

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT,

OAH Case No. 2018101112

SAN MARCOS UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2019020520

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 25, 2018, naming San Marcos Unified School District. OAH granted the parties' joint request for a continuance on December 6, 2018. San Marcos filed a complaint with OAH naming Parents on behalf of Student on February 14, 2019. OAH consolidated the cases on February 15, 2019.

Administrative Law Judge Alexa J. Hohensee heard this matter in San Marcos, California on March 12, 13, 14, 18, 19, 20, and April 4, 2019.

Cindy Lane, Attorney at Law, appeared on behalf of Student. Student's mother attended the hearing on behalf of Student.

Tiffany M. Santos and Sarah E. Orloff, Attorneys at Law, appeared on behalf of San Marcos. Dawn Dully, San Marcos's Executive Director of Special Education, and

Nicole Sestina, San Marcos's Coordinator of Secondary Special Education, attended the hearing on behalf of San Marcos.

At the parties' request, OAH granted a continuance for the parties to file written closing arguments and the record remained open until April 4, 2019. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

STUDENT'S CASE

1. Did San Marcos deny Student a free appropriate public education by failing to timely assess Student and hold an individualized education program team meeting to review those assessments within statutory timelines, pursuant to (a) Parent's request received October 2, 2017, or (b) the June 27, 2018, assessment plan signed on July 16, 2018, such that Parents are entitled to reimbursement for unilaterally placing Student at a nonpublic school?

SAN MARCOS'S CASE

2. Was the psychoeducational portion of San Marcos's multidisciplinary assessment appropriate, such that Student is not entitled to an independent educational evaluation at public expense in the area of psychoeducation?

¹ Student's issue as set forth in the prehearing conference Order has been reworded to clarify that Student contends, and the evidence introduced at hearing addressed, alleged procedural violations regarding two assessment timelines. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (See *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

SUMMARY OF DECISION

San Marcos committed a procedural violation of the Individuals with Disabilities Education Act by referring Student to another school district, specifically to the school district in which the private school that Student attended was located, in response to Parent's October 2, 2017, request for assessment. San Marcos failed to timely assess Student itself, or to expressly inquire of Parent the purpose of the request. However, Student was timely assessed and found eligible for special education by the other district, and timely offered a FAPE by San Marcos. That procedural violation did not result in harm to Parents or Student, and no remedy for that violation is awarded.

San Marcos subsequently developed a plan to perform its own assessments of Student on June 27, 2018, which was signed by Parent on July 16, 2018. San Marcos did not complete those assessments, or convene an IEP team meeting to review them, within the 60-day statutory timeline. The timeline ran on October 19, 2018, but all assessments were not reviewed until the IEP team meeting of January 16, 2019, which review resulted in a change of placement and services. San Marcos's procedural violation significantly interfered with Parents' opportunity to participate in developing Student's IEP. The untimeliness of San Marcos' assessments, which included the psychoeducational portion of the multidisciplinary assessment report, precludes a finding that San Marcos' psychoeducational assessment complied with all state and federal laws regarding assessment. Student is awarded reimbursement to Parents for private school tuition incurred during the delay, and an independent psychoeducational evaluation at public expense.

FACTUAL FINDINGS

1. Student was 14 years old and in ninth grade at the time of the hearing. He resided with Parents within San Marcos's boundaries at all relevant times.

2. Prior to moving to California, Student attended public schools in Texas through the third grade, with the support of IEPs under the eligibility categories of autism, other health impairment, and speech impairment. Student has diagnoses of autism, obsessive compulsive disorder, attention deficit hyperactivity disorder (ADHD), and anxiety.

3. Parents unilaterally placed Student in a small private school in Texas in fall 2014. When the family knew it was moving to California, the school staff recommended the Winston School in Del Mar.

4. Student's family moved to California in summer 2015, within San Marcos's boundaries. Parents enrolled Student at Winston, which was located in the San Dieguito Union High School District. Parents enrolled Student's brother in San Marcos, but did not enroll Student there, or ask San Marcos to assess Student for special education eligibility in California.

5. Student was in sixth grade at Winston for the 2015-2016 school year. Winston was a nonpublic school certified by the California Department of Education. Winston had elementary through high school classes. It had a small campus, with small classes of six to eight children, taught by credentialed special education teachers who had behavioral intervention and autism training. It had an occupational therapy room available to students as needed, and a school counselor to address students' emotional needs. Social lessons and speech services were embedded in all classes. Winston did not provide one-on-one behavioral aides, and did not enroll students with severe attention or behavioral needs.

6. Winston's executive director was Helen (Holly) Reed, Ph.D., who was also a licensed occupational therapist. She did not teach or hold a special education credential, but was familiar with many of the children on the small school campus, including Student. Dr. Reed was calm and professional at the hearing, and her answers were

straightforward and informative. Although she exhibited some unease when testifying that Winston did not require express written consent from a parent to disclose confidential student information to a school district, her testimony was generally credible and persuasive.

7. Student exhibited high energy and was a distraction to other students. Student worked hard to earn rewards on a tiered reward system, but his performance varied from class to class and from day to day. Student was engaged in the classroom, but tended to blurt out and pull discussions toward preferred topics. Dr. Reed was hesitant when asked if Student was progressing in the general education curriculum, and tentatively responded, "Yes, at this time." Student required one-on-one assistance from his teacher to learn math concepts, but it was his inability to self-regulate that interfered most with his education. Student struggled with impulse control and did not understand social interactions. Although he was sometimes on track at school for weeks at a time, there were days when he fell apart in class and Mother had to be called to take him home. Student was also obsessive about objects he could fidget with; for months he wore a tattered baby blanket around his neck that he rubbed and smelled, and he obsessed, in turn, about knitting in class, carrying stuffed animals, using a Rubik's Cube, and picking padlocks. Student used a hall pass that allowed him to go to the occupational therapy room or visit the school counselor whenever he wished. Winston students were taught to be very accepting of differences, and Student had friends and was never mocked or bullied. In general, Student's anxiety increased after transitioning to high school, and Dr. Reed's hesitant answers and tone of voice implied that by the time of the hearing, Student's behaviors were at the limit of what Winston could handle. However, Winston's small class size, credentialed special education teachers, embedded classroom behavioral and autism supports, and provision of generous access to sensory regulation and counseling support for Student's anxiety met

his needs and provided Student with educational benefit, even if it did not provide all necessary educational supports.

8. At the beginning of Student's eighth grade year, 2017-2018, Mother heard from other parents that the tuition of some Winston students was paid by school districts, if those students were eligible for special education.

9. On a Saturday evening, September 30, 2017, Mother wrote an email to Dawn Dully, the executive director of special education for San Marcos. Mother explained that Student had formerly been eligible for special education in Texas, and was privately placed by Parents at Winston since 2015. She requested Ms. Dully provide whatever paperwork necessary to initiate an evaluation by San Marcos of Student's educational needs.

10. Ms. Dully received the email on Monday morning, October 2, 2017. She promptly replied to Mother that Winston was located in San Dieguito Union High School District, so it was San Dieguito's responsibility to evaluate Student. Ms. Dully wrote that if Student was found eligible for special education, San Marcos would be responsible for offering Student special education and related services. She added that if Mother would prefer for San Marcos to conduct the assessment, San Marcos would send Mother the paperwork to initiate an assessment, and asked Mother how she wanted to proceed. Mother emailed back to confirm that San Marcos was not responsible for assessing Student, and that she had been referred to San Dieguito.

11. On October 3, 2017, Mother emailed a request to San Dieguito for a "full Special Education evaluation."

12. On October 4, 2017, the director of school and student services at San Dieguito responded to Mother with information on referrals for initial assessment, a checklist of documents needed to initiate an assessment, a blank release for exchange of information with Winston, and a copy of parent protections and procedural

safeguards. The director explained that once the documents were returned, San Dieguito would move forward to assess Student.

13. Mother did not respond to San Dieguito for nearly a month. On November 1, 2017, Mother mailed San Dieguito the requested information and signed release (dated October 5, 2017) with a letter that provided details about Student's prior assessments and IEPs in Texas. San Dieguito received the letter on November 3, 2017.

14. Around this time, Mother asked Winston administration if there was a difference between the services offered by the district in which a private school was located (commonly called the district of location) and the school district in which the family resided (the district of residence). Winston administration explained that the district of location offered an individual services plan, or ISP, that served a student parentally placed in a private school. Therefore, San Dieguito would offer an ISP, and Mother would need to contact San Marcos, the district of residence, for an IEP. Mother also retained Student's attorney as an advocate to guide her through the assessment process.

15. On November 15, 2017, within 15 days of receiving the requested information from Mother, San Dieguito sent Mother an assessment plan. San Dieguito proposed to assess Student in the areas of academic achievement, health, intellectual development, language/speech communication development, motor development, social emotional functioning, and behavior.

16. Mother signed the assessment plan, but back-dated her signature to September 30, 2017. Mother thought, erroneously, that she could advance the 60-day timeline for San Dieguito to complete and review the assessments by back-dating the assessment plan. San Dieguito correctly calculated the date for completion and review of the assessments from the day it received the signed assessment plan, which fell in the first week of February 2018, as extended school vacations such as the winter recess were

not counted in the 60-day timeline.

17. Mother was frustrated that the process was not moving as quickly as she expected. Mother began sending a series of emails to Winston and San Dieguito, complaining and demanding that “whichever District is responsible” for assessment take necessary steps “within the statutory timelines.” Mother also began to characterize the assessment process as a battle with San Marcos to obtain an IEP since September 2017.

18. Mother’s statements were false exaggerations for several reasons. First, she had not contacted San Marcos until October 2017. Mother was an attorney licensed to practice in two States, and even though she did not practice in special education, she would have known that her initial, weekend-evening email to San Marcos would not have been received until the following business day, Monday, October 2, 2017. Second, she had not requested an IEP from San Marcos, or accepted San Marcos’s offer to conduct its own assessment. Third, Mother’s only contact with San Marcos after her initial email was a confirmation that same day that she preferred for San Dieguito to conduct Student’s initial assessment and would contact San Dieguito. Fourth, Mother’s emails complaining about San Marcos’s conduct were not sent to San Marcos. Mother wrote intelligent and articulate communications when she chose to do so, but repeatedly mischaracterized the date and content of her request to San Marcos. She continued to mischaracterize her communications with San Marcos at hearing. The frequency and manner of these communications indicated a plan to create a false narrative of what had occurred without the awareness or involvement of San Marcos. Mother’s repeated exaggeration and mischaracterization adversely affected her credibility.

19. San Dieguito timely conducted the assessments of Student. Testing was completed at a San Dieguito school site and the San Dieguito district offices. Testing was conducted during school hours, and not during evening hours, or on weekends or

holidays.

20. Dr. Reed was invited by San Dieguito to attend the IEP team meeting to review the assessments. Dr. Reed replied on January 10, 2018, that Winston did not typically attend IEPs for privately placed students, and although Winston was happy to provide feedback as part of the assessment process, it would not send a representative to the meeting.

January 31, 2018 IEP Team Meeting

21. On January 31, 2018, San Dieguito convened a meeting to review the assessments, determine Student's eligibility for special education, and develop an ISP if Student was found eligible. Parents attended with their advocate and participated in the IEP team meeting. The tenor of the meeting was pleasant, and Mother did not complain that Winston staff were not present.

22. San Dieguito found Student eligible for special education under the eligibility category of autism, with a secondary eligibility of other health impairment due to his ADHD and anxiety, which interfered with his access to education. Because Student was a parentally placed private school student located within its boundaries, San Dieguito team members developed and offered Student an ISP. The ISP document consisted of the first page of an IEP, finding Student eligible for special education and related services, and additional pages delineating the equitable services offered. An ISP does not offer the full range of services that would constitute a FAPE for a student with disabilities enrolled in public school. San Dieguito referred Parents to San Marcos for development of a complete IEP with an offer of FAPE.

23. By the time of the January 31, 2018 meeting, Parents were no longer interested in asking San Marcos for an offer of special education and related services for the 2017-2018 school year. Parents informed the San Dieguito team members that their primary concern was making Winston the best program for Student and wanted

recommendations for services at Winston. Parents stated that they were uncertain about approaching San Marcos for an IEP, and in fact did not approach San Marcos for months after the meeting.

24. Parents disagreed with the assessments and the services San Dieguito offered, and did not initially consent to the services plan. Parents demanded independent educational evaluations in speech and language, and in occupational therapy.

25. On March 16, 2018, Student's attorney emailed San Dieguito that Parents would withdraw their request for independent educational evaluations with the understanding that they would reassert their demand if San Marcos offered anything other than a nonpublic school placement when Parents requested an IEP. Parents also requested that San Dieguito attach a second set of notes authored by Parents to the back of the January 31, 2018 ISP, which it did. Parents signed the ISP with both sets of notes on March 27, 2018.

26. Very late Friday afternoon, March 30, 2018, Mother emailed San Marcos a copy of the ISP finding Student eligible for special education. Parents had not contacted San Marcos for six months, and the email was sent the day before San Marcos's spring recess. The email requested that San Marcos provide Student with an offer of FAPE for the following school year, 2018-2019.

27. San Marcos was on spring recess from April 2 to April 6, 2018. However, on April 3, 2018, Ms. Dully responded that if Mother enrolled Student at San Marcos High School, San Marcos would schedule an IEP team meeting.

28. On April 4, 2018, Mother emailed that she was confused about the instruction to enroll Student, as she wanted an offer of FAPE before determining if she would enroll Student in the school district.

29. Ms. Dully responded on April 10, 2018, that if Mother's intention was to

keep Student at Winston, he would be supported by San Dieguito's ISP as a private school student. If she intended to enroll Student in San Marcos, San Marcos would offer an IEP.

30. On April 11, 2018, Mother replied to Ms. Dully that she had attempted to find online enrollment forms for the 2018-2019 school year, but they were not yet available.

31. On April 11, 2018, the coordinator of special education for San Marcos, Nicole (Niki) Sestina, emailed Mother with contact information and offered to answer any questions.

32. On Saturday, April 14, 2018, Mother emailed Ms. Sestina that she wanted to move forward with an IEP for Student, and was interested in learning about the autism and other program supports at San Marcos High School.

33. On April 19, 2018, Ms. Sestina sent Mother releases to sign for San Marcos to exchange information with Winston. Mother responded with a request for clarification that she was not required to enroll Student in San Marcos.

34. On April 20, 2018, Mother signed the release for exchange of information that allowed San Marcos to contact Winston.

35. On April 23, 2018, Ms. Sestina replied to Mother that she did not need to enroll Student, but she did need to register him.

36. On April 24, 2018, Mother emailed Ms. Sestina that she could only find enrollment forms for the 2017-2018 school year on the website, and she did not want to register Student for the 2017-2018 school year.

37. On April 26, 2018, Ms. Sestina responded that Mother could complete the 2017-2018 enrollment paperwork to register, but not enroll, Student, and the registrar at San Marcos High would assist her.

38. On April 27, 2018, Mother registered Student at San Marcos High School.

39. On May 1, 2018, Mother emailed Ms. Sestina with 12 dates and times that she was available for an IEP team meeting between May 11 and May 31, 2018.

40. On May 2, 2018, Ms. Sestina emailed Mother that San Marcos High School staff would assign a case manager, assemble an IEP team, and send her proposed dates for an IEP team meeting.

41. On May 7, 2018, Mr. Warnock emailed Mother to schedule the IEP team meeting for May 16, 2018, one of Mother's proposed dates.

42. On May 9, 2018, Mr. Warnock called Mother to confirm the IEP team meeting date, and Mother expressed concern that Student presented differently in person than he did in standardized test results. After that conversation, Mr. Warnock sent a new email scheduling the IEP team meeting for May 31, 2018, another of Mother's proposed dates, to give the IEP team members an opportunity to observe Student at Winston. Mother replied that she was frustrated with the pace of the process, but agreed to arrange an IEP date, and additionally asked Mr. Warnock for an opportunity to observe autism programs at San Marcos High.

43. On May 10, 2018, Mr. Warnock replied by email that he agreed with Mother's statement that Winston staff knew Student best, but noted that the San Marcos IEP team members would be responsible for offering a FAPE and wanted to observe Student in the school setting.

44. In mid-May 2018, San Marcos staff arranged for Parents to observe a variety of classes at San Marcos High School, including general education math and English classes co-taught by general and special education teachers (called collaborative classes), and classes with embedded autism supports.

45. Throughout the month of May 2018, Mr. Warnock and other IEP team members from San Marcos High, including school psychologist Brett Klepacki, occupational therapist Neika Maryn, and speech and language pathologist Joanne

Navilliat, were in contact with Winston staff to gather information from Student's teachers about Student's functioning. They also observed Student at Winston in academic settings, during informal break time, in music class, and during a computer elective period. Winston was cooperative in scheduling the observations, and the San Marcos IEP team members spoke with Student's teachers. They observed the maladaptive behaviors reported in the San Dieguito assessments, that Student talked out of turn, was often out of his seat, had trouble following directions, required frequent prompting, and was sociable but struggled with social interactions.

May 31, 2018 IEP Team Meeting

46. On May 31, 2018, San Marcos convened an IEP team meeting. It was attended by Mother, Student's attorney, Ms. Sestina, Mr. Warnock, Mr. Klepacki, Ms. Navilliat, an occupational therapist, a general education teacher, the school nurse, program specialists, and San Marcos's attorney.

47. Mother stated at the beginning of the meeting that she wanted San Marcos to offer Student a placement for fall 2018. Mother and Student's attorney also wanted San Marcos staff to obtain and review the San Dieguito assessors' protocols to confirm that there were no scoring errors. Mr. Klepacki explained that the San Dieguito assessments were performed by licensed and credentialed professionals, and that not all scoring errors impact the validity of an assessment's results. He asked if Mother had concerns about any substantive results in any of the assessments. Mother could not articulate at that meeting, or at the due process hearing, a reason for suspecting that any of San Dieguito's testing results were invalidated by scoring errors.

48. The IEP team discussed Student's present levels of performance. Mother's input regarding Student and the San Marcos staff's observations of Student at Winston were consistent with the results of San Dieguito's assessments and the eligibility findings in the January 31, 2018 ISP. Student exhibited difficulty with anxiety, mood

regulation, atypicality, social interactions, interpersonal relationships, reciprocity, and social communication skills. Academically, Student was capable, although he required one-on-one instruction when new math concepts were introduced. Behaviorally, Student obsessed over things like his baby blanket. He regularly blurted out in class, walked around or out of the classroom, and he frequently ignored his teachers' attempts to redirect him. Socially, he was friendly and polite, but wanted to be in control of others, monopolized conversations, and was unaware that he often invaded the personal space of others.

49. Ms. Sestina had told Mother she would invite Winston staff to the meeting, but had forgotten to do so, and Mother became very upset because she felt that the San Marcos team members didn't know Student well enough to develop an educational program for him. San Marcos team members explained that students often came to San Marcos from distant districts or out of state, but with recent and comprehensive assessment information, the educational professionals at San Marcos could design an educational program that met the student's needs. They explained that they had sufficient information to identify Student's educational needs, establish goals, determine the least restrictive placement, and develop services and accommodations that would support Student in the school setting. They noted that San Marcos team members had observed Student at Winston and spoken to his teachers, and that Winston teachers had provided much of the data upon which the San Dieguito assessments were based. The team called Winston during the meeting, but no administrator or teacher was available to join the meeting telephonically. Mother insisted that the Winston teachers who taught Student and knew him "best" should be part of the team discussion.

50. At hearing, Mr. Klepacki testified convincingly that the test measures used to assess Student (both by San Dieguito, and later by San Marcos) were designed to,

and did, reflect Student's true aptitude and achievement levels. Although scores could fluctuate on any given day, each standardized test had a "confidence interval" that took into account that Student might perform slightly better or worse at different times, and the assessments were valid snapshots of Student at the time administered. Mr. Klepacki persuasively explained that educational professionals obtained the training and credentials necessary to administer assessment instruments because data is important and can drive educational decisions. Mr. Klepacki, Mr. Fox, Ms. Navilliat, and Ms. Maryn testified consistently and persuasively that the San Dieguito assessments comprehensively assessed Student in areas of suspected disability, were thorough, and yielded results consistent with Mother's input, Winston teachers' input, their own observations of Student, and the results of their own subsequent multidisciplinary assessment. Parents' assertion that scoring errors by San Dieguito assessors may have affected the results of those assessments was speculative, unsupported, and unpersuasive, particularly in light of the consistency of those results with other substantial evidence of Student's needs and performance. Accordingly, the San Dieguito's assessment results provided the San Marcos IEP team complete, valid, and accurate information on Student's cognitive development and functional performance in fall 2018.

51. With valid and recent assessments of Student from credentialed San Dieguito assessors, San Marcos's observations at Winston, and assessment reports that contained a plethora of information from Winston teachers and Parents about Student's functioning, the San Marcos team members had sufficient information, and were prepared, to develop an IEP offering FAPE to Student on May 31, 2018. However, to accommodate parental concerns, and because there was still sufficient time in which to make an offer of special education and related services for the 2018-2019 school year, the IEP team agreed to adjourn and reconvene the meeting to include Winston staff.

52. After the meeting, Mr. Warnock emailed Winston and gathered additional information from Student's teachers about Student's areas of strength, areas of weakness, concerns, and accommodations or modifications to support him. He also asked Dr. Reed if any of the teachers were available for an IEP team meeting on June 15, 2018. She replied that no teachers were available, although one of Student's teachers had told Dr. Reed she was willing to attend.

53. Mother arranged for Dr. Reed to participate in the reconvened IEP team meeting. Dr. Reed never taught Student, and certainly did not know him "best," but Mother wanted Dr. Reed to provide input on behalf of Winston. Dr. Reed was available on June 27, 2018.

June 27, 2018 IEP Team Meeting

54. On June 27, 2018, San Marcos reconvened Student's IEP team meeting. It was attended by Parents, Student's attorney, Dr. Reed, a caseworker from the Regional Center, Ms. Sestina, Mr. Warnock, Mr. Klepacki, Ms. Navilliat, Ms. Maryn, the San Marcos High School assistant principal, a general education teacher, and San Marcos's attorney.

55. As relevant here, San Marcos made an offer of special education and related services at the June 27, 2018 meeting, including: placement in the Behavior, Academic, Social Skills, Executive Functioning (BASE) program for 60 percent of Student's school day with the remainder of the day in general education. San Marcos also offered Student group language and speech services, individual counseling with the school counselor, individual occupational therapy, and group occupational therapy services as collaboration between the occupational therapist and the teachers who worked with Student. The appropriateness of the June 27, 2018 offer of special education and related services was not at issue in the due process hearing.

56. Mother continued to insist that the San Marcos team members did not know Student well enough to make an offer of FAPE, and San Marcos offered to

conduct comprehensive assessments of Student at the beginning of the new school year. An assessment plan was drafted and printed during the IEP team meeting for assessments in academic achievement, health, intellectual development, language and speech communication development, motor development, social emotional functioning and behavior, and adaptive behavior. The assessment plan also included a functional behavior analysis, assessments for educationally-related mental health services, and an assessment for a special circumstances instructional assistant (one-on-one aide). San Marcos gave Mother the assessment plan at the end of the meeting.

57. The IEP team meeting was adjourned. A final copy of the IEP, with revisions to the draft discussed at the IEP team meeting, was provided to Parents on June 29, 2018.²

58. On July 16, 2018, Parents sent Ms. Sestina a letter declining to consent to the June 27, 2018 IEP. The letter gave 10-days' notice that Parents were placing Student at Winston for the 2018-2019 school year because Parents believed Student had not been offered a FAPE, and stated Parents would seek reimbursement for Winston tuition, transportation, and services. Parents enrolled Student at Winston in August 2018.

59. Parents' letter also contained the assessment plan, signed by Mother on July 16, 2018. The assessment plan was signed and received during San Marcos' summer recess.

60. Mother asked San Marcos to complete the assessments during the summer recess, or on weekends or evenings. San Marcos staff explained that assessments would be done when the school year commenced, and during school hours.

² This Decision will refer to the IEP dated June 27, 2018 and finalized on June 29, 2018, as the June 27, 2018 IEP.

61. Mother also repeatedly asked San Marcos to assess Student at Winston during his elective periods, as it was inconvenient for Parents to transport Student and Mother did not want Student to miss academic instruction. San Marcos staff explained that there was no disability-related reason for Student to be assessed at Winston and that the assessors were based at San Marcos High, and declined to conduct standardized testing at Winston.

62. San Marcos's 2018-2019 school year began on August 21, 2019, as did the timeline for San Marcos to complete the assessments and hold an IEP team meeting to review them. San Marcos calendared completion and review of Student's assessments as due by October 19, 2018.

63. On September 10, 2018, Mr. Klepacki contacted Winston about scheduling an observation of Student the following week. Winston responded that Student had not settled in to high school and requested that Mr. Klepacki observe Student in two weeks, during the week of September 24, 2018. Winston provided Student's daily schedule so San Marcos assessors could choose the settings for each observation. Winston limited observations to 20 minutes per class, and two classes per day. The delay in observing Student at Winston did not preclude San Marcos's assessors from moving forward on other portions of the assessments, such as gathering information, interviews, and standardized testing.

64. On September 18, 2018, Ms. Sestina sent Mother a list of the San Marcos staff members who would be assessing Student, their contact information, and the dates they were available to test Student at San Marcos High, from September 20 through October 5, 2018. This first attempt to schedule testing was made 30 days into San Marcos's 60-day deadline for completing and convening an IEP team meeting to review the assessments.

65. Mother replied that same day that she wanted to minimize disruption of

Student's school schedule and would only permit standardized testing for the assessments at Winston, and only during Student's elective periods.

66. On September 24, 2018, Ms. Sestina sent Parents a letter explaining that school districts were responsible for determining where assessments would take place, and stated that the assessments would be conducted at San Marcos High, as no disability-related reason prevented Student being assessed at San Marcos High. She assured Parents that the assessors would work with Parents to minimize lost academic instruction.

67. On September 25, 2018, Mother responded to Ms. Sestina stating she would coordinate transportation for Student to San Marcos High with her husband, and would consult with Winston on the best days for Student to miss classes. Mother's agreement to make Student available at San Marcos High occurred one day after receipt of Ms. Sestina's explanation and five school days after her initial demand that Student be tested at Winston.

68. On September 26, 2018, occupational therapist Neika Maryn observed Student at Winston and interviewed Student's English teacher. The next day she sent Student's teachers at Winston an aide support questionnaire and sensory rating scales. The questionnaire and one teacher rating scale were returned three school days later on October 1, 2018.

69. On September 27, 2018, special education teacher Craig Fox arranged to observe Student on October 5, 2018.

70. On October 1, 2018, Speech pathologist Joanna Navilliat scheduled an observation at Winston for October 4, 2018.

71. On October 3, 2018, Mother agreed to make Student available for testing at San Marcos High on October 5, 2018, as she had not heard back from Winston on days Student could miss school for standardized testing. Mother offered this date six

school days after she originally said she would make Student available, and October 5, 2018, was one of the dates originally proposed in Ms. Sestina's September 18, 2018, email.

72. Because Mr. Fox would be testing Student at San Marcos High on October 5, 2018, Mr. Fox rescheduled his observation at Winston for October 15, 2018.

73. Ms. Navilliat observed Student at Winston on October 4, 2018.

74. On October 5, 2018, Ms. Navilliat emailed checklists to Winston to be distributed to Student's teachers to report on Student's communication and social interactions. Winston returned the completed checklists two school days later on October 9, 2018.

75. Mother obtained a note from Student's pediatrician recommending that Student be placed at a small school with a small campus due to his anxiety, which Mother asserted to San Marcos required Student to be tested at San Marcos's district office, which was not on a comprehensive high school campus. The doctor's letter did not state that Student could not be tested at San Marcos High, but San Marcos staff agreed to test Student at the district office.

76. On October 5, 2018, Student completed standardized occupational therapy testing instruments with Ms. Maryn, as well as a hearing and vision screening with the school nurse at San Marcos High. Mother and San Marcos scheduled additional test days, including October 8, 2018, for academic and psychoeducational testing and October 10, 2018, for speech and language testing.

77. On the morning of October 8, 2018, Student arrived at San Marcos's district office for academic testing with Mr. Fox. Student required numerous breaks and motivational prompts to complete the assessment tasks. During one break outside the assessment room Student complained loudly about doing further testing and became visibly upset. Mr. Fox calmed Student down and Student returned to the room and

completed the academic testing. Mr. Fox believed that Student put forth good effort, both before and after becoming upset during the break, and that the test results obtained were valid representations of Student's academic abilities.

78. Mr. Fox held a Master's degree in education and a mild/moderate special education credential. He was San Marcos's BASE teacher and experienced in teaching students who required behavior intervention and instruction in social skills and executive functioning. He administered the full battery of a standardized instrument that measured key academic skills in reading, math, written language, and oral language. He was trained and qualified to administer that test, which is typically a portion of a psychoeducational assessment, although the academic testing was separately reported in San Marcos's multidisciplinary report. Student scored in the average range in all academic areas.

79. Mother took Student to lunch after the academic testing was completed, but Student became very agitated and loud, and refused to return to the district office. Mother drove Student to his pediatrician and texted San Marcos staff that Student was too upset to return. She requested again that San Marcos test Student at Winston, which was a more familiar and comfortable setting for Student. San Marcos agreed to arrange further testing at Winston, and canceled the psychoeducational testing and speech and language testing scheduled for that afternoon and October 10, 2018.

80. Mr. Klepacki arrived at the district office on the afternoon of October 8, 2018, to administer test instruments for the psychoeducational portion of the multidisciplinary assessment. He also brought parent rating scales regarding autistic-like behaviors and social-emotional functioning, and planned to interview Mother and have her complete the rating scales. After the afternoon testing was canceled, Mr. Klepacki arranged for Mother to pick up the documents the next day. He emailed documents to Winston to be completed by Student's teachers and support staff, including: a

questionnaire regarding how often Student needed support in the classroom for health/personal care, behavior, instruction, and inclusion, to determine if Student needed aide support; and rating scales for autistic-like behaviors and social-emotional functioning.

81. Ms. Navilliat administered standardized testing in language and communication to Student at Winston on October 12, 2018.

82. Mr. Fox completed his observation of Student at Winston on October 15, 2018, accompanied by Ms. Sestina.

83. Ms. Maryn followed up with one of Student's teachers on October 15, 2018, about sensory rating scales originally forwarded on September 27, 2018. That teacher returned responses to the rating scales three days later, on October 18, 2018.

84. On October 16, 2018, Mother dropped off at the district office the completed parent questionnaires for the psychoeducational and occupational therapy assessments. Mother described Student as having unusual mannerisms typical of children with autism, including being fidgety, distractible, having difficulty taking turns and interacting appropriately with others, and being very anxious and prone to meltdowns. Mother's rating scale responses indicated concern that other children perceived Student as odd, that Student was immature, and that he needed to learn speech and behavior strategies to cope with difficult situations.

85. On October 17, 2018, Mr. Klepacki emailed Winston to schedule an observation on October 19, 2018, and testing on October 22, 2018. He had not yet received the teachers' rating scales and indicated that he could pick them up when he was on the Winston campus.

October 18, 2018 IEP Team Meeting

86. On October 18, 2018, San Marcos convened an IEP team meeting for the purpose of updating the team on the status of Student's assessments. Mother, Student's

attorney, Mr. Klepacki, Mr. Fox, Ms. Navilliat, Ms. Maryn, Ms. Sestina, a general education teacher, the San Marcos High School assistant principal, and San Marcos's attorney attended.

87. Ms. Maryn, Ms. Navilliat and Mr. Klepacki gave the status of their assessments. Ms. Maryn had observed and tested Student, and had received the final rating scales response form Student's teacher that morning. Ms. Navilliat had observed and tested Student and needed to speak with Mother about Student's communication in the home. Mr. Klepacki was scheduled to test and observe Student the following week. The school nurse indicated she had completed Student's hearing and vision assessments, but requested Mother's consent to discuss Student's medical conditions with his pediatrician. Mr. Klepacki also wanted to speak with the pediatrician, particularly for the pediatrician's input on the extreme anxiety Student had displayed during academic testing on October 8, 2018. Mother was uncomfortable with a broad release, but agreed to arrange a telephone conference with the pediatrician, the school nurse, Mr. Klepacki, and Mother. No action was taken at the meeting, and it was adjourned.

88. Mr. Klepacki did not read Winston's response to his request to observe Student on October 19, 2018, until the morning of October 19, 2018, by which time it was too late to make the appointment at Winston. He rescheduled the testing for October 22, 2018, and the observation for October 24, 2018.

89. On October 22, 2018, Mr. Klepacki performed psychoeducational testing at Winston. He interviewed Student, who said he generally liked school, loved playing computer games, and had "a decent amount" of friends. Student showed good attention and concentration, and although he was fidgety, he did not report being anxious during testing.

90. Mr. Klepacki was well-qualified to conduct a psychoeducational assessment of Student. He held master's degrees in school psychology and educational

psychology, and was a credentialed school psychologist. Mr. Klepacki had been a school psychologist for San Marcos since 2011, and some of his early work experience included jobs as an instructional assistant and senior autism therapist. He had conducted over 400 assessments and provided counseling services for high school students for seven years. Mr. Klepacki had a professional demeanor and his testimony was clear, informative, and persuasive. He provided detailed information about the assessment instruments he chose and why, Student's performance on the test instruments and during observations, and the relevant information that was elicited from the information provided by Student, Mother, and Student's teachers at Winston. His opinions regarding the psychoeducational process, San Dieguito's assessments and results, San Marcos' assessments and results, the implications of Student's assessment results in designing an educational program for Student, Student's educational needs, and the program to meet those needs, was accorded significant weight.

91. Mr. Klepacki chose to administer a variety of test instruments that measured areas of suspected disability indicated by his diagnoses, San Dieguito's assessments, and Mother's concerns. A standardized cognitive test broke down Student's intelligence into different areas of learning that identified Student's learning strengths and weaknesses. To assess Student's social, emotional, and behavior functioning, Mr. Klepacki used a rating scale of adaptive behaviors, and Mother and Student's teachers ranked concerns with regard to behaviors typically associated with autism, ADHD, and anxiety. He gave Student a self-report questionnaire focused on anxiety, and had Mother and Student's teachers complete rating scales to measure their perceptions of Student's attention and hyperactivity and how it affected his functioning. Mr. Klepacki also used the Behavior Rating Inventory of Executive Functioning to measure areas of concern regarding Student's mental processes and how they affected Student's thoughts, emotions, planning, organization, and self-regulation. He also

administered rating scales to Mother and two of Student's teachers to assess the extent to which Student displayed autistic-like behaviors. Mr. Klepacki opined that the psychoeducational assessment was comprehensive, yielded valid results, and reflected Student's true aptitude and achievement level.

92. Student scored in the average range in all categories of the test and multiple subtests of processing ability and cognitive development administered by Mr. Klepacki. A review of responses from Student, Mother, and Winston teachers regarding Student's social-emotional and behavioral functioning demonstrated that Student displayed behavioral and social-emotional needs often present among children with ADHD, autism, and anxiety disorders, including hyperactivity, anxiety, depression, atypicality, attention problems, and behavioral problems. An anxiety scale completed by Student indicated that he did not perceive himself to be overly anxious, suggesting that he would benefit from support to help identify and better understand his anxiety. On a norm-referenced screening instrument to identify autism spectrum disorders completed by Mother and Student's teachers, Student exhibited many behaviors associated with autism, which were confirmed by the San Marcos's assessors' observations.

93. On a behavior rating scale completed by Student, Mother, and three teachers, Student scored high for inattention, hyperactivity/impulsivity, learning problems/executive functioning, defiance/aggression, and difficulty with peer relations. These suggested that Student would have trouble organizing his work, concentrating on and completing work, sitting still, remembering concepts, managing anger, making social connections, and being accepted.

94. On another behavior rating scale to measure Student's ability to shift thoughts and modulate behavior, the Behavior Rating Inventory of Executive Function, the responses of Mother and Student's teachers denoted concern with Student's ability to regulate behavior and with his ability to self-manage and monitor his performance.

The version of the Behavior Rating Inventory of Executive Function used by Mr. Klepacki was not the latest version of that rating scale, but Mr. Klepacki testified persuasively that the instrument had been updated in a manner to keep scores on the new version comparable to older versions so that the scores could be compared over years to identify trends and changes, and that the scores on the version he used were valid representations of Student's functioning. Student presented no evidence at hearing that the results of the Behavior Rating Inventory of Executive Function were inaccurate or misleading.

95. At hearing, the evidence demonstrated that Mr. Klepacki erroneously scored one of multiple questions embedded in a rating scale completed by Mother as a test of the validity of the responder. The error did not change Mother's validity index and did not affect the validity of the substantive rating scale results. The evidence did not show that Mr. Klepacki made any other scoring errors.

96. On October 24, 2018, Mr. Klepacki observed Student for a total of 40 minutes in his English and math classes. Mr. Klepacki used time sampling to record Student's adaptive (on-task) and problematic (off-task) behaviors for the functional behavior analysis. In English, Student was off task 43 percent of the time, displaying inattention/distraction, making inappropriate or unrelated comments, and calling out answers without being called upon. Student spun back and forth in his chair, needed prompting twice, was asked if he needed a fidget item, and was later asked if he needed a quick break. In math, Student also spun around in a chair and played with a wooden ball on a string. He was inattentive, distracted, or playing with his fidget item for 33 percent of the time.

97. While at Winston, Mr. Klepacki picked up responses to the questionnaire on aide support by three teachers and Dr. Reed. They reported that Student's strengths were intelligence, eagerness to learn, happiness, and willingness to work hard.

Behavioral and emotional concerns were that Student was distractible, perseverative, naïve, constantly moving and fidgeting, and distracting to others. He needed regular prompts to complete academic tasks, had difficulty participating in large groups, and required close adult proximity. His social relationships were adversely affected by his impulsive behavior and his inability to understand the perspective of others.

98. Student filed for due process in this matter on October 25, 2018, before receiving or reviewing San Marcos's assessment report at an IEP team meeting.

99. On October 31, 2018, Mother made arrangements for Student's pediatrician to participate in a conference call with Mr. Klepacki, the school nurse, and Mother the following morning. However, Ms. Sestina had not responded to Mother's email for the number for the pediatrician to call until the morning of the call, and by the time Mother was given the correct information, the pediatrician was no longer available. The pediatrician left town that day and did not return until November 7, 2018.

100. On November 8, 2018, Mr. Klepacki, the school nurse, and Mother spoke with Student's pediatrician. The pediatrician noted that her greatest areas of concern were Student's anxiety, personal safety, and bullying. Student experienced profound distress when placed into unfamiliar environments, could not self-soothe, and carried around stuffed animals and a blanket that could make him a target for bullying on a comprehensive high school campus. The doctor was also concerned that if Student responded to stress by attempting to leave campus, the school might be too large for staff to track Student.

101. On November 27, 2018, Parents were provided with a draft copy of the multidisciplinary report, which was signed by the assessors without substantive change on November 28, 2018. The assessment results and findings were generally consistent with those of San Dieguito. The assessors found Student eligible for special education under the eligibility categories of autism and other health impairment. The report did

not contain specific recommendations for placement and services, as the assessors intended to make their recommendations at an IEP team meeting.

102. On November 27, 2018, Mother requested that Ms. Sestina postpone the IEP team meeting scheduled for the next day, November 28, 2018, to give her an opportunity to read the report. The meeting was rescheduled and noticed for December 6, 2018.

December 6, 2018 IEP Team Meeting

103. On December 6, 2018, San Marcos convened an IEP team meeting. Mother, Student's attorney, Dr. Reed, Mr. Klepacki, Mr. Fox, Ms. Navilliat, Ms. Maryn, Ms. Sestina, the school nurse, San Marcos High's assistant principal, a general education teacher, and San Marcos's attorney attended.

104. The IEP team reviewed the multidisciplinary report. Mother asked questions and the assessors provided clarification. Dr. Reed shared that Student was earning A and B grades in his classes.

105. In reviewing the psychoeducational portion of the multidisciplinary assessment, Mr. Klepacki reported that Student scored in the average range in overall cognitive ability, and in the average range across academic categories. Student displayed characteristics of autism, ADHD, and anxiety, and Mr. Klepacki recommended a goal in the area of emotional regulation, to be addressed with school counseling and educationally-related mental health services.

106. Mr. Klepacki had also completed the functional behavior assessment, but there was insufficient time to review it at the December 6, 2018 IEP team meeting. The IEP team members agreed to adjourn the meeting and reconvene at a later date.

107. San Marcos was on winter recess from December 24, 2018 through January 11, 2019, a total of 19 days.

January 16, 2019 IEP Team Meeting

108. On January 16, 2019, San Marcos reconvened the IEP team meeting. Mother, Student's attorney, Dr. Reed, Mr. Klepacki, Mr. Fox, Ms. Navilliat, Ms. Maryn, Ms. Sestina, the school nurse, San Marcos High's assistant principal, a general education teacher, and San Marcos's attorney attended.

109. Mr. Klepacki reviewed the functional behavior analysis, answered Mother's questions regarding Student's behaviors, and proposed functionally equivalent replacement behaviors. Mr. Klepacki discussed Mother's concerns about de-escalation, which were addressed in the proposed emotional regulation goal. Mother was concerned that Student's anxiety would be too great to succeed on a large campus, and that there would be too many opportunities for Student to have misunderstandings due to his communication deficits. IEP team members agreed that a behaviorally trained one-on-one aide would support Student in his transition to a large campus.

110. As relevant to this due process proceeding, San Marcos team members amended Student's June 27, 2018 IEP to increase Student's placement in the BASE program at San Marcos High to 80 percent of the school day and to add additional services, including one-on-one behavioral support throughout the school day (including transition and unstructured times) and 30 minutes per week of individual educationally-related mental health counseling.

111. Parents seek reimbursement of tuition for Student's attendance at Winston for the 2017-2018 and 2018-2019 school years. Tuition at Winston was \$1,784.90 per month for the 2017-2018 school year (middle school), and \$2,477.00 per month for the 2018-2019 school year (high school). Dr. Reed testified that Winston requires parents to enter into full-year contracts, but that Winston will work with parents and suspend the contract or refund payments if the student leaves or becomes publicly-funded. Parents also seek reimbursement for one round-trip to Winston for each day of attendance;

however, Mother testified that she was one of many drivers in Student's carpool to Winston and had not kept track of the times she drove. She estimated that reimbursement for one round-trip per day would be adequate travel reimbursement, but did not credibly explain how she arrived at that estimate.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁴ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley, supra*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F., supra*, 137 S.Ct. at p. 1001.) The Ninth Circuit has affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v.*

Newport Mesa Unified School Dist. (9th Cir. 2018) 726 Fed.Appx. 535 [nonpub. opn.]

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on his issue, and San Marcos had the burden of proof on its issue.

5. The IDEA requires that a due process decision be based upon substantive grounds when determining whether a child has received a FAPE. (20 U.S.C. § 1415(f)(3)(E)(i).) In matters alleging a procedural violation, a denial of a FAPE cannot be found unless that procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1482-1484; see also *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3 [procedural errors during assessment do not

entitle the student to relief unless that error denied a suitable educational opportunity] (*Park*.)

6. California law prohibits any due process decision from being based solely on nonsubstantive procedural errors, unless the nonsubstantive procedural error resulted in the loss of educational opportunity, or interfered with the parents' opportunity to participate in formulating their child's IEP. (Ed. Code, § 56505, subd. (j).)

RESPONSIBILITY FOR INITIAL ASSESSMENT OF A PRIVATELY-PLACED CHILD

7. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).) California law refers to evaluations as "assessments." (Ed. Code, § 56302.5.)

8. Children with disabilities enrolled by parents in private schools or facilities are in a category of pupils known as "private school children with disabilities." (Ed. Code, § 56170.)

9. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate children with disabilities in need of specialized education and related services, referred to as "child find." (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a).) California law specifically incorporates child find in Education Code section 56301, subdivision (a).

10. In 2006, the IDEA and its implementing regulations related to child find were changed in significant ways with regard to parentally placed private school

children with disabilities. Previously, the IDEA placed responsibility to conduct child find for parentally placed private school children with the school district in which the children resided (the district of residence). (*Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (The Department of Education, Office of Special Education and Rehabilitative Services of the United States Department of Education (OSERS) April 2011 (*OSERS 2011 Guidance*), answer B-2.) However, in 2006, the school district in which the private schools were *located* (the district of location) became responsible for identifying and evaluating children with disabilities enrolled by their parents in private schools within their boundaries. (20 U.S.C. § 1412 (a)(10)(A); 34 C.F.R. §§ 300.130 through 300.144; see also Ed. Code, § 65171.) The 2006 regulations also required parents to consent to the disclosure of records before school districts could exchange information about parentally placed private school children with other school districts. (34 CFR § 300.662(b)(3).)

11. Once an initial evaluation is completed, the school district conducting the assessment must hold a meeting to review the assessments and determine whether the student is eligible for special education and related services under one of the eligibility categories. (71 Fed. Reg. 46593 (Aug. 14, 2006).) Once a child is found eligible, if the parents choose to forego public school enrollment, the student is not entitled to the same level of service as a public school student. (Ed. Code, § 56174.) The more limited services available to children parentally placed in private schools are commonly referred to as “equitable participation” or equitable services, and offered by the district of location in an individual services plan, or ISP. (See 20 U.S.C. § 1412(a)(10)(A)(ii)(III); Ed. Code, § 56174.5.) However, if parents choose to enroll the student in public school, the district of residence is responsible for offering the student a FAPE. (34 C.F.R. § 300.210.)

12. OSERS, charged with developing implementing regulations for the IDEA, recognized that neither the 2006 statute nor its regulations prohibited parents from

requesting their child be evaluated by the district of residence for the purpose of having a FAPE made available to the child at the same time they requested the district of location to evaluate their child for purposes of considering continued private placement with equitable services. (71 Fed. Reg. 46593 (Aug. 14, 2006).) However, OSERS expressly discouraged the practice, noting:

[W]e do not believe that the child's best interests would be well-served if the parents requested evaluations of their child by the resident school district and the [educational agency] where the private school is located, even though these evaluations are conducted for different purposes. A practice of subjecting a child to repeated testing by separate [educational agencies] in close proximity of time may not be the most effective or desirable way of ensuring that the evaluation is a meaningful measure of whether a child has a disability or of providing an appropriate assessment of the child's educational needs. (*Ibid.*)

13. In 2009, OSERS' Office of Special Education Programs (OSEP) issued guidance on the responsibility of a district of residence to evaluate a private school child parentally placed in the district of location upon parent request. It stated:

If a parent requests that the [educational agency] responsible for providing a FAPE to the child evaluate their child for the purpose of having a program of FAPE made available to the child, the [educational agency] cannot refuse to conduct the evaluation and determine the child's eligibility for FAPE because the child attends a private school in another

[educational agency]. (*Letter to Eig* (OSEP Jan. 28, 2009).)

14. In 2011, OSERS issued guidance that superseded earlier guidance on serving private school children with disabilities. However, its interpretation of district of residence's duty to assess a child parentally placed in a private school upon parent request remained unchanged. In an almost word-for-word recitation of its 2006 commentary, OSERS wrote:

Although the Department discourages parents from requesting evaluations from two [educational agencies], if the parent chooses to request evaluations from the [educational agency] responsible for providing the child with a FAPE and from another [educational agency] that is responsible for considering the child for provision of equitable services, both [educational agencies] are required to conduct an evaluation. (*OSERS 2011 Guidance, supra*, Answer B-4.)

15. When an agency interprets its own regulations, a very deferential standard applies, and such an interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." (*Federal Express Corp. v. Holowecki* (2008) 552 U.S. 389, 397; *Auer v. Robbins* (1977) 519 U.S. 452, 461 [agency commentary explaining final rule and published with the rule in the Federal Register is entitled to deference].) OSERS's commentary comports with its regulations, and for over a decade OAH decisions have consistently adopted OSERS's interpretation. (See *Student v. Upland Unified School Dist.* (2012) OAH Case No. 2012070418; *Student v. Cabrillo Unified School Dist.* (2015) OAH Case No. 2015030583; *Student v. Bellflower Unified School Dist.* (2019) OAH Case No. 2018071234.) Although administrative decisions are not binding,

they may be accorded persuasive value in later cases. (Cal. Code Regs., tit. 5, § 3085).

16. If the initial assessment is completed by the district of location and the student is determined to be eligible for special education, and the parent makes clear his or her intent to keep the child enrolled in a private school in the district of location, the district of residence is not required to make an offer of FAPE; however, if the parent wishes to consider an offer of FAPE, the district of residence must hold an IEP team meeting to make a FAPE available to the child. (*OSERS 2011 Guidance, Answer B-5*)

THE ASSESSMENT PROCESS

17. The "child find" process for privately placed students must be completed in a time period comparable to that for students attending public schools. (20 U.S.C. § 1412(a)(10)(A)(ii)(V); Ed. Code, § 56301, subd. (e)(3).)

18. When a student is referred for assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral (with limited exceptions not applicable in this case). (Ed. Code, § 56321, subd. (a).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision; the assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).)

19. Once a student has been referred for an initial assessment to determine whether the student has a disability and by reason thereof needs special education and related services, an IEP team meeting must be held to determine of eligibility, and to develop an IEP if the student is found eligible. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).) An IEP required as a result of an assessment must be developed within a total time not to exceed 60 days, not counting days between the student's regular school sessions, terms, or days of school vacations in excess of five school days, from the date of receipt of the parent's written consent for assessment, unless the parent agrees to an extension in writing. (Ed. Code, § 56344, subd. (a).)

ISSUE 1(A): OCTOBER 2, 2017 ASSESSMENT REQUEST

20. Student contends that Mother sought to have both San Marcos and San Dieguito assess Student, and that San Marcos was obligated to assess Student upon Mother's October 2, 2017 request. San Marcos contends that Mother withdrew her October 2, 2017 request for assessment, but even if she had not, such a procedural error would not have constituted a substantive denial of FAPE.

21. The weight of the evidence demonstrated that Mother asked San Marcos to assess Student for an offer of special education and related services, and it failed to do so.

22. Mother's initial email to San Marcos asked San Marcos to assess Student for special education eligibility, and asked San Marcos to provide Parents with the information necessary to begin "*the District's* evaluation of [Student's] needs" (emphasis added). The IDEA and its regulations, as consistently interpreted by OSERS and OAH for over a decade, obligated San Marcos to assess Student as the district of residence, regardless of whether an assessment was also requested of or performed by San Dieguito.

23. San Marcos would not have been required to conduct an assessment if Mother had stated that Parents only sought equitable services at Student's private placement and would not consider enrolling Student in public school. Mother's request to San Marcos did not clearly express Parents' intent to consider an offer of FAPE, but if asked, she would have indicated that they hoped Student would be offered special education and related services in the form of placement in a small structured nonpublic school, perhaps Winston, with supports to address Student's behavior, anxiety, and lack of social skills. San Marcos was required to assess upon request, or determine Parents' intent. San Marcos could not avoid its obligation to assess as the district of residence by failing to inquire about the purpose of Parents' request and treating it as one for an

assessment for equitable services from the district of location. Such an inquiry by San Marcos would necessarily have required an explanation of the difference between and IEP offering a child a FAPE and an ISP for limited equitable services available to parentally placed children in private schools. San Marcos's offer to conduct an assessment if Parent "preferred" did not obtain the necessary clarification to relieve San Marcos of its obligation to assess.

24. San Marcos' response that San Dieguito was responsible for assessing Student, and that San Marcos was responsible for offering a FAPE, failed to inform Mother of San Marcos's independent duty to assess, and was incomplete and misleading. Mother's request for an assessment for purposes of an offer of FAPE was improperly deflected to San Dieguito. Mother's interactions with San Dieguito were the result of San Marcos's misdirection, and did not constitute a voluntary withdrawal of Parents' request that San Marcos conduct Student's assessment.

25. San Marcos contends that its SELPA policy required the district of location to conduct the initial assessment, but provided no legal support that a local SELPA policy can abrogate a school district's obligations under federal and State law. Even if it could, the local SELPA's *Policy No. 17.0 – Children with Disabilities Voluntarily Enrolled by Their Parents in Private Schools* simply mirrored IDEA regulations, and required member school districts to assist private schools located within their boundaries in child find activities, accept referrals from private schools, conduct appropriate assessments, and invite the district of residence to participate in the evaluation with the parents' permission. If a child was determined to be eligible for special education, the offer of FAPE was to be made by the district of residence if parents indicated an intent to enroll their child in public school. Nothing in the SELPA policy addressed, let alone contradicted, OSERS's guidance as set forth in *Letter to Eig* and followed by OAH, that a district of residence was obligated to conduct an initial assessment if directly requested

to do so by the parent.

26. The IDEA and federal regulations placed a duty on San Marcos as the district of residence to assess Student upon Parents' request for the purpose of having a program of FAPE made available. In the absence of a clear rejection of public school services, which was not present on these facts, San Marcos was obligated to assess Student. San Marcos's failure to assess Student constituted a procedural error.

27. The consequences and the remedy for San Marcos's procedural error are less clear. Parents contacted San Dieguito the day after being deflected by San Marcos, and San Dieguito immediately initiated the assessment process. Parents did not contact San Marcos during the assessment process, and when Parents did contact San Marcos on March 30, 2018, it was for a FAPE offer, and not for another eligibility assessment. This evidence evinced parental intent to obtain one initial assessment, not two, and Parents' intent was satisfied.

28. Several factors weigh against an award of tuition reimbursement for San Marcos's failure to assess. San Dieguito assessed Student and held a meeting to review the assessments and determine Student's eligibility as promptly as San Marcos could have accomplished the same. Parents assumed the financial responsibility of enrolling Student at Winston at the beginning of the 2017-2018 school year, before their request for assessment several months into that school year. The evidence did not show that Student would not have received an offer of special education and services from San Marcos before January 31, 2018. Accordingly, there is no basis for San Marcos to reimburse Parents for tuition costs incurred prior to January 31, 2018, the earliest that Parents would have received an offer of FAPE had San Marcos conducted the assessments and convened the IEP team meeting.

29. Additionally, despite the initial request for an assessment to consider a FAPE offer for the 2017-2018 school year, Parents had changed their minds during the

assessment process. Mother had retained a special education attorney to assist her, and learned from both counsel and Winston that Student would need to enroll in public school to be provided a FAPE. Parents wanted Student to remain at Winston for his entire eighth grade school year, and would not have accepted a FAPE offer of another nonpublic school or a public school setting. At the January 31, 2018 eligibility meeting, Parents asked the team to focus on how to make Winston the best program for Student for the remaining school year. Parents stated that they were no longer sure they wanted to approach San Marcos for a FAPE offer, and in fact did not approach San Marcos for a FAPE offer for several months. When Mother contacted San Marcos on March 30, 2018, she asked for an offer of FAPE for the 2018-2019 school year. Mother requested high school information, asked to observe classes at San Marcos High, and worked with a team of high school special education professionals to design an educational program for Student's ninth grade year. Equity does not weigh in favor of reimbursing Parents for 2017-2018 tuition after January 31, 2018, as Parents were no longer seeking a FAPE from San Marcos for that school year.

30. Student makes much ado about the time it took San Dieguito to complete the initial assessment. However, San Dieguito responded promptly to all contact from Parent, and it was Mother who delayed almost an entire month in returning documents requested by San Dieguito to initiate the assessment. Mother was unfamiliar with special education law, but as an attorney should have understood that a school district is entitled to documentation regarding the facts that obligate it to assess (such as proof of private placement within the district of location's boundaries, and parent and teacher concerns about suspected areas of disability) before it develops an assessment plan. San Dieguito timely sent Mother an assessment plan on November 15, 2017, less than 15 days from receipt of Parents' information on November 3, 2017. Mother failed to take into account that the 60 days to complete and review assessments did not include

extended school vacations, and did not run during San Dieguito's winter break. Mother's frustration with the length of the assessment process was due to her own delay in responding to San Dieguito and her lack of familiarity with the statutory timeline. There was no evidence that the January 31, 2018 meeting to review the initial assessments was untimely.

31. Any delays in San Marcos making an offer of special education and related services after Student was found eligible were due to Parents' own conduct. Parents did not contact San Marcos from October 2, 2017, through the end of March 2018. Parents forwarded San Dieguito's eligibility determination to San Marcos two months after the ISP meeting that determined Student's eligibility, and six months after their last contact with San Marcos. Upon Student's registration with San Marcos and Parents' consent to exchange of information with San Dieguito, San Marcos staff promptly scheduled an IEP team meeting for May 16, 2018. The meeting was rescheduled to May 31, 2018, one of the dates originally proposed by Mother, due to Mother's concern that San Marcos staff observe Student at Winston before the meeting. San Marcos subsequently continued the May 31, 2018 meeting to June 27, 2018, at Parents' insistence that Dr. Reed attend the meeting, although the San Marcos IEP team members were prepared to offer special education and related services at the May 31, 2018 IEP team meeting. Accordingly, and no remedy is warranted for the time that elapsed between the January 31, 2018 eligibility determination and the June 27, 2018 offer of placement and services.

32. Policy considerations also weigh against an award where, as here, Student was timely assessed and found eligible for special education and related services and suffered no harm because the assessment was completed by one district instead of another. OSERS has repeatedly discouraged parents from seeking cumulative assessments from both the district of location and the district of residence. Student received a thorough initial assessment from San Dieguito immediately upon request,

and OSERS' admonition against duplicative assessments weighs against an equitable award to Parents for lack of a duplicate, simultaneous assessment.

33. Lastly, Student's assessment for eligibility and subsequent FAPE offer occurred exactly as the IDEA and its implementing regulations intended. Student was timely assessed by the district of location, and the district of residence made a prompt offer of FAPE for the 2018-2019 school year at Parents' request after the district of residence was informed of the eligibility determination. Therefore, there is no basis for an award of tuition reimbursement to compensate for a procedural error that did not result in the loss of educational opportunity or interfere with Parents' opportunity to participate in the formulation of Student's IEP offer for the 2017-2018 school year.

34. In summary, San Marcos was obligated to assess Student for special education eligibility upon Parents' October 2, 2017 request, but failed to do so. This failure to timely assess was a nonsubstantive procedural error, as Student was timely assessed by another school district and found eligible for special education, and Parents no longer sought an offer of FAPE for the 2017-2018 school year by the time of the assessment review, which was timely held. At Parents' request for an offer of FAPE for the 2018-2019 school year, San Marcos make an offer of special education and related services on June 27, 2018, well before the start of the 2018-2019 school year. San Marcos's procedural error did not deprive Student of educational benefit, or significantly interfere with Parents' opportunity to participate in the decision making process in developing Student's 2018-2019 IEP.

35. Student did not meet his burden of proving that San Marcos's failure to assess upon Parents' October 2, 2017 request denied him a FAPE, or otherwise entitled him to the remedy sought.

ISSUE 1(B): ASSESSMENT AFTER PARENT CONSENT TO JUNE 27, 2018 ASSESSMENT PLAN

36. Student contends San Marcos failed to timely conduct and review assessments after Mother signed the June 27, 2018 assessment plan. San Marcos contends it was prevented from timely completing the assessments by Parents' refusal to make Student available and Winston's delays in scheduling access.

37. The weight of the evidence did not establish that San Marcos was prevented from timely completing and reviewing assessments by the conduct of Mother or Winston.

38. The timeline for San Marcos to complete the assessments described in the June 27, 2018, assessment plan, consented to over the intervening summer recess, began to run on the first day of the school year, August 21, 2018. The first contact San Marcos made with Mother to schedule time for administration of standardized assessments was September 18, 2018, 30 days into the statutory 60 days for completion of assessment and review. Although Mr. Fox and Ms. Maryn made early arrangements with Winston to observe Student and obtain teacher feedback, Ms. Navilliat waited until October 5, 2018 to solicit teacher input, and Mr. Klepacki waited until October 17, 2018, only two days prior to the expiration of the statutory deadline and one day before the scheduled IEP team meeting to review the assessments. San Marcos's assessors delayed in initiating arrangements for standardized testing, obtaining requisite teacher and Parent feedback, and following-up on information requests. The evidence demonstrated a general lack of urgency by San Marcos to complete the assessments by October 19, 2018.

39. Mother did not unreasonably interfere with San Marcos' access to Student. Mother insisted that Student be assessed at Winston when first contacted to schedule days of standardized testing on September 18, 2018, but the day after Ms. Sestina explained on September 24, 2018, that Parents were required to make Student available

at a location of San Marco's choice, Mother agreed to have Student assessed at San Marcos High (and subsequently at San Marco's district office), a delay of only 6 days. Mother spent one week attempting to coordinate with Winston on the best times for Student to miss academic instruction, but when Winston was untimely responding to her, she agreed to make Student available *within the dates originally proposed by San Marcos*, resulting in no net delay. San Marcos had 60 days to schedule standardized testing with Parent, and San Marcos failed to cite any authority that entitles it to a day-for-day extension for every time there is back and forth on scheduling assessment events, or every time an assessment event needs to be rescheduled due to missed communications or changed schedules. This Decision declines to extend the timeline due to a few days of misunderstanding between San Marcos and Mother regarding the choice of location for assessment, or the two days lost due to changing the location from the San Marcos district office to Winston.

40. All evidence submitted regarding the communications between Winston and San Marcos established that Winston was prompt in responding to San Marcos's assessors. Except for requesting an initial one-week delay in observations, Winston promptly made Student available for observations and testing on the dates requested. The short delay in classroom observations for Student to settle in to his high school classes, which was reasonable, did not in any way prevent San Marcos from moving forward with the assessments by gathering information from Winston teachers and Parents, or scheduling standardized assessments with Mother.

41. The statutory period for conducting the assessments and reviewing those assessments at an IEP team meeting ended on October 19, 2018. Parents were not provided a draft of the multidisciplinary report on most of the assessments until November 28, 2018, and an IEP team meeting was not held to review the multidisciplinary report until December 6, 2018, and the final review of the assessments

identified in the June 27, 2018 assessment plan did not take place until January 16, 2019. Even excluding the 19 days of San Marcos's winter recess, the final review of the assessments delineated in the June 27, 2018 assessment plan occurred on January 16, 2019, 71 days late.

42. Although the IEP team reviewed the psychoeducational assessment at the December 6, 2018 IEP team meeting, and Mr. Klepacki recommended an emotional regulation goals and educationally-related mental health services to address that goal at the meeting, no additional services were offered until the January 16, 2019 IEP team meeting. The additional services of a full-time one-on-one behaviorally trained aide and weekly mental health services were based, at least in part, on the functional behavior analysis and special circumstances aide assessment reviewed on January 16, 2019. Review of those two assessments was due on October 19, 2018, the IEP team – including Parents – did not and could not timely decide if Student required different or additional services to meet his educational needs until January 16, 2019, because it did not have necessary information. The cumulative delays in review of assessments from October 19, 2018, through January 16, 2019, significantly interfered with the opportunity of Parents to participate in the decision making and timely formation of San Marcos's revised offer of special education and related services.

43. Student does not challenge the appropriateness of the June 27, 2018 IEP, and there was no evidence of a denial of educational benefit under the *Rowley* standard when the 2018-2019 school year began. However, the IEP team review of the assessments conducted pursuant to the signed June 27, 2018, assessment plan resulted in a January 16, 2019, amendment of Student's IEP to offer of additional services, which established that Student was deprived of educational benefit he would have received from a timely assessment review for the period of delay in conducting that review.

44. In summary, San Marcos's delay in completing and reviewing the

assessments in the June 27, 2018 assessment plan constituted a procedural error that significantly impeded the opportunity of Parents to participate in the decision making process of providing a FAPE to Student, and deprived Student of educational benefits. Accordingly, this error denied Student a FAPE from October 18, 2018, through January 16, 2019, less the days of San Marcos's winter recess.

45. Student met his burden of proving by a preponderance of the evidence that San Marcos denied him a FAPE by failing to timely complete the assessments identified in the June 27, 2018 assessment plan.

ISSUE 2: APPROPRIATENESS OF SAN MARCOS'S PSYCHOEDUCATIONAL ASSESSMENT

46. District contends that its psychoeducational assessment of Student was appropriate, and that Student is not entitled to an independent educational evaluation. Student contends that the psychoeducational assessment was riddled with scoring errors and untimely completed.

47. Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (*Id.*) The assessment plan must: be in language easily understood by the general public, be provided in the native language of the parent, explain the types of assessments the district proposes to conduct, and state that an IEP will not result from the assessment without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

48. In conducting an assessment, the school district must use a variety of

assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The assessor must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).)

49. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

50. Individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area," must conduct assessments of students' suspected disabilities. (Ed. Code §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not

including speech/language testing where concern prompting assessment was deficit in reading skills].)

51. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) A psychoeducational report must include educationally relevant health information. (See Ed. Code, § 56327.)

52. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park, supra*, 464 F.3d at 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

53. The weight of the evidence established that San Marcos provided Parents with proper notice of the psychoeducational assessment and obtained Parents' consent to assessment. It also established that San Marcos conducted a psychoeducational assessment that complied with all federal and State requirements except one: San

Marcos did not complete the assessment, provide Parents with an assessment report, and convene an IEP team meeting to review the assessment within the statutory timeframe, as detailed in Issue 1(b), above.

54. Mr. Klepacki was properly credentialed and had the necessary experience to conduct a psychoeducational assessment of Student. He was knowledgeable about Student's disabilities of ADHD, autism, and anxiety. He used technically sound testing instruments and a variety of assessment tools, including observation, interview, and standardized and non-standardized instruments to evaluate Student in the areas of cognitive development, adaptive skills, and social emotional functioning. The assessment instruments chosen were designed to provide information to the IEP team about Student's special education eligibility, related services, and accommodations for his IEP. None of the test instruments were racially, culturally, or sexually biased. The assessments were administered in Student's native language of English. The assessment tools were used for the purposes for which the assessments were valid and reliable, and were administered in accordance the producer's instructions. Mr. Klepacki did not use the most current version of an executive functioning assessment, but that assessment tool nonetheless provided the IEP team with current, valid, and reliable information regarding Student's planning and organizational deficits.

55. Mr. Klepacki's assessment was sufficiently comprehensive to identify all of Student's special education and related service needs in the areas of cognitive functioning, adaptive living skills, and social-emotional functioning, whether or not commonly linked to Student's disabilities. His assessment results were valid and provided useful information regarding Student's cognitive abilities, adaptive skills, and social-emotional functioning. The assessment results identified Student's impulsivity, distractibility, social skills deficits, and anxiety, all of which adversely affected Student's educational progress and performance.

56. Mr. Klepacki provided Parents and Student's IEP team with a comprehensive report of the psychoeducational assessment, which included the basis upon which his determinations were made, including: relevant observations of behavior; Student's academic and social functioning; educationally relevant health, development, and medical findings; and a determination that the assessment results were not primarily due to environmental, cultural, or economic factors. The psychoeducational assessment report described Student's relevant behavior in an appropriate setting and the relationship of Student's behavior to his academic and social-emotional functioning.

57. San Marcos's December 6, 2018 IEP team members summarized Mr. Klepacki's psychoeducational findings in relevant portions of Student's IEP document and Mr. Klepacki provided recommendations based on his assessment to the IEP team. The San Marcos IEP team members used the psychoeducational assessment to determine Student's present levels of performance and propose goals, and made a revised offer of FAPE in the January 16, 2019 IEP amendment. The January 16, 2019 IEP team, including Parents and Student's counsel, considered the psychoeducational assessment in developing the IEP amendment.

58. Mr. Klepacki's psychoeducational assessment results were consistent with those of San Dieguito, and Student did not demonstrate that the psychoeducational assessment failed to uncover any cognitive development, adaptive living skills, or social-emotional functioning deficits that were not already known to Parents and San Marcos as a result of San Dieguito's assessment.

59. However, as discussed at Issue 1(b), the delay in completing the psychoeducational assessment report, considering the assessment findings at an IEP team meeting, and offering Student additional services based upon the psychoeducational assessment, deprived Student of educational benefit and significantly interfered with Parents' opportunity to participate in the formulation of

Student's revised IEP from October 20, 2018, through January 16, 2019, resulting in a denial of FAPE.

60. San Marcos failed to meet its burden of proving by a preponderance of the evidence that it complied with all legal requirements for conducting the psychoeducational assessment of Student, such that Student is not entitled to an independent educational evaluation at public expense.

REMEDIES

61. Student requests tuition for the 2017-2018 and 2018-2019 school years at Winston, including mileage for one round-trip per day of attendance. Student also seeks an independent psychoeducational evaluation underlying San Marcos's due process hearing request.

62. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

63. Courts may employ equitable remedies to craft "appropriate relief" for a party. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services

the school district should have supplied in the first place." (*Ibid.*)

64. 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 offer 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); *Burlington, supra*, 471 U.S. at pp. 369-371.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit, even if not all necessary educational benefits are provided. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159 (*C.B.*)) The parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

65. The authority to grant reimbursement is discretionary, and equitable considerations relating to the reasonableness of the action taken by the parents is relevant in fashioning relief. (*Frank G. v. Bd. of Educ. of Hyde Park* (2d Cir. 2006) 459 F.3d 356, 363-364; *Burlington, supra*, 471 U.S. at p. 374 [105 S.Ct. at p. 1996].) Reimbursement may be reduced upon a judicial finding of unreasonableness with respect to action taken by the parents. (20 U.S.C. § 1412(a)(10)(C)(iii)(III).)

66. The U.S. Department of Education, Office of Special Education Programs, has interpreted the IDEA's regulations regarding parentally placed children to allow that, when children with disabilities were placed at private school by their parents without the consent of, or referral by, the public agency because the parents believed that the public agency failed to offer their child a FAPE, "[i]f a hearing officer or court agrees with the parent and finds that there has been a denial of FAPE, the parents may be able to obtain tuition reimbursement for part or all of the cost of their unilateral private school placement. (*Memo 00-14, Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools* (OSEP, May

4, 2000) (*Memo 00-14*), citing former 34 C.F.R. § 300.403(c.) However, it also explained that if parents make clear their intention to enroll their child at a private school and that they are not interested in a public school program or placement for their child, the public agency need not develop an IEP for the child. (*Memo 00-14*)

67. Here, Student's initial assessment was timely completed by San Dieguito on January 31, 2018, and Parents are not entitled to reimbursement for Student's attendance at Winston prior to that date for any reason. Parents unilaterally placed Student at Winston before the beginning of the 2017-2018 school year in August 2017, and Student's attendance at Winston prior to January 31, 2018, was not the result of a denial of FAPE by San Marcos.

68. By January 31, 2018, Parents were no longer seriously interested in a public school program for the remainder of the 2017-2018 school year. Parents told San Dieguito participants at the January 31, 2018 meeting that they were no longer sure they wanted to enroll Student in public school, and did not contact San Marcos to request a FAPE offer until two months later, on March 30, 2018, just as spring break was starting and when the 2017-2018 school year was almost over. Even then, Parents requested San Marcos offer Student a FAPE for the 2018-2019 school year, and not for the 2017-2018 school year. As Parents were not requesting a FAPE offer from San Marcos for 2017-2018, because they did not intend to enroll Student in a public program for the remainder of the 2017-2018 school year, San Marcos had no obligation to offer Student a FAPE for the 2017-2018 school year, per *Memo 00-14*. If Parents had wanted an offer of special education and services for the 2017-2018 school year, they acted unreasonably in delaying that request to San Marcos after Student was found eligible, seeking information on high school placements, and in expressly requesting services for the request to the 2018-2019 school year. Accordingly, Parents are not entitled to reimbursement from San Marcos for Student's tuition at Winston for the

2017-2018 school year.

69. San Marcos made an offer of special education and related services for the 2018-2019 school year in the June 27, 2018 IEP, well before the start of the 2018-2019 school year. Parents disagreed with that offer, and unilaterally enrolled Student at Winston for the 2018-2019 school year, after giving 10-days' notice, because they believed San Marcos had failed to offer Student a FAPE. However, the appropriateness of the June 27, 2018 offer of special education and related services was not in dispute in this due process matter, and Student was not required to, and did not, prove that he was denied a FAPE by the June 27, 2018 offer. The January 16, 2019 IEP amendment was offered after Student's complaint was filed, and was similarly not challenged in this proceeding. Accordingly, it cannot be determined for purposes of awarding a remedy that San Marcos's procedural errors caused a deprivation of educational benefit during the 2018-2019 school year prior to October 19, 2018.

70. However, San Marcos's delay in completing the assessments identified in the June 27, 2018 assessment plan, from October 20, 2018, through January 16, 2019, resulted in a loss of educational benefit and significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student. Student's mood dysregulation and problem behaviors had increased during his transition to high school, ultimately resulting in San Marcos's January 16, 2019 amendment to Student's June 27, 2018 offer of FAPE to add a full-day one-on-one behavioral aide and educationally-related mental health services. These additional services could have, and should have, been presented to Parents and considered at an IEP team meeting by October 19, 2018. Parents were deprived of the opportunity to timely review the assessments, particularly the functional behavior analysis and special circumstances aide assessment upon which the increased services were based, and to discuss the ramifications of those assessments results for Student's educational

program, for a period of 90 days, less the days of San Marcos' winter recess. Student was also deprived of a timely IEP amendment to meet his changing educational needs. Accordingly, Student is awarded reimbursement to Parents for tuition at Winston for actual days of attendance from October 20, 2018, through January 16, 2019, excluding the days of San Marcos's winter recess from December 21, 2018, through January 11, 2019.

71. Mother's testimony regarding Student's transportation between home and Winston was very vague, and it was not convincing with regard to Parents' contribution, if any, to Student's carpool. The evidence did establish that when Mother drove, it was no more than one round-trip per day, but the actual number of trips driven by Parents could not be determined. Accordingly, travel reimbursement is awarded for no more than one round-trip between Student's home and Winston for each school day of Student's actual attendance at Winston upon presentation of appropriate documentation to San Marcos of actual trips driven by Mother.

72. Student filed his due process hearing request before the ongoing assessments were completed, and before the review and revised offer of special education and related services on January 16, 2019. Student did not challenge the appropriateness of the June 27, 2018 offer in effect at the time of filing, and filed before the new offer had been made in light of the reassessment results. Student sought a remedy of 2018-2019 tuition reimbursement that was almost entirely prospective, and based on results and actions that did not occur until after the complaint was filed, and could not be encompassed within the complaint. The assessments were only six days late at the time of filing. Nonetheless, OAH has broad power to award equitable remedies, taking into account circumstances occurring after a complaint was filed, and this Decision finds that partial tuition reimbursement for the period of delay in completing and reviewing the assessments at an IEP team meeting is appropriate relief

for that delay.

ORDER

1. After this Decision is issued, within 45 days of receiving from Parents reasonable proof of attendance and payment, San Marcos shall reimburse Parents for the cost of tuition at Winston for Student's actual positive days of attendance from October 20, 2018, through January 16, 2019, excluding the days of San Marcos's winter recess from December 21, 2018, through January 11, 2019.

2. After this Decision is issued, within 45 days of receiving from Parents reasonable proof of Mother having driven Student to or from Winston on school days of actual attendance, San Marcos shall reimburse Parents for mileage on those trips. Reimbursement is limited to direct trips between Student's home and Winston, from October 20, 2018, through January 16, 2019, and excluding December 21, 2018, through January 11, 2019, at the prevailing federal reimbursement rate then in effect, not to exceed one round-trip per day.

3. San Marcos's psychoeducational assessment was not timely completed and reviewed at an IEP team meeting. Student is entitled to an independent psychoeducational assessment funded by San Marcos, in accordance with SELPA guidelines.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, San Marcos prevailed on Issue 1(a), San Marcos prevailed in part, and Student prevailed in part, on Issue 1(b). Student prevailed on Issue 2.

RIGHT TO APPEAL THIS DECISION

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

Dated: April 26, 2019

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings