

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

V.

NEWPORT-MESA UNIFIED SCHOOL DISTRICT.

CASE NO. 2024010516

DECISION

July 25, 2024

On January 18, 2024, Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Newport-Mesa Unified School District. OAH continued the matter for good cause on February 15, 2024. Administrative Law Judge Cynthia C. Fritz, called ALJ, heard this matter via videoconference on May 14, 15, 16, 23, 24, and 28, 2024.

Attorney Bruce Bothwell represented Student. Parent attended all hearing days on Student's behalf. Attorney Daniel Harbottle represented Newport-Mesa. Special Education Local Plan Area Director Juliana Sauvoa attended all hearing days on Newport-Mesa's behalf.

At the parties' request, the ALJ continued the matter to June 18, 2024, for closing briefs. The matter was submitted, and the record closed on June 18, 2024.

## ISSUES

Student alleged 23 issues with some issues dating back to 2013. On the first hearing day, the ALJ notified the parties that the hearing would be structured into two phases, with the first phase focused solely on the statute of limitations issue and the second phase focused on the substantive issues. The ALJ offered a hearing continuance to prepare. Student declined to continue the hearing and requested a dismissal of Issues one through 10, the issues associated with the period beyond the statute of limitations. The ALJ granted Student's request and Student's Issues one through 10 were dismissed. During hearing, Student requested to withdraw Issue 23. The ALJ granted Student's request and Issue 23 was dismissed. The ALJ renumbered the remaining Issues 1 through 12, for clarity.

FAPE means free appropriate public education. IEP means individualized education program.

- 1) Did Newport-Mesa deny Student a FAPE by failing to find Student eligible for special education and related services due to autism at the IEP team meetings held on:
  - a) May 17, 2022,
  - b) November 14, 2022,
  - c) November 18, 2022,
  - d) December 7, 2022,
  - e) February 7, 2023,

- f) March 14, 2023, and
  - g) April 20, 2023,?
- 2) Did Newport-Mesa deny Student a FAPE by failing to offer Student appropriate behavior support services at the IEP team meetings held on
  - a) May 17, 2022,
  - b) November 14, 2022,
  - c) November 18, 2022,
  - d) December 7, 2022,
  - e) February 7, 2023,
  - f) March 14, 2023, and
  - g) April 20, 2023,?
- 3) Did Newport-Mesa deny Student a FAPE by failing to offer Student appropriate speech and language services at the IEP team meetings held on
  - a) May 17, 2022,
  - b) November 14, 2022,
  - c) November 18, 2022,
  - d) December 7, 2022,
  - e) February 7, 2023,
  - f) March 14, 2023, and
  - g) April 20, 2023?

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- 4) Did Newport-Mesa deny Student a FAPE by failing to offer Student appropriate occupational therapy services at the IEP team meetings held on
  - a) May 17, 2022,
  - b) November 14, 2022,
  - c) November 18, 2022,
  - d) December 7, 2022,
  - e) February 7, 2023,
  - f) March 14, 2023, and
  - g) April 20, 2023?
- 5) Did Newport-Mesa deny Student a FAPE at the IEP team meetings held on (a) May 17, 2022, (b) November 14, 2022, (c) November 18, 2022, (d) December 7, 2022, (e) February 7, 2023, (f) March 14, 2023, and (g) April 20, 2023, by failing to develop and offer appropriate goals in:
  - i) behavior;
  - ii) communication;
  - iii) socialization; and
  - iv) occupational therapy?
- 6) Did Newport-Mesa deny Student a FAPE at the IEP team meeting held on April 20, 2023, by failing to consider the results of the March 7, 2023 independent psychoeducational assessment?

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- 7) Did Newport-Mesa deny Student a FAPE by failing to find Student eligible for special education and related services due to autism at the IEP team meetings held on:
  - a) May 18, 2023,
  - b) November 13, 2023, and
  - c) December 11, 2023?
- 8) Did Newport-Mesa deny Student a FAPE by failing to offer Student appropriate behavior support services at the IEP team meetings held on:
  - a) May 18, 2023,
  - b) November 13, 2023, and
  - c) December 11 2023?
- 9) Did Newport-Mesa deny Student a FAPE by failing to offer Student appropriate speech and language services at the IEP team meetings held on:
  - a) May 18, 2023,
  - b) November 13, 2023, and
  - c) December 11, 2023?
- 10) Did Newport-Mesa deny Student a FAPE at the IEP team meetings held on (a) May 18, 2023, (b) November 13, 2023, and (c) December 11, 2023, by failing to develop and offer appropriate goals in:
  - i) behavior;
  - ii) communication:
  - iii) socialization; and
  - iv) occupational therapy?

- 11) Did Newport-Mesa deny Student a FAPE at the IEP team meeting held on November 13, 2023, by failing to consider the results of the October 16, 2023 independent speech and language assessment?
- 12) Did Newport-Mesa deny Student a FAPE at the IEP team meeting held on November 13, 2023, by failing to consider the results of the October 23, 2023 independent functional behavior assessment?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are to ensure:

- all children with disabilities have available to them a FAPE, that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, and 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,

and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed2d 387] (*Schaffer*); and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student filed this matter and bore the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 15 years old and in tenth grade at the time of hearing. Student resided within Newport-Mesa's geographic boundaries at all relevant times. In 2018, Student received a diagnosis of attention deficit hyperactivity disorder, called ADHD. Newport-Mesa found Student eligible for special education under the other health impairment category on September 7, 2021. Student's issues are analyzed by school year rather than numerically to enhance clarity.

## 2021-2022 SCHOOL YEAR – EIGHTH GRADE

In September 2021, during Student's eighth grade school year, Newport-Mesa completed assessments to determine if Student met special education eligibility. Newport-Mesa's Speech and Language Pathologists Mary Jutila and Lauren Cameli, School Psychologist Tuyen Williams, Occupational Therapists Jean Yeojean You and Tim Chen, Education Specialist Kim Wooden, Adapted Physical Education Specialist Kristine Dawson, and School Nurse Christy Craig, completed assessments in their fields for Student's assessments.

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The September 2021 assessments established Student had strengths in cognition, academics, and gross motor, and weaknesses in

- social pragmatic language,
- social communication including inappropriate behavior and comments,
- attentional processing,
- executive functioning,
- fine motor coordination, and
- sensory processing.

After completing the assessments, Newport-Mesa held an IEP team meeting and determined Student was special education eligible under the other health impairment category. It offered Student a special education program and related service. The IEP offer included direct speech and language and specialized academic services, and occupational therapy and speech and language consultation services.

This Decision does not determine whether Student received a FAPE during this time. Rather, the assessment results and IEP offer establish what information Student's IEP team knew at the time at issue in this matter, beginning May 2022.

At the March 2022 IEP team meeting, Parent expressed that she wanted Student to attend Early College High School the following school year. Early College is a Newport-Mesa college preparatory high school designed for high achieving students in an academically challenging environment that allows them to receive college credits on site and requires an application and acceptance before attending the school. Newport Mesa accepted Student into Early College for ninth grade.



At the March IEP team meeting, Newport-Mesa explained to Parent that Early College, without exception, offers no on-site direct special education related services, only consultation services. It also has no school counselor, special education service providers, or special education case carrier on site for special education students. As shown below, Newport-Mesa designed IEP offers that could be implemented at Early College and not what addressed Student's needs.

In May 2022, at the end of Student's eighth grade school year, Newport-Mesa convened Student's annual IEP team meeting to offer him a special education program for ninth grade. Newport-Mesa discontinued all direct services that had previously been offered and instead offered consultation services, specifically,

- 60 minutes monthly of specialized academic instruction consultation services;
- 15 minutes monthly of occupational therapy consultation services; and,
- 20 minutes, 5 times yearly, of speech and language consultation services.

It offered four goals related to study skills and pragmatic communication, and accommodations including

- preferential seating,
- typing assignments,
- graphic organizers,
- taking photographs of the board,
- extra time on assignments,
- physical movement breaks,

- additional set of textbooks for campus, and
- pencil grips.

It continued Student's eligibility category as other health impairment. Parent wanted Student to attend Early College and consented to the May 2022 IEP offer.

### ISSUE 1(a): AUTISM ELIGIBILITY AT THE MAY 2022 IEP TEAM MEETING

Student contends Newport-Mesa denied him a FAPE at the May 2022 IEP team meeting because it failed to find him special education eligible under the autism category. Newport-Mesa contends that the IDEA language itself disposes of this claim as it is not necessary to accurately identify Student's disability if his needs were identified and addressed, which they were. Alternately, Newport-Mesa contends Student does not meet autism eligibility criteria.

Student did not prove that Newport Mesa denied Student a FAPE for failing to make him special education eligible under autism at the May 2022 IEP team meeting. A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006).)

Only children with certain qualifying disabilities are eligible for IDEA benefits. (20 U.S.C. § 1401; 34 C.F.R. § 300.8 (2017); Ed. Code, § 56026, subd. (d).) Nothing in the IDEA requires that a child be classified by the most accurate disability so long as each child who has an IDEA listed disability, and who, by reason of that disability needs special

education and related services, be regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. 300.111(d) (2006); Ed. Code, § 56301, subd. (a).) The IDEA does not give a student the legal right to a proper disability classification. (Weissburg v. Lancaster Sch. Dist. (9th Cir. 2010) 591 F.3d 1255, 1259.) The IDEA's overarching substantive goal is to ensure that all children with disabilities have available to them a FAPE designed to meet their unique needs. (20 U.S.C. § 1400(d)(1)(A); Forest Grove Sch. Dist. v. T.A. (2009) 557 U.S. 230, 244-245 (Forest Grove).)

In *Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045 (*Heather S.*), the parties disputed the appropriate eligibility categories for a student whose disability was hard to categorize. The Seventh Circuit Court of Appeals declined to settle the dispute noting that the "IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [student's] disabilities." (*Heather S., supra*, 125 F.3d at p. 1055.) The federal district courts in California applied the same principle. (See, *Timothy O v. Paso Robles Joint Unified Sch. Dist.*, (C.D. Cal., April 21, 2014) 2014 WL 12675212, at \*12, citing *Heather S.*, rejecting student's argument that a failure to classify student under the autistic-like category denied student a FAPE; See, *M.M. & E.M. v. Lafayette Sch. Dist.*, (N.D. Cal., Feb. 7, 2012, Nos. V094624, 10-04223 SI) 2012 WL 398773, at \*17, *affd. in part and revd. in part* (9th Cir. 2014) 767 F.3d 842.) citing *Heather S.*, stating that the question is whether the application of the IEP denied student a FAPE, not the precise label the school district applied.)

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Student argues three Ninth Circuit cases stand for the proposition that the school district needs to accurately label a student with autism so that it could properly address issues related to social, emotional, and communication needs. Student asserts a failure to properly label a student, is a FAPE denial. Student's reliance on these cases is misplaced under these facts.

In *Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1005, the school district suspected autism and thought about assessing him, even conducting an observation for that purpose. Ultimately, Paso Robles did not assess which the court determined was a FAPE denial. (*Id.* at pp. 1123-1124.) In *N.B. v. Hellgate Elementary Sch. Dist.* (9th Cir. 2008) 541 F.3d 1202, the court found that failing to obtain critical medical information about whether a child has autism "render[s] the accomplishment of the IDEA's goals-and the achievement of a FAPE-impossible." (*Id.* at p. 1210, citing *Amada J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877 (*Amanda J.*)). In *Amanda J.*, also cited by Student, the court found that the IEP team could not create an IEP to address student's needs as an autistic child without knowing the student was autistic. (*Id.* at p. 894.) In these cases, the school district failed to assess, obtain medical information, or disclose information about the student denying the student a FAPE. However, the court did not find that the improper or lack of special education label, alone, caused a FAPE denial. Thus, Student's cited cases are not persuasive and unlike the issues alleged and facts presented in this matter.

Here, Student alleges that Newport-Mesa denied Student a FAPE for failing to find Student eligible under the autism category. Student did not allege any failure to assess, obtain medical records, or disclose information. Newport-Mesa suspected

Student might be autistic. It assessed Student for autism in 2019 and 2021 and found Student eligible in September 2021 for special education eligibility under other health impairment. Newport-Mesa did not believe Student met special education autism eligibility. Here, Student argues an improper special education label only. Thus, Student's cited cases are distinguishable. Student failed to cite any law that a school district's failure to properly label a student under a particular special education category, alone, denied Student a FAPE. Thus, Student failed to prove by the preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to find Student special education eligible under autism at the May 2022 IEP team meeting.

ISSUE 5(a)(1)-(4): GOALS IN BEHAVIOR, COMMUNICATION,  
SOCIALIZATION, AND OCCUPATIONAL THERAPY AT THE MAY 2022  
IEP TEAM MEETING

Student contends Newport-Mesa denied him a FAPE at the May 2022 IEP team meeting because it failed to offer appropriate goals in behavior, communication, socialization, and occupational therapy. Newport-Mesa contends that it offered appropriate goals to Student.

Student did not prove Newport-Mesa failed to offer appropriate goals at the May 2022 IEP team meeting. An IEP provides 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, making progress in the general education curriculum, and participating in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a)(1)(A).)

The IDEA requires that a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate considering the child's circumstances. (*Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000].) California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.)

The IEP document for each disabled child must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).) It must also

- contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability;
- how progress toward meeting annual goals will be measured, and
- when the periodic progress reports will be provided. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007); Ed. Code, § 56345, subd. (a)(2).)

The purpose of annual goals is to permit the IEP team to determine whether the student is making progress in an area of need. (Ed. Code, § 56345, subd. (a)(2).) The IDEA requires goals to target a student's needs, but the IDEA does not require an IEP to contain every goal from which a student might benefit. (*Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1134-1135 (9th Cir. 2021), *cert. denied sub nom. S.W. on Behalf of B.W. v. Capistrano Unified Sch. Dist.*, 143 S. Ct. 98 (2022).)

"[T]he IEP annual goals must meet a student's needs, but the IDEA does not require that they have a one-to-one correspondence with specific needs. So long as the goals, as a whole, address the student's needs and enable progress appropriate in light of the student's circumstances, the IEP is appropriate." (*K.M. by & through Markham v. Tehachapi Unified Sch. Dist.*, 2017 WL 1348807, at \*17 (E.D. Cal. April 5, 2017).

Additionally, a school district is not required to develop goals for areas covered by the general curriculum for which the student needs only accommodations and modifications. (Fed. Regs., Appendix A, Part 300 – Assistance for the Education for Children with Disabilities (1999) discussing language also contained in the 2004 reauthorization of the IDEAS at 20 U.S.C. § 1414(d)(1)(A)(i)(II).)

A child's educational needs are to be broadly construed to include the child's

- academic,
- social,
- health,
- emotional,
- communicative,
- physical, and

- vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. at pp. 56-58.)

Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must

- be designed to meet the student's unique needs,
- comport with the student's IEP, and
- be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*)

In September 2021, Newport-Mesa offered Student a special education program including four goals in "on-task behavior," "organization," "expected class behavior," and "conversation skills." The "on-task" and "organization" goals focused on completing assignments, remaining on task, identifying weekly assignments, and completing a daily agenda and was for his attention and executive functioning needs. The "conversation



skills” and “expected class behavior” goals worked on communication breakdown repairs, initiating and maintaining conversation, and unexpected behavior like inappropriate comments, and was for his social pragmatic communication needs.

On March 4, 2022, Newport-Mesa held an amendment IEP team meeting to discuss Student’s transition to high school the following school year. Student’s present levels of performance were reviewed with Parent actively participating in the discussion. Jutila, Student’s speech and language service provider, reported Student was doing well in his speech sessions and making progress in pragmatics. Chen, Student’s occupational therapist provider, reported Student’s progress and improvement to his occupational therapy needs. Student’s eighth grade teachers reported progress with being respectful to peers and teachers, asking questions, and seeking out support. Newport-Mesa convincingly showed it had accurate present levels of performance data at that time based upon teacher and service provider reports, grades, informal assessments, testing, and goal progress reporting.

Student made educational, behavioral, and social progress from September 2021. Despite Student’s progress, Student continued to struggle with

- unexpected language and behavior,
- difficulty engaging with peers,
- reading social cues,
- initiating conversations,
- turning in and completing assignments,
- staying focused and on task, and
- organization skills.

At the May 17, 2022 annual IEP team meeting, Newport-Mesa offered Student a special education program and related services, including an offer for ninth grade. Newport-Mesa discussed Student's present levels of performance and goals. Newport-Mesa determined Student met his "conversation skills" goal and made progress at 60 percent achieved on his "expected classroom behavior" goal, 70 percent achieved on his "organization" goal, and 75 percent achieved on his "on-task" goal. Newport-Mesa established that Student's areas of need had not changed since March 2022.

To address Student's needs, Newport-Mesa offered four goals for Student's ninth grade year. In pragmatics, it offered goals in "expected classroom behavior" and "social language initiating." These goals built upon his prior pragmatic language goals. Newport-Mesa proposed these goals to have Student work on inappropriate comments verbally and in writing in all classes, and to initiate and continue conversations with peers.

It offered two additional executive functioning/study skill goals in "organization tool" and "weekly planner." Newport-Mesa proposed these goals to work on

- organizing assignments,
- daily checking of academic progress,
- filling in his weekly planner,
- taking home appropriate materials for assignments, and
- timely completing assignments.

Newport-Mesa witnesses agreed that these goals met Student's unique needs. Parent subsequently agreed. The evidence established goals addressed Student's needs at that time.

## ISSUES 5(A)(1)-(3): BEHAVIOR, COMMUNICATION, AND SOCIALIZATION GOALS

Student maintains his previous “expected classroom behavior” goal should have been continued from the prior goal that had been offered in September 2021 because that goal was not met. Student maintains that the version of the goal that was offered in the May 17, 2022 IEP, was an overly simplistic version of the previous goal.

Student’s argument fails. Although more singularly focused, the “expected classroom behavior” goal that Newport-Mesa offered at the May 2022 IEP continued to work on his inappropriate comments and behavior. Thus, this goal sufficiently addressed Student’s need for which Newport-Mesa was targeting.

Additionally, Student offered little evidence that Student’s goals at the May 2022 IEP were inappropriate. Student’s expert Dr. Helena Johnson, a clinical psychologist with a doctorate in clinical psychology, completed a psychoeducational assessment of Student in early 2023. Johnson determined through her assessment results that Student had needs in

- executive functioning,
- sensory seeking behavior,
- socialization with peers,
- social communication,
- self-awareness,
- perspective taking, and
- social problems solving.

Johnson opined Student needed additional goals in promoting friendship, improving social awareness while in class, and perspective taking. However, the goals Newport Mesa offered in “expected classroom behavior” and “social language initiating” were reasonably calculated to assist Student with friendship building, social awareness, and perspective taking. Student’s goals could be applied to all school settings and generally addressed his needs.

Student also maintained that he should have had goals to stay on task, following group instruction, and completing classwork, and should have continued his “on-task” goal from the September 2021 IEP because it had not yet been achieved. Student’s arguments were unpersuasive. Student’s “weekly planner” goal built on his prior study skills and behavior goal and continued to work on staying on task and completing classwork. Additionally, the offered pragmatic goals assisted with following group instruction.

Student’s goals, overall, addressed his needs at that time. The goals appropriately tracked Student’s deficits. No evidence was presented at hearing that Student behaviors, communication skills, and socialization deficits increased. Student did not require any further goals in behavior, communication, and socialization to address his needs at the May 2022 IEP team meeting. Student failed to meet his burden of proof on this issue.

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## ISSUE 5(a)(4): OCCUPATIONAL THERAPY GOALS

Newport Mesa did not offer any occupational therapy goals at the May 2022 IEP meeting and Student did not need any to make progress. You established that occupational therapy focuses on evaluating and addressing needs in

- fine motor skills,
- gross motor skills,
- sensory processing,
- vestibular function, and
- proprioception.

Student had occupational therapy needs in fine motor coordination and sensory perception.

At the May 2022 IEP team meeting, Newport-Mesa offered Student 15 minutes monthly of occupational therapy consultation. The occupational therapy consultation services were offered to address Student's fine motor coordination and assist staff with Student's sensory strategies and equipment to access his curriculum. Newport-Mesa maintained that Student did not need occupational therapy goals because his needs could be addressed through his consultation support and accommodations. Newport-Mesa is not required to develop goals for every one of Student's needs if the offered IEP program addresses his needs.

Student's expert witness with an occupational therapy doctorate, Doctor Susanne Smith Roley, completed an independent occupational therapy assessment in January 2023. Roley has extensive training and experience in assessing children in fine and gross motor skills and sensory needs and making recommendations for goals and services.

Roley opined that Student had deficits in self-regulation, fine motor coordination, executive functioning, and social skills at all times during the statutory period. Roley maintained that Student should have had six additional occupational therapy goals to address Student's occupational needs. She recommended goals in

- task monitoring and completion,
- work production,
- planning,
- planning and sequencing,
- organizational skills, and
- social participation.

Roley's opinions were undermined for a variety of reasons. Roley failed to review Newport-Mesa's September 2021 assessment report and many of Student's recent IEPs. Roley did not have the most up-to-date Student assessment information and IEP history before conducting her assessment and making recommendations.

The report displayed carelessness that lessened its persuasiveness. The report noted the incorrect school of attendance and the wrong student's name being tested on the Beery-Buktenica Developmental Test of Visual-Motor Integration tool. Even though the name was corrected through a stipulation between the parties at hearing, the data in this report section did not match the narrative explaining it. Roley opined at hearing that the data showed no concerns in sub-domains of reversals, letters touching, and case errors, but her narrative in the report stated that there were concerns in reversals and case errors. She had no explanation for this inconsistency and did not appear to know if the data or narrative was accurate for Student.

Additionally, Roley's testimony contradicted the report, as she found greater deficits than the report itself disclosed. For instance, when describing her colleague's observation of Student, she said Student appeared somber. Yet, in the report for this same observation, Student was described as friendly. Her explanation of this inconsistency fell short as she stated that it was based on a later conversation with her colleague. Yet, no report correction was made. Roley overstated Student's weaknesses at hearing.

Other report and assessment issues also diminished her opinion. Roley administered and relied on the Sensory Integration and Praxis Test and the Evaluation in Ayres Sensory Integration assessments, although they were not standardized for Student's age, and the results were to be interpreted with caution. Yet, based on her report results and testimony, Roley relied on these assessment results when developing her opinions.

Roley opinions were further unconvincing due to her professional limitations in addressing occupational therapy as she had not conducted direct occupational therapy services in a private or public setting to anyone for over 20 years. She neither met Student before the assessment nor provided any services to him and did not have a grasp on his full history because of her limited records review. Roley generally appeared to have a lack of familiarity with Student, and her report. For these reasons, Roley's opinions were given little weight.

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Occupational Therapist Yola Lin, who provided occupational therapy consultation services to Student during the 2022-2023 and 2023-2024 school years, generally agreed that Student had deficits in self-regulation, fine motor coordination, executive functioning, and social skills. Lin, disagreed, however, with how to address these deficits, including adding occupational therapy goals.

Lin demonstrated that Student's needs in self-regulation, social skills, and executive functioning, were addressed through the other behavioral, socialization, and communication goals offered to Student. Student's occupational therapy consultation services and an accommodation that was offered to provide him with physical movement breaks, together addressed his fine motor coordination need. Lin established that the combination of the other goals offered, consultation services, and accommodations met Student's occupational needs.

Lin had experience with Student as his assessor and his service provider and worked with him regularly. Her testimony was thoughtful and well-informed, and she displayed familiarity with Student. Her testimony reflected a thorough evaluation of his abilities and needs in this area. Her opinions were corroborated by Chen and other testimonial and documentary evidence and found to be more persuasive than Roley's opinions and given substantial weight.

No other witness besides Parent supported Roley's occupational therapy recommendations and Parent had no occupational therapy expertise. Parent's opinion on this issue was given less weight. Accordingly, Student failed to prove that Student needed any occupational therapy goals at the May 2022 IEP team meeting. Student



failed to prove by a preponderance of the evidence that Newport-Mesa did not offer appropriate goals in behavior, communication, socialization, and occupational therapy at the May 2022 IEP team meeting.

## ISSUE 2(a): THE BEHAVIOR SERVICES SUPPORT OFFER AT THE MAY 2022 IEP TEAM MEETING

Student generally alleges that Newport-Mesa denied Student a FAPE by failing to offer appropriate behavior support services. Newport Mesa contends that its offer was sufficient to provide Student a FAPE at the May 2022 IEP team meeting.

Student failed to prove that Newport-Mesa offered inappropriate behavior services at the May 2022 IEP team meeting. Related services are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education and may include psychological services, speech and language pathology, and occupational therapy when appropriate. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a) & (b)(1), (6) & (10).)

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (2006); Ed. Code, § 56341.1, subd. (b)(1).) Educational benefit is not limited to academic needs, but also includes the social and emotional needs that affect academic progress, school behavior, and socialization. (County of San Diego v. California Special Education Hearing Office, et al. (9th Cir. 1996) 93 F.3d 1458, 1467 (San Diego).)

At the May 2022 IEP team meeting, the Newport-Mesa members of the team agreed that Student's behaviors did not impede his own or other's learning and concluded that behavior intervention services were not necessary. Newport-Mesa witnesses agreed that behavior support services were not necessary at that time to provide a FAPE.

While Student generally argued that Newport-Mesa should have offered more robust behavior support services throughout the statutory period, Student failed to provide any specific evidence contradicting Newport-Mesa witnesses regarding the appropriateness of its behavior service support offer in May 2022. Thus, Newport-Mesa was more persuasive on this issue.

Student failed to prove by the preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to offer appropriate behavior support services at the May 2022 IEP team meeting.

### ISSUE 3(a): THE SPEECH AND LANGUAGE SERVICE OFFER AT THE MAY 2022 IEP TEAM MEETING

Student contends that Newport-Mesa should have offered him direct speech and language services instead of consultation services at the May 2022 IEP team meeting for ninth grade because he did not meet his expected classroom behavior goal in eighth grade with the direct services offered. Thus, Newport-Mesa should have continued with direct speech and language services to meet Student's communication needs. Newport Mesa contends 20 minutes of consultation services every other month was appropriate to meet Student's needs.

Student proved that Newport-Mesa should have offered direct speech and language services to him at the May 2022 IEP team meeting because its offer failed to meet Student's speech and language needs. In September 2021, Newport-Mesa had offered Student 30 minutes of direct speech and language services twice a month and 20 minutes of speech and language consultation services every other month. With these services, Student made progress but did not meet his goal for "expected classroom behavior" by May 2022.

Newport-Mesa drafted a similar goal, "expected classroom behavior," to work on inappropriate behavior and comments in ninth grade, thus conceding that Student had a need in this area. Despite this, Newport-Mesa discontinued his direct speech and language services. Student's direct speech and language services should not have been eliminated, as Student continued to have pragmatic communication needs that these direct services assisted in his progress with this goal. Additionally, Student continued to have pragmatic communication goals that needed to be implemented for ninth grade. Newport-Mesa's decision to preclude direct related services to Student for ninth grade resulted from cost concerns, because most students attending the school did not have special education needs, and it did not offer any direct services to students attending Early College. So, Newport-Mesa did not offer them to Student. This decision was not based on Student's individual needs.

After-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2011) 652 F.3d 999, 1006.) Two months after school started for Student's ninth-grade year, Student exhibited escalating behaviors related to his inappropriate comments and unwanted touching toward female Students. Newport-Mesa should have offered direct speech and language services to assist him

with his social pragmatic communication deficits for ninth grade like it had in eighth grade. It failed to do so and instead offered consultation speech and language services because Early College did not offer any direct special education services to any student. The speech and language offer failed to meet Student's unique needs and focused on Newport-Mesa's deliberate decision to not offer direct services at his placement.

Additionally, based on how the communication goals were written, it would be impossible for Student to meet them with the level of service offered. For instance, to meet the "expected classroom behavior" goal, mastery required that Student would refrain from making off topic or inappropriate comments verbally or in writing, in all subjects and classrooms across two months of data collection. With consultation services every other month, this would be impossible for Newport-Mesa to determine and Student to meet. Newport-Mesa offered no explanation how either communication goal could be achieved given the offer.

Student needed direct speech and language services. Student proved by the preponderance of the evidence that Newport-Mesa denied him a FAPE for failing to provide appropriate speech and language services at the May 2022 IEP team meeting.

#### ISSUE 4(a): THE OCCUPATIONAL THERAPY SERVICE OFFER AT THE MAY 2022 IEP TEAM MEETING

Student contends Newport-Mesa should have offered Student direct occupational therapy services at the May 2022 IEP team meeting in addition to consultation services. Newport-Mesa contends its May 2022 offer was appropriate.

Student failed to prove that Newport-Mesa should have offered direct occupational therapy services at the May 2022 IEP team meeting. In September 2021, Newport-Mesa had offered Student 15 minutes monthly occupational therapy consultation services to meet Student's fine motor coordination and sensory perception needs.

Chen opined at the March 2022 IEP team meeting that Student progressed with his occupational therapy needs through his consultation support and accommodations through May 2022, and could continue successfully with occupational therapy consultation support. Chen had personal experience with Student and appeared knowledgeable of Student and his occupational therapy needs. His testimony was consistent and was corroborated by Lin. No new information demonstrating Student's occupational therapy needs changed from September 2021 to May 2022.

At the May 2022 IEP team meeting, Newport-Mesa offered Student 15 minutes monthly occupational therapy consultation services and accommodations. The occupational therapy consultation services were offered to address Student's fine motor coordination and assist staff with Student's sensory strategies and equipment to access his education.

Roley opined that Student needed 20 minutes weekly of direct occupational therapy services, and 15 minutes of consultation services monthly to meet his needs. As already discussed, Roley's opinions were undermined and given little weight. Lin maintained that the combination of classroom accommodations and consultation services met Student's occupational needs. Lin's opinion was more persuasive than Roley's opinions.

Student failed to meet his burden of prove by the preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to offer appropriate occupational therapy services at the May 2022 IEP team meeting. As to the May 2022 offer, Student proved that Newport-Mesa denied Student a FAPE for failing to offer appropriate speech and language services only.

## 2022-2023 SCHOOL YEAR- NINTH GRADE

Student began Early College in August 2022 for ninth grade. Newport-Mesa convened six amendment IEP meetings related to his ninth grade May 2022 annual IEP offer from November 2022 to April 2023, and held his annual IEP team meeting in May 2023. No evidence was presented at hearing regarding the December 2022 IEP team meeting. Student failed to meet his burden regarding any allegation in this matter related to the December 2022 IEP, and it will no longer be discussed. For this reason, Newport Mesa prevailed on Issues 1(d), 2(d), 3(d), 4(d) and 5(d)(1)-(4), all challenges directed only at the December 2022 IEP.

As previously described, Parent wanted Student to attend Newport-Mesa's college preparatory specialized public school, Early College, and Newport-Mesa accepted Student into the school. Newport-Mesa knew that direct services would not be offered to Student at Early College and informed Parent of this in March 2022. Newport-Mesa's blanket approach of failing to offer direct special education services at Early College had a significant impact on Student's IEP offers while attending the school. As shown below, Newport-Mesa repeatedly cobbled together IEP offers that focused on his preferred placement and not on his unique needs.

Newport-Mesa provided no legal authority supporting the idea that it is permissible that a public high school campus can unilaterally determine it will not offer any direct special education and related services on a school site should a student choose to attend the school. However, this Decision makes no findings whether that is permissible or not as a general principle under the IDEA because the law is clear that Student is entitled to program and services that meet his individual needs in the least restrictive environment.

Here, Newport-Mesa's cobbled approach fell short. Student proved that Newport-Mesa failed to offer appropriate behavior, communication, socialization goals, behavior support services, and speech and language services during the 2022-2023 school year.

#### ISSUES 1(b), (c) AND (e)-(g) AND 7(a): AUTISM ELIGIBILITY AT THE NOVEMBER 2022 THROUGH MAY 2023 IEP TEAM MEETINGS

As previously discussed, the IDEA does not give a student the legal right to a particular disability classification. Student failed to meet his burden of persuasion on this issue. Accordingly, Student failed to prove that Newport-Mesa denied Student a FAPE by failing to find Student special education eligible under the autism category at the November 2022, February 2023, March 2023, April 2023, and May 2023 IEP team meetings.

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ISSUES 5(b), (c) (1)-(3) AND (e)-(g) (1)-(3) AND 10(A) (1)-(3):  
BEHAVIOR, COMMUNICATION, SOCIALIZATION GOALS AT THE  
NOVEMBER 2022 THROUGH MAY 2023 IEP TEAM MEETINGS

Student contends that Newport-Mesa failed to offer appropriate goals to Student in behavior, communication, and socialization, at the November 2022 through May 2023 IEP team meetings. Newport-Mesa contends it offered Student appropriate goals to Student.

Student proved Newport-Mesa should have offered additional "behavior, communication, socialization" goal during this time. Student began Early College in August 2022 for ninth grade. Student's behavior significantly changed at Early College by October 2022. Newport-Mesa suspended Student for three days and removed him from his physical education class and leadership group because multiple female students complained of profanities and obscenities that were sexual in nature, and unwanted touching during his physical education class. Student's teachers also shared that Student was often requesting to use the restroom and would wander around campus for long periods.

Newport-Mesa convened IEP team meetings on November 14, and 18, 2022, to discuss concerns related to Student's behavior and social skills and make changes to Student's IEP. At these meetings, Newport-Mesa found that Student continued to have communication needs related to the social use of language, and engaging in unexpected behaviors in class, staying on task, and following instructions. Student's needs in these areas intensified at this time.



Newport-Mesa continued with Student's organizational tool and time management goals. It added goals in "expected versus unexpected behavior" and "conversation skills." It discontinued his two goals in "expected classroom behavior" and "social language initiating," although the "expected classroom behavior" goal had addressed inappropriate comments and behavior and had not been met by the November 2022 IEP team meetings. Student's dropped goal, "expected classroom behavior," stated that Student will refrain from making any off topic or inappropriate comments verbally or in writing across two months of data collection. Newport-Mesa did not provide an explanation for dropping this goal other than that it drafted a similar goal for "expected and unexpected behavior." The "expected and unexpected behavior goal," however, did not assist Student in refraining from making inappropriate comments. Nor did Newport Mesa measure and keep data regarding Student's inappropriate comments. The evidence established this continued to be one of Student's most significant areas of need.

Student's two new goals in "expected versus unexpected behavior" and "conversation skills" worked on engaging in conversation and follow up conversation, and determined if behavior was expected or unexpected, how unexpected behavior makes the other person feel, and alternative expected behavior. The Speech and Language Pathologist, Luke Padgett, who attended the November 2022 IEP team meetings, opined that these goals were appropriate to address Student's needs, and no one disputed the appropriateness of these goals, including Parent.

However, Student argued he needed additional goals specifically targeting his inappropriate comments and behavior, off-task behavior, and wandering around the school, especially given that the inappropriate comments and unwanted touching,

greatly impeded Student's education due to his suspension and removal from one class and one school group. Neither of the new pragmatic communication goals targeted Student's inappropriate comments.

Newport-Mesa should have continued the "expected classroom behavior" goal or offered an alternative, goal addressing Student's significant inappropriate comments and communication exhibited by him while attending Early College. The new goal focused on behavior and not communication. The "expected classroom behavior" goal also would have complemented the "expected versus unexpected behavior" goal to facilitate his progress in this area since the dropped goal worked on refraining from inappropriate comments and the new goal worked on understanding his behavior and the impact on others.

At the April 2023 IEP team meeting, Johnson recommended goals to address inappropriate behavior, social communication, and perspective taking. While Newport-Mesa's goals in "expected and unexpected behavior" and "conversation skills" addressed social communication and perspective taking, Student continued to need a goal to address his inappropriate comments and behavior. Student's goals remained the same until the May 2023 annual IEP team meeting. Thus, Student proved that Newport-Mesa failed to offer a behavior, communication, socialization goal to address inappropriate comments and behavior through the May 2023 IEP team meeting.

Issue 10 (a)(1)-(3) concerns these same goals offered in his tenth grade annual IEP that Newport-Mesa convened May 18, 2023. Multiple teachers reported at his May 2023 IEP team meeting that Student continued to exhibit inappropriate comments toward his peers. Although some improvement had been made, Student continued to have a significant need with inappropriate comments and behavior through the end of

the 2022-2023 school year. Teachers also reported issues with Student's inability to follow directions. Padgett reported continued difficulty with inappropriate humor, profanity, and touching to the extent it made other students uncomfortable and unamused.

Newport-Mesa should have continued the "expected classroom behavior" goal on November 18, 2022, and throughout the school year, so Student could receive support for his inappropriate comments in ninth grade. No explanation was given as to why the goal related to inappropriate comments was dropped in November 2022.

Newport-Mesa offered three pragmatic communication goals for tenth grade in "conversation skills," "expected and unexpected behavior," and "social autopsy." Social autopsy helps a student understand social errors during social interactions and promotes choosing alternative solutions. These goals aimed to assist Student in:

- initiating and maintaining conversations with peers;
- helping determine unexpected and expected behavior, and giving alternatives to unexpected behavior, understanding how unexpected behavior makes others feel; and
- when given unexpected social situations, be able to explain what happened, what was the social error, who was hurt, what should be done to correct it, and what should be done the next time.

These goals addressed Johnson's goal recommendations for perspective taking and social communication and some of Student pragmatic communication needs in social use of language.

Newport-Mesa also offered two behavior goals for tenth grade for inappropriate comments. It also offered a goal for following directions. Newport-Mesa proposed these goals to assist Student in avoiding saying off-topic or inappropriate comments verbally or in writing and following instructions in all classrooms settings. The "following directions" goal satisfied Student's increased need in this area. The goal related to inappropriate comments satisfied Johnson's recommendation for a goal targeting inappropriate behavior and addressed Student's need in this area that had been missing in his IEPs since November 2022.

Student argued that Newport-Mesa's goals should have addressed behaviors during unstructured time. However, Newport-Mesa persuasively showed that the skills gained through these goals could be utilized in both structured and unstructured settings at school. Thus, this contention was unpersuasive. Student's May 2023 IEP goals in behavior, communication, and socialization for tenth grade were appropriate.

However, Student proved by a preponderance of the evidence that Newport-Mesa denied Student a FAPE at the November 2022, February 2023, March 2023, and April 2023 IEP team meetings for failing to offer an appropriate "behavior, communication, socialization" goal to address Student's inappropriate comments.

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## ISSUES 5(b), (c) AND (e)-(g) (4) AND 10(a) (4): OCCUPATIONAL THERAPY GOALS AT NOVEMBER 2022 THROUGH MAY 2023 IEP TEAM MEETINGS

Student maintains Student needed six additional occupational therapy goals that Roley recommended in

- task monitoring and completion,
- work production,
- planning,
- planning and sequencing,
- organization skills, and
- social participation.

Newport Mesa offered no occupational therapy goals to Student at the November 2022 through May 2023 IEP team meetings.

Student failed to meet his burden of proof on these issues. Lin credibly established that the lack of occupational therapy goals was appropriate because Student's occupational therapy needs were addressed through its consultation services and accommodations. Lin's opinion garnered more credibility than Roley's opinion as already discussed. Additionally, the other goals Newport-Mesa offered addressed all Roley's recommendations.

Student failed to meet his burden of prove by the preponderance of the evidence that Newport-Mesa's lack of occupational goals from November 2022 through May 2023 denied Student a FAPE.

## ISSUE 2(b)-(g) AND 8(a): THE BEHAVIOR SUPPORT SERVICES OFFER AT THE NOVEMBER 2022 THROUGH THE MAY 2023 IEP TEAM MEETINGS

Student contends that Newport Mesa's IEP offers from November 2022 through April 2023 denied him a FAPE because it did not have the appropriate behavior support services to address his increased behavioral needs. Newport-Mesa contends that it always offered Student a FAPE.

Student proved that Newport-Mesa failed to offer appropriate behavior support services at the November 2022 through May 2023 IEP team meetings. A child's education is more effective when positive behavioral interventions and supports are provided to address the child's learning and behavioral needs. (20 U.S.C. § 1400(c)(5)(F); Ed. Code, § 56520, subd. (a)(3).) Students who exhibit serious behavioral challenges shall receive appropriate and timely assessments and positive supports and interventions. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56520, subd. (b)(1).)

Student argued that Newport-Mesa offered no behavioral supports to Student. However, in November 2022, to address Student's increased behavioral challenges at Early College, Newport-Mesa added additional services to Student's IEP offer. At the November 2022 IEPs Student offered:

- a 30-minute weekly social skills group at Costa Mesa High School;
- general education counseling services through a Turning Point intern, a behavioral specialist one time per week to work on social issues;
- a Tutor Core class to work on executive functioning skills; and
- consultation occupational therapy services.

It also offered to conduct a functional behavior assessment. According to Principal David Martinez the Turning Point counseling was available to all students once a week or every other week. It was unclear what the Turning Point counselor would be working on with Student.

Newport-Mesa understood that Student required behavior services to address his significant increase in maladaptive behavior such as inappropriate comments, unwanted touching, and wondering around the school. However, based upon the hearing testimony and corroborated by the IEP team meeting notes, Newport-Mesa based its offer for behavioral support on availability of special education services at Early College and what it could work into Student's Early College school schedule. Newport-Mesa did not base its decision on Student's unique needs.

Student needed more intense special education counseling services with a school psychologist rather than general education counseling available to all students. Student was experiencing significant social and behavior issues and needed more individualized support in managing his behavioral challenges that was negatively impacting his educational performance. Student needed weekly special education counseling from a school psychologist who could implement his goals and measure his progress. Newport-Mesa failed to offer Student appropriate behavioral services at the November 2022 IEP team meetings.

Newport-Mesa reviewed its three-page functional behavior assessment at the February 7, 2023 IEP team meeting. A functional behavior assessment is an assessment that evaluates a Student's maladaptive behaviors to determine the antecedents and functions, or what the Student achieves from the maladaptive behaviors, and then can propose a behavior intervention plan to retrain Student to meet those needs in an

alternative way. Newport-Mesa's functional behavior assessment analyzed three behavioral areas: use of profanity, off-task behavior, and non-compliance. It found that Student sought attention from peers and teachers in unstructured settings. Newport-Mesa determined the replacement behavior should be asking for breaks and vocalizing his needs to gain attention, and the utilization of break cards. The assessor determined that current strategies, accommodations, and supports were effectively meeting Student's academic, social, and behavioral needs.

The functional behavior assessment failed to show a clear understanding of Student's functional behaviors at that time. Board-Certified Behavioral Analyst Doctor Rosa Patterson conducted an independent functional behavioral assessment of Student in October 2023. Patterson was highly trained and experienced in behavior analysis. Patterson disagreed with Newport-Mesa's functional behavior analysis and believed Student needed behavior interventions, including a behavior intervention plan. Patterson opined that Newport-Mesa's functional behavior analysis was incomplete. It did not include a Student assessment and administration of ratings scales, it lacked clarity of what was being observed and analyzed, the testing did not capture all the behavior challenges that were targeted, and the replacement behavior was too simplistic.

Patterson demonstrated that the functional behavior assessment was faulty. Without an appropriate functional behavior assessment, Student established that Newport-Mesa did not offer appropriate behavior support services because it did not accurately identify Student's functional behavioral needs.



Newport-Mesa witnesses attempted to defend its decision that Student did not require a behavior intervention plan. Patterson's opinion regarding Newport-Mesa's functional behavior assessment, however, was more credible. Patterson, the only board-certified behavior analyst who testified at hearing, had more experience with behaviors and their function than any other Newport-Mesa witness. She opined that Student needed a behavior intervention plan and consultation support by a behavior specialist for those implementing the plan to address his unique needs. Johnson agreed. Newport-Mesa should have offered a behavior intervention plan with consultation support at the February 2022 IEP team meeting.

Newport-Mesa's February and March 2023 IEP behavior support service offers remained the same as the November 2022 IEP offer. In April 2023, Newport-Mesa offered 30 minutes weekly of counseling with a school psychologist trained in cognitive behavior therapy and consult with Parent regarding skills targeting in the counseling session. However, Johnson opined that Student needed 60 minutes weekly of counseling services instead of 30, with a psychologist trained in cognitive behavior therapy. She also believed Student needed a behavioral aide. Newport-Mesa did not agree with these recommendations.

At the May 2023 IEP team meeting, Newport-Mesa acknowledged that Student's behavior impeded his education. While Student's behavior improved since November 2022, he continued to have significant maladaptive behavior related to

- inappropriate comments,
- using profanity,
- struggling with focus and concentration,
- having difficulty following directions,

- time-management,
- avoiding completing non-preferential work, and
- trouble interacting appropriately with peers.

Student argued he needed 60 minutes of cognitive behavior therapy, 60 minutes monthly of Parent training, and a behavioral aide. Newport Mesa offered 30 minutes weekly of counseling with a school psychologist, consult with Parent with the school psychologist as needed, and use of a behavior chart to provide timely feedback to Student regarding his behavior. Newport-Mesa contended that a behavioral aide was too restrictive and the social stigmatization that comes with an aide in high school would negatively impact Student's social interactions.

Newport-Mesa witnesses' opinion regarding an aide was persuasive because unlike Johnson and Patterson who endorsed a classroom aide for Student, Newport Mesa staff were more familiar and had more experience working in a high school environment and understanding the impact of an aide on Student, especially given that less restrictive alternatives could be implemented. Student's contention that he needed a classroom behavior aide fails.

However, both Johnson and Patterson endorsed the need for a behavior intervention plan with consultation support and more counseling for Student. While Newport-Mesa endorsed the use of a behavior chart for Student. Student needed a more formalized behavior intervention plan for improving and replacing his behavior, rather than a chart to assist with his behavior. He also needed consultation support by a behavior specialist to assist Newport-Mesa staff implementing the behavior intervention plan. Additionally, Student's contention that he needed more counseling, such as 60 minutes, was also persuasive, given his continued significant needs with inappropriate

comments and socialization issues that continued. That was true even though he had been receiving general education counseling services since November 2022 and special education counseling services since April 2023. Student needed more counseling to address his multiple behavioral needs. Both Johnson and Patterson were persuasive on this point.

Student established he required a behavior intervention plan, with consultation services, and one hour of counseling weekly with a school psychologist to address his needs. Student proved by the preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to offer appropriate behavior support services from the November 2022 through the May 2023 IEP team meeting.

### ISSUE 3 (b)-(g) AND 9(a): THE SPEECH AND LANGUAGE SERVICE OFFER AT THE NOVEMBER 2022 THROUGH THE MAY 2023 IEP TEAM MEETINGS

Student contends Newport-Mesa should have offered him more direct speech and language services. Newport-Mesa contends that the speech and language social skills group offered to Student was sufficient to meet his needs.

Student proved Newport-Mesa should have offered more direct speech and language services to Student. At the November 2022 IEP team meetings, Newport-Mesa offered 30 minutes weekly direct group speech and language services, which was a social skills group, to be implemented at Costa Mesa High School. Newport-Mesa believed the social skills group could address Student's pragmatic communication

goals and needs. However, Newport-Mesa's decision to offer a social skills group on a different school campus and for only 30 minutes was not enough to address Student's needs.

Newport-Mesa knew direct services would not be offered to Student at Early College because it did not offer them at the school as its practice. This practice was not based on Student's needs. This is evidenced by offering an off-site social skills group, instead of one with his peers, and only for 30 minutes because it would not interfere with Student's Early College school schedule. However, this was one of Student's greatest areas of need, namely maladaptive social interaction. The offer should have been based on Student's needs and not centered around his preferred placement.

Additionally, Newport-Mesa had dropped its "expected classroom behavior" goal at the November 2022 IEPs. It could no longer work on his inappropriate comments and behavior through its offered IEP services, including the social skills group. Padgett also conceded that Student's goals were not always worked on weekly at this social skills group.

At the November 2022 IEP, Newport-Mesa offered Student 30 minutes weekly of general education counseling from Turning Point although it was not a special education service. Yet, no evidence presented demonstrated that this service addressed Student's inappropriate comments to peers or that this service worked on Student's goals. Likewise, Newport-Mesa offered a behavior specialist to Student weekly but did not include it as a special education service in his IEP offer and it was unclear if his inappropriate comments and behaviors would be addressed in this service. The

evidence demonstrated that the behavior specialist would work generally on social issues, however, she would not be responsible for implementing any of Student's goals. The offer did not meet Student's needs.

Student's expert, Speech and Language Pathologist Susan Hollar, opined that Student needed more intensive services to meet Student's pragmatic communication needs, including reducing inappropriate behavior and comments. Hollar demonstrated that a 30-minute social skills group could not target all of Student's significant behavioral and pragmatic communication needs. Hollar opined Student needed additional group speech and language services along with an evidence-based social skills group to assist him.

Newport-Mesa maintained Hollar's opinions were not appropriate because she failed to review the May 2023 IEP document before her October 2023 assessment. Thus, she did not have comprehensive information about Student before formulating her opinions. However, Newport-Mesa's speech and language offer did not change from the November 2022 offer through her assessment. Thus, this argument fails.

Hollar's testimony was credible and most of her recommendations for compensatory speech services and social skills were reasonable based on the evidence of Student's deficits. Further, Johnson corroborated Hollar's opinion that Student needed more intense services for his behavior and pragmatic communication skills.

Conversely, Newport-Mesa's decisions regarding Student's services focused more on availability of services and working around Student's schedule at Early College since it offered no direct services. It did not center its decisions on Student's unique needs as evidenced by the Newport-Mesa witness testimony and IEP team notes that

collaborated this universal attitude. Thus, Hollar's opinions regarding Student's need for more speech and language services was given greater weight. At the November 2022 IEP team meetings, Student established that Newport-Mesa needed more intense special education behavioral support services with providers that would assist with and work on Student's behavior and pragmatic communication issues and measure his progress.

Newport-Mesa's February and March 2023 IEPs remained the same as the November 2022 IEP offers. Thus, Student established that the February and March 2023 IEP offers were also insufficient for the same reasons as described for the November 2022 IEP offers.

At the April 2023 IEP team meeting, Newport-Mesa offered Student 30 minutes weekly of cognitive behavior therapy. However, no evidence demonstrated that this service addressed Student's inappropriate behavior. Wendy Maraffi, the school psychologist providing this service, stated that the counseling sessions were used to work on Student's goals. Since there was no goal for inappropriate comments, Newport-Mesa did not address this need through this counseling service or any other service or support from November 2022 through the April 2023 IEP team meetings.

Student's May 2023 IEP speech and language and counseling service offer to Student did not change from the April 2023 IEP offer. However, Newport-Mesa offered an additional goal for inappropriate behavior that the speech and language pathologist was responsible for implementing. The evidence established, however, that Student required additional speech and language services to address the additional goal for the upcoming school year.

Student proved by a preponderance of evidence that Newport-Mesa failed to offer sufficient speech and language services at the November 2022 through the May 2023 IEP team meeting. Student prevailed on Issues 3(b)(c)(e)(f)(g) and 9(a).

#### ISSUES 5(b)-(g) AND 10(a): THE OCCUPATIONAL THERAPY SERVICE OFFER AT THE NOVEMBER 2022 THROUGH MAY 2023 IEP TEAM MEETINGS

Student contends that Newport-Mesa failed to offer appropriate occupational therapy services at the November 2022, through May 2023 IEP team meetings because he needed direct occupational therapy services. Newport-Mesa contends that it offered appropriate consultation occupational therapy services.

Student failed to meet his burden of proof on this issue. Student's occupational therapy service offered at the November 2022 IEPs through the April 2023 IEP remained the same. Newport Mesa offered no occupational therapy goals to Student and 15 minutes monthly of consultation occupational therapy services, identical to the May 2022 IEP offer to assist with sensory strategies equipment, and motor coordination. In May 2023, Newport-Mesa increased this amount to 30 minutes monthly of consultation occupational therapy services to allow more time to assist with sensory strategies and equipment.

As already discussed, no persuasive evidence was presented at hearing that Student needed direct occupational therapy services to meet his needs. Thus, Student failed to meet his burden of prove by a preponderance of the evidence that Newport-Mesa's denied Student a FAPE by failing to offer appropriate occupational therapy services from November 2022 through April 2023.

## ISSUE 6: CONSIDERATION OF JOHNSON'S PSYCHOEDUCATION ASSESSMENT RESULTS AT THE APRIL 2023 IEP TEAM MEETING

Student contends that Newport-Mesa failed to consider Johnson's recommendations regarding autism eligibility and aide support in her psychoeducation assessment report at the April 2023 IEP team meeting. Newport-Mesa maintains that it considered the report and its results, but it had no legal obligation to adopt Johnson's recommendations.

Student failed to meet his burden on this issue. When presented with a private expert's report, a school district must consider the results of the assessment in any decision made with respect to the provision of FAPE to the student. (34 C.F.R. § 300.502(c)(1) (2006); Ed. Code, § 56329, subd. (c).) There is no requirement that the school district adopt the findings of the private evaluation. (*See T.S. v. Board of Educ. of Town of Ridgefield*, (2nd Cir. 1993) 10 F.3d 87.)

Student failed to prove that Newport Mesa overlooked Johnson's assessment results as legally required. Johnson completed Student's independent psychoeducational assessment and report on March 7, 2023. Newport-Mesa held an IEP team meeting on April 20, 2023, to review Johnson's report. Johnson presented her report that day and it was discussed by the IEP team. Newport-Mesa memorialized the review of Johnson's report at length in the April 20, 2023 IEP team meeting notes. Newport-Mesa IEP team members present at the meeting, Maraffi and Peters-Gamboa, corroborated this at hearing.



Newport-Mesa disagreed with some of Johnson's recommendations but made changes to Student's IEP based on Johnson's results. This included adding the school psychologist as an additional person responsible for implementing Student's pragmatic language goals for expected behavior, 30 minutes weekly individual counseling, and consultation between the school psychologist and Parent regarding skills targeted in counseling sessions. The evidence established Newport-Mesa considered Johnson's assessment results.

Student argued the IEP team failed to give a substantive response to Johnson's recommendations concerning autism eligibility and aide support because it wanted to review the independent speech and language report first before making determinations regarding these recommendations. This contention does not support the proposition that Newport-Mesa failed to consider Johnson's assessment results at the April IEP team meeting. Rather, it demonstrates that Newport-Mesa considered the results, declined to incorporate some recommendations, but wanted to revisit them once new information arose, which it can do. Thus, Student's contention is unsupported by the evidence.

Newport-Mesa is neither legally required to adopt any of the reports' recommendations nor required to respond to all recommendations in an independent assessment report. The evidence overwhelmingly demonstrates Newport-Mesa considered Johnson's assessment results. Student failed to prove by a preponderance of the evidence that Newport-Mesa failed to consider Johnson's independent psychoeducation assessment results at the April 20, 2023 IEP team meeting.

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## 2023-2024 SCHOOL YEAR – TENTH GRADE

Student continued to attend Early College for his tenth-grade school year. Student established that Newport-Mesa failed to offer appropriate “behavior, communication, socialization” goals, behavior support services, and speech and language services during the 2023-2024 school year through the date of filing, January 18, 2024.

### ISSUE 7(b)-(c): AUTISM ELIGIBILITY

Student presented no persuasive evidence, as described above, in support of Student’s special education autism eligibility. Student failed to meet his burden of persuasion on this issue.

Accordingly, Student failed to prove by the preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to find him eligibility under the autism category at the November and December 2023 IEP team meetings.

### ISSUE 10(b)(1)-(4) AND (c)(1)-(4): GOALS IN BEHAVIOR, COMMUNICATION, SOCIALIZATION, AND OCCUPATIONAL THERAPY AT NOVEMBER AND DECEMBER 2023 IEP TEAM MEETINGS

Student contends that Newport-Mesa failed to offer appropriate goals to Student in “behavior, communication, socialization”, and occupational therapy at the November and December 2023 IEP team meetings. Newport-Mesa contends it offered Student appropriate goals.

Newport-Mesa convened two amendment IEP team meetings associated with the May 2023 annual IEP. The meetings took place on November 13, 2023, and December 11, 2023, and IEP team considered Hollar's independent speech and language assessment and Patterson's functional behavior assessment. Student received weekly private counseling and social skills from Johnson beginning May 2023.

#### 10(b)(1)-(3) AND (c)(1)-(3): BEHAVIOR, COMMUNICATION, AND SOCIALIZATION GOALS

At the November 2023 IEP team meeting, Newport-Mesa IEP team members found that Student continued to have needs with

- social language,
- using inappropriate language and comments,
- focus and concentration,
- following directions, and
- completing assignments.

Student was having significant difficulty in his academic support program class mostly due to his executive functioning deficits. However, the IEP team members were generally positive concerning Student's progress during the first two months of the 2023-2024 school year. Student's goals remained the same from the May 2023 IEP team meeting.

Hollar determined, after assessing Student's speech and language and communication needs, that he had needs in speech organization, reading non-verbal cues and social context, and social pragmatic skills. Hollar opined that the offered goals were appropriate but recommended a goal targeting nonverbal communication such as perspective taking, friendship, and self-advocacy. Student mastered his "expected and

unexpected behavior” goal and Padgett proposed an additional “perspective taking” goal to fulfill Hollar’s recommendation. He also agreed to get baseline data for perspective taking, friendship, and self-advocacy goals. However, Newport-Mesa did not offer this goal at the November or December 2023 IEP team meetings.

Student proved he needed a perspective taking goal. Accordingly, Student proved that Newport-Mesa failed to offer appropriate speech and language, behavior, socialization goals at the November and December 2023 IEPs.

### 10(b)(4) AND (c)(4): OCCUPATIONAL THERAPY GOALS

Student contends that Newport-Mesa should have offered Student occupational therapy goals at the November and December 2023 IEP team meetings. Newport Mesa offered no occupational therapy goals to Student at that time and did not believe that Student needed them.

Patterson found after conducting Student’s functional behavior assessment that Student had foundational social skills, but had deficits in reciprocal communication, social relationships, and emotional regulation skills, plus had repetitive behaviors. Patterson recommended three goals in sensory regulation, sensory breaks, and social emotional. These goals would assist with managing his sensory regulation breaks and social emotional. These goals would assist with managing his sensory regulation, taking sensory breaks, and assisting with inappropriate and off topics. Newport-Mesa persuasively demonstrated that it already offered goals, services, and accommodations to address these areas of need. Thus, additional goals to address these areas of need were unnecessary.

As already discussed, there was no need for specific goals in occupational therapy as Student's needs in this area had not changed and the goals, services and accommodations addressed Student's needs, including his occupational therapy needs. Further, Roley's opinion regarding this issue was unpersuasive.

Student failed to prove by a preponderance of the evidence that Newport-Mesa failed to offer appropriate occupational therapy goals at the November and December 2023 IEP team meetings.

#### ISSUE 8(b) AND (c): THE BEHAVIOR SUPPORT SERVICE OFFER AT THE NOVEMBER AND DECEMBER 2023 IEP TEAM MEETINGS

Student contends he continued to need more counseling services, Parent training, a behavioral aide, and behavior intervention services and supervision to address his behavioral needs. Newport-Mesa argues that it offered Student a FAPE.

Student proved he needed more behavior support services. Student's behaviors lessened in the first two months of tenth grade. Student was receiving 30 minutes weekly counseling from a Newport-Mesa school psychologist which began after the April 2023 IEP team meeting. He was also receiving 60 minutes counseling every two weeks starting in May 2023 with Johnson. Student credits his progress with Johnson's counseling, and Newport-Mesa credits Student's progress with its counseling services. Student received twice the counseling services that Newport-Mesa offered to Student between both Johnson's and Newport-Mesa's which resulted in fewer maladaptive behaviors at school. Thus, given the enhancement of private services, the evidence

established Student needed more counseling services than what Newport-Mesa offered to meet his needs. He needed 60 minutes of counseling services with a psychologist to address his numerous behavioral issues.

Newport-Mesa also offered a behavior chart to help him with his behaviors. Student needed a more formal behavior intervention plan with behavior specialist consultation support to focus on specific issues that could be charted and measured. Newport-Mesa offered consultation between the school psychologist and Parent to discuss strategies addressed in the counseling sessions. This offer satisfied Johnson's request for Parent training on strategies for Student. As already described, aide support was too restrictive given less restrictive alternatives were available to Student.

Student proved by the preponderance of the evidence that Newport-Mesa denied Student a FAPE at the November and December 2023 IEP team meetings by failing to offer appropriate behavior support services, specifically a behavior intervention plan with consultation support.

#### ISSUE 9(b) AND (c): THE SPEECH AND LANGUAGE SERVICE OFFER AT THE NOVEMBER 2023 AND DECEMBER 2023 IEP TEAM MEETINGS

Student contends that Newport-Mesa failed to offer appropriate speech and language services at the November 13 and December 11, 2023 IEP amendment team meetings. Newport-Mesa contends it offered Student a FAPE.

Student proved Newport-Mesa failed to offer appropriate speech and language services. As already determined, Student needed more than 30 minutes weekly to address all his pragmatic communication needs. Additionally, Hollar established that

Student needed two 30 minutes sessions of group speech and language services and an evidence based social skills group to address his pragmatic communication needs. Additionally, a perspective taking goal was needed for Student which was not offered and no services or supports were offered to work on this goal. Student needed more than 30 minutes a week of a group social skills to work on his communication and social skill needs as already established.

Although Newport-Mesa witnesses disagreed, much of Newport-Mesa's opinions were influenced by the lack of direct services offered at Early College. These comments were repeated themes throughout Newport-Mesa's witness testimony at hearing. Newport Mesa generally focused on what services were available at Early College rather than Student's unique needs. Student proved by a preponderance of the evidence that Newport-Mesa denied Student a FAPE for failing to offer appropriate speech and language services.

#### ISSUE 11: CONSIDERATION OF HOLLAR'S SPEECH AND LANGUAGE ASSESSMENT RESULTS AT THE NOVEMBER 2023 IEP TEAM MEETING

Student contends that Newport-Mesa ignored Hollar's recommendations from her independent speech and language assessment report by deferring decisions on its findings and recommendations until review of another assessment. Newport-Mesa maintains that it considered the assessment results, but it had no legal obligation to adopt Hollar's recommendations.

Student failed to prove that Newport Mesa overlooked Hollar's assessment results. Hollar completed an independent speech and language assessment and report on October 16, 2023. On November 13, 2023, Newport-Mesa convened an IEP team

meeting to review Hollar's report. At that time, the IEP team members listened to the report presentation and reviewed the written report. Hollar attended the IEP team meeting and conceded at hearing that her report was reviewed. Padgett, an IEP team member at the November IEP team meeting, corroborated that the report results were considered that day and detailed in depth the reasons why he was not persuaded by Hollar's recommendations for Student. Newport-Mesa memorialized the review of Hollar's assessment results in the IEP team meeting notes. After reviewing Hollar's report, the IEP team then revisited autism eligibility as well as Student's special education program. Thus, Newport-Mesa considered Hollar's assessment results.

Student argued in his closing brief that the IEP team failed to consider Hollar's findings and recommendations because it wanted to review an assistive technology assessment before considering them. The evidence does not support Student's contention. The testimonial and documentary evidence described above contradicts Student's characterization of this issue and thus, was unpersuasive.

Here, the evidence demonstrates Newport-Mesa met its legal obligation and considered Hollar's report results at the November 2023 IEP team meeting. Additionally, Newport-Mesa is not legally obligated to incorporate Hollar's recommendations and can revisit an assessment once additional information is available to it, including other assessments. Student failed to prove by a preponderance of the evidence that Newport-Mesa failed to consider Hollar's assessment results at the November 13, 2023 IEP team meeting.

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## ISSUE 12: CONSIDERATION OF PATTERSON'S FUNCTIONAL BEHAVIOR ASSESSMENT RESULTS AT THE NOVEMBER 2023 IEP TEAM MEETING

Student contends that Newport-Mesa failed to consider Patterson's October 2023 functional behavior assessment results by delaying recommendations until review of another assessment. Newport-Mesa maintains that it reviewed and considered her report but had no legal obligation to adopt Patterson's recommendations.

Student failed to prove that Newport Mesa overlooked Patterson's assessment results. Patterson completed an independent speech and language assessment and report on October 23, 2023. On November 13, 2023, Newport-Mesa convened an IEP team meeting to review Johnson's report. At the meeting, Patterson presented her assessment report and results, and the IEP team listened and subsequently discussed it. Newport-Mesa's IEP team meeting notes corroborate the review of Patterson's assessment results and the subsequent discussion with the IEP team members. Thus, Newport-Mesa considered Patterson's results.

Student argues that the IEP team failed to consider Patterson's findings and recommendations because it wanted to review an assistive technology assessment before considering them. Student's contention is not supported by the testimonial and documentary evidence, and thus, was unconvincing. Newport-Mesa met its legal obligation and considered Patterson's assessment results at the November 2023 IEP meeting. The IEP team did not agree with Patterson's recommendations. It also wanted

to review another assessment in December 2023 and consider it again. Additionally, as already stated, Newport-Mesa is not legally obligated to incorporate assessment recommendations, only to consider them.

Student failed to prove by a preponderance of the evidence that Newport-Mesa failed to consider the results of Johnson's assessment findings at the November 13, 2023 IEP team meeting.

## CONCLUSIONS AND PREVAILING PARTY

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

### ISSUE 1:

Student failed to prove that Newport-Mesa denied Student a FAPE at the May 17, 2022, November 14, 2022, November 18, 2022, December 7, 2022, February 7, 2023, March 14, 2023, and April 20, 2023 IEPs by failing to find Student special education eligible under the autism category.

Newport Mesa prevailed on Issue 1.

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## ISSUE 2:

Student proved that Newport-Mesa denied Student a FAPE at the November 14, 2022, November 18, 2022, February 7, 2023, March 14, 2023, and April 20, 2023 IEPs, by failing to offer appropriate behavior support services. Student did not prove that Newport-Mesa denied Student a FAPE at the May 17, 2022, and December 7, 2022 IEPs, by failing to offer appropriate behavior support services.

Student partially prevailed on Issue 2. Specifically, Student prevailed on Issues 2 (b), (c), (e), (f), and (g). Newport-Mesa partially prevailed on Issue 2. Specifically, Newport Mesa prevailed on Issues 2(a) and (d).)

## ISSUE 3:

Student proved that Newport-Mesa denied Student a FAPE at the May 17, 2022, November 14, 2022, November 18, 2022, February 7, 2023, March 14, 2023, and April 20, 2023 IEP team meetings, by failing to offer appropriate speech and language services. Student did not prove that Newport-Mesa denied Student a FAPE at the December 7, 2022 IEP, by failing to offer appropriate speech and language services.

Student partially prevailed on this Issue 3. Specifically, Student prevailed on Issues 3(a)(b)(c)(e)(f) and (g). Newport-Mesa partially prevailed on Issue 3. Specifically, Newport Mesa prevailed on Issue 3(d).

#### ISSUE 4:

Student failed to prove that Newport-Mesa denied Student a FAPE at the May 17, 2022, November 14, 2022, November 18, 2022, December 7, 2022, February 7, 2023, March 14, 2023, and April 20, 2023 IEP team meetings, by failing to offer Student appropriate occupational therapy services.

Newport-Mesa prevailed on Issue 4.

#### ISSUE 5:

Student proved that Newport-Mesa denied Student a FAPE at the November 14, 2022, November 18, 2022, February 7, 2022, March 14, 2023, and April 20, 2023, for failing to offer appropriate goals in behavior, communication, and socialization. Student failed to prove that Newport-Mesa denied Student a FAPE at the at the May 17, 2022, November 14, 2022, November 18, 2022, February 7, 2022, March 14, 2023, and April 20, 2023, for failing to offer appropriate goals in occupational therapy, and any goals at the May 17, 2022, and December 7, 2022 IEP team meeting.

Student partially prevailed on Issue 5. Specifically, Student prevailed on Issues 5(b)(c)(e)(f) and (g) (1-3). Newport-Mesa partially prevailed on Issue 5(a) and (d)(1-3) and 5(a-f)(4)

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#### ISSUE 6:

Student failed to prove that Newport-Mesa denied Student a FAPE at the April 20, 2023 IEP team meeting, by failing to consider the results of the March 7, 2023 independent psychoeducation assessment results.

Newport-Mesa prevailed on Issue 6.

#### ISSUE 7:

Student failed to prove that Newport-Mesa denied Student a FAPE at the May 17, 2022, November 14, 2022, November 18, 2022, December 7, 2022, February 7, 2023, March 14, 2023, and April 20, 2023 IEP team meetings, by failing to find Student special education eligible under the autism category.

Newport Mesa prevailed on Issue 7.

#### ISSUE 8:

Student proved that Newport-Mesa denied Student a FAPE at the May 18, 2023, November 13, 2023, and December 11, 2023 IEP team meetings, by failing to offer Student appropriate behavior support services.

Student prevailed on Issue 8.

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## ISSUE 9:

Student proved that Newport-Mesa denied Student a FAPE at the May 18, 2023, November 13, 2023, and December 11, 2023 IEP team meetings, by failing to offer Student appropriate speech and language services.

Student prevailed on Issue 9.

## ISSUE 10:

Student proved that Newport-Mesa denied Student a FAPE by failing to offer appropriate behavior, communication, and socialization goals at the May 18, 2023, November 13, 2023, and December 11, 2023 IEP team meetings. Student failed to prove that Newport-Mesa denied Student a FAPE by failing to offer appropriate occupational therapy goals at the May 18, 2023, November 13, 2023, and December 11, 2023 IEP team meetings.

Student partially prevailed on Issue 10. Specifically, Student prevailed on Issues 10(a-c)(1-3). Newport-Mesa partially prevailed on Issue 10. Specifically, Newport-Mesa prevailed on Issues 10 (a-c)(4).

## ISSUE 11:

Student failed to prove that Newport-Mesa denied Student a FAPE at the November 13, 2023 IEP team meeting, by failing to consider the October 16, 2023 independent speech and language assessment results.

Newport-Mesa prevailed on Issue 11.

## ISSUE 12:

Student failed to prove that Newport-Mesa denied Student a FAPE at the November 13, 2023 IEP team meeting. by failing to consider the October 23, 2023 independent functional behavior assessment results.

Newport-Mesa prevailed on Issue 12.

## REMEDIES

Student prevailed on Issues 2 (b)(c)(e)(f) and (g), 3(a)(b)(c)(e)(f) and (g), 5(b)(c)(e)(f) and (g) (1-3), and 10(a-c)(1-3), 8, and 9. Student proved that Newport-Mesa failed to offer:

- appropriate behavior, communication, and socialization goals from November 14, 2022, through May 17, 2023 and November 13, 2023, through the time of filing on January 18, 2024;
- appropriate behavior support services from November 14, 2022, through January 18, 2024; and
- Appropriate speech and language services from May 17, 2022, through January 18, 2024.

As remedies, Student requested as compensatory education:

- behavior services recommended by Patterson,
- a behavior intervention plan,
- positive behavior support plan,
- a behavior classroom aide,

- a board-certified behavior analyst to supervise a behaviorist four hours per week,
- social skills training, and
- 64 hours of speech and language services from a nonpublic agency.

Student also requested reimbursement in the amount of \$4,612.50 for Johnson's counseling services.

Prospectively, Student requested changes to his IEP, specifically,

- 60 minutes per week of cognitive behavior training by a licensed psychologist,
- 60 minutes per month of Parent training,
- two 30 minutes per week of group speech and language services,
- 20 minutes per week of direct individual occupation therapy,
- 15 minutes per week of consultation occupational therapy, and
- changing Student's primary eligibility category to autism. Newport-Mesa maintained that Student was not entitled to any relief.

Courts have broad equitable powers to remedy the failure of a local educational agency to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(if)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct.1996] (*Burlington*); *Parents of Student W. v. Puyallup Sch. Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).

The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 638 F.3d. at p. 1239.)



An administrative law judge can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.*; *Puyallup, supra*, 31F.3d at p.1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

Compensatory education is a prospective award of educational services designed to catch-up the student to where the student should have been absent the denial of a FAPE. (*Brennan v. Regional Sch. Dist. No. 1* (D. Conn. 2008) 531 F.Supp.2d 245, 265.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

Parents may also be entitled to reimbursement for costs of placement of services they independently obtained for their child when the school district failed to provide a FAPE. (*Burlington, supra*, 471 U.S. at p. 374 ) Reimbursement is not a damage remedy, but merely requires a school district to pay expenses it should have paid all along and would have born in the first instance had the school district developed a proper IEP. (*Id.* at pp. 370-371.)

In remedying a FAPE denial, the student is entitled to relief that is “appropriate” considering the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d. at p. 1497.)

Student maintained he required a behavior aide. As already discussed, Newport-Mesa showed that a behavior aide was too restrictive given there were less restrictive alternative available to meet assist Student in his deficits. Student requested perspective relief. Student offered no current, assessment-based information on Student’s needs in all areas. No persuasive evidence indicated the type, frequency, or duration of services that would be appropriate to enable Student to make progress or address his unique needs in the areas of behavior, speech and language, and occupational therapy at this time. Student’s request for prospective relief is denied.

This Decision holds that Newport-Mesa denied Student a FAPE from the May 17, 2022 IEP team meeting, through the date of filing, January 18, 2024. This Decision orders compensatory education and reimbursement.

FAILURE TO OFFER APPROPRIATE BEHAVIOR, COMMUNICATION,  
AND SOCIALIZATION GOALS AND BEHAVIOR SUPPORT SERVICES  
FROM NOVEMBER 2022 THROUGH JANUARY 2024

Newport Mesa failed to offer Student a goal related to Student’s inappropriate behavior and comments from November 14, 2022, through May 17, 2023, and a perspective taking goal from November 14, 2023, through January 18, 2024. It also

failed to offer appropriate counseling services from November 14, 2022, through January 18, 2024, and appropriate behavior intervention services from February 7, 2023, through January 18, 2024.

Student should have received 30 minutes of special education counseling services from a school psychologist from the November 2022 IEPs through the April 2023 IEP, and 60 minutes weekly counseling services from a school psychologist from the April 2023 IEP to January 18, 2024, instead of 30 minutes weekly counseling services. This amount of counseling services was needed to address Student's inappropriate comments and significant behaviors and socialization issues that continued throughout the statutory period.

This amounts to approximately 23 hours of individual counseling services that Student should have been offered during the statutory period. As an equitable remedy, Newport-Mesa must reimburse Parent for Johnson's counseling services in the amount of \$4,612.50.

Additionally, Newport-Mesa should have also offered appropriate behavior goals to Student, and a behavior intervention plan with consultation support from a behavior specialist from February 2023 through January 18, 2024. This amounts to 35 school weeks without these behavior services and supports offered to Student. As an equitable remedy, Newport-Mesa is ordered to provide 35 hours of individual counseling services through a nonpublic agency of Parent's choice, to assist with the impact of Newport-Mesa's failure to offer appropriate behavior services, supports, and goals. Newport-Mesa must all reimburse Parent for the cost of transportation to attend the counseling services.

## FAILURE TO OFFER AND SPEECH AND LANGUAGE SERVICES FROM MAY 2022 TO JANUARY 2024

Student proved that Newport-Mesa denied Student a FAPE by failing to offer speech and language services from May 2022 through January 2024. Newport-Mesa should have offered Student 30 minutes of group speech and language services from August 22, 2022, through November 14, 2022, because Student's pragmatic social communication needs persisted, and consultation services were insufficient. Newport Mesa offered a 30-minute social skills group from November 14, 2022, but it needed to offer an additional 30 minutes of group speech and language services from November 14, 2022, through January 18, 2024 to address Student's continued needs in pragmatic social communication, including inappropriate comments and behavior, peer socialization issues. This amounts to approximately 26 hours of group speech and language services that Newport-Mesa should have offered Student.

As an equitable remedy, Newport-Mesa is ordered to provide Student 26 hours of group speech and language therapy or a social skills program through a non-public agency of Parent's choice. Newport-Mesa must also reimburse Parent for the transportation cost to the group speech and language therapy or social skills program.

### ORDER

1. Newport-Mesa must reimburse Parent in the amount of \$4,612.50 for Dr. Helena Johnson's counseling services given to Student. Newport-Mesa must reimburse Parent within 30 days of written proof of billing of the counseling services, and payments by Parent.

2. Newport-Mesa must fund 35 hours of individual counseling services from a certified non-public agency of Parent's choice. Within 30 days of the date of this Decision, Newport-Mesa must give Parent a list of non-public agencies it has contracts with to provide compensatory services. If Parent selects a non-public agency Newport-Mesa does not have a contract with, Newport-Mesa must establish direct payment to the certified non-public agency Parent selected. The hours will be available to Student until December 31, 2025, and will be forfeited thereafter. Newport-Mesa must reimburse Parent at the federal mileage rate for transportation costs for one round trip per counseling session.
3. Newport-Mesa must fund 26 hours of group speech and language services or a social skills group from a certified non-public agency of Parent's choice. Within 30 days of the date of this Decision, Newport-Mesa must give Parent a list of non-public agencies it has contracts with to provide compensatory services. If Parent selects a non-public agency Newport-Mesa does not have a contract with, Newport-Mesa must establish direct payment to the certified non-public agency Parent selected. The hours will be available to Student until December 31, 2025, and will be forfeited thereafter. Newport-Mesa must reimburse Parent at the federal mileage rate for transportation costs for one round trip per speech and language or social skills group session.
4. All other requests for relief by the parties are denied.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Under Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Cynthia C. Fritz

Administrative Law Judge

Office of Administrative Hearings