

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2013071304

v.

NEWPORT-MESA UNIFIED SCHOOL  
DISTRICT,

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NEWPORT-MESA UNIFIED SCHOOL  
DISTRICT,

OAH Case No. 2013040881

v.

PARENT ON BEHALF OF STUDENT.

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DECISION

On April 22, 2013, the Newport-Mesa Unified School District filed with the Office of Administrative Hearings a Request for Due Process Hearing in OAH Case Number 2013040881 naming Parent on behalf of Student (Student) as respondent.

On July 30, 2013, Student filed with OAH a Request for Due Process Hearing in OAH Case Number 2013071304 naming Newport-Mesa as respondent. The Newport-Mesa case was consolidated with the Student's case by order of OAH on August 6, 2013. OAH has granted continuances on the motion of one or both parties on three occasions.

OAH Administrative Law Judge Robert Helfand heard this matter in Costa Mesa, California on March 10 through 13, and 17, 2014, and April 1 through 3, 2014.

Adam J. Newman, Attorney at Law, represented Newport-Mesa. Maureen Cottrell, Newport-Mesa's director of special education resolution, was present throughout the hearing.

Student's mother (Mother) represented herself and Student. Tracey Clausen, a friend and advisor to Mother, attended for part of the first day of the hearing.<sup>1</sup> Student attended on March 12, 13, 17, and April 2-3, 2014.

At the request of the parties, the record remained open for the submission of written closing briefs. Closing briefs were to be filed on April 30, 2014. On April 22, 2014, Student, through attorney Richard M. Peterson of the Pepperdine University School of Law Special Education Advocacy Clinic, filed a motion for a 30-day extension to file closing briefs. On April 25, 2014, Newport-Mesa filed an opposition. OAH, on April 25, 2014, issued an order partially granting Student's motion by permitting an extension until May 9, 2014, to file closing briefs. Both sides timely filed closing briefs and the matter was submitted on May 9, 2014.

## ISSUES<sup>2</sup>

The following issues were determined:

- (a) Was the District's multi-disciplinary assessment dated April 1, 2013, administered by District staff, conducted appropriately?

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<sup>1</sup> Ms. Clausen was removed from the hearing because of continued interruptions.

<sup>2</sup> The ALJ has reformatted the issues. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) The issues in each of the complaints were identical.

(b) Whether the District's Individualized Education Program offer of April 1, 2013, provided Student a free appropriate public education in the least restrictive environment?

## SUMMARY OF DECISION

Student in this case is a likeable young man in his early teens, who is far below grade level in reading, writing, and math due to his disabling condition. The parties disagree on the appropriateness of a triennial assessment completed in April 2013, and of the April 1, 2013 IEP for Student. In particular, Student asserts that the assessment was flawed because he was under the influence of pain medication, and that Newport-Mesa erred in deciding to move him from general education to a special day class setting. This decision finds that Newport-Mesa performed a thorough and complete triennial assessment of Student, and that the April 1, 2013 IEP offered Student a free and appropriate public education in the least restrictive environment.

## FACTUAL FINDINGS

### INTRODUCTION

1. Student is an almost 14-year-old young man who currently resides with his family within the geographic boundaries of Newport-Mesa. Student suffered at birth from hydrops fetalis (the abnormal accumulation of fluid in the fetus) and right congenital femoral deficiency which caused the growth plates in Student's right leg to die. Student has undergone numerous surgeries to permit his right leg to be extended to make up for the death of his growth plate. On May 12, 2004, Student was first found eligible for special education under the eligibility categories of orthopedic impairment and other health impaired by the Los Angeles Unified School District where he then attended. Student currently utilizes a wheelchair.

2. Student attended school in the Castaic Union School District from April 13, 2009, to November 8, 2010, when he moved to Newport-Mesa. Student attended Lincoln Elementary School upon his arrival at Newport-Mesa until the 2013-2014 school year. Student presently attends the seventh grade at Corona del Mar Middle School (CDM).

## 2009 ASSESSMENT

3. Castaic conducted a triennial assessment in April 2009. Student received a composite score of 84 in the Leiter-Revised which measures cognitive ability.<sup>3</sup> Student received a score of 95 in the verbal comprehension subtest of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-4). In the Wechsler Individual Achievement Test, Second Edition, (WIAT-2) which measures academic skills, Student had composite scores of 71 in writing and spelling, 66 in math, and 74 in reading.

## 2010 ASSESSMENT

4. In October 2010, Mother retained Keri Ross, Psy.D., a psychologist from Valencia, California, to conduct a psychodiagnostic assessment to understand Student's academic strengths and weaknesses. The assessment was also to determine whether Student had a learning disability or attention deficit disorder because of Student's struggles in school.

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<sup>3</sup> Test scores are reported using standard scores. The average or the mean, standard score is 100. Most students fall within 15 points of mean. Percentile scores measures how the student ranks within his same-age group. Standard scores in the "very low" range are 69 and below, 70-79 are "low" range, 80-89 in the "low average" range, 90 -109 are "average," and 110 and above in the "high average" to "high" ranges.

5. Dr. Ross diagnosed Student with a reading disorder, written expression disorder, borderline intellectual functioning, and learning disorder not otherwise specified. She concluded that Student met the diagnostic category for several learning disabilities as a discrepancy existed between Student's academic ability, and his ability to concentrate, attend, and process information. She also ruled out Attention Deficit Disorder because she did not have sufficient information to make such a diagnosis.

6. In the area of cognition, Dr. Ross administered to Student the WISC- 4 for which Student received a full scale score of 82. He scored 110 in verbal comprehension, 70 in processing speed, 75 in perceptual reasoning, and 80 in working memory. For academic skills, Dr. Ross administered the Woodcock Johnson III Tests of Achievement. Student scored in the average range in one cluster-oral language where he scored 103. Student scored in the below average range with a score of 84 in broad reading. In the remaining clusters, Student placed in the borderline range in academic skills, academic fluency, and academic application with scores between 73 and 75. In four clusters, Student scored in the extremely low range with scores of 52 in math calculation and 61 in broad math, broad written language, and written expression.

7. Dr. Ross noted that Student demonstrated difficulty in reading, reading comprehension, processing speed, and written expression. Dr. Ross made 31 recommendations which included smaller class size, small group instruction, tutoring, extended time on tests, a quiet area to take exams, and that teachers avoid using questioning as a teaching technique.

#### FALL 2010-FALL 2012

8. On November 8, 2010, Newport-Mesa adopted an interim IEP which placed Student in a general education class at the Lincoln with five one-hour sessions of resource support, one 30-minute session of occupational therapy, one 30-minute

session of adapted physical education, 30 hours per week of independence facilitation,<sup>4</sup> and 60 minutes per month of consultation with Newport-Mesa's inclusion specialist.<sup>5</sup> On November 22, 2010, Newport-Mesa added assistive technology services as needed. Mother consented to the IEP.

9. On May 17, 2011, the IEP team conducted Student's annual meeting. The team offered identical services as was offered in the November 8, 2010 IEP except that it increased resource services to five 100-minute sessions. The team noted that resource services were required due to Student's difficulty in academics; difficulties in attending to tasks; and his need for repetition, pre-teaching of material, and re-teaching of new skills. Mother objected to the increased resource services and only consented to the goals, occupational therapy, adapted physical education, and independence facilitation.

10. Since third grade, Student has made only limited progress toward meeting grade level standards in mathematics and written language; limited to moderate progress in reading social science, and science; and moderate to good progress in listening and speaking.

11. On April 4, 2012, Student underwent surgery to install a Taylor Spatial Frame to extend his right leg. The Taylor Frame was connected to Student's leg with screws and pins. This required Student to utilize a wheelchair. Student moved to Florida for the surgery and recovery period. Student missed the remainder of the 2011-2012 school year.

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<sup>4</sup> This was with a one-to-one aide to assist Student because of his physical limitations.

<sup>5</sup> Student had not provided to Newport-Mesa a copy of Dr. Ross's assessment report prior to the meeting.

## 2012-2013 SCHOOL YEAR

12. For the 2012-2013 school year, Student returned to Lincoln on September 20, 2012 and was assigned to the general education sixth grade class taught by Nancy Urricariet. The class consisted of 30 students. On September 20, 2012, Mother requested that all resource services be discontinued. Newport-Mesa complied with Mother's request in an IEP addendum on September 21, 2012, in which Newport-Mesa noted that if resource services were discontinued that Student would not continue to provide specialized instruction for Student's academic goals. Mother consented to the addendum.

13. Ms. Urricariet has a B.A. in English and an M.A. in Education. She possesses a multiple subject credential. She has over 30 years teaching experience and has taught at Lincoln since the 1992-1993 school year.

14. Student exhibited an attention span of two to three minutes as compared to the average of 15 to 20 minutes for his class peers. Student had great difficulty in following directions and following class routine. At times, Student would leave the classroom when refusing to follow directions. Student required constant re-direction in order to stay on task. Student had difficulty in starting tasks and required continual direct prompting. He frequently was unable to complete class work and out of class assignments. When frustrated, Student frequently would speak out and refuse to do the work. Student's inattentiveness was a major concern which required constant prompting.

15. Writing was a major area of deficit for Student. Student was only able to put together two to three sentences in writing an essay or giving a written response to a question. The rest of the class was able to write five paragraph essays with each paragraph consisting of at least five sentences. Student also was unable to correct his writing even using a computer for assistance. Student was low functioning in math and

reading comprehension. In math, Student had difficulty in division and multiplication. He was only able to add or subtract single digit numbers and had difficulty with borrowing. On the STAR test, Student scored at a third grade level, three months on the reading test, which placed him over three years behind grade level. Student was below grade level content in science and social studies. Student did exhibit good skills in decoding and fluency and vocabulary. Ms. Urricariet worked one-to-one with Student on vocabulary which permitted him to make limited progress. On his report card, Student failed to score a grade of "3" (good progress toward grade level standards) in any area. Student scored "1" (limited progress toward grade level standards) in 12 areas and a "2" (moderate progress) in three areas.

16. Student was administered the California Modified Assessment test which is designed to measure how well students with disabilities have achieved California's content standards. The Spring results showed Student as "proficient" in English-Language Arts. Student's math portion was not scored because he did not answer a sufficient amount of questions to produce a score.

#### THE 2012-2013 TRIENNIAL ASSESSMENT

17. Newport-Mesa conducted a triennial assessment of Student beginning on November 27, 2012, which culminated in a 59 page written report dated April 1, 2013. The multidisciplinary team consisted of a school psychologist, special education teacher, school nurse, occupational therapist, adapted physical education specialist, and an inclusion specialist. Mother and Student's general education teacher also participated in the assessment by completing various rating scales and being interviewed.

18. The assessment team was comprised of persons who were trained and knowledgeable.

(a) Thi Le has been a school psychologist since August 2006. She has a B.A. in psychology and an M.A. in educational psychology. Ms. Le possesses a pupil



personnel services credential in school psychology and an educational specialist degree as well as being a nationally certified school psychologist.

Ms. Le estimates that she assesses on average between 30 and 40 students who are eligible for special education under the category of specific learning disability and 20 who meet the category of other health impaired.

(b) Michael Waldinger was been a special education teacher from 2004 to 2011 and a program specialist from 2011 to 2012 at the Fountain Valley School District. He joined Newport-Mesa starting in 2012 as a special education teacher. He has a B.A. in sociology and an M.S. in education administration. He possesses certification in mild/moderate special education with autism authorization. He was previously named as the Orange County Teacher of the Year. Mr. Waldinger was familiar with Student who was in his resource class for one month at the beginning of the start of the 2012-2013 school year. Mr. Waldinger conducts 20 or so academic assessments annually. He conducted the academic testing of Student.

(c) Cynthia Grainey has been a registered nurse since 1982 and employed as a school nurse since June 1999. Ms. Grainey has been with Newport-Mesa since 2006. Ms. Grainey has a B.S. and M.S. in nursing. She has a clear school nurse services credential. Ms. Grainey conducted the health portion of the assessment.

(d) Gabrielle Sullivan has been an occupational therapist with Newport-Mesa since September 2011 and has been a school-based occupational therapist since 2008. She has a B.S. and M.A. in occupational therapy. She is a state licensed occupational therapist, nationally certified in occupational therapy, and board certified behavior analyst. Ms. Sullivan administers assessments to an average of 18 students annually in occupational therapy. Ms. Sullivan was

familiar with Student as she provided occupational therapy services to him during school year 2011-2012.

- (e) Kristine Dawson has been an adapted physical education teacher since 2006. Prior to 2006, she taught middle school physical education for about seventeen years. She has a B.S. in physical education and a master's degree in adapted physical education. She has a clear adapted physical education specialist credential. She conducts adapted physical education assessments for eight to 10 students annually on average. Ms. Dawson was familiar with Student as she had provided adapted physical education services to him since his arrival at Lincoln.
- (f) Claudine Steck has been an inclusion specialist with Newport-Mesa since 2005. She has been in special education since 1995 as a teacher, team leader, and as an inclusion specialist. She has a B.A. and possesses a learning handicap and multiple subject credentials. Part of her duties is to work with students and staff to fully include students with disabilities in general education. She has worked with Student since the Fall of 2010.

19. The purpose of the assessment was to determine (a) whether Student continued to meet the eligibility requirements of special education; (b) whether Student continued to demonstrate an educational need for special education; (c) to determine Student's present levels of performance; (d) identify any unique needs that may have developed since the previous assessment; and (e) to provide the IEP team information which would aid it to determine what changes need to be made to the current IEP to meet Student's needs. The testing instruments used were technically sound, administered in accordance with the test producer's instructions, and used for the purposes intended. The tests were not given in a discriminatory way and were given in Student's native language, English.

## Health and Development History

20. Ms. Grainey authored the health and developmental history portion of the assessment report. She conducted a review of health and medical records in the possession of Newport-Mesa. She also conducted a health screening in the areas of vision, hearing, and dental. Ms. Grainey found no deficits in these screenings. Ms. Grainey noted that Student utilized a wheelchair because of recent surgery that installed a Taylor Spatial Frame. Ms. Grainey reported that Student had been advised by his physician to ambulate using a walker at least one hour daily as tolerated. She also reported that although Student had been prescribed diazepam<sup>6</sup> in the past as needed for muscle spasm, Student did not have at the time of the assessment a current order for use of diazepam or other prescription drug at school.

## Academics

21. Mr. Waldinger, the case manager for Student, conducted the academics portion of the assessment. Mr. Waldinger was familiar with Student as he had been in his resource class at the beginning of school year 2012-2013. Even though Student was removed from the resource class per Mother's request, Student would still stop in for help from Mr. Waldinger. He also frequently had contact with Student as he did push-in services in some of Student's classes.

22. Mr. Waldinger administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III). The WIAT-III is designed to measure a student's achievement in grades pre-kindergarten through 12. The WIAT-III consists of four main areas with each area containing subtests, which measure listening, speaking, reading, writing, and mathematical skills. Student received a score of 112 in the Oral Language portion which

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<sup>6</sup> Diazepam is marketed under the commercial name "Valium."

placed him in the average range (the 79th percentile). He scored within the average range in all oral language subtests. In reading, Student scored in the "below average" range with a score of 84 (10th percentile). In written expression, Student received a score of 67 which placed him in the "low" range (first percentile). Student scored "below average" in four subtests and "low" in three. In mathematics, Student measured in the "low" range with a score of 66 (first percentile). Student scored a 59 in math fluency-multiplication and 60 in math fluency-subtraction (less than the first percentile). He also scored a 63 (first percentile) in numerical operations and a 68 in math problem solving (second percentile). All these results were in the "low" range. Student's results were consistent with his performance in school since the third grade as well as the 2009 Castaic and 2010 Ross assessments.

#### Psychoeducational

23. Ms. Le conducted the psychoeducational portion of the assessment. She reviewed Student's past and current educational records; reviewed past assessments; interviewed Student, his teachers, and Mother; reviewed parental and teacher report forms; observed Student in class, during testing, and on the playground and administered several standardized tests.

#### PARENT AND TEACHER INTERVIEWS

24. In the Parent Input Interview Report, Mother wrote Student had retention issues and short term memory issues. Mother also reported that Student required prompting to stay on task and was at high risk for depression. Student's teacher, Ms. Urricariet, reported on the teacher report form that Student's verbal communication skills were strong; he was resistant to completing class and homework; had difficulty with gross and fine motor skills; and had a short attention span. Ms. Urricariet reported that Student was below grade level in reading, math, and writing.

## OBSERVATIONS

25. Ms. Le conducted four observations of Student at school with two during class, one at lunch, and one on the playground. Ms. Sullivan, the occupational therapist, conducted one observation on the playground. On the November 27, 2012 observation during math instruction, Student was only 40 percent of the time on task compared to his peers who were on task 77 percent of the time. Student engaged in conversations with peers on related topics during instruction. During the 25 minute observation, Student was only able to complete two problems. On November 29, 2012, Ms. Le observed Student during science instruction. Student was on task for 50 percent of the time as compared to peers being on task 88 percent of the time. The class was broken into small groups on a project. Student was watching but not participating. On January 8, 2013, Student was observed in social engagement with peers during lunch. Ms. Sullivan observed Student on the playground on January 9, 2013. Student engaged with peers in the Beyblades game. He was observed engaging in self-stimulatory behavior, such as snapping and wiggling fingers for one to three seconds, while watching others play. During the administration of testing, Student's examiners noted his behavior. Student gave a good effort. Ms. Sullivan noted that in a one-to-one testing environment with minimal auditory and visual distractions, Student presented with good attention to task and complied with instructions. On occasion, Student ignored repeated directions how to complete tasks pursuant to the test directions.

## INTELLECTUAL FUNCTIONING

26. Ms. Le administered two standardized tests to measure intellectual functioning. Like Dr. Ross in 2010, she administered the WISC-IV. The Full Scale Intelligence Quotient is an estimate of global intellectual functioning. Student's full scale score was 74, which placed him in the fourth percentile and in the "borderline" range. Ms. Le observed that there was a discrepancy in Student's scores between his verbal

reasoning abilities and his nonverbal reasoning abilities. In the area of verbal comprehension, Student scored in the “average” range with a score of 104 which placed him in the 61st percentile. In perceptual reasoning and working memory, Student scored in the “borderline” range with scores of 77 and 74, respectively. This placed Student in the sixth percentile for perceptual reasoning and the fourth percentile in working memory. Student’s processing speed score was 50 which placed him below the one-tenth percentile in the “extremely low” range.

27. Ms. Le testified that the results on her administered WISC-IV were similar to the results obtained by Dr. Ross. Ms. Le opined that the difference in the full scale score obtained by Dr. Ross (which was an 82) could be attributable to Student’s lower score on the processing speed area. Student’s composite score on the Leiter-Revised, which is also an IQ test administered by Castaic, was also similar.

28. Ms. Le also administered a second standardized test, the Differential Ability Scales-Second Edition to measure intellectual functioning to corroborate the scores received on the WISC-IV. Student received a score of 82 in the general conceptual ability. This placed him in the 12th percentile and in the “low average” range. Student scored “average” in verbal (103 and 58<sup>th</sup> percentile), 85 for nonverbal reasoning (85 and 16th percentile), and “extremely low” for spatial or recall of designs (68 and second percentile). Student’s scores on the Differential Ability Scales were consistent with other IQ tests administered by Dr. Ross and Castaic, as well as the WISC-IV by Ms. Le.

#### ADAPTIVE BEHAVIOR

29. Adaptive behavior is the ability to adapt to and manage one’s surroundings, which mean an individual’s ability to effectively manage social and community expectations for personal independence, physical needs, and interpersonal relationships. Ms. Le administered the Adaptive Behavior Assessment System, Second

Edition (ABAS-II), which is designed to measure important behaviors an individual displays at school, home, the community, and other settings. The ABAS-II is normed to individuals from infancy to age 89. The ABAS-II measures three domains and includes a general adaptive composite score. It consists of rating scales filled out by raters who subjectively record their observations of Student's functioning. Both Mother and Ms. Urricariet were the raters. Mother rated Student as "average" in social, "low average" in conceptual, and "extremely low" in practical. This resulted in Student being in the "low average" overall. Ms. Urricariet rated Student in the "extremely low" range in all domains. The results demonstrated that Student's adaptive skills were significantly lower in the educational setting then reported by Mother at home.

#### AUDITORY PROCESSING, MEMORY, AND ATTENTION

30. Auditory processing is involved in all areas of academics since all instruction involves verbal explanations and directions. The Comprehensive Test of Phonological Processing (CTOPP) is a standardized test measuring phonological processing, which is the skill of processing basic word sounds (phonemes). Phonological processing is related to working memory and reading. Student tested in the "borderline" range in phonological awareness with a score of 76, which placed him in the fifth percentile, "below average" in phonological memory with a score of 82, which placed him in the 12th percentile, and "below average" in rapid naming (speed that an individual can name letters presented in written form), which placed him in the 16th percentile with a score of 85.

31. Memory is an important component of learning. Memory skills include short-term memory (retaining new information), active working memory (temporarily retaining new information for active use), and long-term memory (consolidating information permanently which can be retrieved at a later time). Ms. Le administered the Wide Range Assessment of Memory and Learning-Second Edition (WRAML-2). The

WRAML-2 is a standardized test, which assesses the ability to acquire and retain a variety of information. The test contains three indexes. Student received a score on the general memory index of 77 and the sixth percentile which was in the "borderline." Student scored in the "average" range in verbal memory, "below average" in visual memory, and "borderline" in attention/concentration.

32. Ms. Le administered the Connors Rating Scales-3rd Edition, which is a rating scale utilized to obtain parental and teacher observations about a child's behavior in social and school settings. The Connors is designed to assess attention deficit hyperactivity disorder. The Connors is to be used in conjunction with other information. The Connors was filled in by Mother and Ms. Urricariet. On the index scores, Mother rated Student as "average" in restless impulsive and "elevated" as to emotional ability (likelihood to change). This resulted in a global index of "elevated." Ms. Urricariet scored Student in the "very elevated" range in all areas. The Connors also contains scores under the Diagnostic and Statistical Manual-IV-TR. Ms. Urricariet rated Student as "elevated" in ADHD predominately hyperactive-impulsive and conduct disorder. Ms. Urricariet rated Student as "very elevated" in ADHD predominately inattentive type and oppositional defiant disorder. Mother scored Student as "average" in all areas except for oppositional defiant disorder, which Student was graded as "high average." Based on the Connors, observations, and reports from parent and teacher, Student presented with significant difficulty attending to tasks at hand in the classroom and as compared to peers.

#### SOCIAL/EMOTIONAL FUNCTIONING

33. To assist in determining Student's social and emotional functioning, Ms. Le administered the Behavior Assessment System for Children, Second Edition (BASC). The BASC is a rating scale, which facilitates a differential classification of emotional and behavioral disorders in children and young adults. Scores in the "at risk" range may identify a significant problem which may require formal treatment. In Mother's ratings,



Student was marked as "average" in all areas except for three. In somatization (tendency to be overly sensitive to and complain of physical discomforts) and attention problems, Mother rated Student as "at risk." Ms. Urricariet marked Student as "average" in three areas including somatization. She rated Student as "at risk" in hyperactivity, aggression, anxiety, attention problems, adaptability, leadership, study skills, and functional communication (ability to communicate ideas in a way others can understand). Ms. Urricariet rated Student as "clinically significant" (high level of maladjustment that may require formal treatment) in conduct problems, depression, learning problems, and withdrawal. The BASC also includes a consistency index, which is used to determine whether a reviewer's answers do not appear consistent. Both Mother and Ms. Urricariet scored "acceptable." Additionally, Ms. Le observed that Ms. Urricariet had reported concerns with Student's non-compliant behaviors, poor attention, lack of work completion, poor organizational skills, and an increase of defiant behaviors.

#### Occupational Therapy

34. The occupational therapy assessment dealt with sensory-motor integration, which refers to the ability to relate visual stimuli to motor responses in an accurate and appropriate manner. Ms. Sullivan used the Educational Framework for Child Success model as a guideline. The Educational Framework is identified in the Guidelines for Occupational Therapy and Physical Therapy in California Public Schools as best practice within the school environment. The assessment is designed educationally rather than for medical uses. Student chose to be assessed in his wheelchair rather than use a chair. Ms. Sullivan administered three standardized tests- the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, the Beery Test of Visual-Motor Integration, Sixth Edition (VMI), and the Test of Handwriting Skills-Revised. These tests are normed and are technically sound.

35. To measure Student's fine motor/visual motor skills, he was given the fine motor portions of the Bruininks-Oseretsky and the VMI. Student scored "well below average" on the fine motor control composite and "below average" on the manual dexterity subtest. The VMI requires the subject to undergo tasks involving paper-pencil exercises. Student scored in the "very low" range in all areas. Student required instructions outside the standardized directions and had problems recalling what he was to write. Because of this, the examiner could not score two parts of the Test of Handwriting Skills. Of those subtests that could be scored, Student scores varied from the second to the 37th percentile.

36. Ms. Sullivan conducted observations of Student on three occasions. During these observations, Student was functioning inside the classroom and on the playground. Student's handwriting, although poor, was legible to his teacher.

#### Adapted Physical Education

37. Ms. Dawson used the Brockport Physical Fitness formal assessment tool and a record review. The Brockport is designed to assess a subject's physical fitness level. Student was given only two portions of the Brockport due to Student being confined to a wheelchair with a spatial rod on his right leg. Student registered dominant grip strength of two kilograms force on his right hand and four on his left hand. The minimum standard in grip strength for 11 year old boys is 21 kilograms. On the dumbbell press, Student was able to press a five-pound weight 12 times with his right hand and 15 times with his left hand. The dumbbell press is designed to use a 15 pound weight. Ms. Dawson noted that in the Castaic 2009 assessment, Student was given portions of the Curriculum Assessment, Resources and Evaluation- Revised to evaluate adapted physical education levels. Student scored in the four to six year range in throwing a playground ball overhead, small ball throw and small ball catching. Student's results were similar to the 2009 evaluation.

## Recommendation of Eligibility

38. The assessment report concluded that Student was eligible for special education under the categories of Orthopedic Impairment, Other Health Impairment, and Specific Learning Disability. As to OI, the team noted that Student used a wheelchair and that his adaptive living skills were significantly impacted due to his physical disability. As to OHI, the team noted that Student had difficulty sustaining attention in the educational environment as well as his physical disability causing limitation to Student's ability to maintain alertness, strength, and vitality.

39. In order to be eligible under the category of SLD, a student (a) must demonstrate a severe discrepancy between intellectual ability and achievement in one or more areas of oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematics reasoning ; and (b) that the discrepancy is due to a disorder in one or more of the basic psychological processes, including attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities. As to Student's eligibility under SLD, the report pointed out that Student presented with a discrepancy between ability and achievement in the area of math calculation.<sup>7</sup> The report also concluded that Student presented with a disorder in attention, sensory motor processing and long and short-term memory.

40. The report concluded that Student's unique needs were in the following areas: mathematics, written expression, spelling, study skills, social-emotional, strength, and recreation/leisure.

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<sup>7</sup> The report indicated that although Student's discrepancy totaled 18 points, the standard error measurement allowance of four points falls within the 22 points required by federal and state law.

## Appropriateness of the Newport-Mesa Assessment

### CONTENTION THAT STUDENT WAS MEDICATED DURING THE ASSESSMENT TESTING

41. Student contends that the District's assessment was not appropriate because Student could not be properly evaluated due to his being on narcotic prescription drugs. Mother testified that Student was prescribed diazepam and oxycontin<sup>8</sup> since Student's April 2011 surgery to install the leg extending appliance. She stated that Student was given a dose for aches and pains when he awoke each day and again at bedtime as Student was in constant pain. Mother also contended that Student was given diazepam each day as well. Mother related that she was often called to school to medicate Student when he complained of pain. The ALJ found no credibility to such claims.

42. Student produced a copy of a prescription for diazepam dated May 9, 2011, from Shriners Hospitals in Tampa, Florida. Student failed to produce any independent evidence that his physicians ever prescribed either oxycontin or diazepam after May 2011. On August 17, 2012, Student's surgeon, Dr. Dror Paley, forwarded a letter to the District dealing with what activities Student could partake in physical education and in daily activities. Dr. Paley made no reference to Student being on pain medication. Ms. Graine, in her assessment record review, noted that Newport-Mesa did not have a current order for use of diazepam at school. There was no mention in Newport-Mesa health records of an order for use of oxycontin at school either. Newport-Mesa health records failed to show any indication that Student was on such drugs nor that Mother was called to school because of Student being in leg pain except

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<sup>8</sup> Oxycotin is the brand name for oxycodone hydrochloride. It is an opioid analgesic which features time release. Oxycontin is well known that it can be highly addictive.

for January 8, 2013, which was after the completion of assessment testing. Claire McGirr is the Lincoln school nurse. She has been a registered nurse for 34 years. Ms. McGirr was not aware that Student was on either diazepam or oxycontin. She had frequent contact with Student and never observed him to appear under the influence of medication. Ms. McGirr is an experienced medical professional who would be able to observe if Student showed signs of being under the influence of drugs. Based on her experience, she also opined that persons with surgically installed appliances are not regularly prescribed pain medication except immediately after surgery.

43. Student testified that his medication caused him to be drowsy, slur his words, and be spacey. He claimed to be medicated and tired throughout his assessment. Student also claimed that he threw multiple tantrums during testing which contradicts that he was drowsy and spacey. Student concluded that because of being medicated that he did not give his full effort. This was contradicted by each of the assessors. Although, Ms. Le noted that Student threw a tantrum when brought for testing one time as he did not want to miss class, Student was cooperative during testing and showed no signs of being medicated or under the influence of drugs. The observations during class, at lunch, and on the playground, all demonstrated that Student was engaged and actively socializing with peers. Ms. Steck had frequent contact with Student and never observed him "drugged." Student's teacher, Ms. Urricariet, observed him every day in class and never observed any signs Student was under the influence of drugs. Also, Ms. Urricariet was never informed by Mother or Student that he was on pain medication.

44. On November 14, 2012, Mother wrote a letter relating to Student attending science camp. The letter discussed Student's medical condition. Mother stated:

"[Student] hasn't taken any pain medications in several months. Botox as nerve block is in [Student's] right leg. [Student] may take Aleve if tired and achy from extra exertion."

45. Mother testified that the information provided in the letter was false so as to obtain permission for Student to attend the camp. Student corroborated Mother by testifying that Mother put a vial of oxycontin hidden in his backpack, which he would take in the restroom during the day. Mother testified that Student was given his pain medication twice per day-when Student awoke and when he retired for the night. Oxycontin is a time-release drug that is administered every 12 hours.<sup>9</sup> If Student were being given oxycontin, especially more than the recommended dosage, all persons in contact with him, including the assessors and education professionals, would have readily observed Student demonstrating signs of being drugged.

46. The results of the 2010 Ross assessment and the Newport-Mesa assessment were consistent as Student scored within the same ranges in both assessments. The difference in the full score intelligent quotients was the result of a lower score in one of the subtests administered in 2013. Student's score on the Differential Ability Scales was similar to the score Student had on the Ross assessment, WISC-IV and the Leiter-Revised from the 2009 Castaic assessment. This is further evidence that Student was not under the influence of medication at the time of the Newport-Mesa assessment.

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<sup>9</sup> "OxyContin: Pain Relief vs. Abuse," [www.webmd.com/pain-management/features](http://www.webmd.com/pain-management/features)

#### STUDENT'S EXPERT

47. Grace Mucci, Ph.D., a child psychologist from the Children's Hospital of Orange County, testified on behalf of Student. Dr. Mucci was called to testify as an expert on the appropriateness of the Newport-Mesa assessment. Dr. Mucci met Student for one hour at the customer service room of the specialty clinic. Dr. Mucci recommended that Student should be evaluated by a neuro-psychologist. Dr. Mucci never evaluated Student nor reviewed the Newport-Mesa assessment report. Dr. Mucci refused to render an opinion as to the appropriateness of the District assessment. Thus, the ALJ gave no weight to her testimony as she was not knowledgeable enough to render any opinion as to the appropriateness of the Newport-Mesa assessment.

#### THE APRIL 1, 2013 IEP MEETING AND OFFER

48. On March 21, 2013, Mother emailed Newport-Mesa and gave notification that she would not attend the April 1, 2013 scheduled triennial/annual IEP meeting. Mother instructed Newport-Mesa to hold the scheduled meeting without her presence. In the email, Mother expressed several concerns regarding Student.

49. On April 1, 2013, the IEP team convened. The team comprised the assessment team members, Lincoln personnel, as well as persons from CDM, where Student was to commence attending during the 2013-2014 school year. Additionally, Maureen Cottrell, the Newport-Mesa's director of special education resolution, and an assistive technology specialist attended.

#### Present Levels and Student's Unique Needs

50. The team reviewed Student's present levels of performance by reviewing the recent assessment. Each of the assessors reviewed their individually conducted evaluations. The assessment team reported that Student's strengths were in oral communication, verbal reasoning, and listening comprehension. They reported

Student's areas of unique need as visual perceptual reasoning, spatial motor integration, processing speed, adaptive/independent living skills, written expression, letter formation when writing, phonological skills, auditory processing, attention/concentration, visual memory, and math calculation. Ms. Urricariet reported that Student continued to have difficulty focusing on assignments and initiating a task. Ms. Urricariet noted that Student required continual prompting by his aide to complete any part of an assignment. She also related that Student had problems accepting adult direction, engaged in outbursts, and avoidance of class and homework assignments. The team then adopted the recommendation of the assessment team finding Student eligible for special education under OI, OHI, and SLD.

### Goals

51. The IEP team then discussed goals to meet Student's needs. Ms. Urricariet, the classroom teacher, and Ms. Fusaro, a special education teacher, actively participated in the discussion. The team adopted 19 goals in the areas of adapted physical education (two goals), gross motor skills (two goals), study skills, reading (three goals), mathematics (four goals), behavior (three goals dealing with attention, work completion, and compliant behavior), writing (two goals in editing and writing a five sentence response to a writing prompt), and social/emotional (two goals in peer interaction and perspective taking). Each goal included benchmarks where available<sup>10</sup> and the annual objective for Student to reach. Each of the IEP team members opined that the goals were appropriate to meet Student's unique needs. Student offered no evidence to the contrary.

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<sup>10</sup> Because Mother removed Student from resource services this resulted in Student not receiving specialized academic instruction where benchmarks would have been established.



## FAPE Offer

52. The team reviewed Student's instructional needs and where these needs could be met. Since Student was at a second grade level in mathematics, the team determined that the pre-algebra class at CDM would be too advanced for Student to access the curriculum. The team opined that a special education replacement math curriculum class designed for students in the moderately delayed area was an appropriate placement for math. The team also opined that a "mild" special education class was appropriate for Student because of his delayed reading and writing skills. General education students were able to write five paragraph essays with each paragraph containing at least five sentences. Student was not near that level. By being placed in a "mild" class, Student would be able to be provided with a standard based curriculum and be able to improve on his writing skills which were at a third to fourth grade level. The team discussed the replacement curriculum which would be used in the special education classes for reading as opposed to the reduced work production which could be implemented if Student was placed in general education with resource services. The team determined that Student's comprehension difficulties created a significant obstacle to Student being a successful participation in a standard special education or general education class.

53. The team determined Student's orthopedic impairments, which resulted in frequent class absences, combined with his identified unique needs in reading, math, and writing affected his ability to fully participate in the general education classroom.

54. The IEP team then made a FAPE offer for the remainder of the 2012-2013 school year and for school year 2013-2014. The offer for the remainder of 2012-2013 would continue the placement and services called for in the preceding IEP which included 2 hours and 45 minutes of resource services per day; one 30 minute session of adaptive physical education; 30 hours of a an independent facilitator (aide); four 30

minute sessions of occupational therapy consultation per year to consult with the general education teacher as environmental adaptations and accommodations; and inclusion specialist consultation once per month for 30 minutes. The team made the following offer for the 2013-2014 school year:

- (a) A "moderate" special day class for three 57-minute periods per day in the areas of reading, writing, and mathematics;
- (b) A "mild" special day class once daily for 57 minutes in history and science;
- (c) One general education elective class;
- (d) One 57 minute daily class for adapted physical education;
- (e) 30 hours per week of support by an independence facilitator;
- (f) Occupational therapy consultation with the general education teacher four times annually;
- (g) Inclusion specialist consultation once per month for 30 minutes;
- (h) Eight 30-minute sessions of individual counseling from April 1, 2013 through November 22, 2013;
- (i) School nurse available for consultation as needed;
- (j) Transportation; and
- (k) Extended school year.

The FAPE offer also included assistive technology for language arts, math and district testing; supervised breaks; use of a calculator for district testing; extra time on tests within a testing day; and small group settings in language arts, math, and district testing. The team also offered modifications: computer access to type assignments; extra time to complete assignments; tests can be taken in an alternative setting; repeated and clarified instructions with Student repeating the instructions; allowed to dictate responses during class tests or assignments; reinforcement systems; preferential seating and access for wheelchair; access to word prediction and text-to-speech

software; use of a calculator to check work and use of a multiplication chart in math class; equipment adaptations as needed; use of visual aids for instructions and directions; and early dismissal from classes for transitions. Additionally, Student would have access to an assistive technology specialist as needed.

55. Mother did not consent to any portion of the IEP except as to the implementation of accommodations and modifications.

#### APPROPRIATENESS OF THE APRIL 1, 2013 IEP

##### Opinion of Student's Current Teachers

56. Student's present teachers testified as to their opinion regarding the appropriateness of the April 1, 2013 IEP based on their experience with Student in their classes. For school year 2013-2014, Student attends seventh grade at CDM where he continues to be placed in general education classes pursuant to Student's former IEP. Student's first quarter grades were an "A" in adaptive physical education, "A-" in art, "D" in language arts, "C" in world history/geography, "D" in biological sciences, and an "F" in math. During the second quarter, Student received an "A" in adaptive physical education, "D" in art, "D" in language arts, "C-" in world history/geography, "C" in biological sciences, and "D-" in math. Student's academic average equaled 1.9167.

57. Student's seventh grade teachers all opined that the April 1, 2013 IEP offer was appropriate for Student based on his deficits, which they observed during the present school year. All agreed that Student's academic skills and performance were well below those of his peers. They also cited continued problems in his ability to complete class assignments and homework as well as inattentiveness and problems following directions.

58. Brian Tulley, who has taught science for 30 years, is Student's seventh grade science teacher. Mr. Tulley noted that Student had failed to demonstrate

understanding of the concepts being taught as compared to his classmates. Mr. Tulley stated that he bumped up Student's grades so that Student's actual grade should be one grade lower than he received. He admitted that a student in his class can pass the course without passing a single test. Mr. Tulley opined that Student was improperly placed in his general education class and should be in a less academically rigorous class.

59. Student's math teachers in the seventh grade both noted that Student lacked the basic math skills required to access the seventh grade curriculum. Joseph Sloate, Student's math teacher for the beginning of the 2013-2014 school year, noted that Student needed coaching in every step of solving a multi-step problem. Damon Hill, Student's current math teacher, and Mr. Sloate opined that Student requires significant remediation instruction, which cannot be given in a general education class.

60. Todd Eversgerd is Student's current history teacher. He noted that the level of Student's work is not up to that of his peers. Student received quarter grades of "C" and "C-" which he stated were modified to give credit to Student's effort. Mr. Eversgerd noted that Student had difficulty in reading comprehension and pacing which permitted him to complete only 25 percent of work done in class. He also noted that Student had not turned in any homework assignments on time. Mr. Eversgerd opined that Student requires a much slower paced class.

61. Christopher Brude is Student's current language arts teacher. Student has struggled in his class due to his difficulties in reading comprehension and his poor writing skills. The class standard is to write five paragraph essays with each paragraph comprising at least five sentences to answer questions. Student was only able to respond to these questions with one to two sentences which were poorly constructed. Student's work contained numerous spelling and punctuation errors. Mr. Brude estimated that Student is noncompliant about half the time. Student appeared not to understand class content and struggled to complete his work on time. Mr. Brude strongly

felt that Student was improperly placed in general education and would benefit from a special day class where he could receive more direct instruction.

62. Student attempted to impeach the testimony of Mr. Brude and Mr. Eversgerd by using examples of Student's work. Both remarked that the homework assignments were a much higher caliber of work than done in class. Student, because of his disability, has a scratchy type of writing. Parts of the work samples were class assignments in history and language arts and were in Student's writing. These assignments had scratchy type writing, and the sentences written were simple in structure and there were never more than a two sentence response to a question. Some of Student's homework consisted of typed pages which contained a single full paragraph essay with structured sentences. Others contained no structured paragraphs and were filled with numerous errors in spelling and punctuation. The caliber of these clearly showed that Student did not author the structured essay responses as he does not have the ability to write five sentence paragraphs. Student's maps, which were history assignments, also did not contain his handwriting. Mr. Brude and Mr. Eversgerd did not feel that the work was Student's, but both gave him credit on these assignments. Mr. Tulley also doubted that Student's homework and many late submitted class assignments were Student's actual work product as they contained a much higher caliber of writing skill than the work Student completed in the classroom. The ALJ found Student's teachers credible as the work samples were so varied in quality.

#### Expert Testimony

63. Tracey Clausen testified as an expert for Student. Ms. Clausen has been retired for more than 10 years. She had been a teacher for 13 years and worked for eight years in the special education office of the United States Department of Education. Ms. Clausen, with Mother, observed a mild/moderate special day class at CDM taught by Marisa Booker, where Student would be placed. Ms. Clausen was very critical that some

of the class was being given lessons by instructional aides. She claimed that special day classes amounted to nothing more than “warehousing” for disabled students. As to her opinion of Student being placed in general education classes, Ms. Clausen performed no formal evaluations nor did she refer to the triennial or older assessments as evidence to support her opinion. Ms. Clausen said that Student had read aloud to her proficiently, was able to follow instructions when vacuuming for her, and was able to sort her videos in alphabetical order. In contrast, Ms. Booker testified that she recalled when Mother and Ms. Clausen observed her class. The class had been broken into smaller groups which were led by instructional aides under her direction. This allows for students to be given individual attention. Ms. Booker explained that Student’s abilities would place him in the middle range of her students. Of the 18 students assigned to her class,<sup>11</sup> Ms. Booker estimated that at least five were on target to graduate high school and attend a four year college. The ALJ gave no credence to Ms. Clausen’s testimony as there was no tangible evidence cited to corroborate her opinion.

64. Newport-Mesa also relied on the testimony of two experts in support of their contention that the April 1, 2013 FAPE offer was appropriate. Jenni Khoury has been employed as a school psychologist at CDM since 2008 and has been a school psychologist since 2006. She possesses a B.A. and M.A. in psychology. She attended the April 1, 2013 IEP team meeting as a consultant in the transition to CDM. Ms. Khoury opined that based on the assessments by the multidisciplinary team and Student’s past lack of academic progress that placement in a mild/moderate special education class was appropriate to meet Student’s unique needs. She also indicated that the scores obtained during the assessment by the Newport-Mesa team were consistent with those

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<sup>11</sup> The class has about 10 students in the classroom as some students attend general education classes during times.

earlier obtained by Castaic and Dr. Ross as they were within the 12 point confidence factor. Ms. Khoury noted that Student's poor academic performance during seventh grade general education classes demonstrates that the FAPE offer was appropriate since Student is continuing to struggle in all classes. The second expert was Ms. Urricariet, Student's sixth grade teacher. Ms. Urricariet opined that Student's low academic skills in the areas of reading comprehension, math and written expression, plus his inattentiveness, poor work habits, and compliance issues require that he be placed in a special day class where he could receive one-to-one instruction as needed. Ms. Urricariet believes that being placed in a special day class, Student would have an opportunity to build relationships, friendships, and give him an opportunity to build proper study skills. Since one of Student's major deficits is his lack of attentiveness, the small size of the class would offer fewer distractions which would benefit Student. The ALJ gave great weight to the testimony of Ms. Khoury and Ms. Urricariet as both were well qualified to render their opinions. Additionally, Ms. Urricariet was the individual most knowledgeable of Student's abilities as she was his teacher throughout the sixth grade.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>12</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs.,

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<sup>12</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) Related services include speech and language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

3. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate



in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

4. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

5. 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, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, 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 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

WAS THE DISTRICT'S MULTI-DISCIPLINARY ASSESSMENT DATED APRIL 1, 2013,  
ADMINISTERED BY NEWPORT-MESA STAFF, CONDUCTED APPROPRIATELY?

The Triennial Assessment Was Administered Appropriately

6. Newport-Mesa contends that the triennial assessment was appropriate. Student counters that the triennial assessment was not appropriate as (a) he was under the influence of pain medication at the time of the assessment, and (b) that the assessment team should not have found him eligible under the category of SLD.

7. Assessments are required in order to determine eligibility, and what type, frequency, and duration of specialized instruction and related services are required. An assessment of a pupil who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).)

8. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) Here, there is no dispute that the District complied with this requirement.

9. Triennial assessments have the same basic requirements applicable to initial assessments. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (e).) A pupil must be assessed in all areas related to the suspected disability, prior to the development of an IEP. (Ed. Code, § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related

services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

10. As part of triennial assessments, as with all reassessments, the IEP team and other qualified professionals must review existing assessment data on the child, including teacher and related service-providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. §300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).)

11. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h))

12. The triennial assessment was comprehensive as Student was assessed in all areas of suspected disability. The areas assessed were health and developmental history; intellectual/ cognitive functioning; adaptive behavior; academic levels; sensory-motor functioning; visual-spatial processing; gross motor skills; auditory processing; memory and learning; attention and executive functioning; and social-emotional/behavior functioning. The team determined areas of suspected disability by reviewing Student's academic performance since the third grade, Student's California Modified Assessment test scores, the 2009 Castaic assessment and the 2010 Ross independent education evaluation, input from Mother, and an interview with Student's then current teacher.

13. The assessment team was comprised of persons who were well trained and knowledgeable in their areas of expertise. The team utilized a variety of assessment tools comprising of standardized tests, observations, interviews, and parental input. The team did not rely on a single measure or assessment as the sole criteria for determining whether Student was a child with a disability. The test instruments used were technically sound and to assess Student's cognitive and behavioral levels. The tests were also administered in accordance with test producer's instructions and used for the purposes for which they were designed.

#### The Written Assessment Report Was Appropriate

14. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development, and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence

disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

15. The assessment team produced an exhaustive 59 page written report which found that Student required special education and related services, gave the basis for such determination, listed Student's behavior during observations, and Student's level of academic and social functioning.

#### The Assessment Team Recommendation as to Eligibility Was Appropriate

16. California law provides two alternative, but not mandatory, methods that a school district may use to determine whether a child requires special education due to an SLD. (Ed. Code, § 56337.) A school district may, but is not required to, "take into consideration whether a pupil has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning" (the severe discrepancy approach). (Ed. Code, § 56337, subd. (b).) A school district "may" use a "process that determines if the pupil responds to scientific, research-based intervention" as part of the assessment procedures (the RTI approach). (Ed. Code, § 56337, subd. (c).)

17. The severe discrepancy approach is described in California Code of Regulations, title 5, section 3030, subdivision (j). To determine if a severe discrepancy exists between a pupil's intellectual ability and achievement, the law requires a comparison of the standard scores a child receives in cognitive testing and achievement testing. The raw scores are converted to common standard scores using a mean of 100 and a standard deviation of 1.5. Then the scores are compared using the standard criterion, which is the product of 1.5 multiplied by the standard deviation. Using that

mathematical formula, the standard criterion is 22.5 points. Therefore, if there is a 22.5 difference or more between the intellectual functioning score and the achievement score, adjusted by one standard error of measurement of not more than four points, then a severe discrepancy exists, when that severe discrepancy is "corroborated by other assessment data which may include other tests, scales, instruments, observations, and work samples, as appropriate." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).)

18. Where the standardized tests do not reveal a severe discrepancy, the IEP team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more basic psychological processes. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team which shall include, but not limited to: (1) data obtained from standardized assessment instruments; (2) information provided by the parent; (3) information provided by the pupil's present teacher; (4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil's age; and (6) any other relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j) 4(C)). See also, 34 C.F.R. §300.309(a); *Letter to Prifitera*, Office of Special Education Programs (OSEP) 107 LRP 45656 (March 1, 2007)

19. The assessment team's recommendation that Student was eligible for special education and related services under the category of SLD in mathematics was appropriate. Student's score in math calculation on the WIAT-III had an 18-point differential from his score on the Differential Ability Scales, which falls within the four-point standard error measurement allowance. Student's general math score on the WIAT-III was in the first percentile while his subtest scores fell in the first percentile or

below in numerical operations, math fluency-multiplication and math fluency-subtraction. He also scored in the second percentile in math problem solving. The assessment team's recommendation that Student was eligible under SLD is similar to Dr. Ross' diagnosis in 2010 that Student suffered from a Learning Disorder, Not Otherwise Specified. Student's actual performance in math indicates that he is far below grade level as he was only able to add or subtract single digit numbers, had difficulty with borrowing numbers, and was unable to master multiplication as a concept. This performance supports the testing result obtained by the assessment team were an accurate reflection of Student's math ability.

WHETHER THE DISTRICT'S IEP OFFER OF APRIL 1, 2013, PROVIDED STUDENT A FREE APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT?

20. Newport-Mesa contends that the April 1, 2013 IEP was appropriate as it is designed to meet Student's unique needs, will provide educational benefit to Student, and that placement is in the least restrictive environment. Student contends that the April 1, 2013 IEP was not appropriate as it is based on an inappropriate assessment and placement is not in the least restrictive environment. As indicated above, the assessment was appropriate.

21. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

22. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general

education curriculum. The goals are based upon the child's present levels of academic achievement and functional performance. The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, a statement of the special education and related services to be provided to the child, a statement of the program modifications that will be provided for the child, and a statement of individual accommodations for the child related to the taking of state and district-wide assessments. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

23. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).)

24. One or both of the student's parents are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1); Ed. Code, §§ 56341, subd. (b); 56342.5 [parents must be part of any group that makes placement decisions].) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education ... designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.)

25. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4) An IEP meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend, and the



school district keeps records of its attempts to arrange a mutually agreeable time and place for the meeting. (34 C.F.R. §300.322(d).) Here, Mother directed the IEP meeting to proceed without her attendance. Thus, Mother was afforded an opportunity to participate in the April 1, 2013 IEP meeting.

26. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.*, *supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

27. School districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56000, subd. (b).) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56040.1.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the followed factors: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student]." (*Sacramento City*

*Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Bd. of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

### Analysis

28. The April 1, 2013 IEP offer provided Student with a FAPE and was appropriate:

- (a) The IEP team reviewed the results of the triennial assessment as well as reviewed Student's actual academic functioning with his then current teacher, Ms. Urricariet. The team found that Student had deficits in visual perceptual reasoning, reading comprehension, spatial motor integration, processing speed, adaptive/independent living skills, written expression, letter formation when writing, phonological skills, auditory processing, serious attention issues, visual memory, math calculation, and extreme difficulty completing classroom and homework assignments. Student also exhibited behavior problems accepting adult direction, engaging in outbursts in class, and avoidance of work assignments. The team, based on the information presented, determined that Student was eligible for special education and related services under three categories: OI, OHI, and SLD in math. The IEP team's finding is similar to the diagnosis of Dr. Ross in 2010. Dr. Ross diagnosed Student with a reading disorder, disorder of written expression, borderline intellectual functioning, and learning disorder, not otherwise specified.
- (b) Based on the IEP team's findings of Student's academic achievement levels and functioning as well other related needs, the team adopted 19 goals. The goals were designed to meet Student's academic, developmental, and functioning needs. Each of the goals contained measures to allow Student's progress or lack of progress to be measured.

(c) The IEP team discussed potential placements, including general education, where Student could meet his annual goals and access the curriculum due to his low academic levels and functioning as well as taking into account his cognitive functioning. The team, noting Student's low level of skill in math, writing, and pacing determined that the appropriate placement was in "moderate" special education classes for language arts and math and "mild" special day classes for social studies and science.

(d) Placement in "mild/moderate" special day classes also meets the recommendations contained in Dr. Ross' 2010 evaluation. Dr. Ross recommended that Student be placed in a smaller class size with small group instruction. This cannot be accomplished in a large general education class. Dr. Ross' recommendation can only be accomplished in a special day class. Student would be assigned to a special day class like that taught by Ms. Booker, who is assisted by four to five instructional assistants. Ms. Booker's class comprises about 10 students which is often further broken down to smaller groups or individual instruction which permits individual instruction as well as ensuring that students with attention issues remain on task.

29. The proposed placement in "mild/moderate" special education classes for the core academic subjects was in the least restrictive environment for Student to make meaningful progress in his education. In examining the *Rachel H.* factors, the April 1, 2013 IEP offer was appropriate:

(a) Student had previously been in general education classes and had made only limited progress toward meeting grade level standards since the third grade. Student demonstrated that he was unable to keep pace with the teaching of the general education curriculum as he almost never completed assignments timely. His academic performance had been far below average. Student's skills

in math, writing, and reading comprehension were far below grade level and his peers.

- (b) By being placed in a special education class, Student would continue to have opportunities to socialize with non-disabled peers at lunch, school activities, and during general elective classes.
- (c) Student had a history of non-conforming behaviors which, at times, caused class disruptions. Student was in constant need to be prompted to stay on task coupled with his need for individual instruction deprives the class of teacher time required for classroom instruction.

## ORDER

- 1. Newport-Mesa's Assessment dated April 1, 2013 was appropriate.
- 2. The April 1, 2013 IEP was appropriate and constituted a FAPE in the least restrictive environment. Newport-Mesa may implement the April 1, 2013 IEP immediately.
- 3. Student's requests for relief are denied.

## 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. In accordance with that section the following finding is made: Newport-Mesa prevailed on all issues heard and decided in this consolidated case.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56506, 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: June 3, 2014

\_\_\_\_\_/s/\_\_\_\_\_  
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Robert Helfand

Administrative Law Judge Office of  
Administrative Hearings