

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019120861
CASE NO. 2020050135

THE CONSOLIDATED MATTERS INVOLVING

PARENTS ON BEHALF OF STUDENT, AND

NEWPORT-MESA UNIFIED SCHOOL DISTRICT.

DECISION

AUGUST 11, 2020

On December 20, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on Behalf of Student, naming the Newport-Mesa Unified School District, called Newport-Mesa, as respondent. On March 26, 2020, OAH granted Student leave to amend his complaint. On May 6, 2020, OAH received a due process hearing request from Newport-Mesa naming Student. On May 7, 2020, OAH granted Student leave to amend his first amended complaint. OAH consolidated the two matters on May 11, 2020. Administrative Law Judge Cynthia Fritz heard the matter by videoconference on June 30, July 1, 2, 7, 8, and 9, 2020.

Attorneys Timothy Adams and Lauren-Ashley Caron represented Student. Advocate Patricia McGehee attended all hearing days. Parents attended all hearing days. Student did not attend the hearing.

Attorney Daniel Harbottle represented Newport-Mesa. Kari Adams, Newport-Mesa Special Education Coordinator, attended all hearing days.

OAH continued the matter to July 29, 2020, at the parties' request for written closing briefs. OAH closed the record and submitted the matter on July 29, 2020.

ISSUES

STUDENT'S ISSUES

1. Did Newport-Mesa deny Student a free appropriate public education, called FAPE, by failing to make an appropriate offer of the following through the December 21, 2017 individual education program, called IEP, team meeting:
 - A. placement;
 - B. academics, social-emotional status, pragmatic speech and language, and auditory processing services;
 - C. academics, social-emotional status, pragmatic speech and language, and auditory processing goals; and
 - D. academics, social-emotional status, pragmatic speech and language, and auditory processing accommodations?
2. Did Newport-Mesa deny Student a FAPE during the 2017-2018 and 2018-2019 school years by failing to convene an annual IEP team meeting in April 2018?
3. Did Newport-Mesa deny Student a FAPE by failing to complete Student's assessments within the 2019 triennial assessment timeline?

4. Did Newport-Mesa deny Student a FAPE by failing to make an appropriate offer of the following at the May 29, 2019 IEP:
 - A. placement;
 - B. academics, social-emotional status, pragmatic speech and language, and auditory processing services;
 - C. academics, social-emotional status, pragmatic speech and language, and auditory processing goals; and
 - D. academics, social-emotional status, pragmatic speech and language, and auditory processing accommodations?
5. Did Newport-Mesa deny Student a FAPE by failing to file for due process when Parents did not consent to the May 29, 2019 IEP?
6. Did Newport-Mesa deny Student a FAPE by failing to send Parents prior written notice in response to the closures related to the COVID-19 pandemic?

NEWPORT-MESA'S ISSUE

Are Newport-Mesa's May 29, 2019 triennial multidisciplinary assessment and assessment report appropriate, so that is not required to fund independent educational evaluations at public expense?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, 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 Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for 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) and (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.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In these matters, Student has the burden of proving the claims he alleged, and Newport-Mesa has the burden of proving the claim it alleged. 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 14 years old and entering ninth grade at the time of hearing. He resided within Newport-Mesa's geographic boundaries and was eligible for special

education under the categories of autism, other health impairment, and specific learning disability at all relevant times.

STUDENT'S ISSUE NO. 1: DID NEWPORT-MESA DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF THE FOLLOWING THROUGH THE DECEMBER 21, 2017 IEP TEAM MEETING?

- A. Placement;
- B. Academics, Social-Emotional Status, Pragmatic Speech and Language, and Auditory Processing Services;
- C. Academics, Social-Emotional Status, Pragmatic Speech and Language, and Auditory Processing Goals; and
- D. Academics, Social-Emotional Status, Pragmatic Speech and Language, and auditory Processing Accommodations?

Student contends that Newport-Mesa denied him a FAPE by failing to offer appropriate goals, services, and accommodations in academics, social-emotional status, pragmatic speech and language, and auditory processing. Additionally, Student required a different placement at a different school. Newport-Mesa asserts that it offered Student a FAPE.

A FAPE means special education and related services that are available to an eligible child that meet 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); see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), 56363, subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006) & 300.501 (2006).)

In general, 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 in light of 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. ____ [137 S.Ct. 988, 1000].)

Student struggles with written expression, attention, auditory processing, executive functioning, and social communication. He was found eligible for special education in 2014, and was diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, a specific learning disability in writing, Central Auditory Processing Disorder, deficits in pragmatic speech and language, and depression.

During the 2016-2017 school year, Student was in fifth grade and attended a Newport-Mesa elementary school. Student's IEP team placed him in a general education classroom with other services, supports, and accommodations. During that time, Student took psychotropic medication, and received private therapy and applied behavior analysis services. Due to his autism, Student sometimes displayed rigidity and self-focused conversations which undermined his social skills and interfered with peer relationships. However, he did have some positive interactions with peers. Academically, Student struggled with written expression, and wore a frequency modulation microphone system to clarify sound transmitted from his teachers.

Between January 31, 2017, and the April 17, 2017 IEP team meeting, Mother complained five times regarding Student's social peer problems and requested additional supports from Newport-Mesa. The complaints included being teased, deserted at recess, sitting alone at lunch, taking his food at lunch, feeling sad at grandparents' day, and an incident that occurred outside of school. The evidence

established that the school responded to Mother's concerns and followed up with Student.

Newport-Mesa's April 2017 IEP offer to Student continued his placement in general education, with services, accommodations, and supports, and proposed four goals. To address Mother's concerns related to Student's peer interactions, Newport-Mesa agreed to observe Student at recess and lunch over a two-week period, gather data, and meet to discuss the results. Parent consented to the April 17, 2017 IEP offer.

Newport-Mesa held an IEP team meeting on May 10, 2017, to review the observation results. The data revealed that Student's overall social skills were good. Student was observed at lunch as engaged, talkative, and part of a group. Student interacted with other peers on the playground, especially in structured games, although he continued to miss social cues and exhibit inappropriate behaviors. Halfway through the data collection, Student noticed the aide observing him, and Newport-Mesa conceded at hearing that the observations afterward were not reliable. Despite this, Newport-Mesa's IEP team members agreed that the data was consistent with his previously identified needs that were appropriately addressed in his goals.

At hearing, Student argued that the observations were unreliable and did not capture the daily difficulties Student was having with peer interactions at that time. Student, however, presented no evidence from any witness with personal knowledge to contradict the repeated testimony of Newport-Mesa staff during hearing regarding their observations and communications with Student and his peer interactions. Their testimony was consistent and based upon personal knowledge of Student at school and is deemed reliable. Mother and Father testified to the contrary but had not observed Student at school during that time, so the testimony was given less weight. The

evidence established that Newport-Mesa was aware of Student's peer interaction difficulties and was addressing them.

The following school year, while Student was in sixth grade, Mother complained twice about Student's peer interaction difficulties and requested an IEP team meeting to address her concern with his social interactions and his writing. On December 21, 2017, Newport-Mesa held an IEP team meeting to address Parents' concerns. The IEP team discussed the social skills concerns and writing progress and agreed to add a speech-to-text accommodation for writing and use of a reinforcement system including involvement in a peer mentorship program. Everything else remained the same, including placement, goals, services, other accommodations, and supports. Parents did not agree to the December 21, 2017 IEP and immediately notified Newport-Mesa of Student's unilateral placement at Fusion Academy, a private school, and that they may seek reimbursement. At the time of hearing, the April 17, 2017 IEP was the last consented-to IEP.

At hearing, Newport-Mesa made several evidentiary objections regarding the statute of limitations as it relates to the April 2017 IEP. However, Newport-Mesa did not address the statute of limitations in its closing brief and appears to have abandoned the argument.

ISSUE 1C: GOALS REGARDING ACADEMICS, SOCIAL-EMOTIONAL STATUS, PRAGMATIC SPEECH AND LANGUAGE, AND AUDITORY PROCESSING

Student criticized the appropriateness of the April-December 2017 IEP annual goals and argued that additional goals were required to meet his needs. Newport-Mesa

contends that the goals were appropriate and in compliance with all legal requirements, and no additional goals were needed.

An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including the way the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1) (2007); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals.

An annual IEP must also contain a statement of measurable annual goals designed both to meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg., pp. 12,406, 12,471 (1999 regulations).)

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, abrogated in part on other grounds by *Schaffer v. Weast* (2005) 546 U.S. 49, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) Moreover, "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* (9th Cir. 1996) 93 F.3d 1458, 1467.) Accordingly, the law requires the IEP

team to consider the overall impact of Student's limitations on his educational performance, not merely his academic performance.

Newport-Mesa's April–December IEP offer contained four goals: non-verbal communication; social autopsy; social interaction; and writing, annotation, and prompt. Newport-Mesa's goals bore a correlation to the present levels of performance in the offered IEP. Doctor Marta Shinn, Student's expert and a licensed clinical and educational psychologist, and Michelle Walquist, Student's expert and treating speech and language pathologist, challenged the progress reporting but failed to review the data collected in support of the November 2017 progress report, or make any effort to contact anyone at Newport-Mesa about the goals. Further, Dr. Shinn acknowledged the methodology of addressing goals is within the discretion of the educator implementing the IEP. Thus, their opinions were not compelling. The evidence showed that Newport-Mesa's goals were derived from specific baselines which reflected Student's then-current capabilities and used numerical standards to formulate present levels of performance.

For example, the baseline of Student's writing, annotation and prompt goal was: "[Student] is able to write a given prompt/directions (understand its' objectives) 25% of the time." The baseline accurately reflected Student's present level of performance when it was written. The related goal was:

"When given a prompt/direction, [Student] will demonstrate his understanding of the objective(s) by underlining or highlighting key words/information with 80% accuracy in four out of five opportunities."

The other three offered goals were similarly quantified and specific. All of them were capable of numeric measurement throughout the year. All of them stated how progress would be measured and who was responsible for measuring it.

Christine Spilka, Newport-Mesa special education teacher and education specialist, addressed the academic goal at hearing. Ms. Spilka was Student's education specialist in fifth and sixth grade and worked with him on his writing, organizational graphics, and goals during his specialized academic instruction. She also regularly observed him in his classroom. Ms. Spilka was responsible for writing the academic goal for writing, annotation, and prompt. She convincingly established that she accurately tracked his progress for valid baseline data and appropriate present levels and explained how the goal was being implemented. Ms. Spilka opined that no additional academic goals were needed as Student's area of concern was context writing, which could be worked on through the drafted goal.

Dr. Shinn opined that Student's writing goal was incomplete because further testing needed to be done, specifically that Newport-Mesa should have conducted the Test of Written Language, a writing readiness assessment, to determine his writing deficits. She argued that once the testing was completed, additional writing goals needed to be drafted based upon the results. Dr. Shinn first met Student in April 2020. She explained that she was unable to test Student in this area due to COVID-19 and could not give any further details as to why the writing goal was incomplete or specifically what additional writing goals were needed. Her testimony in this area was vague and speculative and did not overcome Ms. Spilka's detailed opinion that she had sufficient information to draft an appropriate goal.

Laina Knott, Newport-Mesa's school psychologist, described the social emotional goal, labeled social interaction. Ms. Knott observed and communicated with Student during the 2017-2018 school year and was aware of Mother's concerns with his peer interactions. Ms. Knott explained that Student was more successful in shorter recess

periods and shorter social interactions, and the drafted goal focused on sustained interactions to target this deficit.

Dr. Shinn criticized the social interaction goal as not being evidence-based and believed Student needed additional goals in frustration tolerance, depression and anxiety. However, the IDEA does not require that each identifiable need, deficit, or area of struggle or challenge be addressed in a separate goal as long as the IEP, overall, offers a FAPE.

In *Coleman v. Pottstown Sch. Dist.* (E.D.Pa. 2013) 983 F.Supp.2d 543, the District Court found:

Plaintiffs interpret [§ 1414(d)(1)(A)(i)(II)] as requiring a school district to create measurable goals for every recognized educational and functional need of a student with disabilities. ...[I]t would...be inconsistent with the longstanding interpretation of the IDEA to find that providing a FAPE requires designing specific monitoring goals for every single recognized need of a disabled student. As noted above, a FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education.

(*Id.* at pp. 572-573.) The Court of Appeal affirmed that part of the District Court's decision. (*Coleman v. Pottstown Sch. Dist.* (3d Cir. 2014) 581 Fed.Appx. 141, 147-148; see also *N.M. v. The School Dist. of Philadelphia* (3d Cir. 2010) 394 Fed.Appx. 920, 923 [nonpub. opn.]; *L.M. v. Downingtown Area Sch. Dist.* (E.D. Pa., April 15, 2015, No. 12-CV-5547) 2015 WL 1725091, p. 16; *Benjamin A. v. Unionville-Chadds Ford Sch. Dist.* (E.D. Pa., Aug. 14, 2017, Civ. No. 16-2545) 2017 WL 3482089, pp. 12-13.)

As detailed above, Newport-Mesa proved its goals were evidence-based. Student's previous frustration tolerance goal for the 2016-2017 school year had been met and Student was able to engage in replacement behavior and calming strategies. Dr. Shinn failed to elaborate on what Student additionally needed in the area of frustration tolerance and how this was a continued area of need. Further, she said nothing specific about why Student needed goals for anxiety or depression. Besides Student's previous diagnosis of depression and continued use of psychotropic medication, it was unclear what evidence would have supported goals in these areas. The evidence established that Student did not exhibit signs of depression or anxiety at school, although Student had social interaction difficulties and was lonely at times. Further, Dr. Shinn's did not elaborate as to what the additional depression and anxiety goals would contain, and how the data would be collected and measured. Further, Dr. Shinn believed there were no calming strategies in his IEP to address his social difficulties during recess; however, calming strategies were an accommodation listed in the IEP. Thus, the testimony was unpersuasive.

Melissa Powell, Newport-Mesa's speech and language pathologist explained the two pragmatics speech and language goals, nonverbal communication and social autopsy, at hearing. Ms. Powell worked with Student since 2016 and was his treating speech and language pathologist at school until he left Newport-Mesa in December 2017. She described how the baseline data for the present levels were collected, and how the goals would be implemented. The nonverbal communication goal emphasized nonverbal cues while the social autopsy goal worked on social situation awareness. She believed the speech and language goals offered in the April-December IEP were appropriate for him, valid, measurable, and addressed his needs, without the need for additional goals.

Ms. Walquist did not dispute the appropriateness of the nonverbal communication goal at hearing. She criticized the structure of the social autopsy goal, not its context. She opined that it was a challenging goal that needed to be broken down into four separate goals but believed that what it was measuring was appropriate for Student. She was concerned with the time it would take for Student to achieve the goal. She made no recommendations for additional goals. Ms. Walquist's criticism did not render the social autopsy goal inappropriate because she failed to identify any substantive flaws. Further, she conceded that between herself and Ms. Powell, one should defer to the later because she had prepared and implemented the goal.

Dr. Shinn criticized the nonverbal communication goal because she believed it focused on positive interactions and opined that it should also be addressing negative interactions. The baseline of the goal states that Student can identify when someone is expressing a positive message through non-verbal communication 25 percent of the time, but Student does not identify when non-verbal communication may be indicating a less positive message. The related goal is "following a social interaction, real or contrived, [Student] will indicate how others in the situation felt and provide an example of the person's nonverbal communication as rationale in 80 percent i[n] measured trials across the reporting period." Dr. Shinn's analysis is wrong. The language of the goal shows it was intended to work on non-verbal communication, both positive and negative. The evidence showed that Newport-Mesa appropriately addressed Student's pragmatic speech and language deficits through its two communication goals that followed the most recent data collected by its staff, and the experience and knowledge of the Student at that time.

Newport-Mesa failed to offer an auditory processing goal to Student in his April-December 2017 IEP. Newport-Mesa, however, offered staff audiology consultation for Student's frequency modulation microphone system but there is no legal requirement for consultation goals. Dr. Shannon Ricci, Newport-Mesa's audiologist, concluded that no audiology modifications to the IEP were necessary, and Student presented no qualified audiology witness or evidence that an audiology goal was necessary.

An examination of the four goals in the offered IEP showed that they were legally compliant. The April-December 2017 IEP goals met the educational needs the evidence showed Student had. The IEP described his present levels of academic and functional performance in general and used those levels to establish benchmarks for each of the four goals. The goals described the advancement that Student could reasonably expect to reach in a year, considering his deficits. Each goal described in detail how progress would be measured, who would measure it, and how it would be reported to Parent. For these reasons, the four goals in the April-December 2017 IEP and their related baselines were appropriate, adequately and complied with legal requirements.

ISSUE 1 B AND D: SERVICES AND ACCOMMODATIONS REGARDING ACADEMICS, SOCIAL-EMOTIONAL STATUS, PRAGMATIC SPEECH AND LANGUAGE, AND AUDITORY PROCESSING

Student contends that he required more services and accommodations in academics, social emotional, pragmatic speech and language, and auditory processing in the April-December 2017 IEP. Newport-Mesa asserts that it contained all the services and accommodations necessary for FAPE and to allow Student to access the curriculum and benefit from his education.

An IEP must contain a statement of the related services, supplementary aides and services, program modifications and supports that will allow the student to advance toward his goals, access and make progress in his curriculum, participate in activities and to be educated with other disabled and nondisabled children. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56345, subd. (a)(4).)

The April-December 2017 IEP contained a variety of services and accommodations. For services in a general education setting, Newport-Mesa offered group direct speech and language support for 30 minutes per week, an individual consultation with a district specialist 45 minutes per month, and an individual audiological consultation services 30 minutes four times a year. For services in a special education setting, Newport-Mesa offered individual direct speech and language in a special education setting 15 minutes per week, and Student group direct specialized academic instruction in a special education setting for 30 minutes per week. For extended school year, Newport-Mesa offered group direct social skills for 18 hours, and one hour of individual applied behavior analysis consultation.

For accommodations, Newport-Mesa offered Student: preferential seating near point of instruction; breakdown of instruction; ability to take breaks and utilize calming strategies; prompting of calming strategies; ability to complete assignments and receive additional support with writing; use of positive verbal reinforcement for on-task behaviors during non-preferred activities and assignments; access to computer, laptop, or tablet for writing with the use of spelling and grammar check; use of word prediction; use of visual graphic organizers or checklists for writing assignments; staff to check scantrons prior to scanning; and the use of personal hearing assistive technology for reduction of background noise. To address Parents' concerns, Newport-Mesa added a

text to speech accommodation for writing assignments and use of a reinforcement system at the December 2017 IEP team meeting.

By November 2017, Student's last progress report on his IEP goals showed that he was on track to meet all his goals by his annual review in April 2018. The evidence established that Student was making meaningful progress prior to his unilateral placement in December 2017.

While staff continued to believe he resisted and struggled with writing, and did not take advantage of some IEP accommodations, Student's academic grades and standardized test scores were encouraging. At the April 17, 2017 IEP team meeting, Student's general education teacher noted that he met or exceeded grade level standards in reading and mathematics but needed some additional support in writing. On the Spring 2017 California Assessment of Student Performance and Progress, during Student's fifth grade year, he met the overall standard in English language arts and literacy, which included a writing component. And, Student exceeded the State standard in mathematics. In Student's sixth grade first quarter grade reporting period, after 43 days of school, Student received five level four grades described as early advanced. Student received six level three grades, described as intermediate. And, he received 10 level two grades, described as early intermediate. He received no level one beginner grades.

While Dr. Shinn opined that Student needed more specialized academic instruction in writing, his academic performance did not support that claim. His grades and standardized test scores showed Student was making substantial progress. The fact that he continued to struggle with writing, and to resist writing services and accommodations, does not equate to a lack of educational benefit. It shows that Newport-Mesa was working correctly on areas of weakness. Further, Dr. Shinn was

unaware of the services or specialized academic instruction provided or did not have insight into Student's functioning in 2017 beyond the records review because she did not contact Newport-Mesa teachers for information and was unfamiliar with the school. This diminished the persuasiveness of her opinion.

In his closing brief, Student argued that because he was not performing comparably to his grade level peers, more writing services were needed. This statement does not comply with the IDEA as Student was substantially progressing, accessing his education, and gaining educational benefit. Further, no evidence was offered to show that Student was deprived of educational benefit by the academic services and accommodations provided. Thus, Newport-Mesa offered an adequate amount of specialized academic instruction, and Student earned passing grades to allow him to progress academically year to year.

Socially and emotionally, Student struggled with peer interactions. At the April 17, 2017 IEP team meeting, it was noted that Student appeared to have friends and socialize with peers but was inconsistent in reporting social interactions and did not always interpret non-verbal communication. After the April 2017 IEP, Mother contacted Newport-Mesa twice with continued concerns about name calling and peer interaction difficulties. She requested an IEP team meeting during the 2017-2018 school year to discuss Student's peer interaction issues. Although there was no evidence Student displayed depression at school, Mother reported her perceptions of his sadness and loneliness associated with his social problems, and Student's psychotropic medication was increased. While staff noted intermittent peer interaction problems, they also noted some good interactions as well.

During the December 2017 IEP meeting, Kari Adams, Newport-Mesa's special education coordinator, stated that it would refer Student for general education

counseling if he remained at or returned to Newport-Mesa. Mother suggested Student receive support from a behavioral interventionist, but Student's private applied behavior analysis services ceased because he had progressed. Further, Mother stated she would unilaterally place Student even if a behavioral interventionist was offered to Student.

From January 2017 through December 2017, Newport-Mesa spent considerable time with observations, check-ins, and communications with Parents and Student regarding Student's social difficulties. This involved a number of staff including his teacher, a school psychologist, his speech and language pathologist, an aide, and the school principal. Newport-Mesa collected enough data during this time to make its determinations of Student's services and accommodations.

Dr. Shinn believed that Student should be receiving school counseling services, an evidence-based social skills program, and coping accommodations to address his peer interaction difficulties. She relied on Newport-Mesa's 2016 triennial assessment results, which were not submitted into evidence. As stated in her report, the highest scores were at-risk scores but no clinically significant scores that may have suggested a need for services. Further, Newport-Mesa offered a social-emotional goal to address these concerns, an 18-hour social skills class during the 2017 extended school year, and coping accommodations throughout the year.

Newport-Mesa did not offer counseling to Student, or any other service or accommodation other than described above to address his emotional state during 2017. Nonetheless, Student continued to progress well enough in his social interactions at school as described by Newport-Mesa staff. No professional showed that Newport-Mesa's failure to offer more social-emotional services and accommodations deprived Student of an educational benefit in any area at that time. To the contrary, the evidence showed that he functioned at school and accessed his education, despite his

loneliness and sadness at times, and progressed in his social interactions, despite his deficits.

Student struggled in pragmatic speech and language, but the evidence showed that he was continuing to sufficiently progress. Ms. Walquist opined that Student needed more individual speech and language services and further accommodations; however, her opinion was unpersuasive. Most troubling was Ms. Walquist's opinion that if a student shows a deficit in speech and language, then the student will always have problems accessing education. This is contradictory to the IDEA and showed little understanding of speech and language special education eligibility and how services, accommodations, and supports are provided in an educational context. Although attempts were made to rehabilitate her, Ms. Walquist's misunderstanding of educationally related speech and language services diminished the persuasiveness of her opinion. Further, none of Ms. Walquist's critiques were supported by the evidence.

The evidence demonstrated that Student's speech services needed to focus on social cues and social autopsy. Group speech therapy provided opportunities for Student to react to stimuli from others rather than just a pathologist, and to build skills in reading facial expressions, behavioral cues, and repairing misunderstood messages. Individual speech services do not provide a natural environment, like a school setting, in which to develop communicative exchange. Interestingly, Ms. Walquist provided only individual speech and language services to Student as his treating speech pathologist, although Student's deficit is in social communication, and her agency provides group services. While one-to-one speech services are helpful in acquiring tools and strategies from a pathologist, Newport-Mesa properly decided that Student's speech needs were better addressed with more group speech sessions and follow-up with individual speech and language services. Newport-Mesa's speech and language pathologist, Ms. Powell,

persuasively showed that the pragmatics speech and language services and accommodations he was given were appropriate at that time.

At hearing and in his closing brief, Student presented instances in which he failed to use his frequency modulation microphone system in class as evidence of a need for further audiology accommodations or services. Mother complained to Newport-Mesa once about Student's frequency modulation microphone system prior to the December 2017 IEP team meeting, and only Parents perceived any material failure in Student's use of his microphone set, not Newport-Mesa staff. In fact, in Mother's correspondence, she admitted that the microphone set was unnecessary due to Student's improvements in the area. Student failed to show a material failure in his use of the personal microphone device.

Student also failed to present testimony from a qualified professional regarding any need for further audiology services or accommodations or any evidence of deficits in the April-December 2017 audiological offer to refute Dr. Ricci's testimony. Additionally, the December 2017 IEP meeting was called by Mother to discuss Student's writing and social interaction difficulties, and according to the notes the frequency modulation microphone system was not discussed by Parents or Newport Staff. When Parents were asked to discuss concerns at the December 2017 IEP team meeting, they neither raised nor discussed it as a reason for Student's departure from the school.

Accordingly, Student failed to show that Newport-Mesa denied him a FAPE for failure to offer appropriate services and accommodations in academics, social-emotional status, pragmatic speech and language, and audiological processing through the December 2017 IEP team meeting.

ISSUE 1A: PLACEMENT

Student asserted that he required one-to-one instruction, and not a general education setting, in order to succeed educationally. Newport-Mesa argues that it offered Student a FAPE in the least restrictive environment by his placement in the general education setting, and Student benefitted educationally from this placement.

The IDEA expresses a clear policy preference for inclusion with non-disabled students to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 (2006) & 300.116 (2006).) School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced. The IEP team must consider the educational benefits of full-time placement in a regular classroom, and the non-academic benefits of full-time placement in a regular classroom. It must also consider the effects the presence of the child with a disability has on the teacher and children in a regular classroom, and the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams v. State of Oregon* (9th

Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (Id. at p. 1149, citing *Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

Based on what it knew at the time, Newport-Mesa offered Student placement in the general education classroom 95 percent of the time and five percent spent outside of the general education classroom for special education services, at the April-December 2017 IEP. Student was cognitively average and did well academically in his general education setting. No evidence was presented that he had behavior problems in class or was disruptive to the teacher and other children. In fact, most witnesses described Student as polite and kind. Further, Student was exposed to typical peers in his general classroom and could model behavior and work on his social interaction skills in this setting. No evidence was submitted regarding the cost of placing Student in a general education classroom, but the other three factors supported continuing Student's placement in a general education setting with services, accommodations and supports.

Student believed that his least restrictive environment was a one-to-one instructional model, specifically Fusion Academy. In support of this contention, Dr. Shinn testified that Fusion Academy was the appropriate placement in the least restrictive environment. Fusion Academy was a private educational institution that offered one-to-one instruction in a variety of subjects. It was accredited by the Western Association of Schools and Colleges but not certified by the California Department of Education as a non-public school. Thus, a school district is precluded from placing a student with an IEP in an uncertified private school and OAH is unable to order it. (Ed. Code, §§ 56366 subd. (d), 56505.2.) Fusion does not have special education teachers or special education related services, and no social engagement in

any class. Students can study, complete projects, and socialize in what is called a homework café, which is an area where students go when they are not in class.

Dr. Shinn's opinion is flawed because it involved the analysis of a single placement, Fusion Academy, and did not consider any Newport-Mesa placements or any other alternatives. Dr. Shinn's testimony appeared unreasoned because she had less data than Newport-Mesa had at the time the placement was offered. While a qualified expert, her opinion was not persuasive. As stated, Dr. Shinn met Student in April 2020 and spent no more than a few hours with Student virtually for testing and to assess his educational needs. Dr. Shinn also observed Student virtually at Fusion Academy while Student was taking a virtual class. Dr. Shinn made no attempt to gather information regarding the setting offered in the April-December 2017 IEP, or interview any Newport-Mesa staff, teachers, or service providers for their opinions of Student's educational needs. Dr. Shinn relied on Parents' accounts, review of the records, her virtual observation of Fusion Academy, testing, and her limited interaction with Student in 2020. Dr. Shinn had only a superficial familiarity with Student and his educational needs, and no understanding of Newport-Mesa's programs and services. Further, Dr. Shinn opinion that a one-to-one environment was the least restrictive environment was unsupported by the evidence. Student satisfactorily progressed and accessed his education while at Newport-Mesa in 2017.

Dr. Shinn further argued that Fusion Academy was the appropriate placement due to bullying of Student at Newport-Mesa. California Education Code section defines bullying as a "severe or pervasive physical or verbal act or conduct...", and the evidence does not support that Student was bullied at Newport-Mesa, thereby making the placement inappropriate. (Ed. Code, § 48900, subd. (l.) Student struggled socially and there were some documented instances of negative social interactions and teasing, but

they were not pervasive. Mother complained seven times during a one-year period and one instance stemmed from an issue outside of school. No evidence suggested that Student was in fear at school. Additionally, no evidence showed a detrimental effect on mental or physical health at school. The only evidence based on personal knowledge at school came from Newport-Mesa staff, which was specific and credible. Student progressed in his performance, activities, and privileges at the school. In fact, while at Newport-Mesa, Student ran for student council and participated in the talent show. Further, Dr. Shinn's opinion of his mental state in 2017 was unpersuasive as she met him in April 2020 and did not consider the personal accounts from Newport-Mesa staff.

Additionally, Student argues in his closing brief that because Student failed to wear his frequency modulation microphone system, an alternative placement was necessary. As discussed, Student did not show that Newport-Mesa failed to materially implement the frequency modulation microphone system used by Student in the classroom. Additionally, his academic ability, grades, and standardized testing failed to show a loss of educational benefit from not using the microphone set. To unilaterally place Student in a restrictive one-to-one setting to not have to wear a microphone set is unreasonable when a less restrictive alternative is appropriate and available.

To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not parent's preferred program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents

preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

Here, the evidence showed that Student's goals could be appropriately implemented with almost full access to a general education setting and interaction with general education peers. Student progressed on all goals and succeeded in school. He continued to struggle socially, as a result of his autism and pragmatic language deficits, but not to the extent that he did not gain educational benefit. Student could learn and benefit in the placement and accessed his education. At the time the April-December 2017 IEP placement was offered, a more restrictive environment was not compliant with Newport-Mesa's obligation to educate Student in the least restrictive environment, given Student's then-present levels of performance and unique needs. And, here, on balance, the testimony of qualified individuals drafting and implementing the goals, services, accommodations, and supports was entitled to more weight than that of retained experts who evaluated Student after the fact. The evidence demonstrated that Student's education in regular classes with the use of supplementary aids and services could be achieved satisfactorily with the placement Newport-Mesa offered in the April-December 2017 IEP with the information known at the time.

STUDENT'S ISSUE NO. 2: DID NEWPORT-MESA DENY STUDENT A FAPE IN THE 2017-2018 AND 2018-2019 SCHOOL YEARS BY FAILING TO CONVENE AN ANNUAL IEP TEAM MEETING IN APRIL 2018?

Student contends Newport-Mesa denied him FAPE by failing to hold an annual IEP team meeting in April 2018, and instead conducted one in May 2019, depriving him of a new IEP offer for over 13 months. Newport-Mesa asserts that it inquired with Parents about conducting the IEP team meeting but received no response, and thus was

under no obligation to hold one for Student because it took substantial steps to reach Parents.

An IEP meeting must be held at least annually. (20 U.S.C. § 1414 (d)(4)(A); 34 C.F.R. § 300.324(b)(1)(i) (2006); Ed. Code, § 56343, subd. (d).) The failure to timely hold an IEP team meeting is a procedural violation. A procedural violation results in a denial of a FAPE only if the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2) and (j).)

An offer of placement must be made to a parentally placed private school student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district. The requirement of a formal, written offer should be enforced rigorously and provides parents with an opportunity to accept or reject the placement offer. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, *cert. den.*, 513 U.S. 965 (1994).) If parents of a privately placed student with an existing IEP revoke consent in writing for the provision of special education and related services to their child, the school district is not required to hold an IEP team meeting. (34 C.F.R. § 300.300(b)(4)(iv) (2008); Ed. Code, § 56346, subd. (d).) If the parents do not revoke consent in writing, the school district must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. (20 U.S.C. § 1414 (d)(4)(A); *Department of Educ., State of Hawaii v. M.F. ex rel. R.F.*, (D.Hawaii 2011) 840 F.Supp.2d 1214, 1228-1230, *clarified on denial of reconsideration*, (D.Hawaii, Feb. 28, 2012, No. CIV 11-00047 JMS) 2012 WL 639141 [rejecting public agency's argument that the student's disenrollment from public education, without a written revocation of consent to special education services, excused the agency from preparing further IEP's

until the parents subsequently requested services].) There is no exception when a parent unilaterally places a child in private school and requests reimbursement. (*Briere v. Fair Haven Grade Sch. Dist.* (D.Vt. 1996) 948 F.Supp. 1242,1254.)

A failure to hold an IEP team meeting is a procedural violation. A child is denied a FAPE only when a procedural violation results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP process. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932,938 (9th Cir. 2007).)

Here, it was Newport-Mesa's policy to send out a form letter to parents of privately placed students and request that it be filled out and returned to the school district. The form letter included options such as scheduling an IEP team meeting, discussing a prior IEP offer, or that parents were not interested in enrolling the student in the school district. Between January 2018 through March 2018, Newport-Mesa sent the form letter to Parents three times but did not receive any response. Additionally, in March 2018, Newport-Mesa sent a prior written notice to Parents denying reimbursement for Fusion Academy and reminded them that they could request an IEP team meeting. Parents failed to respond to the correspondence.

Newport-Mesa argued that because Parents failed to respond to its requests, it was no longer compelled to hold an annual IEP team meeting. However, Newport-Mesa presented no law to support this contention. Here, Parents neither affirmatively responded to the correspondence nor revoked their consent to special education in writing. Thus, Newport-Mesa needed to attempt to conduct the IEP team meeting by April 16, 2018 which it did not do. Instead, the next IEP team meeting was held on May 29, 2019.

Student proved that Newport-Mesa did not hold an IEP team meeting for Student until May 29, 2019. Although Student no longer attended a Newport-Mesa school, he was living within the school district, and had not revoked consent to special education. Newport-Mesa's failure to call an IEP team meeting until May 29, 2019, was a procedural violation. It did not impede Student's right to a FAPE initially, as it appeared that Parents did not desire to have an IEP team meeting, much less a public placement. Parents did not respond to multiple notices from Newport-Mesa to set up an IEP team meeting. Mother's explanation that she did not respond because the form was unclear, and she was awaiting a notice of a meeting date was unpersuasive. Months later in September 2018, she responded to Newport-Mesa's form letter for triennial assessments, although she failed to respond to two more form letters regarding setting up an IEP team meeting. Further, Mother stated that she was unsure an IEP team meeting would be beneficial. And, by April 6, 2018, Parents had paid the Fusion Academy tuition deposit for the next year. Thus, the evidence established that there was no educational opportunity lost or impediment to parent participation from mid-April 2018, through the end of the 2017-2018 school year.

However, by the start of the 2018-2019 school year, Student would have transitioned to a middle school if he were attending Newport-Mesa. Thus, the IEP offer may have been significantly different from the 2017 IEP offer because of the different setting, programs, and services at middle school. Without an annual IEP team meeting, Student was not provided with an updated offer for the 2018-2019 school year. Thus, Parents were unable to make an informed decision regarding Student's placement, program, and services available at a Newport-Mesa middle school, and whether they would have accepted a public placement at that time.

Instead, Newport-Mesa sent out more form letters to Parents without any response. Newport-Mesa's failure to hold an IEP team meeting in April 2018 and offer Student placement, services, and supports for the 2018-2019 school year significantly impeded Student's right to a FAPE by denying Parents the right to participate in the IEP process once Student entered seventh grade. Student established he was denied a FAPE during the 2018-2019 school year.

STUDENT'S ISSUE NO. 3: DID NEWPORT-MESA DENY STUDENT A FAPE BY FAILING TO COMPLETE STUDENT'S ASSESSMENTS WITHIN THE 2019 TRIENNIAL ASSESSMENT TIMELINE?

Student contends Newport-Mesa denied him FAPE by failing to complete triennial assessments by April 21, 2019. Newport-Mesa concedes the delay but argues that much of the five-week delay was caused by Parents, who did not agree to the requested IEP dates to review the assessments. Additionally, Newport-Mesa argued that the five-week delay was not prejudicial to Student since he was attending private school.

The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) Reevaluations require parental consent. ((20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment

must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

Newport-Mesa completed Student's previous triennial assessments in April 2016, and his next triennial assessments were due April 21, 2019. Newport-Mesa offered an assessment plan to Parents on March 12, 2019, and Parents consented to it on March 22, 2019, with additional parental input. The evidence established that Student's testing was completed April 26, 2019 and the multidisciplinary assessment report was completed on May 29, 2019.

Student proved that Newport-Mesa failed to conduct timely triennial assessments. Newport-Mesa should have offered an assessment plan earlier in order to timely complete assessments. Any delay in Student's timely assessments was due to Newport-Mesa, not Parents, and was a procedural violation.

The failure to complete timely assessments in this case did not significantly impede Student's and Parent' right to meaningful participation in the IEP process or result in a loss of educational benefit. No evidence was presented at hearing to demonstrate a FAPE violation resulting from the tardy assessments. Based on the evidence, it did not appear that Parents were waiting for the public education program to be proposed. By March 29, 2018, Parents had already paid the deposit for Student to attend Fusion Academy during the 2019-2020 school year and paid full tuition for the 2018-2019 school year through June 2019. Further, the May 2019 IEP offer was rejected, and no evidence was presented that their response would have been different had it been offered five weeks earlier.

Thus, there was neither an impediment to parental participation nor a loss of educational benefit from the five-week delay. The procedural violation was harmless.

NEWPORT-MESA'S ISSUE: ARE NEWPORT-MESA'S MAY 29, 2019
TRIENNIAL MULTIDISCIPLINARY ASSESSMENTS AND ASSESSMENT REPORT
APPROPRIATE?

Student asserts six separate issues in this matter and Newport-Mesa asserts one issue. Student's issue number four contests the appropriateness of Newport-Mesa's May 2019 IEP offer. Newport-Mesa's sole issue is the appropriateness of Student's May 2019 triennial assessments. As the May 2020 IEP offer in Student's issue four hinges, in part, on the accuracy of those assessments, Newport-Mesa's issue must be analyzed first. Thus, Newport-Mesa's issue is taken out of order.

Newport-Mesa asserts that its triennial assessments and the subsequent multidisciplinary report complied with all requirements of state and federal law. Student contends that the assessments were not thorough and failed to meet several procedural and substantive requirements necessary to establish legal compliance.

The IDEA provides for reevaluations to be conducted at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) In performing an assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305 (2007); Ed. Code, § 56381, subd. (b)(1).) It must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

In conducting an assessment, a school district must follow statutory guidelines. It must select and administer assessment materials that are in the student's native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Trained, knowledgeable, and competent district personnel must administer the assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) The assessments must be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) A district cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2) (2006).) An assessment must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors, and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(a)(2), (b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).) Student must be assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) Psychological assessments shall be conducted by a credentialed school psychologist. (Ed. Code., § 56324, subd. (a).) Health assessments shall be conducted by a credentialed school nurse or physician. (Ed. Code., § 56324, subd. (b).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.)

The personnel who assess the student must prepare a written report that shall include the following: whether the student may need special education and related services; the basis for making that determination; the relevant behavior noted during the

observation of the student in an appropriate setting; the relationship of that behavior to the student's academic and social functioning; the educationally relevant health, development, and medical findings, if any; and a determination of the effects of environmental, cultural, or economic disadvantage if appropriate. (Ed. Code, § 56327.)

Parents signed Newport-Mesa's assessment plan with additional input but did not request additional assessments that were not already included in the plan. The assessment plan included testing in the areas of academic, intellectual development, social/emotional/adaptive behavior, perceptual processing, gross/fine motor development, speech and language, assistive technology, audiology, and health. Newport-Mesa completed the assessments and reviewed them during the IEP team meeting held May 29, 2019. The multidisciplinary triennial assessment report included multiple assessments by a multidisciplinary team included in one report.

The assessment team received substantial input from Parents, Student's teacher, and his treating speech and language pathologist, reviewed records, observed Student at Fusion Academy during class and social time, reviewed health and developmental history, interviewed Student, collected Parent and teacher questionnaires, and conducted multiple standardized and informal assessment measures.

THE ACADEMIC ASSESSMENT

Michael Waldinger was a special education teacher, with a master's in education administration, and a credentialed education specialist in mild-moderate special education. He conducted Student's academic assessment and had previously conducted hundreds of academic assessments. He tested Student's academic abilities due to concerns with his writing and prior specific learning disability eligibility. Mr. Waldinger was knowledgeable of Student's suspected disabilities, and qualified, trained, and competent to perform the academic evaluation.

A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. (34 C.R.F. § 300.8(c)(10)(2017); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030(b)(10).) The basic psychological processes include attention, visual processing, auditory processing, phonological processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030(b)(10).)

In California, a student is eligible for special education in the category of specific learning disability if, among other things, he exhibits a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030(b)(10)(B).) A severe discrepancy exists if, on standardized tests, a student's scores show a standard deviation of 1.5 or more between ability and achievement according to a complex mathematical formula set forth by regulation. (*Ibid.*) Newport-Mesa used the severe discrepancy mode as specified in the report.

The determination of whether a student suspected of having a specific learning disability is a child with a disability must be made by the student's parents and a team of qualified professionals including the child's teacher and at least one individual qualified to conduct assessments. (34 C.F.R. § 300.308 (2006).) The student must be observed in his learning environment to document the student's academic performance and behavior in his areas of difficulty, including in the regular classroom setting. (34 C.F.R. § 300.310(a) (2006); Ed. Code § 56341, subd. (c).) In determining whether a student has a specific learning disability, the team must decide to use past classroom observation data

or have one team member conduct an observation of the Student's academic classroom performance after the child has been referred for assessment. (34 C.F.R. § 300.310(b) (2006).)

Mr. Waldinger reviewed the information gathered from seven of Student's Fusion Academy teachers, Parents' input, and data collected by the assessment team. Additionally, he administered the Wechsler Individual Achievement Test, Third Edition, to measure Student's achievement. Newport-Mesa established that the test was tailored to assess specific areas of educational need based on Student's educational background and generated accurate academic results. Student results showed an overall average range academically with strengths in mathematics problem solving and below average scores in essay composition. His written expression was in the average range. Mr. Waldinger's testing was used for purposes for which the test was intended and was valid and reliable. He followed the test protocols and instructions. Based on the assessment results, and teacher input data, Mr. Waldinger opined that Student had a weakness in writing, specifically in essay composition. The evidence at hearing established this was an area of need for Student. Mr. Waldinger's academic report was included in Newport-Mesa's multidisciplinary assessment report. At the May 29, 2019, IEP team meeting, he reviewed his academic testing, results, and recommendations with Parents.

Mother stated at the IEP team meeting that the essay composition score improved, and the information sounded right. However, at hearing, Dr. Shinn and Ms. Walquist found fault in the testing because they believed a narrow writing assessment was needed to properly evaluate Student's writing deficit. They did not explain what specifically was needed to be determined that was not discerned from the standardized testing and input from his seven Fusion Academy teachers.

Further, Ms. Walquist could have had a qualified colleague at her agency test Student in a narrow writing assessment but did not do so, although she believed it was necessary. Thus, the persuasiveness of their opinions was diminished. Here, an appropriate program could be developed to address Student's writing deficit without conducting further testing. Consequently, the academic testing and report were legally compliant.

THE SOCIAL EMOTIONAL ASSESSMENT INCLUDING COGNITION, ATTENTION PROCESSING, BEHAVIOR, AND AUTISM

A social-emotional assessment is not limited to an inquiry into a student's behavior. "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).)

Newport-Mesa chose licensed and credentialed educational school psychologist Veronique McCarthy, who holds a master's degree in counseling, to conduct the cognitive and social-emotional portions of the multidisciplinary assessment. Ms. McCarthy had previously conducted hundreds of psychoeducational assessments and participated in hundreds of IEP team meetings. She conducted testing and a social observation at Fusion Academy, reviewed teacher and parent input, educational records and prior assessments.

Ms. McCarthy gathered relevant functional, developmental, and behavioral information in preparing for her cognitive, social emotional, autism and attention processing assessments. She selected technically sound tools that assessed Student's cognitive, behavior, attention, and developmental factors. She observed Student at Fusion Academy in a social environment outside of the classroom and gathered teacher

and Parent input. These strategies helped her determine Student's strengths and weaknesses. The evidence established that all her tests were in conformance with instructions and protocols, generated results that reflected Student's current abilities, and were tailored to measure his cognition, social emotional, and attention abilities. Ms. McCarthy was qualified to conduct the assessments based on her experience, knowledge, and training. Her responses were measured and thoughtful and given great weight.

COGNITIVE FUNCTIONING

To measure Student's cognitive ability, Ms. McCarthy administered the Kaufman Assessment Battery for Children, Second Edition. This assessment tool generated valid results that accurately reflected Student's full-scale intelligence quotient score of 110, placing him in the average range of intellectual functioning. He demonstrated strength in crystalized intelligence and long-term memory and a deficit in short term memory.

ATTENTION PROCESSING

Ms. McCarthy tested in the areas of attention due to a prior diagnosis of attention deficit hyperactivity disorder; and teacher reports that Student struggles with organization, initiation, task completion, and following directions in a one-to-one setting.

In the Behavior Assessment System for Children, Third Edition executive functioning index, a test that elicits ratings about Student's behaviors, Mother and two of Student's current teachers rated Student. On this index, one teacher endorsed elevated concerns in attentional and behavioral control. She opined that the test results demonstrated deficits in attention processing and executive functioning.

Ms. McCarthy administered the Comprehensive Executive Functioning Inventory to determine executive functioning and obtained responses from Mother and two of Student's current teachers. The data showed weaknesses in initiation, organization, and working memory. Ms. McCarthy also reviewed the Kaufman Assessment Battery for Children, Second Edition results, indicated a short-term memory deficit, and determined it to be a secondary deficit in the area of attention. Ms. McCarthy administered comprehensive testing in these areas. The evidence established that Student had attentional processing deficits with a weakness in executive functioning.

Ms. McCarthy reviewed her results and recommendations at the May 29, 2019 IEP team meeting. She presented her recommendation for continued eligibility in the category of Other Health Impairment due to Student's attention deficit hyperactivity disorder including deficits in executive functioning. The Fusion Academy teacher and IEP team member, Andrew Haynes, commented that Ms. McCarthy's attention assessment results were good and sounded like Student.

Ms. McCarthy also recommended Student continued eligibility in the category of Specific Learning Disability due to a discrepancy between cognition with an intelligence quotient of 110, and an academic achievement score in written expression of 85, coupled with a psychological processing disorders in attention processing and auditory processing. She presented her recommendations and conclusions to Parents in the May 29, 2019 multidisciplinary assessment.

BEHAVIORAL AND ADAPTIVE FUNCTIONING

For behavior and adaptive functioning, Ms. McCarthy used a variety of assessment tools. She administered the Behavior Assessment System for Children, Third Edition, which tests for emotional and behavior disorders and requires completion of

rating scales. Overall, Student's index scores were average in externalizing and internalizing problems, and at-risk for behavioral symptoms and adaptive skills. Student's scores showed no clinically significant rating on any index score across all raters. A clinically significant rating may warrant formal treatment.

Because Student was diagnosed with depression, Ms. McCarthy administered the Children's Depression Inventory, Second Edition to get more information about Student's behavior at school. Two of Student's teachers completed rating scales for this test. The results showed Student in the average range for both emotional and functional problems and did not indicate depressive symptoms.

Student argued that Newport-Mesa should have administered self-rating scales for the attentional processing and behavior assessments. Dr. Shinn stated it was best practice to administer the rating scales to Student because some internalizing behaviors are not observable to others. Dr. Shinn's point is a valid criticism, but no evidence was presented that the lack of self-ratings violated assessment protocols or the instructions. Further, when Mother consented to the assessment plan, she demanded that Newport-Mesa not administer any ratings to Student regarding suicide. The Behavior Assessment System for Children, Third Edition, indirectly analyzes suicidal thoughts, and the Children's Depression Inventory, Second Edition, directly explores this issue. Thus, Mother limited Newport-Mesa's assessments in this area.

Additionally, Dr. Shinn administered the Behavior Assessment System for Children, Third Edition, with Student's self-rating scales the following year. The results, like Newport-Mesa's, showed no clinically significant index scores with the Student's self-rating. Further, Dr. Shinn did no further testing in behavior, and no narrow tests in depression and attention processing, as Newport-Mesa had done. If she believed the self-ratings were necessary for appropriate current functioning, she would have

conducted them. Further, Student was not receiving mental health counseling or taking psychotropic medications at the time of testing that would suggest a necessity for self-ratings. Thus, no evidence was presented that further self-rating scales would invalidate the results. Although Student has a diagnosis of depression, the evidence failed to show current depressive symptoms or an emotional deficit in depression or anxiety.

AUTISM FUNCTIONING

Ms. McCarthy tested Student for autism due to his previous autism diagnosis. Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

Ms. McCarthy administered the Autism Spectrum Rating Scales to Mother and two of Student's current Fusion Academy teachers. It tests behaviors associated with Autism Spectrum Disorder. The three assessments results were evaluated with other information to assess whether Student has symptoms associated with autism.

The ratings indicated that Student's overall behavior is characteristic of a youth diagnosed with autism. Mother rated Student as having elevated difficulties in peer socialization, adult socialization, atypical language, and sensory activity. Meara Vorck, Student's teacher, noted slightly elevated behavior in peer socialization, atypical language, stereotypy, and behavioral rigidity. Calvin Pennix, Student's teacher, rated

Student in the very elevated range in the areas of social/communication, peer socialization, and atypical language.

The results established that Student had limited willingness and capacity to socially engage in activities that develop and maintain relationships with peers. Behaviorally, Student has difficulty tolerating changes in routine, activities, or behavior, and teachers report that he has difficulty shifting attention away from preferred activities like video games to other activities and getting constructive feedback.

Ms. McCarty observed Student playing a game with other peers at Fusion Academy in the homework café. During the structured activity, Student was engaged in fluid back and forth conversation, made appropriate eye contact, and leaned in toward peers to share information. Once he lost the game, he disengaged with the group by putting his headphones on and focused his attention on his laptop.

Based upon her standardized assessment and observation, Ms. McCarthy recommended special education autism eligibility. Ms. McCarthy included the results, conclusion, and recommendations in the multidisciplinary assessment and discussed Student's autism eligibility with Parents.

Ms. McCarthy assessed Student in all areas of suspected disability related to his unique needs in the cognitive and social-emotional areas, including autism. The results were valid representations of Student's abilities at the time. The evidence established that he specifically had needs in attention processing such as executive functioning, developing relationship with peers, and behavior rigidity. The assessment and report were legally compliant.

AUDITORY PROCESSING ASSESSMENT

Audiologist Shannon Ricci conducted Student' audiological processing assessment. She has a doctorate in audiology, over 20 years of experience, and has conducted over 1000 audiology assessments.

Dr. Ricci reviewed Student's educational history, prior evaluations, prior treatment history, received Parent and assessor input, and reviewed other assessors' Student observations. She explained that Student was previously administered a central auditory processing evaluation in 2016 and has a documented central auditory processing disorder with a right ear advantage. In 2016, Dr. Ricci conferred with Student's private audiologist regarding recommendations, and Newport-Mesa provided Student a bilateral wireless assistive hearing device in the classroom at that time. Student also received outside audiology treatment from a private provider, but Dr. Ricci opined that while it may have been helpful, no research-based intervention existed to completely remediate central auditory processing disorder. Additionally, the audiology treatment that Student was previously given is a new type of treatment, and it is too soon to determine its benefits.

Dr. Ricci administered a battery of audiological measures. Student's peripheral hearing test indicated normal hearing and ear function. Student scored 100 percent on speech discrimination testing. The SCAN-3 and the Banford-Kowal-Bench Speech in Noise tests auditory processing and indicated evidence of a central processing disorder and atypical right ear advantage. The Masking Level Difference test showed a weakness in binaural processing. The Pitch Pattern Sequence was a strength for Student which discriminated between high and low pitches. The Dichotic Digits test indicated normal range for bilateral processing. Dr. Ricci administered the tests using the required

protocols and performed a valid and comprehensive auditory processing assessment. The results were accurate measures of Student's performance.

Dr. Ricci credibly explained that Student's auditory processing ability falls within the average range; however, he continues to display evidence of a central auditory processing disorder and atypical right ear advantage. Dr. Ricci opined that it may be difficult for Student to track multiple sound sources, especially in noisy environments. Dr. Ricci recommended a bilateral personal remote microphone system in a large class setting but it is not needed at Fusion Academy in a one-to-one educational setting. Dr. Ricci presented her findings and recommendations to Parents at the May 29, 2019 IEP team meeting. Mother stated that Student would be retested by their private audiologist in the next few weeks to see if there are any other recommendations, but no evidence was submitted at hearing regarding additional auditory testing or additional auditory recommendations.

At hearing, no testing evidence that contradicted Dr. Ricci's findings was presented by an audiologist, and no expert or non-expert witness refuted Dr. Ricci's qualifications, her administration of the auditory processing evaluation, the standardized testing instruments she chose, her findings, or her recommendations.

In sum, Student failed to identify any areas of Student's suspected or actual audiological needs that Newport-Mesa failed to consider, or deficits in her testing, results, and report. As a result, the audiology assessment and report were legally compliant.

THE SPEECH AND LANGUAGE ASSESSMENT

Ms. Powell, Newport-Mesa's speech and language pathologist conducted the speech and language assessment as part of Student's triennial assessments. She was

Student's speech and language pathologist from 2016 through 2018 and has conducted approximately 100 speech and language assessments. Although Student challenged Ms. Powell's qualifications, he failed, as the evidence showed that Ms. Powell was appropriately qualified and trained to conduct the assessment and opine as to Student's abilities and functioning in speech and language.

At the time of the assessment, Student was receiving private speech and language services. Ms. Powell contacted Student's private speech and language pathologists for input. Additionally, Ms. Powell observed Student at Fusion Academy in the homework café where he was socially engaging with peers. She also interviewed Student, and reviewed Parent's input and prior educational information. Additionally, from January 2017 through December 2017, Ms. Powell investigated Parents' concerns regarding Student's social interaction difficulties at school.

A speech and language impairment exists when a student meets one or more of the following criteria: an articulation disorder significantly interfering with the ability to speak; a defective voice in quality, pitch, or loudness; a fluency disorder resulting in impaired flow of verbal expression; an expressive or receptive language disorder as demonstrated by a score of at least 1.5 standard deviations below the means, or below the seventh percentile for the student's chronological age on two or more standardized tests in specified areas of language development; or scores as designated above on a single test, accompanied by displays of inadequate or inappropriate usage of receptive or expressive language as represented by a language sample of a minimum of 50 utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

Ms. Powell administered the Test of Language Development, Intermediate, Fourth Edition, to Student, which is designed to measure Student's overall spoken language skills. Student scored in the above average range and average range on all subtests and composite scores. She administered the Test of Problem Solving, Second Edition, to test for critical thinking and problem solving. The test showed below average scores in making inferences and determining solutions.

The Social Skills Improvement System test, which Ms. Powell administered to Student, measures social skills functioning. The rating scales were completed by Mother and Student. The testing showed Student's areas of weakness were empathy and engagement. Ms. Walquist criticized Ms. Powell's administration because she did not obtain any teacher input. Ms. Powell, however, explained that the Fusion Academy teachers noted on their input forms that had no applicable information about Student in a classroom group setting because they provide one-to-one instruction.

In Ms. Powell's non-standardized testing with her informal language observation, she found Student had appropriate speech articulation, used age-appropriate grammar, appropriate conversational functions, spoke in coherent utterances, used appropriate word order, and made no errors in syntax, morphology, and semantics. The evidence showed that Student demonstrated weaknesses in understanding body language, perspective taking, and feedback.

Ms. Walquist opined that it was necessary to conduct a conversation sample to get additional information. Here, Ms. Powell used more than one standardized test, and additional non-standardized observations. While a critique can always be made that additional information can be useful, it does not invalidate the results under the regulations. And, if the conversation sample was necessary, Ms. Walquist would not have failed to conduct one in her February 2020 testing.

Based on her assessments, Ms. Powell opined that Student's overall spoken language ability was strong, he did not demonstrate any expressive or receptive unique needs, and he did not meet the criteria for speech and language special education eligibility. However, Student showed unique needs in pragmatics such as problem solving and social skills including interpreting non-verbal communication and perspective taking, and feedback. Ms. Powell's opinion, conclusions, and recommendations were discussed with Parents at the May 29, 2019 IEP team meeting. As follows, Ms. Powell testing and report is deemed legally compliant.

THE ASSISTIVE TECHNOLOGY ASSESSMENT

A school district is required to provide any assistive technology device that is necessary to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a) (12) (B)(i); Ed. Code, § 56341.1, subd. (b)(5).) An IEP team must consider whether a child requires assistive technology devices or services. (20 U.S.C. § 1414(d)(3)(B); Ed. Code, § 56341.1, subd. (b)(5).) An assistive technology device is any piece of equipment that is used to increase, maintain, or improve the functional capabilities of individuals with disabilities. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

Newport-Mesa selected licensed speech language pathologist Jo-Ann Pazdur to conduct the assistive technology assessment. Ms. Pazdur also has a clear speech language pathology services credential, and certificates in assistive technology assessments and augmentative alternative communication assessments. Ms. Pazdur was an experienced assessor who routinely conducted assistive technology assessments for disabled students. She previously assessed Student in assistive technology in 2016. At that time, it was determined that Student required the use of assistive technology to access the curriculum in the area of writing.

As part of her 2019 assistive technology assessment, Ms. Pazdur reviewed Student's school records, and received input from his teacher and Mother. She also observed Student at Fusion Academy during his language arts class and noted that he received a lot of verbal prompts for writing, spelling, what to write, and corrections by the teacher. She also received and reviewed Student's writing samples from Fusion Academy and included them in the multidisciplinary report. A written productivity profile was completed by Student's current teacher and Mother. It showed Student struggled with speed, letter formation, and use of lines when writing.

Ms. Pazdur measured Student's handwriting skills and keyboarding skills. As compared to her previous assessment with Student, he was able to get through testing but continued to be resistant to pencil to paper tasks. Ms. Pazdur determined that Student's handwriting and overall legibility were adequate, but he had an aversion to handwriting for written work. She determined that Student's keyboarding speed was faster than is his overall handwriting speed for all tasks, but that he had some spelling, grammar, and punctuation errors while typing. She found that writing continued to be a non-preferred activity for Student, who would perform better on assignments if given the option to type. Ms. Pazdur also tested voice recognition, word prediction, text-to-speech, organization and error correction software.

Ms. Pazdur considered several assistive technology applications and tested them with Student including word prediction for spelling, voice recognition, spell check, grammar check, digitized math paper, graphic organizers, organizational supports, and reading with speech to text. She believed that technology tools should be used for Student instead of the prompting that she observed at Fusion Academy for Student to become more independent.

The results of the assessment suggested that Student would benefit from assistive technology in the area of writing. Ms. Pazdur recommended the use of spellcheck and grammar check while typing to correct errors of punctuation, spelling, capitalization, and grammar. She recommended voice recognition, word prediction, and text to speech applications for editing Student's writing. Graphing organizers should be used for all writing assignments, including web based graphic organizers. And, Student would also benefit from planners or checklists.

Ms. Pazdur also found that Student did not require assistive technology in the area of math as he was able to complete math worksheets using handwriting. In reading, Student demonstrated average reading skills and did not require text to speech for reading support.

Ms. Pazdur's opinions were well articulated and comprehensive at hearing. On May 29, 2019, Ms. Pazdur shared her findings in the written report with the IEP team. Parents did not question the validity of the assistive technology assessment or the qualifications of the assessor during the IEP team meeting. Nor did anyone at the meeting request additional assessments in the area of assistive technology or question the assistive technology assessment findings. At hearing, no expert refuted Ms. Pazdur's qualifications, validity of the testing, her findings, or recommendations. Student failed to show any defects in her assistive technology assessment. Consequently, Newport-Mesa's technology assessment and report were legally compliant.

THE OCCUPATIONAL THERAPY ASSESSMENT

Serena Au, licensed occupational therapist, who holds a masters' degree in occupational therapy, assessed Student's fine motor, visual motor, motor coordination, manual dexterity, visual processing, and visual perception skills. Over six years, Ms. Au has assessed hundreds of students and provided school based occupational therapy

services. She was knowledgeable of occupational therapy, trained, and well qualified to conduct Student's occupational therapy assessment.

Occupational therapy is a related service that can be provided to assist a child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a).)

Ms. Au included her findings in Newport-Mesa's multidisciplinary assessment report. She based her portion of the report on a review of Student's educational records, prior assessments, classroom and clinical observations, and teacher and Parent input. Mother had no concerns with Student's motor skills but had concerns with his handwriting, indicating that he writes some letters backward or out of order. One of his teachers also had concerns with his writing but no concerns with motor skills.

Ms. Au observed Student for one hour at his Fusion Academy language arts class and in the common area. He demonstrated appropriate sitting posture, normal muscle tone, and normal range of motion. He had some anxiety when instructed to handwrite and engaged in negative self-talk but appeared to use appropriate grip, spacing, writing pressure, erasing pressure, and manual manipulation, and wrote within the lines. Student produced legible handwriting in his educational setting.

Ms. Au utilized the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, to assess Student's fine motor precision, fine motor integration, visual motor integration, and manual dexterity. The results showed average fine motor precision, below average fine motor integration, and above average manual dexterity subtests, with an overall average range score. Results from the Visual Motor Integration test, including the supplemental visual perception test and supplemental motor coordination test, showed Student demonstrated average visual motor skills, average visual

perception skills, and average motor coordination skills. On the Test of Handwriting Skills, Revised, an instrument used to assess functional handwriting skills, Student performed within above average limits. Student demonstrated high foundational skills for handwriting.

Ms. Au obtained non-standardized handwriting samples to review Student's letter formation, orientation, and spacing. Student showed legible handwriting and good spacing, placement, and sizing of words. The results of standardized and non-standardized tests showed adequate fine motor skills. Parents did not have major concerns with gross motor skills, and through her informal testing, Ms. Au did not observe anything that would raise gross motor concerns. Through her observations and teacher and Parent reports, Ms. Au determined that Student was able to perform activities of daily living, and occupational and play activities.

Ms. Au convincingly testified at hearing that she obtained enough information to determine Student's needs in the area of occupational therapy and chose instruments that related to the concerns raised by teachers and Parents. The assessment results were valid representations of Student's fine motor, visual motor, motor coordination, manual dexterity, visual processing, and visual perception skills. Ms. Au opined that Student demonstrated enough fine and visual motor skills to access his education. His writing was functional. The speed of his writing was slow and could be supported through assistive technology. Based on the assessment results, records review, observations, and interviews, which she explained to Parents at the May 29, 2019 IEP team meeting, Ms. Au did not recommend occupational therapy services for Student. Parents did not have any questions or comments related to Ms. Au's findings and recommendations at that time. Student did not present a professional or any witness to

refute Ms. Au's testimony at hearing. Accordingly, the occupational therapy assessment and report were legally compliant.

THE HEALTH ASSESSMENT

Health and nursing services are related services that are specifically included as designated instructional services in California. (Ed. Code, § 56363, subd. (b)(12).) Health and nursing related services may include providing services by qualified personnel and managing the individual's health problems on the school site. (Cal. Code Regs., tit. 5, § 3051.12, subs. (a)(1), (2).)

Education Code section 49423.5 regulates the delivery of "specialized physical health care services" by school personnel. Specialized physical health care services means those health services prescribed by the child's licensed physician and surgeon requiring medically related training for the individual who performs the services, and which are necessary during the school day to enable the child to attend school. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(A).) Medically related training must be done by "a qualified school nurse, qualified public health nurse, qualified licensed physician and surgeon, or other approved programs..." (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(E)(2).) Nursing services are related to the delivery of prescribed medications or medical devices that must be administered during school.

In March 2019, Newport-Mesa selected registered nurse and credentialed school nurse Francine Brock to complete a health report for Student. Ms. Brock reviewed Student's educational and medical files available to Newport-Mesa, provided Mother a health inventory that was completed on March 25, 2019, screened Student for near and far vision acuity, and checked Student's hearing.

Student's health history which Ms. Brock reviewed included attention deficit hyperactivity disorder, autism, anxiety, depression, constipation, vision impairment, bilateral ankle joint pain and bilateral hip pain at times when walking over one mile or jogging. At the time of the evaluation, Student was awaiting a physical therapy evaluation for custom orthotics.

Student completed the vision and hearing screening tests conducted by Ms. Brock. Student was within normal expectations for his age. Student was in overall good health and was not taking any medications. Student had no health or medical concerns that required the services of a nurse inside or outside of school at that time. Ms. Brock's health findings were included in the multidisciplinary assessment report, and she reviewed them with Parents during the May 29, 2019 IEP team meeting.

In Student's closing brief, he argued that the health assessment was invalid because Newport-Mesa failed to gather information from Student's doctors. However, Student presented no evidence from any qualified expert or non-expert witness that this lack of information impacted Student's access to education as he contends.

Here, Parents did not question the qualifications of the school's registered school nurse or the validity of the health report during the IEP team meeting. Neither Parents nor any other IEP team member requested additional testing in health at that time. Parents did not request nursing services and Student did not require nursing services. During the hearing, none of Student's expert witnesses gave an opinion as to Student's health assessment as conducted by Ms. Brock. Student's non-expert witnesses also failed to show any defects in Ms. Brock's health assessment. There was no evidence submitted that showed that Student was medically fragile, required prescribed medication during school, or required the use of a medical device at school. Student submitted no evidence to challenge Ms. Brock's qualifications or the validity of

Newport-Mesa's health report. Finally, Student failed to provide any evidence that showed Student required further testing in an area which fell under the purview of the school nurse, such as medical records that counsel claims were needed to render a valid opinion. For all these reasons, the health assessment and report were legally compliant.

OBSERVATIONS

Student argued that Newport-Mesa's observations were insufficient because Dr. Ricci and Mr. Waldinger failed to conduct their own observations of Student at Fusion Academy. A district must ensure that the child is observed in his learning environment, including a regular classroom setting, to document his academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a) (2006)) Under California law, an assessment report must describe "relevant behavior noted during the observation of the pupil in an appropriate setting." (Ed. Code, § 56327, subd. (c).)

Here, Ms. Pazdur and Ms. Au observed Student in his regular classroom, which is a one-to-one setting at Fusion Academy. Additionally, Ms. Powell and Ms. McCarthy observed Student in Fusion Academy's homework café, which is described as an area for independent study, group study, and socializing with peers. Additionally, Mr. Waldinger observed Student engage socially with other students at Ensign Middle School during his academic testing. Ms. McCarthy mistakenly did not describe her observation in the observation portion of the multidisciplinary report, but it was included in the social emotional portion of the report.

Newport-Mesa reliably reported on Student's academic performance and behavior and noted both classroom and social observations in its report. The assessment team utilized the individual assessor's observations along with other data to determine Student's current educational needs for accurate recommendations for

eligibility, placement, services, accommodations, and interventions to the IEP team. It was not required that every assessor on the multidisciplinary team observe Student in his learning environment. Thus, Newport-Mesa's assessments and multidisciplinary report generated the required information about Student's classroom performance and behavior.

In sum, Newport-Mesa selected qualified, trained, and experienced assessors to conduct all assessments. The assessments were conducted in Student's native language and not discriminatory. The assessors did not rely on a sole criterion for the assessment or findings and used a variety of technically sound assessment tools including standardized and non-standardized instruments to evaluate Student. The tests were administered in accordance with protocols and instructions. The assessments comprehensively assessed Student's areas of need and suspected areas of need. Student was observed in the classroom and in social interactions. Newport-Mesa collected substantial input from Student's Parents, teachers, and his speech and language pathologist. Student's assessors correctly determined that Student did not suffer from any environmental, cultural, or economic disadvantage that would impact the assessment results.

The evidence established that consistent with the assessments, Student had unique needs in written expression, attention processing, audiological processing, social emotional, and pragmatic language, and recommended eligibility under the categories of autism, specific learning disability, and other health impairment. Moreover, the assessment instruments chosen were designed to provide information about Student's special education eligibility, placement, related services, and accommodations, and were free of any racial, cultural, and sexual discrimination. Newport-Mesa's assessments were valid and reliable.

Newport-Mesa produced a 78-page multidisciplinary team report, dated May 29, 2019, that included the findings and recommendations, which was shared with Parents during the May 29, 2019 IEP team meeting. The report included: Student's health, developmental, and educational background; classroom and social observations, interviews; input from teacher, Mother, and Student; testing; results; recommendations for eligibility considering all eligibility categories, services, accommodations, and modifications, including the basis for the recommendations; the relationship to Student's social and academic functioning; and the effects of environmental, cultural, and economics. The 2019 IEP team had reliable and comprehensive assessment information to develop and IEP for Student. Given the foregoing, Newport-Mesa showed by a preponderance of the evidence that its assessments abided by all statutory requirements, and it produced a legally complaint multidisciplinary assessment report.

STUDENT'S ISSUE NO. 4: DID NEWPORT-MESA DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF THE FOLLOWING AT THE MAY 29, 2019 IEP:

- A. Placement;
- B. Services Regarding Academics, Social-Emotional status, Pragmatics, Speech and Language, and Auditory Processing;
- C. Goals Regarding Academics, social-emotional status, Pragmatics, Speech and Language, and Auditory Processing; and
- D. Accommodations Regarding Academics, Social-Emotional status, Pragmatics, Speech and Language, and auditory Processing?

Student contends that Newport-Mesa failed to provide appropriate goals, sufficient services and accommodations, and that placement should have been in a one-to-one instructional setting.

Newport-Mesa asserted that its May 2019 IEP offered Student placement, related services, accommodations, modifications, and supports reasonably calculated to ensure that Student made appropriate educational progress considering his circumstances.

The May 29, 2019 IEP team adopted the assessors' recommendations and found Student eligible for special education in the categories of autism, other health impairment, and specific learning disability. Newport-Mesa offered Student nine goals, a program, placement, services, accommodations, modifications, and supports. Parents did not agree to the IEP offer and sent a unilateral placement notice on June 28, 2019.

ISSUE 4C: GOALS REGARDING ACADEMICS, SOCIAL EMOTIONAL, PRAGMATICS SPEECH AND LANGUAGE, AND AUDITORY PROCESSING

Based on the assessment data and present levels of academic achievement and functional performance in the May 2019 IEP, the IEP team identified the areas of educational need to be written expression, pragmatics, social-emotional needs, attention processing, executive functioning, and audiological processing.

Newport-Mesa's May 2019 IEP offer contained nine goals in four areas. Mr. Waldinger drafted four academic/executive functioning goals for Student including coherence in his writing, editing his written work, study skills in initiation and self-advocacy, and turning in timely work. The four communication goals addressed were directly focused on his areas of need, including each area identified by Ms. Powell and Ms. McCarthy in their assessments including body language, conversation starters,

problem solving, and social rules to address his social pragmatics deficits and autism. Ms. McCarthy drafted a frustration tolerance goal to address behavior.

Dr. Shinn criticized the frustration tolerance goal because it did not address teasing and his depression. The frustration tolerance goal stated:

"in counseling sessions, when presented with real life or made up scenario which creates strong emotion, [Student] will identify a calming technique (e.g. lazy 8 breathing) and a thinking strategy (e.g., big vs. little problem) to decrease his frustration in 4 out of 5 consecutive counseling sessions."

The evidence showed that the goal addressed teasing or any other scenario that creates strong emotion. Further, the evidence did not show that Student was depressed at the time of the 2019 assessments and IEP team meeting.

Further, the four communication and pragmatic communication goals addressed areas such as solving problematic social situations, non-verbal cues, and engaging in social activity. Thus, Dr. Shinn's concerns were addressed in the pragmatic communication goals already offered. Without any further explanation from Dr. Shinn regarding what the additional goals might contain, Student failed to prove that additional social and emotional goals were needed.

Additionally, Dr. Shinn's opinion that further writing goals were needed was unpersuasive. Dr. Shinn based her opinion on her belief that further testing in written expression was needed, and thus new goals would have to be written based upon the results of the additional testing. Ms. Walquist agreed, but their opinions are pure speculation and unconvincing as discussed before. Further, the evidence did not support a need for further writing goals in drafting sentences, building punctuation, and contextual convention as Dr. Shinn asserts. Student's weakness was in essay

composition, and Newport-Mesa's goals for coherence in writing worked on producing paragraphs in his writing. His editing goal was focused on planning, rewriting, and editing. The evidence did not support that further goals were needed in more specific areas of writing than the ones already drafted by Newport-Mesa.

Ms. Walquist opined that an additional narrative story telling goal was needed. Her opinion was not supported by the evidence of Student's weaknesses in social pragmatics, specifically problem solving, interpreting non-verbal communication, and perspective taking that was determined at the time of the 2019 triennial assessments.

Student suggested in his closing brief that since Student had received private auditory services in the past, and Dr. Ricci thought they were helpful, a goal should have been written for audiological services. Dr. Ricci, however, explained that the treatment may have been helpful but was uncertain. Further, Dr. Ricci did not endorse any auditory processing goals, and Student presented no professional witness that suggested such goals. Further, the assessment data did not support an auditory processing goal as the accommodation was sufficient to support Student and had been successful in the past at Newport-Mesa.

The May 2019 IEP contained annual goals appropriately designed to measure Student's progress that met his educational needs, consistent with state and federal standards, developed in all areas of need, that were identified by assessments and the IEP team, without the need for additional goals. The goals described and provided a means of evaluating what Student could reasonably be expected to accomplish over a 12-month period. The IEP included appropriate objective criteria, evaluation procedures, and schedules for determining on an annual basis whether the goals were being met and a statement on how Student's progress toward goals would be measured. Both the method and frequency of collection met the statutory requirements

of measurability of annual goals. Student failed to prove that the May 2019 IEP offer denied him a FAPE due to inappropriate goals or the absence of any goals.

ISSUE 1 B AND D: SERVICES AND ACCOMMODATIONS REGARDING ACADEMICS, SOCIAL EMOTIONAL, PRAGMATICS SPEECH AND LANGUAGE, AND AUDITORY PROCESSING

Student asserts that more services and accommodations in academics, social-emotional needs, pragmatic speech and language, and auditory processing were required. Newport-Mesa argues that its May 29, 2019 IEP contained the appropriate services and accommodations to access the curriculum and benefit from his education.

To support Student in meeting the annual goals, the IEP team offered an extensive variety of accommodations and services. For services, Newport-Mesa offered group direct specialized academic instruction in a general education setting four hours per week in a general education co-taught mathematics class, group direct specialized academic instruction in a special education setting eight hours a week for language arts and basic skills, individual direct speech and language in a special education setting 20 minutes every two weeks, group direct speech and language in a special education setting 30 minutes per week, direct individual educationally related mental health services 30 minutes every two weeks, 15 minutes of weekly speech and language individual consulting with teacher and staff, 30 minutes direct individual district specialist consulting with teachers monthly, and direct individual audiology consulting in a general education session for 30 minutes four times per year.

The mathematics class is taught by two teachers with 32 children in the classroom. The language arts specialized academic instruction was proposed to support writing and basic skills for executive functioning. It is a special education classroom with

a special education teacher and class aide in a small group setting. In language arts, students would receive more intense writing instruction than in a general education setting. In basic skills, students would receive help for projects and in studying for tests in a small group setting and would learn time management and organization strategies. The Program for the Education and Enrichment of Relational Skills, called PEERS, an evidence-based social skills program for children with autism spectrum disorder, would also be provided and taught by a certified teacher.

For accommodations, Newport-Mesa offered Student: preferential seating near instruction and away from distractions with his right ear favored; extra time and alternate location for tests; grammar and spell check applications for writing, Grammarly and Read and Write for Google; digitized and web-based graphic organizers for all writing assignments; web-based check lists; web-based application to create and share notes, accommodations for statewide assessments, and a personal remote microphone system for whole group instruction. Other supports included consultations and training.

Dr. Shinn argued that Student needed more specialized academic instruction, individualized counseling, and social emotional and writing accommodations. For academics, Dr. Shinn failed to show that the proposed offer of specialized academic instruction with academic accommodations and supports was not reasonably calculated to provide Student meaningful educational benefit. Her opinion was speculative, vague, and based on her perception of the need for additional testing.

Student had previously succeeded in a general education setting in academics while attending Newport-Mesa in fifth and sixth grade, without one-to-one instruction and with less specialized academic instruction. A smaller class size with a teacher and aide for language arts would provide additional support for his writing along with the additional writing accommodations, seating, extra time on tests, and computer

applications targeting his writing. The co-taught math class would also provide additional support and a smaller student-to-teacher ratio. The Newport-Mesa offer also allowed for more independence than the one-on-one instruction and inclusion in a general education setting, which Newport-Mesa staff convincingly testified was needed.

Dr. Shinn also believed that further accommodations may be needed after further testing, for punctuation, vocabulary, and writing generation. Dr. Shinn's opinion is speculative, and Newport-Mesa addressed those needs by offering accommodations in spell check, grammar check, Read it and Write Google, and Grammarly.

Student argued in his closing brief that the specialized academic instruction was designated in the IEP as language arts and not writing instruction, and thus was inappropriate. However, this was not a complaint of any witness at hearing, and was contradicted by the IEP goals, notes, and testimony regarding the implementation of the specialized academic instruction. The evidence demonstrated that the academic services and accommodations were understandable and appropriate in academics.

The evidence further showed that Student's most recent testing regarding his depression and anxiety did not support a need for more counseling than was offered by Newport-Mesa. Student received no clinically significant index scores in the Behavior Assessment System for Children, Third Edition, administered by Newport-Mesa in 2019 or Dr. Shinn in 2020. Parents reiterated during hearing that since early January, Student no longer sees a psychologist or uses psychotropic medication. Thus, treatment for depression and anxiety was not advocated by Parents at that time.

Dr. Shinn gave no further reasoning for her belief that more individual counseling and group counseling were needed. The IEP team offered direct educationally related mental health services to Student, and a consultation during class in which the

psychologist or autism specialist would work with Student's teachers on generalizing skills in the classroom environment to support his frustration goal. The type and duration of the counseling was appropriate given the assessment results and information from Parents and teachers.

Further, no coping accommodations were added because the frustration tolerance goal encompassed this area. Dr. Shinn's request for a support plan for teasing was also unsupported by the evidence. The teasing occurred in 2017 and Student would have been attending a different school than the one he attended at that time.

Ms. Walquish believed that Newport-Mesa incorrectly offered the PEERS program because it did not have a parent training component. Ms. Walquish, although certified in the clinical PEERS training, was not certified in the school-based PEERS training. Ms. Powell, however, was certified in school-based PEERS and convincingly testified that Newport-Mesa's PEERS offer in the May 29, 2020 IEP was appropriate.

The proposed speech and language services were focused directly on Student's deficits in this area, and included both individual, group, and consultation services. Ms. Walquish criticized the frequency of the speech and language services and believed weekly individual services were needed. As stated, Ms. Walquist only offered individual services to Student since 2018, and had no personal experience with speech and language services in a school setting. The need for more group services, not individual, was appropriate as previously determined. Ms. Powell convincingly established that the type and amounts of speech and language services were adequate given Student's assessment results and needs at that time.

Student suggests in his closing brief that since the audiological consultation services were the same as in December 2017 IEP offer, they are inappropriate because

now that he is in middle school, he will have more teachers. Thus, more consultation services were needed. He further argued that no training was offered Student for the audiological consultation and accommodations.

No professional testified that any further audiology services or additional accommodations were needed. And while training may be appropriate as Dr. Ricci conceded, Newport-Mesa asserted that little training is needed on a device that Student has previously used. Thus, Student's audiological goals were appropriately addressed through the offered personal remote microphone system accommodation and consultation services.

Newport-Mesa services and accommodations addressed all areas of need and supported his goals. Accordingly, Student failed to show by the preponderance of the evidence that Newport-Mesa denied him a FAPE for failure to offer appropriate services and accommodations in academics, social-emotional needs, pragmatic speech and language, and audiology.

ISSUE 1A: PLACEMENT

Student continued to assert that he required one-to-one instruction in order to succeed educationally. Newport-Mesa argued that it offered Student a FAPE in the least restrictive environment.

Newport-Mesa offered to place Student in the general education classroom 60 percent of the time and 40 percent spent outside of the general education classroom for special education services, with the goals, services, accommodations, and supports as stated in the May 29, 2019 IEP.

Applying the *Rachel H.* factors to this offer, general education for 60 percent of the day for some academics, physical education, school day activities, lunch and recess

was appropriate to expose him to typical peers and role models. He further had success in a general education setting in fifth and sixth grade, and as Newport-Mesa teachers explained, contributed to the classroom and discussion in the general education setting without behavioral issues. Thus, Newport-Mesa continued to place Student in the general education setting for a portion of the school day.

After the 2019 triennial assessments, it was determined that Student had needs in writing, pragmatic communication, attention, behavior, and autism despite his placement in a restrictive setting at Fusion Academy for over one year. Newport-Mesa targeted his unique needs and placed him in a smaller special education classroom for his specialized academic instruction for language arts, specifically writing and for basic skills to work on his executive functioning deficits and social skills. He also received individual speech and language and individual counseling to address pragmatic communication and frustration that was determined to be deficits from the assessments. The reduction in the general education setting was appropriate given the new information gleaned from the triennial assessment data. Further, the smaller language arts, basic skills, and co-taught math class would be more helpful for his central auditory processing disorder. No evidence was submitted regarding the cost of placing Student in a general education classroom, but the other three factors supported continuing Student's placement in a general education setting with services, accommodations and supports.

Notably, Student again failed to address a school district's legal obligation to place a special education student in the least restrictive environment. Student argued that based on Dr. Shinn's criticisms of the goals, services, and accommodations, Newport-Mesa was an inappropriate placement. Yet, those are deemed appropriate in this Decision. Further, Student offered no specific evidence that any feature of the

program would not be appropriate for Student. There was no evidence that Parents or any of his witnesses visited or had personal knowledge of the co-taught class, the special education class language arts and basic skills class, or the services for speech and language and counseling. Further, Dr. Shinn testimony endorsed Fusion Academy as the only appropriate placement for Student, with no other alternative or research into a Newport-Mesa placement. Dr. Shinn's testimony appeared inaccurate and careless.

Further, Mr. Mufich believed a large general education classroom was inappropriate for Student, pull out services would be hard for Student to handle, and Student could not focus on his art and music at a Newport-Mesa placement. Yet, Mr. Mufich had no knowledge of the placement Newport-Mesa offered, including whether it offered music and art. Additionally, Ms. Mufich is not a credentialed teacher in California and has no education, license, or credential in special education such that he has personal knowledge of pull out services. Thus, his opinion on the appropriate placement was given little weight.

The weight of the evidence demonstrated that Newport-Mesa's placement offer with the services, accommodations, and supports was reasonably calculated to provide Student meaningful educational benefit in the least restrictive environment.

STUDENT'S ISSUE NO. 5: DID NEWPORT-MESA DENY STUDENT A FAPE BY FAILING TO FILE FOR DUE PROCESS WHEN PARENTS DID NOT CONSENT TO THE MAY 29, 2019 IEP?

Student contends Newport-Mesa denied Student a FAPE by failing to file for due process to defend its May 29, 2019 IEP offer after Parents did not provide consent. Newport-Mesa argues that it was not required to file for due process because Parents rejected the entire IEP offer and Student was privately placed.

The California Education Code requires that if the parent consents in writing to special education and related services for the child but does not consent to all of the components of the IEP, those components to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) However, if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated by the public agency to seek an order declaring that its offered IEP constitutes a FAPE. (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164, 1167-1168 (*I.R.*.)

In *I.R.*, the court clarified that Education Code section 56346, subdivision (f), requires a school district to "expeditiously" request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. (805 F.3d at p. 1169.) The Ninth Circuit explained, "if, in the school district's judgement, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime." (*Id.* at p. 1170.)

The analysis set forth in *I.R.* does not apply where a student is not in a public school placement. The student in *I. R.* was in a public placement and remained so throughout the hearing. The parent partially consented to the IEP offer at issue and the school could implement only the consented portion, although it believed the non-consented portion was required to provide the student a FAPE. Thus, it was

obligated to file for due process hearing and defend its IEP offer as the school district was not providing FAPE to the student.

Parents rejected the May 29, 2019 IEP offer. Unlike *I.R.*, Student was not attending a Newport-Mesa school after the May 29, 2019 IEP offer. Parents had unilaterally placed Student at Fusion Academy in January 2018. Newport-Mesa did not implement an IEP that it believed was not a FAPE. Thus, at the time, it was not obligated to file for due process because it was not providing a FAPE to Student.

Further, Parents did not claim to Newport-Mesa that Fusion Academy was inappropriate. Thus, *I.R.* does not apply under these facts either because Student was unilaterally placed, Parents believed it was an appropriate placement, and no evidence was presented that Newport-Mesa had determined Fusion Academy was an inappropriate placement at that time such that Newport-Mesa would not be obligated to file for due process. Accordingly, Student failed to prove by a preponderance of evidence that Newport-Mesa denied him a FAPE by failing to file for due process to defend its May 29, 2019 IEP offer.

STUDENT'S ISSUE NO. 6: DID NEWPORT-MESA DENY STUDENT A FAPE BY FAILING TO SEND PARENTS PRIOR WRITTEN NOTICE IN RESPONSE TO THE CLOSURES RELATED TO THE COVID-19 PANDEMIC?

Student contends that Newport-Mesa should have provided prior written notice to Parents when it closed its school facilities in March 2020 due to the COVID-19 pandemic. Newport-Mesa argues that it was not required to send prior written notice to a privately placed student regarding its school facility closures at that time.

A parent must be provided written prior notice when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503 (2006); Ed. Code, § 56500.4.) The purpose of the prior written notice requirement is to ensure that "parents of a child with a disability are both notified of decisions affecting their child and given the opportunity to object to these decisions." (*C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 70 (3rd. Cir. 2010.))

At or around March 13, 2020, Newport-Mesa closed its school facilities due to the COVID-19 pandemic and soon after switched to a distance learning program. Newport-Mesa sent a prior written notice to parents of special education students enrolled in the district. Since Student was not enrolled in the district at that time, Parents did not receive prior written notice from Newport-Mesa regarding this change.

The procedural requirements of prior written notice do not apply to Student under these facts. The statute contemplates notice of decisions particular to a student, not decisions that are system wide. In addition, uncontroverted evidence overwhelmingly demonstrates that Student had not attended a Newport-Mesa public school or a school under contract with Newport-Mesa to provide services from which a change of placement was proposed since December 2017. Student was not involved in any Newport-Mesa program at the time from March 13, 2020 to the time of the hearing, and Newport-Mesa had no special education obligation to Student beyond attempting to hold an IEP team meeting unless he reenrolled in the district.

Student was continuing to attend Fusion Academy and participate in its virtual program due to the COVID-19 pandemic. Thus, Newport-Mesa was not required to send a prior written notice regarding proposed changes to a program that did not affect

Student, as he was not participating in any Newport-Mesa placement, services, or supports.

Accordingly, Student failed to prove by a preponderance of evidence that Newport-Mesa denied him a FAPE by failing to send a prior written notice in response to school closures due to the COVID-19 pandemic.

Further, if a procedural violation occurred, it did not rise to a FAPE violation because no educational benefit was lost since Student attended Fusion Academy through June 2020 and not participating in a Newport-Mesa program. Additionally, Parents previously paid for Fusion Academy tuition through the 2019-2020 school year. And, Parents have two other children attending Newport-Mesa schools and were generally aware of Newport-Mesa's distance learning program, but at no time indicated that they were interested in Student attending it. In fact, at hearing, Parents disparaged Newport-Mesa's online learning program and praised Fusion Academy's online program. Thus, the evidence shows that Parents were uninterested in the Newport-Mesa program at that time. Thus, Parents' participation rights were not impeded.

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.

Student's Issue 1(a)(b)(c) and (d): Student failed to prove by a preponderance of the evidence that Newport-Mesa denied Student a FAPE through the December 2017 IEP by failing to offer Student appropriate goals, services, and accommodations in

academics, social emotional, pragmatics speech and language, and audiology, and appropriate placement.

Student's Issue 2: Student proved that Newport-Mesa denied Student a FAPE during the 2018-2019 school year by failing to convene and IEP team meeting in April 2018.

Student's Issue 3: Student failed to prove by a preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to complete Student's assessments within the triennial assessment timeline.

Student's Issue 4(a)(b)(c) and (d): Student failed to prove by a preponderance of the evidence that Newport-Mesa denied Student a FAPE by failing to make an appropriate offer of goals, services, and accommodations, in the areas of academics, social emotional, pragmatics speech and language, and auditory processing, and appropriate placement.

Student's Issue 5: Student failed to prove by a preponderance of the evidence Newport-Mesa denied Student a FAPE by failing to file for due process when Parent did not consent to the May 29, 2019 IEP.

Student's Issue 6: Student failed to prove that Newport-Mesa denied Student a FAPE when it failed to send Parents prior written notice in response to the COVID-19 pandemic school closures.

Newport-Mesa's Issue: Newport-Mesa proved that its May 29, 2019 triennial multidisciplinary assessment and assessment report were legally compliant.

REMEDIES FOR STUDENT

Student seeks reimbursement for the 2017-2018, 2018-2019, and 2019-2020 Fusion Academy school tuition and costs, transportation, counseling, speech and language, physical education, and Dr. Shinn's independent educational assessment in the total amount of \$146,269. Prospectively, Student seeks placement for the 2020--2021 school year at Fusion Academy or non-public school plus transportation, and speech and language, counseling, and physical education services.

Newport-Mesa argues that Student is not entitled to any reimbursement or prospective placement because it offered and provided Student a FAPE.

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of 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.)

Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 96] (*Burlington*)). When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" considering the purposes of

the IDEA. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent School Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide student with an educational benefit. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c) (2006); Ed. Code, § 56175; *Carter, supra*, 510 U.S. at pp. 7, 15-16 [.] The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the hearing officer. (*School Committee of Burlington v. Department of Ed. supra*, 471 U.S. at p. 369.)

In *C. B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There, a student had benefited substantially from a private placement, but parents had been awarded only partial reimbursement because the placement did not address all the student's special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA "does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement." (*Id.* at p. 1158.) In reaching this conclusion, the Ninth Circuit relied

upon a standard set forth by the Second Circuit. The Court concluded that, for a parent to qualify for reimbursement, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only to demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from instruction. (*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d. Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)].)

This Decision holds that Newport-Mesa failed to hold Student's April 2018 IEP team meeting which was a procedural violation that substantively denied Student a FAPE for the 2018-2019 school year. Newport-Mesa should have offered Student an IEP that included placement, program, services, and supports for the 2018-2019 school year.

Parents placed Student at Fusion Academy in January 2018 after informing Newport-Mesa on December 21, 2017 of his unilateral placement and request for reimbursement, and timely and appropriately notified Newport-Mesa of their intent because they did not believe Newport-Mesa offered Student a FAPE. For the 2018-2019 school year, Student received some educational benefit at Fusion Academy as Robin Podway, Fusion Academy's head of school, and Connor Mufich, Fusion Academy's assistant director persuasively described. Student's social interaction difficulties decreased, and he continued to progress academically. While his standardized testing showed regression in academics, Fusion Academy gave him A grades in every subject for the school year. Student showed that he received some educational benefit.

Considering all the relevant facts and circumstances, Newport-Mesa shall reimburse Parents for the Fusion Academy 2018-2019 school year beginning

August 28, 2018 through June 11, 2019 in the amount of \$45,387.97 for registration and tuition, \$1041.85 for speech and language service, and \$680 for private physical education lessons. These amounts were determined by the billing and payment statements provided by Student. Additional charges, billing and payments that were admitted but services outside of the statute of limitations, irrelevant billing and payments, service charges, extra tutoring, and field trips will not be reimbursed.

Parents shall receive reimbursement for transportation for the 2018-2019 school year. Student would have attended Ensign Intermediate School during the 2018-2019 school year if he attended a Newport-Mesa school. The distance from Parents' residence to Fusion Academy is slightly shorter than the distance from Ensign Intermediate to Fusion Academy. Thus, Parents' residence was used for transportation reimbursement. Additionally, Father argued that they took a longer route to Fusion Academy to avoid traffic, but reimbursement is based on the shortest route, not the most convenient route for Parents. Additionally, Father stated that Parents took two roundtrips each day to drop off and pick up Student that was uncontested, thus two roundtrips a day will be reimbursed.

The federal transportation rate in 2018 was \$.545 per mile. Student attended 64 days of school from August 2018 through December 2018. The shortest route to Fusion Academy from Parents' residence is 21 miles roundtrip and 42 miles for two roundtrips a day. Newport-Mesa shall reimburse Parents \$1464.96 for transportation for August 2018 through December 2018. The federal mileage rate in 2019 was \$.58 per mile. Student attended school 67 days of school from January 2019 through June 2019. Newport-Mesa will reimburse Parents \$1632.12 for January 2019 through June 2019. Parent's reimbursement for tuition, speech and language services, private physical

education, and transportation is considered both compensatory and the appropriate remedy for Newport-Mesa's failure to hold the IEP team meeting.

All of Student's other claims for relief were carefully considered and denied.

REMEDIES FOR NEWPORT-MESA

Under certain conditions, a student is entitled to obtain an independent educational evaluation, called an IEE, at public expense. (20 U.S.C. § 1415(b)(1); Ed. Code, § 56329, subd. (b) Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].)

Here, Newport-Mesa's triennial assessments were legally compliant. Thus, it is not required to pay for independent education evaluations in the areas of academics, intellectual development, social/emotional/adaptive behavior, perceptual processing, gross/fine motor development, speech and language, assistive technology, audiology, or health.

ORDER

1. Within 45 calendar days, Newport-Mesa shall reimburse Parents for the 2018-2019 Fusion Academy registration and tuition in the amount of \$45,387.97.
2. Within 45 calendar days, Newport-Mesa shall reimburse Parents for the 2018-2019 speech and language services in the amount of \$1041.85.
3. Within 45 calendar days, Newport-Mesa shall reimburse Parents for Student's physical education classes for the 2018-2019 school year in the amount of \$680.
4. Within 45 calendar days, Newport-Mesa shall reimburse Parents for transportation for the 2018-2019 school year in the amount of \$3097.08.

5. All Student's other requests for relief are denied.
6. Newport-Mesa's May 29, 2019 triennial multidisciplinary assessments and assessment report were legally compliant such that Student is not entitled to independent educational evaluations in the areas of academic, intellectual development, social/emotional/adaptive behavior, perceptual processing, gross/fine motor development, speech and language, assistive technology, audiology, or health, at the public's expense.

RIGHT TO APPEAL THIS DECISION

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

/s/

Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings