability.

51. The social-emotional assessment was used as a foundation for evaluating the possibility of eligibility for special education and related services in the areas of emotional disturbance. Here, the report inaccurately concludes that inappropriate types of behavior or feelings under normal circumstances or a general pervasive mood of unhappiness or depression were not observed across settings. As the conclusion fails to consider Burke's rating from the teacher and Mother, as well denying school nurse visits which are evidenced by an Andersen health center report, Newport-Mesa has failed to establish that the social emotional assessment was accurate or reliable.

52. The social-emotional assessment was also the basis for evaluating whether student suffered from other health impairments. In the area of chronic impairments, the assessment fails to consider whether any of the health impairments Student was demonstrating, such as motor tics, picking at his own skin, frequent stomach aches, anxiety, depression or withdrawal might be impacting Students ability to access his education. Instead, only the listed ailments were considered and dismissed. The list of chronic or acute

health problems set forth in the table under “other health impairment” is not comprehensive.

53. The assessment also dismisses consideration of an attentional processing issue without discussing the observations of the assessors, all of whom noted Student’s extraordinary difficulty sitting still to take tests. Conclusory dismissal of the activity as “not impacting results” is not equivalent to a considered examination of the issue, especially in light of the disparity between Student’s final ability score and his scores on standardized academic tests. Mother also stated concerns about Student’s inability to focus. Given all of this information, a statement that ratings of Student’s attention in the average range “indicate that there are no problems reported across settings/environment” is inaccurate. The report has apparently based its conclusion on the ratings and ignored the other data rendering it fundamentally unreliable in this area.

54. After finding Student did not have one of the listed ailments, the assessment goes on to declare that Student “has had limited school exposure and does not present with a diagnosis at this time that negatively impacts his ability to access the general education curriculum.” This is very confusing because it is not clear whether the report is saying it would not recommend qualification under this category because Student does not have a health problem or because he has limited school exposure. As the school exposure issue is never thoroughly analyzed for bias in the contribution of data from Father or accuracy in the presentation of attendance data from Andersen records, a recommendation regarding this category of eligibility cannot reliably rest on either assertion. Furthermore, the fact that Student’s many health issues were not evaluated as possible reasons for eligibility under this category renders the assessment report incomplete.

55. Similarly, the adaptive behavior assessment data included so many errors of rating scores that did not match descriptors that it was completely unreliable. As a result, it was impossible to determine whether or not Student had deficits in this area. Newport-Mesa failed to meet its burden of demonstrating the assessment produced accurate results.

COGNITIVE FUNCTION

56. Issues are raised regarding the conclusions pertaining to Student's cognitive functioning when the overall ability score is compared to the academic achievement scores. In both instances, it is notable that assessors commented on Student's inability to sit still and focus on the testing but failed to evaluate the impact of that difficulty beyond dismissing it as "not impacting results" without citing to any evidence that this was actually true. This is particularly suspicious given the comparison of Student's ability scores and scores on standardized academic tests.

57. Student achieved an overall ability score of 103. However, the lack of discussion of potential impact of student's inability to sit still coupled with the unusual dichotomy between the ability scoring and the academic scoring renders the accuracy of the cognitive testing as a whole, and this score in particular, questionable.

58. Ms. Puffer reported that Student scored a 118 on the listening comprehension subtest; a 123 on the oral expression subtest; a 107 in early reading skills; a 111 on alphabet writing fluency, a 109 on the spelling subtest, (during which he was playing with his finger) and 123 in math problem solving and a 119 in numerical operations. Usually in an assessment, ability scores and academic achievement scores are numerically close in range. When an ability score is substantially higher than scores on standardized tests, Students are usually evaluated for a specific learning disability. (5 C.C.R. 3030(b)(10)(B)(1).) Here we are presented with the opposite phenomenon. While there may not be a basis for eligibility under the category of specific learning disability, the assessment left the question regarding the unusual juxtaposition of ability and academic achievement scores unexamined. This may not be a definitive indication that Student's score on the test of cognitive function was an inaccurate representation of his abilities. However, the fact that this disparity was not even mentioned, much less analyzed, results in Newport-Mesa being unable to demonstrate that Student's cognitive function assessment met the legal standard of producing accurate, reliable results.

59. Finally, the fact that possible eligibility under the category of specific learning disability is dismissed based on “limited school exposure” also raises the concerns discussed above with regard to this conclusion being applied to the assessment of other health impairment eligibility. Newport-Mesa’s recommendation regarding Student’s possible eligibility under the category of specific learning disability simply is not accurate and reliable.

AUDITORY PROCESSING

60. Student’s auditory processing was assessed using subtests from the Wechsler Intelligence Scale for Children and the Wechsler Individual Achievement Tests. Nowhere in the report is it explained why these instruments were chosen for measuring auditory processing. Nor was the range of auditory processing functions assessed ever described. Ms. Rovzar submitted Burke’s ratings indicating that Student repeats himself and lacks a variety of responses to a considerable degree, seems confused and apprehensive about the rightness of his responses to a considerable degree and is indecisive to a considerable degree, as well as being observed to a slight degree to be confused in following directions and to give illogical responses. Yet no analysis of these ratings is included in the assessment of Student’s auditory processing. Instead, the report concludes, “[Student’s] performance on the verbal comprehension index and both subtests that make up the index all fall within the average range and indicate there are no concerns with [Student’s] processing of auditory information.” That is not consistent with information received from Ms. Rovzar whose Burke’s ratings indicate that an assessment of all aspects of potential auditory processing deficits should be conducted. Newport-Mesa has failed to meet its burden of demonstrating that the assessment of Student’s auditory processing meets the legal standards requiring that they choose instruments that assess all areas of suspected disability.

Other Eligibility Categories

61. In its conclusion, the assessment report sets forth a laundry list of other

categories of possible eligibility that, "based on the current assessment data", were said to have been summarily dismissed on "the professional opinion of this evaluator". Included in the list is the category of emotional disturbance which was actually one of the categories analyzed in assessing Student. A statement such as this, carefully reviewed to ensure summary dismissal of a category makes sense in the circumstances, might be acceptable if only a few very specific categories are included. However, in a report with so very many errors and in which the statement itself is not carefully reviewed for accuracy, the conclusion becomes suspect.

ORDER

1. Newport-Mesa's May 23, 2016 multidisciplinary assessment did not meet the mandated legal standards. Therefore, Student is entitled to an independent multidisciplinary assessment at public expense. The assessment shall consist of a psycho-educational assessment, a speech and language assessment, a health assessment and an academic assessment. Once the assessment report is completed, if Mother requests an IEP team meeting, Newport-Mesa shall hold an IEP team meeting to discuss the assessment.

2. Newport-Mesa shall immediately provide Mother with the independent assessment criteria. No assessment plan shall be required or utilized.

3. Mother shall notify Newport-Mesa within 30 days of receiving the criteria of the names of her chosen assessors. Newport-Mesa shall contract with the chosen assessors within 14 days. Beyond the initial contact necessary to arrange for an assessment contract, Newport-Mesa shall not be allowed to have any other communications with the assessor, except as needed and determined by the assessors. Newport-Mesa shall promptly comply with all reasonable requests from the assessors necessary to complete the assessments. The assessment reports, when completed, will be provided directly to Mother by the assessors.

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. Student 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: April 12, 2017

/s/

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings