

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MARCOS UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2018080080

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on August 2, 2018, naming San Marcos Unified School District. On August 30, 2018, OAH granted the parties joint request to continue the hearing. On October 15, 2018, OAH granted Student's request to amend his complaint.¹

Administrative Law Judge Paul H. Kamoroff heard the matter in San Marcos, California, on December 11, 12, 13, 18, and 19, 2018.

Soo J. Yun, Attorney at Law, represented Student. Parents attended the hearing. Student did not attend the hearing.

Sarah E. Orloff, Attorney at Law, represented San Marcos. Dawn Dully, San Marcos' Executive Director of Special Education, attended most days of the hearing. Amanda Carlson, San Marcos' program specialist, attended the remaining days.

At the request of the parties, OAH continued this matter for closing briefs. The

¹ District filed its response to Student's amended complaint on October 24, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

record closed on January 7, 2019, upon receipt of written closing briefs.

ISSUES²

1. Did San Marcos deny Student a free appropriate public education from August 2, 2016, to October 11, 2018, by:
 - a. failing to provide Parents with progress and information in a timely manner for meaningful participation in the development of Student's individualized education program; and
 - b. deprive Parents the opportunity to participate in the decision making process about Student's placement and behavior services?
2. Did San Marcos deny Student a FAPE from August 2, 2016, to October 11, 2018, by failing to offer appropriate: (a) behavior intervention and supports; (b) speech and language services; and (c) and occupational therapy services?
3. Did San Marcos deny Student a FAPE by failing to offer appropriate placement in the least restrictive environment at the June 13, 2018 IEP team meeting?
4. Did San Marcos fail to file for due process hearing without unnecessary delay following Parents' request for an independent educational evaluation in June 2018?

² At the beginning of the hearing, Student withdrew issues alleging that San Marcos failed to provide Parents assessment information, and the opportunity to participate in the development of Student's speech and language and occupational therapy services. The remaining issues have been rephrased and reorganized for clarity. The ALJ has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

SUMMARY OF DECISION

Student had autism and related delays in academics and behavior. As a result, he was unable to access the general education curriculum. Student asserts that he should remain in a mild/moderate special day class, regardless of his inability to benefit from the general education curriculum utilized in that program. District asserts that Student requires a modified curriculum that is provided in a moderate/severe special day class.

The evidence overwhelmingly showed that a moderate/severe special day class with a modified curriculum was appropriate for Student in light of his circumstances.

The Decision finds that Student's IEPs were reasonably calculated to provide him a FAPE, and that Parents were able to meaningfully participate in the development of Student's educational program. The Decision also finds that San Marcos timely agreed to fund Parents' request for an independent educational evaluation.

FACTUAL FINDINGS

THE STUDENT

1. Student was a seven-year-old boy whose parents resided within San Marcos's boundaries during the applicable time frame. Since 2014, Student received special education under the primary eligibility category autism and, beginning in 2018, the secondary category speech and language impairment.

2. Autism is a spectrum developmental disorder characterized by difficulties with social interaction, communication, and behavior. Speech and language impairment is identified by an articulation or fluency disorder, or abnormal voice, or expressive or receptive language disorder. As a result of his disabilities, Student demonstrated behavior difficulty and cognitive skills in the low range. His disabilities impacted his ability to access the general education curriculum even with accommodations and modifications.

3. Student was first found eligible for special education by the San Diego Unified School District in December 2014. Student was just turning four years old and displayed maladaptive behaviors, delays in pre-academics, and disorders in receptive and expressive language. Student began attending San Marcos during the 2015-2016 school year, preschool.

4. San Marcos held IEP team meetings for Student on March 9, and 18, 2016, the last annual IEP before the time frame in dispute. Student's ability to participate in general education was substantially impacted by delays in attention, adaptive skills, pre-academics, expressive language, social skills, and behavior. Although Korean was primarily spoken at Student's home, Student spoke English at school and his inability to learn in general education was not the result of second language acquisition difficulty.

5. Along with Parents, education specialist Leslie Upson; a preschool coordinator; a school occupational therapist; and a school speech-language pathologist, attended the IEP team meetings. Parents were provided a copy of procedural safeguards and encouraged to ask questions during the meetings. The team reviewed Student's progress toward prior goals and his present levels of performance. With Parents' input, the team developed seven new annual goals in the areas of social language; expressive language; receptive language; fine motor skills; social-emotional functioning; attention; and behavior. To meet those goals, San Marcos offered Student various accommodations and the following services: specialized academic instruction, 720 minutes weekly; speech and language therapy 1,280 minutes per year; occupational therapy 450 minutes per year; and extended school year services. Parents consented to the March 2016 IEP.

6. San Marcos held amendment IEP team meetings for Student on September 7, and 16, 2016. Student was attending a moderate/severe preschool special day class at Carrillo Elementary School, a San Marcos school. Mother attended the

meetings, along with Ms. Upson, who taught Student's class; school psychologist Jason Clark; and the school principal. Like each IEP team meeting, including amendments, San Marcos ensured Parents attendance; provided Parents a copy of procedural safeguards; and Parents contributed to the development of Student's educational program. The amendment meetings were called to address Student's behavior challenges. As the grade level work increased, Student became more distracted and attention-seeking. Serious behaviors included eloping from the classroom and from tasks while in the classroom; lying on the floor; climbing on furniture; and jumping off of furniture.

7. Ms. Upson shared prior and current interventions and strategies, including visual supports, schedules, a token economy, and other reinforcers, in addition to individualized support by staff during class. The ratio of students to adults in the classroom was no more than two-to-one, and often one-to-one. The special day class was small, self-contained, and used various academic and behavior strategies.

8. San Marcos carefully considered Student's unique needs and proposed a functional behavior assessment to address Student's more excessive behaviors. The school psychologist explained the functional behavior assessment process to Mother and, along with Ms. Upson, answered any questions she had regarding Student's behavior and classroom performance. Mother consented to the functional behavior assessment and amendment IEP.

9. San Marcos selected school psychologist Mr. Clark and education specialist Ms. Upson to conduct the functional behavior assessment. The assessors reviewed school records; interviewed school staff and Parents; observed Student at school; and collected data over two weeks in September 2016. The assessors identified three primary, excessive behaviors: eloping, climbing, and throwing objects. During the two weeks of data collection, Student eloped 112 times, approximately 12 times per day. Student climbed on furniture 60 times, seven times per day. Student threw classroom

materials, including pencils, papers, chalk, and blocks, 22 times. These behaviors disrupted the learning of Student and others, and created an unsafe environment.

10. Mr. Clark and Ms. Upson examined environmental factors and antecedents and developed a behavior intervention plan to diminish the targeted behaviors. The five-page plan meticulously examined the duration and frequency of the behaviors; predictors for behavior; changes to structure and supports to address the behaviors; the function of the behaviors; selected replacement behaviors; proposed modifications to teaching strategies and materials; reinforcement procedures; reactive strategies if the behaviors reoccurred; and established communication provisions for teachers, staff, and Parents.

11. San Marcos timely convened an amendment IEP team meeting on October 19, 2016, to review the functional behavior assessment. Parents attended, along with Ms. Upson; the school speech-language pathologist; a school psychologist; the principal; and a school occupational therapist. In addition, Student's private behavior therapist attended the meeting. The IEP team jointly reviewed the functional behavior assessment.

12. Parents participated in the IEP team's review of the behavior assessment and plan, and the development of a new behavior goal. The IEP team determined that Student did not require an individual aide because of the structure and individual support embedded in the classroom. San Marcos made changes to Student's educational program based upon Parents' requests, including the addition of a weekly communication log between the teacher and Parents. Parents consented to the IEP and behavior intervention plan.

13. During hearing, Ms. Upson and the school's Board Certified Behavior Analyst, Katerina Dewing, testified in support of the functional behavior assessment and behavior intervention plan. In sum, the behavior intervention plan effectively curtailed the targeted behaviors. By the end of the school year, Student no longer threw objects

or climbed furniture. His elopement from the classroom and his in-class elopement significantly decreased. No persuasive evidence was provided that impeached the validity of the functional behavior assessment, the effectiveness of the behavior intervention plan, or the testimony of Ms. Upson or Ms. Dewing. Rather, Student's expert Betty Jo Freeman, Ph.D. testified that the behavior intervention plan was well-written and had successfully decreased the targeted behaviors.

14. San Marcos convened an annual IEP team meeting for Student on February 15, and March 23, 2017. Student was five years old. Parents attended the annual IEP team meetings with Student's private speech-language therapist Jamie Segal, and private occupational therapist Angela Ochoa.³ The following people attended for San Marcos: Ms. Upson; a special education coordinator; an occupational therapist; a speech-language pathologist; behavior specialist Ms. Dewing; and special education teacher Caitlin Livingston.

15. The IEP team reviewed Student's present levels of performance. Student continued to exhibit substantial delays related to autism, which impacted his ability to participate in general education. Student was distracted during class and still engaged in off-task behaviors, although the behaviors targeted by his behavior intervention plan had substantially decreased. Student now demonstrated the targeted behaviors less than three times per week. Nonetheless, Student required assistance to transition between tasks and to complete tasks.

16. Student had improved in the area of occupational therapy. He benefited from the sensory breaks embedded in the classroom, and the teacher and occupational therapist worked together to trial different sensory tools and strategies in the classroom.

17. The IEP team discussed the appropriateness of an individual aide. The IEP

³ Ms. Segal and Ms. Ochoa did not testify during the hearing.

team determined that an aide would cause Student to become too prompt dependent, and an individual aide was unnecessary given the structure of the special day classroom. During hearing, Ms. Upson provided uncontroverted testimony that her moderate/severe special day class was an appropriate fit for Student in light of his delays in attention, academics, behavior, and language. The high adult-to-student ratio embedded in the classroom provided Student small group and individual instruction, without the need for an individual aide.

18. The IEP team identified deficits in fine motor skills, attention, social interaction, expressive language, social-emotional functioning, and behavior. To meet Student's unique needs, the IEP team collaborated to develop eight goals in the areas of communication; attention, behavior; prevocational/transitions; fine motor skills; and social skills. To meet those goals, San Marcos offered Student various accommodations and the following services: specialized academic instruction 720 minutes weekly for the remainder of the 2016-2017 school year, with an increase to 895 minutes weekly for the 2017-2018 school year; three, 15-minute sessions per week of speech and language services; 450 minutes per year of occupational therapy; and extended school year services.

19. The 2017-2018 school year would begin prior to the next annual IEP team meeting. For that school year, kindergarten, San Marcos offered a mild/moderate special day class entitled BASE, designed to address behavior, academics, social skills, and executive functioning, located at Double Peak Elementary, a San Marcos school. BASE had nine students, most of whom attended part of the day and also attended general education classes. Approximately three students attended BASE full time. A special education teacher, three adult aides, and a behavior specialist were embedded in the program. The BASE class was taught by Ms. Livingston, who attended the March 2017 IEP team meeting, to describe her classroom and to answer any questions Parents had

regarding the BASE program. Parents requested, and San Marcos agreed, to observe the BASE classroom.

20. San Marcos held a subsequent IEP team meeting for Student on April 21, 2017, to discuss Parents' concerns. Parents had yet to agree to the annual IEP, and San Marcos staff answered Parents' various questions regarding the proposed goals and Student's educational program. Student had continued improving in functional communication and behavior since the last meeting. The team agreed to revise the goals and IEP offer to address Parents concerns. For example, San Marcos added monthly clinic meetings, classroom data collection, and a more robust home-to-school communications system. The team, especially the behavior specialist, held a thorough discussion regarding Student's unique needs, and Parents were active participants in the discussion.

21. San Marcos held another IEP team meeting on April 25, 2017, to discuss Parents' concerns. The IEP team again answered Parents' questions and made additional revisions to the proposed services to address Parents' concerns. For example, San Marcos added formal classroom observations by its behavior specialist to the IEP offer, in addition to the behavior support embedded in the classroom. San Marcos concluded that Student required a self-contained special day classroom with embedded behavioral supports and behavioral specialist support in the BASE classroom for Kindergarten. Parents consented to the IEP.

22. San Marcos held an addendum IEP team meeting for Student on September 26, 2017, to review his transition from preschool to Kindergarten. Parents and Ms. Livingston attended, along with a San Marcos school psychologist; a general education teacher; a speech-language pathologist; an occupational therapist; and a program coordinator. Student had transitioned well into the BASE program. Parents shared that Student was excited to go to school and his at-home tantrums had

decreased. Student was progressing in occupational therapy and no longer required a pencil grip or compression vest. Student was more attentive during speech therapy, and the team agreed to increase the length of his speech and language therapy sessions, to two, 30-minute sessions per week. Part of each session was individual and part was in a small group. Academically, Student was still below academic content standards, but had shown improvement. For example, he was using longer sentences and engaged his peers when prompted and provided reinforcement. Like every IEP team meeting, Parents actively participated in the team discussion and the development of Student's educational program. Parents consented to the IEP addendum.

23. San Marcos conducted Student's triennial assessments in December 2017. Student was five years, 11 months old. San Marcos selected school psychologist Alexis Alegre; Ms. Livingston; licensed speech-language pathologist Bonnie Denny; and registered occupational therapist Patricia Palomar to conduct the assessments. The school assessors observed Student; interviewed Student, Parents, teachers, and private therapists; reviewed school records; collected data using inventories; and formally assessed Student. Assessments included the Kaufman Assessment Battery for Children, Second Edition; Autism Spectrum Rating Scale; Kaufman Tests of Educational Achievement; Developmental Assessment of Younger Children; Adaptive Behavior Assessment System, Third Edition; Macarthur-Bates Communication Development Inventories' Language Samples; and the Goldman Fristoe Test of Articulation. Each assessor was experienced and qualified to assess in the area she was responsible for assessing, properly followed the testing protocols, and obtained valid and reliable results.

24. Standardized testing revealed that Student was functioning in the below average range of intellectual ability. Per the Kaufman Assessment Battery for Children, Second Edition, a comprehensive set of individually administered tests for measuring

cognitive abilities and mental processing, Student demonstrated abilities below the first percentile, meaning that Student was more delayed than over 99 percent of his same-aged peers. Ms. Alegre was concerned by the low scores obtained by the Kaufman Assessment and, as a careful assessor, elected to administer additional testing, the Developmental Assessment of Young Children – Second Edition. However, the DAYC-2 yielded similar results: Student was substantially delayed in cognition, communication, and social-emotional functioning.

25. Academically, Student was far below average in every area measured. In speech and language, Student was significantly below average in receptive and expressive language, communication, and articulation.

26. In occupational therapy, Student demonstrated average abilities in all areas of fine motor skills, including visual motor, visual perceptual, and fine motor/dexterity. Student copied shapes quickly, visually scanned adequately, and correctly placed pegs in a pegboard.

27. Student met the eligibility criteria for autism. He had difficulty developing peer relationships, lacked social/emotional reciprocity, and demonstrated marked impairment in non-verbal behaviors including eye contact, facial expressions, and gestures. Student also displayed preoccupation with stereotyped and restricted patterns of interest and inflexible to change in routines. These difficulties negatively impacted Student's educational performance and required the support of special education.

28. Student also met the eligibility criteria for speech and language impairment. Student had an articulation disorder that significantly interfered with his ability to produce speech and to communicate. He also fell below the seventh percentile in the areas of expressive and receptive language.

29. San Marcos held three IEP team meetings, on December 5 and 15, 2017, and January 19, 2018, to review Student's triennial assessments and educational

program. Student was turning six years old and attending the BASE program. Parents attended the triennial IEP team meeting, along with Ms. Alegre; Ms. Denny; the assistant principal; Ms. Dewing; behavior interventionist Ms. King; occupational therapist Steve Ferrang; Ms. Livingston; and a general education teacher. The school assessors reviewed the triennial assessments. Each IEP team member, including Parents, participated in the review of each assessment and a comprehensive discussion of Student's educational performance.

30. Student could learn rote skills but was far below kindergarten standards in reading, writing, and math. Student was below his peers in the BASE program, who, with accommodations, benefited from the general education curriculum utilized in BASE. Student required prompting, redirection, and a modified curriculum.

31. While there had been a trend in decreased maladaptive behaviors during the prior year, and during the beginning of the 2017-2018 school year, Student's maladaptive behaviors increased when the BASE class switched from a review of prior, preschool material, to new, kindergarten-level work. Student became increasingly distracted and inattentive when presented new or grade-level material.

32. Although Student's prior annual goals were not due until February 2018, the IEP team reviewed progress towards those goals. Student met the scheduled benchmarks for every goal, and had completely met two speech and language goals, and goals in social skills, attention/behavior, fine motor skills, and prevocational/transition. Student had made measurable progress in each area of deficit.

33. Overall, Student presented delays in reading, math, classroom behavior, social skills, executive functioning, expressive language, comprehension, and articulation. To remediate those deficits, the IEP team developed 12 new goals in the areas of expressive language, reading, writing, attention, math, sorting, following a schedule, task completion, independence, behavior, pragmatics, social interaction,

receptive language, and articulation. The goals were carefully considered and developed by qualified team members with direct input from Parents. No area of deficit was left unaddressed. To meet those goals, the IEP team offered Student substantial accommodations, some modifications, and the following services: individual speech and language therapy, 1,000 minutes yearly; group speech and language therapy, 350 minutes per year; occupational therapy, 450 minutes per year; individual specialized academic instruction in the general education classroom, 195 minutes weekly; group specialized academic instruction in the BASE classroom, 745 minutes weekly; transportation; and extended school year services.

34. Finally, the IEP team reviewed and revised Student's behavior intervention plan. The prior behavior plan had successfully eliminated two of the targeted behaviors; throwing objects and climbing on furniture. Student still eloped, but much less frequently than previously reported. The revised behavior plan targeted eloping from the classroom and elopement from instruction while in the classroom. Like the prior behavior plan, the revised plan was developed by qualified staff with Parents' input, and carefully considered the function of behavior, environmental factors; necessary changes; replacement behaviors; teaching strategies; reinforcement procedures; and response to behavior strategies.

35. The triennial IEP meaningfully addressed each of Student's unique needs. Parents did not consent to the IEP offer because they had concerns regarding Student's cognitive abilities and requested nonverbal intelligence testing. The IEP team agreed to Parents' request and San Marcos offered Parents an assessment plan for additional testing, to which Parents consented.

36. San Marcos conducted additional testing of Student in the areas of cognition and gross motor skills in March 2018. School psychologist Ms. Alegre administered the cognitive testing, with the help of another, qualified school

psychologist. School adapted physical education specialist Anthony Dunne administered the gross motor testing. Ms. Alegre selected the Universal Nonverbal Intelligence Test – Second Edition, and the Test of Nonverbal Intelligence – Fourth Edition, for the cognitive testing. Mr. Dunne administered the Test of Gross Motor Development. The assessors were qualified and experienced to conduct the tests they selected and each followed the testing protocols.

37. The assessors were unable to complete the Universal Nonverbal Intelligence Test. Even with substantial modifications, Student was unable to complete the tasks presented. The assessors therefore administered another non-verbal intelligence assessment, the Test of Nonverbal Intelligence. Student was significantly distracted during testing, but, with substantial assistance, completed this test. Nonverbal cognitive results fell in the poor range, similar to prior testing. Student also had below average gross motor skills.

38. San Marcos held an amendment IEP team meeting on March 15, 2018, to review the additional testing. Parents attended, with Ms. Alegre; Ms. Denny; a general education teacher; Mr. Dunne; Ms. Dewing; Ms. Livingston; and Mr. Ferrang. Ms. Alegre and Mr. Dunne reviewed the results of their testing and answered various questions posed by Parents and others regarding their testing. The teachers and therapists each shared Student's progress in class and during therapy sessions. Based on the assessment results and information presented during the amendment meeting, San Marcos added adapted physical education, 900 minutes yearly, to Student's IEP. Parents consented to the IEP.

39. San Marcos held another amendment IEP team meeting for Student on May 23, 2018. Student was six years old and struggling in the classroom. He was far below his peers in the BASE program. While his peers could access the general education curriculum utilized in BASE, Ms. Livingston had to substantially modify

Student's work. Even with substantial modifications, Student could not access the material. Ms. Livingston frequently used her own money to purchase alternative materials just for Student, so he could benefit from BASE. Ms. Livingston was a caring and ambitious teacher who wanted to accommodate Student in her classroom, and attempted to do so throughout the school year. However, by the end of the 2017-2018 school year, it was clear that Student required an alternative curriculum, like the one utilized in San Marcos' moderate/severe special day class. For those reasons, San Marcos offered to transition Student to its moderate/severe special day class during the extended school year and for the 2018-2019 school year. No other changes to Student's IEP were offered. San Marcos offered for Student to attend a similarly structured classroom with identical services, but with a modified curriculum and materials at his ability level. Parents did not consent to the amendment IEP.

40. San Marcos convened another amendment IEP team meeting on June 13, 2018, to further discuss the placement offer with Parents. Parents expressed their desire for Student to stay in the BASE classroom. Teacher and school staff reported that Student struggled in BASE, and, in light of his circumstances, required the alternative curriculum and modified materials utilized in the moderate/severe classroom. Parents did not consent to the IEP, and, on August 2, 2018, filed the present complaint to keep him in the BASE classroom.

PARENTS' ABILITY TO MEANINGFULLY PARTICIPATE IN THE IEP PROCESS

41. During hearing, Student presented no evidence to support his claim that Parents were prevented from meaningfully participating in the development of Student's educational program. To the contrary, Mother testified that she actively participated during each IEP team meeting. No one prevented her or Father from attending, bringing private therapists, asking questions, sharing information, or helping to develop Student's educational program.

42. In addition to the frequent IEP team meetings, San Marcos provided Parents weekly and monthly behavior and communication logs. San Marcos also frequently provided behavior charts that graphed Students' daily behaviors, copiously compiled by teachers and staff. Moreover, Parents emailed teachers and school staff almost daily, sometimes several times per day. And teachers and staff quickly responded to each email, with substantive information. Not a day passed where Parents were not actively involved in the development and provision of every aspect of Student's educational program.

STUDENT'S WITNESSES

43. In addition to Mother, Student called Karen Schnee and Dr. Betty Jo Freeman as witnesses. Ms. Schnee was an experienced speech-language pathologist. She had master's degrees in special education and communication disorders. She was a licensed speech pathologist since 1985, and had conducted numerous speech and language assessments for school districts and for her private practice.

44. Ms. Schnee first met Student in November 2018, as part of a private assessment. Her assessment was first provided to San Marcos during the hearing. As part of her assessment, she briefly observed Student at school on November 29, 2018. San Marcos had not yet had the opportunity to review her assessment during an IEP team meeting.

45. During the hearing, Ms. Schnee did not formally review her assessment. And she did not offer any criticism of San Marcos' speech and language assessment. In significant part, Ms. Schnee's assessment mirrored the results of Ms. Denny's assessment. Each assessor found that Student had significant deficits in expressive and receptive language, and articulation.

46. Ms. Schnee was not familiar with Student's IEP goals or services. For example, she testified that San Marcos should add group speech and language services,

pushed into the classroom to his IEP; in addition to individual services. This overlooked that each of Student's IEPs offered both individual and group speech and language services. In particular, Student's March 2018 IEP offered group speech and language, pushed into the classroom, in addition to individual services. Ms. Schnee also incorrectly testified that Student had not met any of his speech and language goals. Overall, Ms. Schnee provided little insight regarding Student's speech and language needs.

47. Most of Ms. Schnee's testimony pertained to Student's behavior services. Although Ms. Schnee was not a behavior specialist, she opined that Student's behavior intervention plan was defective because it failed to identify attention as a targeted behavior. This testimony contradicted Student's expert Dr. Freeman, who testified that Student's behavior intervention plan was well-written. It was also less persuasive than testimony provided by San Marcos witnesses, Ms. Dewing and Ms. Upson, who were experienced behavior specialists. Ms. Upson and Ms. Dewing credibly testified that behavior intervention plans normally targeted excessive behavior, like those targeted in Student's plan; which could be easily identified and created safety concerns. Inattention was not a targeted behavior, like elopement or throwing objects, because it was not excessive or a safety issue. Rather, Student's attention difficulty was properly addressed through IEP goals, accommodations, and placement.

48. Ms. Schnee also complained that the school staff in the moderate/severe special day class did not have sufficient behavior training, including in the area of applied behavior analysis. However, Ms. Schnee only briefly observed the moderate/severe classroom and was not familiar with the level of training provided to classroom teachers and aides. Ms. Dewing, an experienced Board Certified Behavior Analyst, more persuasively testified that the moderate/severe classroom teachers and aides had received extensive training in the area of behavior, including applied behavior analysis. Ms. Dewing had personally provided 20 hours of behavior training to the

classroom teacher and aides, each year, over the past two years. Moreover, along with the teacher and aides, the moderate/severe classroom had a behavior specialist embedded in the program, and the program was overseen by Ms. Dewing. Consequently, Ms. Schnee's testimony was less persuasive than that provided by San Marcos' behavior specialists.

49. Dr. Freeman was a California licensed clinical psychologist. She received a master's degree in psychology in 1968, and a doctorate in psychology in 1969. Dr. Freeman had vast experience and training in childhood autism. Dr. Freeman first met Student in November 2018, as part of a private assessment. Her assessment was first provided to San Marcos at the start of the hearing. San Marcos did not have an opportunity to review her assessment during an IEP team meeting.

50. There were problems with Dr. Freeman's assessment. During hearing, Dr. Freeman admitted that she incorrectly compiled raw data scores and that the first copy of her report contained inaccurate scores. However, a corrected version, provided at the start of the hearing, also contained scoring inaccuracies. For example, Dr. Freeman reported a 70-point difference between Student's verbal and non-verbal skills, when she meant to write that a 53-point difference existed. More significantly, Dr. Freeman failed to follow testing protocols, thereby inflating scores. For example, she continued testing after Student received three wrong responses, contrary to the testing protocols. Several subtests, including verbal comprehension, picture similarities, naming vocabulary, and copying, started at a much younger age than Student's age, contrary to testing protocols. On the copying subtest, Dr. Freeman used lined paper on eight and a half-by 11-inch paper, instead of the unlined, smaller paper required by the protocol. Dr. Freeman also failed to indicate if some testing was timed or untimed. All of these failures to follow testing protocols resulted in inflated ability scores, which provided the foundation for Dr. Freeman's conclusion that Student had higher ability levels than that

reported by San Marcos; which formed the basis of her recommendation that Student should remain in the higher functioning mild/moderate BASE classroom, instead of the lower functioning moderate/severe special day class. Similarly, Ms. Schnee relied on Dr. Freeman's invalid scores in her speech and language report, to base her opinion that Student had higher abilities than that reported by San Marcos. For these reasons, Dr. Freeman's and Ms. Schnee's assessments were given little weight.

51. Student's experts' testimony was inconsistent. For example, Dr. Freeman first testified that San Marcos should provide Student an individual aide. However, after it was pointed out that San Marcos frequently provided Student individual instruction, she testified that individual assistance was problematic for Student because it caused him to become too prompt dependent.

52. Another example was Dr. Freeman's and Ms. Schnee's advocacy for Student to remain in the mild/moderate BASE program. Yet, Ms. Schnee's assessment stated "It is clear and understood that [Student] does not have the readiness and academic skills to access the curriculum in Base [*sic*] Program at this time." Dr. Freeman similarly testified that Student did not have the ability to access the general education curriculum utilized in the BASE program. In fact, Dr. Freeman recommended that San Marcos forgo teaching Student academic or behavior skills altogether, and focus solely on teaching Student "school readiness" skills. This recommendation was incongruent with her recommendation for continued placement in the BASE program, which utilized grade-level general education materials and curriculum. And it was inconsistent with her conclusory testimony that the moderate/severe special day classroom was inappropriate; given its utilization of lower level materials and modified curriculum that would address school readiness concerns more than the BASE classroom. In sum, Dr. Freeman's and Ms. Schnee's testimony was not persuasive or supported by the evidence submitted for this matter.

53. Mother's testimony failed to illustrate any problems with Student's IEPs. To the contrary, Mother was pleased with the BASE program and related IEP offers, which encapsulated the majority of issues for this matter. During hearing, Mother made clear that the basis of this case was her desire to keep Student in the BASE classroom. Overall, Mother failed to describe what was wrong with Student's educational program, including why the moderate/severe special day classroom was inappropriate for Student.

SAN MARCOS WITNESSES

54. San Marcos witnesses Ms. Livingston, Ms. Upson, Ms. Alegre, Ms. Dewing, Ms. Denny, registered occupational therapist Carissa Aung, and Dawn Dully, persuasively testified in support of San Marcos' offer of placement and services. Each was an experienced educator who was familiar with the educational programs and services offered by San Marcos. Most had directly taught or provided services to Student over several years. In particular, Ms. Livingston, Ms. Upson, and Ms. Alegre, presented as deliberative and caring professionals who had intimate knowledge regarding Student's unique needs. Each routinely observed Student and had collected academic and behavioral data. The school witnesses unanimously and persuasively testified that Student required a modified curriculum, as contained in the moderate/severe special day classroom, rather than the general education curriculum utilized in the BASE program.

55. San Marcos witnesses' testimony, supported by uncontroverted evidence, showed that Student had made meaningful progress in behavior, speech and language, and occupational therapy, during each year in dispute. Student had also made slow yet steady academic progress, based in part upon Ms. Livingston providing him store-bought materials for a lower skill-level. It was not reasonable to require Ms. Livingston to continue modifying classroom curriculum and materials just for Student, when that

level of modification was already included in the moderate/severe classroom.

THE INDEPENDENT EDUCATIONAL EVALUATIONS

56. On June 25, 2018, Mother sent an email to San Marcos staff discussing various concerns. Embedded in the email was the following: "As we saw a lot of inconsistencies from previous triennial evaluations, we hope to see more comprehensive pictures of his cognitive ability from IEE [*sic*]." On July 3, 2018, San Marcos denied Student's request for an independent educational evaluation. During hearing, Ms. Dully testified that the June 25, 2018 email did not provide San Marcos with enough information to either fund an independent educational evaluation, or to file for due process to defend its assessment. Ms. Dully persuasively pointed out that it was not possible to discern from the email which school assessment Parents disagreed with, or what type of independent educational evaluation was being requested.

57. On October 11, 2018, San Marcos had additional information, based on the allegations in Student's amended complaint filed for this matter. Accordingly, on October 11, 2018, San Marcos sent Parents a letter agreeing to fund independent educational evaluations in the areas of psycho-education and functional behavior. Ms. Dully requested that Parents forward the names and contact information of the proposed assessors to her office. Parents did not respond to Ms. Dully's letter.

58. On November 9, 2018, Student's attorney sent San Marcos a letter informing San Marcos that Parents disagreed with its December 2017 and March 2018 assessments, and requested that San Marcos fund the following independent educational evaluations: psycho-education by Dr. Freeman; functional behavior by Greg Elsky; speech and language by Ms. Schnee; and occupational therapy by a mutually

agreed-upon assessor. No contact information for the assessors was provided in the letter.⁴

59. On November 16, 2018, Ms. Dully sent Parents a letter stating that San Marcos would fund Dr. Freeman and Mr. Elsky's assessments, if the assessors met guidelines established by San Marcos' special education local plan area, the North Coastal Consortium for Special Education. Ms. Dully again requested contact information for the assessors.

60. On November 30, 2018, Student's attorney sent Ms. Dully a letter describing why Parents disagreed with the school's psycho-educational, speech and language, and occupational therapy assessments. The letter also contained contact information for Dr. Freeman and Ms. Schnee. The letter did not request an independent educational evaluation in the area of functional behavior or provide contact information for Mr. Elsky, as requested by San Marcos.

61. On December 10, 2018, the night before the start of this hearing, Parents provided an invoice to San Marcos for Dr. Freeman's assessment. Dr. Freeman's invoice for \$5,000 described it was for her assessment and her testimony at the hearing. It did not separate the fees incurred. There was no evidence provided during hearing that Mr. Elsky had assessed Student or that Student had submitted his contact information or invoice to San Marcos. Student failed to present any evidence that San Marcos would not pay for the independent educational evaluations if given adequate time and opportunity to do so.

⁴ Student's request for speech and language and occupational therapy independent educational evaluations constituted a separate request for assessments that is not part of this case.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)⁶; 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (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 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 IEP is a written statement for each child with a disability that is developed under the IDEA's procedures

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies 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. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The Supreme Court recently clarified and expanded upon its decision in

Rowley. In *Endrew F. v. Douglas County School District*, the Court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School District* (2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*)) The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student, as the petitioning party, had the burden of proof for the issues alleged in this matter.

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

7. A procedural violation constitutes a denial of FAPE only if it 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 to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484).

ISSUES 1(A) AND (B): PARENTS' ABILITY TO PARTICIPATE IN THE DEVELOPMENT OF STUDENT'S EDUCATIONAL PROGRAM

8. Student claims that, from August 2, 2016, to October 11, 2018, San Marcos denied him a FAPE, by failing to provide Parents with progress and information in a timely manner so they could meaningfully participate in the development of Student's IEPs, including in the areas of placement and behavior.

9. Federal and State law require that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A school district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

10. Student's claim is meritless. Evidence overwhelmingly showed that San Marcos was vigilant in its obligation to include Parents during every step of the development of Student's educational program. For example, San Marcos convened 14 IEP team meetings for Student during the two years in dispute for this matter. San Marcos took steps to ensure that Parents could attend each IEP team meeting, and Parent or Parents actually attended each meeting. Parents sometimes brought private therapists to the IEP team meetings, whose attendance and input were also welcomed by San Marcos. During each IEP team meeting, Parents were provided a copy of procedural safeguards and encouraged to ask questions and share information. At no

point was a Parent question or concern not responded to by qualified school staff. With Parents' input, the IEP teams reviewed Student's present levels of performance, current educational needs, and developed annual goals to meet those needs. With Parents' input and Student's circumstances in mind, the IEP teams determined accommodations, services, and placements. Parents were vocal and informed participants at every IEP team meeting and during each step of the IEP process.

11. San Marcos held various IEP team meetings to discuss Student's behavior, including two held in September 2016. Mother participated, along with qualified school staff. The classroom teacher reported on Student's classroom behaviors, and the IEP team discussed prior and current behavior interventions and strategies. With Parent input, San Marcos carefully considered Student's unique needs and proposed a functional behavior assessment to address Student's more excessive behaviors. Before the assessment plan was presented to Parent, the school psychologist explained to her the functional behavior assessment process and answered any questions Mother had regarding Student's behavior and classroom performance. San Marcos thoroughly shared information regarding Student's behavior, and substantially included Parent during this discussion.

12. San Marcos timely convened an amendment IEP team meeting on October 19, 2016, to review the functional behavior assessment. Both Parents attended, with their private behavior therapist, along with the assessors and all necessary school staff. Ms. Upson and school psychologist Mr. Clark carefully reviewed the behavior assessment with Parents and their private behavior therapist. Parents actively participated in the IEP team's review of the behavior assessment and plan, and the development of a new behavior goal. The IEP team determined that Student did not require an individual aide because of the structure and individual support embedded in the classroom. San Marcos made changes to Student's educational program based upon

Parents' requests, including the addition of a weekly communication log between the teacher and Parents. Parents consented to the IEP and behavior intervention plan.

13. In addition to frequent IEP team meetings, San Marcos provided Parents weekly and monthly behavior and communication logs. San Marcos also frequently provided behavior charts that graphed Students' daily behaviors, copiously compiled by teachers and staff. In addition, Parents emailed teachers and school staff almost daily, sometimes several times per day, which teachers and staff quickly responded to with substantive information. Not a day passed where Parents were not actively involved in the development of Student's educational program or kept abreast of daily educational concerns.

14. San Marcos held frequent IEP team meetings to discuss Student's placement. Parents participated during each meeting. Along with necessary staff, Student's classroom teachers attended each IEP team meeting and reported Student's academic and placement needs. In addition, teachers communicated to Parents on a monthly, weekly, and daily basis, through communication logs, charts, and emails. This was in addition to report cards, progress reports, and assessments.

15. Special day class teacher Ms. Livingston attended the February 2017 IEP team meeting, along with his present teacher Ms. Upson, seven months before she would be Student's teacher, to answer any questions Parents had regarding the proposed BASE kindergarten classroom. Parents were encouraged to observe each classroom placement, and did so. San Marcos held a follow up IEP team meeting in March 2017, including Ms. Livingston, to further discuss Student's placement with Parents.

16. San Marcos held two IEP team meetings for Student in April 2017, to discuss Parents' concerns. San Marcos staff answered Parents' various questions regarding the proposed goals and Student's educational program, and agreed to revise

the goals and IEP, to address Parents' concerns. San Marcos added monthly clinic meetings, classroom data collection, a more robust home-to-school communications system, and formal classroom observations by its behavior specialist, in addition to the behavior support embedded in the classroom, based upon Parents' requests. The team held a thorough discussion regarding Student's unique needs, and Parents were active participants in the discussion.

17. San Marcos timely held an IEP team meeting in May 2018, to discuss Student's progress over the school year and need for a moderate/severe classroom for the following school year. San Marcos held another IEP team meeting in June 2018, to further consider Parents' concerns. While San Marcos did not agree to keep Student in the BASE classroom as requested by Parents, that does not mean that Parents did not actively participate during the IEP team meetings, or were not informed of Student's educational needs as the "IDEA's encouragement of parental participation does not require the District to bend to every parental demand, only that the District give due consideration to the parents' requests in developing an IEP that meets an eligible student's educational needs." *Cupertino Union School District v. K.A.* (N.D. Cal. 2014) 75 F.Supp.3d 1088, 1103 fn. 12.)

18. During hearing, Student presented no evidence to support his claim that Parents were prevented from meaningfully participating in the development of Student's educational program. To the contrary, Mother testified that she actively participated during each IEP team meeting. San Marcos considered Parents' concerns and frequently made changes to Student's IEP based upon those concerns. No one prevented Parents from attending, bringing private therapists, asking questions, sharing information, or helping to develop Student's educational program, and they did all those things. Consequently, there was no evidence provided which supported Student's claim.

19. For the foregoing reasons, Student failed to prove by a preponderance of evidence that San Marcos denied him a FAPE by depriving Parents of the ability to meaningfully participate in the development of Student's educational program.

ISSUES 2(A)(B) AND (C): THE RELATED SERVICES

20. Student complained that San Marcos failed, from August 2, 2016, to October 11, 2018, to offer appropriate services in the areas of (a) behavior; (b) speech and language; and (c) occupational therapy. San Marcos avers that the services it provided met Student's individual needs and permitted Student to benefit educationally from his instructional program.

21. Related services include speech and language services, occupational therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

22. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

Behavior

23. Here, Student demonstrated behavior problems that disrupted the learning of himself and others and therefore required behavior interventions. In accord with this need, San Marcos ensured that each IEP team meeting included a behavior

specialist; assessed Student in the area of behavior; provided a behavior intervention plan; and offered IEPs that addressed Student's behavior through goals, accommodations, and placement. For example:

24. San Marcos offered Student small, self-contained special day classes that utilized various academic and behavior strategies. The ratio of students to adults in the classroom was no more than two-to-one, and often one-to-one. Each placement had embedded behavior strategies, including visual schedules, token economies, and reinforcers to modulate behavior. In addition, each special day class had a behavior specialist assigned to the classroom.

25. San Marcos held IEP team meetings in September 2016, to address Student's behavior challenges. The IEP team discussed prior and current interventions and strategies, and carefully considered Student's unique needs to determine that a functional behavior assessment was necessary to address Student's excessive and dangerous behaviors.

26. San Marcos selected qualified assessors to conduct the behavior assessment, school psychologist Mr. Clark and education specialist Ms. Upson. The assessors reviewed school records; interviewed school staff and Parents; observed Student at school; and collected data over two weeks. The assessors identified three primary, excessive behaviors: eloping, climbing, and throwing objects. These behaviors disrupted the learning of Student and others, and created an unsafe environment.

27. Mr. Clark and Ms. Upson examined environmental factors and antecedents and developed a behavior intervention plan to diminish the targeted behaviors. The behavior assessment and related behavior intervention plan meticulously examined the duration and frequency of the behaviors; predictors for behavior; changes to structure and supports to address the behaviors; the function of the behaviors; selected replacement behaviors; proposed modifications to teaching strategies and materials;

reinforcement procedures; reactive strategies if the behaviors reoccurred; and established communication provisions for teachers, staff, and Parents.

28. On October 19, 2016, Parents and Student's private behavior therapist participated in the IEP team's review of the behavior assessment and plan, and the development of a new behavior goal. San Marcos changed Student's educational program based upon Parents' requests, including adding a weekly communication log between the teacher and Parents. Parents consented to the IEP and behavior intervention plan.

29. In December 2017, the IEP team reviewed and revised Student's behavior intervention plan. The prior behavior plan had successfully eliminated two of the targeted behaviors: throwing objects and climbing on furniture. Student still eloped, but much less frequently than before. The revised behavior plan targeted eloping from the classroom and elopement from instruction while in the classroom. Like the prior behavior plan, the revised plan was developed by qualified staff with Parents' input, and carefully considered the function of behavior, environmental factors; necessary changes; replacement behaviors; teaching strategies; reinforcement procedures; and response to behavior strategies. The revised plan also worked, and Student's elopements substantially decreased.

30. During hearing, Ms. Upson and the school's Board Certified Behavior Analyst, Ms. Dewing, testified in support of the functional behavior assessment and behavior intervention plan. In sum, the behavior intervention plan effectively curtailed the targeted behaviors. By the end of the school year, Student no longer threw objects or climbed furniture. His elopement from the classroom was eventually extinguished and his in-class elopement significantly decreased. No persuasive evidence was provided that impeached the validity of the functional behavior assessment, the effectiveness of the behavior intervention plan, or the fidelity of its application. Rather,

Student's expert Dr. Freeman testified that the behavior intervention plan was well-written and had successfully decreased the targeted behaviors.

31. In addition, evidence showed that Student did not require an individual behavior aide. Student's IEP teams correctly determined that Student did not require an individual aide because of the structure and individual support embedded in the special day classrooms. Each classroom had a high adult-to student ratio, which provided Student small group and individual instruction. In addition to the teacher and adult aides, each classroom had the support of a behavior specialist. Ms. Upson's and Ms. Dewing's testimony that Student did not require an individual behavior aide because of the substantial behavior support already included in Student's IEPs, was corroborated by Student's expert Dr. Freeman, who testified that she was concerned Student would become too prompt dependent if provided an individual behavior aide.

32. During hearing, Student failed to call Student's private behavior therapist who helped develop Student's IEPs. Rather, Student's issue was supported solely by Ms. Schnee. Ms. Schnee was critical of the behavior intervention plan because it did not include attention as a targeted behavior. Ms. Schnee also complained that the moderate/severe special day class staff lacked sufficient behavior training. However, Ms. Schnee was a licensed speech-language pathologist, not a behavior expert. Moreover, she had only recently met Student and was not familiar with his educational program or the training of school staff. For these reasons, Ms. Schnee's testimony was less persuasive than San Marcos witnesses, including education specialists Ms. Upson and Ms. Livingston, and behavior specialist Ms. Dewing; who observed and taught Student on a daily basis. San Marcos witnesses more persuasively testified that behavior intervention plans do not normally include attention as targeted behavior. Rather, as here, behavior intervention plans targeted excessive behaviors, like elopement, climbing on furniture, and throwing things, as those behaviors created an unsafe learning

environment. For Student, his attention difficulty was addressed through his IEP accommodations, goals, and placement. San Marcos witnesses' testimony was supported by a preponderance of evidence, including behavior charts that graphed daily behaviors, and showed that Student's maladaptive behaviors significantly decreased during the time in dispute. Finally, Ms. Dewing credibly testified that the teachers and aides in the moderate/severe special day class had received extensive and appropriate behavior training.

33. For the foregoing reasons, Student failed to prove that San Marcos denied him a FAPE by failing to provide appropriate behavior interventions or services.

Speech and Language

34. Student had speech and language delays in articulation, and in expressive and receptive language, which required special education and related services. A preponderance of the evidence showed that San Marcos met Student's unique needs in the area of speech and language.

35. In addition to language-rich special day classrooms, each of Student's IEPs offered speech and language goals and individual and group speech and language services. For example, in March 2016, San Marcos offered annual goals for social, expressive, and receptive language skills. To meet those goals, San Marcos offered Student various accommodations and speech and language 1280 minutes per year; 15 minutes per session, three times per week. Each session included group and individual services.

36. Student's February and March 2017 IEP developed eight goals, including three in speech and language; and offered three, 15-minute sessions per week of speech and language services, individual and group.

37. By September 2017, Student was more attentive during speech therapy, and San Marcos increased the length of his speech and language therapy sessions, to

two, 30-minute sessions per week. Part of each session was individual and part in a small group.

38. By December 2017, Student met two of the three speech and language goals in less than one year, and made substantial progress towards the remaining goal.

39. San Marcos conducted triennial assessments of Student in December 2017, including in the area of speech and language. Licensed speech-language pathologist Ms. Denny conducted the school's speech and language assessment. Ms. Denny observed Student; interviewed Student, Parents, teachers, and private therapists; reviewed school records; collected data using inventories; and formally assessed Student. She was experienced and qualified to assess in the area she was responsible for assessing, properly followed the testing protocols, and obtained valid and reliable results. Testing revealed that Student had delays in articulation, and in expressive and receptive language.

40. San Marcos reviewed the triennial testing results in December 2017. To remediate Student's deficits, the IEP team developed 12 goals, including goals in articulation, pragmatics, receptive language, and expressive language. No area of speech and language need went unaddressed. San Marcos offered individual speech and language therapy out of the classroom, 1,000 minutes yearly, and group speech and language therapy pushed into the classroom, 350 minutes per year.

41. San Marcos offered Student a solid plan to address all of his delays, including the area of speech and language. Student was assessed by a qualified school assessor whose report identified each area of speech and language deficit. Each IEP addressed Students' speech and language needs through goals, accommodations, placement, and direct services. San Marcos provided Student individual speech and language outside of the classroom, and pushed-in group speech and language services inside the classroom.

42. In sum, to meet Student's needs, San Marcos included a speech-language pathologist at Student's IEP team meetings; assessed Student in speech and language by qualified personnel; developed annual speech and language goals; and provided individual and group speech and language services. Student met his goals and progressed in the area of speech and language.

43. During hearing, Ms. Denny, a licensed speech-language pathologist who had personally delivered services and assessed Student, credibly testified that the IEPs offered Student appropriate levels of speech and language, in light of his unique needs.

44. Student's private speech and language therapist Ms. Segal had helped develop Student's IEPs. However, Student did not call her as a witness during the hearing. Rather, Student called Ms. Schnee, who had just met Student weeks prior to the hearing. Ms. Schnee had briefly observed his school classes, and was not familiar with his IEPs. She incorrectly testified that Student had not met any speech and language goals and was not aware that San Marcos had offered Student group speech and language therapy. During hearing, she did not formally review her speech and language assessment or provide an opinion regarding the school's speech and language assessment. Overall, Ms. Schnee provided little insight regarding Student's speech and language needs. For these reasons, Ms. Schnee was not as persuasive as the school's witnesses for this issue.

45. Consequently, Student failed to prove that San Marcos denied him a FAPE by failing to provide appropriate speech and language services.

Occupational Therapy

46. Student had minor delays in fine motor skills and deficits in sensory processing. To meet those needs, San Marcos ensured that a registered occupational therapist attended Student's IEP team meetings; assessed Student in occupational therapy by qualified personnel; offered occupational therapy services in each IEP; and

provided sensory tools and strategies in his special day classrooms.

47. The March 2016 IEP addressed Student's sensory delays through a special day class placement rich in sensory tools and strategies; IEP accommodations; a fine motor skills goal, and 450 minutes per year of occupational therapy services.

48. By February 2017, Student had improved in the area of occupational therapy. He benefited from the sensory breaks embedded in the classroom, and the teacher and occupational therapist worked together to use different sensory tools and strategies in the classroom.

49. San Marcos included a registered occupational therapist at each annual IEP team meeting, and welcomed Student's private occupational therapist to participate in the development of Student's educational program, along with Parents and necessary IEP team members. Although Student had shown substantial progress, San Marcos did not decrease the level of occupational therapy in the February 2017 annual IEP.

50. In September 2017, San Marcos again reviewed Student's occupational therapy progress. Student made progress due to occupational therapy and no longer required a pencil grip or compression vest.

51. In December 2017, San Marcos conducted triennial assessments of Student, including for occupational therapy. The school's registered occupational therapist observed Student; interviewed Student, Parents, teachers, and private therapists; reviewed school records; collected data using inventories; and formally assessed Student. The assessor was experienced and qualified to assess in the area she was responsible for assessing, properly followed the testing protocols, and obtained valid and reliable results. Student demonstrated average abilities in all areas of fine motor skills, including visual motor, visual perceptual, and fine motor/dexterity. Student copied shapes quickly, visually scanned adequately, and correctly placed pegs in a pegboard.

52. San Marcos reviewed the triennial assessments over three IEP team meetings in December 2017 and January 2018. The IEP team developed 12 goals to remediate Student's deficits and offered, among other services, 450 minutes per year of occupational therapy services.

53. During hearing, the school's registered occupational therapist, Ms. Aung, testified that Student had made meaningful progress in occupational therapy during each year in dispute.

54. During hearing, Student abandoned this issue. Although Student's private occupational therapist Ms. Ochoa helped develop Student's IEPs, she was not called as a witness for this matter. Student failed to present any evidence regarding the school's assessors, assessments, goals, services, or IEPs, as they related to occupational therapy.

55. As the petitioning party, Student had the obligation of proving, by a preponderance of evidence, his allegation that San Marcos failed to provide appropriate occupational therapy services. Student made no attempt to litigate this issue, and the claim is therefore meritless.

56. For the foregoing reasons, Student failed to prove by a preponderance of evidence that San Marcos denied him a FAPE by failing to provide appropriate behavior, speech and language, or occupational therapy services.

ISSUE 3: THE LEAST RESTRICTIVE ENVIRONMENT

57. Student alleges that San Marcos denied him a FAPE by failing to offer appropriate placement in the least restrictive environment at the June 13, 2018 IEP team meeting. The June 2018 IEP was a continuation of a May 2018 IEP team meeting, wherein San Marcos offered Student placement in a moderate/severe special day class. No other changes to Student's prior IEP, including services or the amount of time Student would spend outside of regular education, was offered.

58. School districts are required to provide each special education student

with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5, 56040.1, subd. (b), 56342, subd. (b).) The IDEA also requires, to the maximum extent appropriate, that a child with a disability be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

59. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*). A school district is required to have a continuum of program options available for a child. (Ed. Code, § 56360.) The continuum of program options includes, but is not limited to regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction; and instruction using telecommunications in the home or hospitals or institutions. (Ed. Code, § 56361.)

60. Here, Parents are not requesting to place Student in a mainstream, regular education classroom, the least restrictive environment on the continuum of placement options. Rather, as a remedy, Student requests that he remain in the mild/moderate special day class, entitled BASE. Hence, the crux of this issue is whether Student should

remain in the BASE classroom, as requested by Parents, or be transitioned to a moderate/severe special day class, as offered by San Marcos.

61. The BASE classroom and moderate/severe classrooms were each small, structured, special day classrooms, where every student was disabled with an IEP. Each classroom had a high adult-to student ratio and embedded behavior support. Each class permitted its students to transition back and forth between the special day class and regular education classes, as delineated in the pupil's IEP. The primary difference between the placements was that the mild/moderate, BASE, classroom used the general education curriculum, albeit with accommodations and minor modifications; where the moderate/severe special day class used a modified curriculum and modified materials. The modified curriculum and materials permitted pupils, like Student, who were far below grade-level standards to receive academic instruction at their own ability levels.

62. Consequently, there is no dispute that Student belonged in a special day class rather than a regular education classroom, the least restrictive environment. For example, during hearing, Mother requested that Student remain in a special day classroom, albeit the BASE classroom. Each witness agreed that Student could not benefit academically from placement in a regular education classroom, even with accommodations and services. San Marcos assessments similarly showed that Student had very low cognitive abilities and substantially delayed in all academic areas. He required specialized academic instruction in a small, structured special day classroom, as offered in each IEP, not regular education in a mainstream classroom.

63. For the foregoing reasons, analysis of the factors required by *Rachel H.*, Student's ability to benefit from a mainstream classroom, even with accommodations and services, show that San Marcos did not deny Student educational rights by removing him from the regular education classroom. Therefore, the issue at hand is whether the moderate/severe classroom was appropriate for Student in light of his

circumstances.

64. However, there is no genuine dispute that Student's disability required a higher level of academic support than the program utilized in BASE. For example, Student's expert Ms. Schnee stated in her assessment: "It is clear and understood that [Student] does not have the readiness and academic skills to access the curriculum in Base [sic] Program at this time." Moreover, during hearing, Student's expert Dr. Freeman advocated for doing away with academic teaching for Student altogether because of his low level abilities, and providing only a school readiness program for Student. Consequently, Ms. Schnee and Dr. Freeman's testimony that Student should remain in the higher functioning BASE classroom was inconsistent and unpersuasive. Student failed to present any persuasive evidence in support of this issue.

65. Nonetheless, Parents made clear that their preference for Student's placement was the BASE special day classroom. However, starting with *Rowley*, courts have held that an educational agency is not held to a standard of parental preference. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21 [the IDEA does not require a potential-maximizing education]; see also *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658; *N.T. v. Garden Grove Unified School Dist.* (C.D. Cal. May 19, 2016, No. SA CV 15-1013-GHK (JPRx)) 2016 WL 2984192, *5.) An appropriate education under the IDEA need not be "the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the best choice." (*G.D. v. Westmoreland School Dist.* (1st Cir. 1999) 930 F.2d 942, 948 (italics in original).) Here, the June 13, 2018 IEP offer was reasonably calculated to provide Student an educational benefit in light of his circumstances, based upon the information that San Marcos had at the time it was offered. (*Rowley, supra*, 458 U.S. at pp. 206-207; see also *Andrew F., supra*, 137 S.Ct. at p. 999 [IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"])

66. For example, San Marcos witnesses Ms. Livingston, Ms. Upson, Ms. Alegre, and Ms. Dewing, persuasively testified in support of the moderate/severe special day class for Student. Each was an experienced educator familiar with the educational programs and services San Marcos offered and Student's unique needs. Most had directly taught or provided services to Student for several years. Ms. Livingston, Ms. Upson, and Ms. Alegre routinely observed Student and had collected academic and behavioral data, which supported their testimony recommending the moderate/severe classroom. San Marcos witnesses' testimony was also corroborated by the December 2017 triennial assessments and March 2018 cognitive testing, which identified Student with low level abilities. The school witnesses credibly testified that Student required a modified curriculum, as contained in the moderate/severe special day classroom, rather than the general education curriculum used in the BASE program. It was not reasonable for Ms. Livingston to continue modifying the BASE curriculum, textbooks, and materials just for Student, at her own cost, when the modified curriculum, textbooks, and materials, were available and used in the moderate/severe classroom.

67. Although San Marcos offered Student a moderate/severe classroom in contradiction to the requests by Parents for a mild/moderate classroom, the overall educational plan was thoughtful and reasonable in light of Student's circumstances and the information the IEP team had at the time the IEP was formulated. The IEP offered a solid plan to address Student's unique needs by including specialized academic instruction; speech and language services; occupational therapy; adapted physical education; a behavior intervention plan; and extended school year services; provided in a small, structured placement where work and materials would be modified to Student's ability level.

68. Given the foregoing, Student failed to show by a preponderance of evidence that San Marcos denied him a FAPE by failing to offer an appropriate

placement in the least restrictive environment.

ISSUE 4: PARENTS' REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION IN JUNE 2018

69. Student complains that San Marcos failed to file for a due process hearing without unnecessary delay, following Parents' request for an independent educational evaluation in June 2018. Student does not challenge the appropriateness of San Marcos' assessments. During hearing, Student did not present any evidence that impugned the qualifications of any San Marcos assessors or the validity of San Marcos' assessments. Rather, Student's issue is technical and pertains solely to whether San Marcos waited too long to file for due process after receiving Parents' June 25, 2018 request for an independent educational evaluation.

70. To date, San Marcos has not filed for due process to defend its assessments. San Marcos argues that it has not filed for due process because Student's June 2018 request failed to identify which school assessment he disagreed with, and because San Marcos agreed to fund independent educational evaluations.

71. A parent has the right to obtain an independent if the parent disagrees with a district's assessment. (Ed. Code, § 56329, subd. (b).) When a parent makes a request for an independent educational evaluation, a district must either fund the independent educational evaluation at public expense or file for a due process hearing to show that its assessments were appropriate. (Ed. Code, § 56329, subd. (c).) If the district prevails in the due process hearing, the parent still has the right to obtain an IEE, but not at public expense. (*Ibid.*) Here, the facts do not support that San Marcos had sufficient information as of June 25, 2018, to determine whether to fund an independent educational evaluation or to file for due process to defend an assessment.

72. San Marcos convened 14 IEP team meetings for Student during the time frame in dispute. Parent or Parents attended each meeting, yet failed to express any

dissatisfaction with a school assessment or to request an independent educational evaluation. In particular, Parents attended IEP team meeting in October 2016 to review San Marco's functional behavior assessment, and three IEP team meetings during December 2017 and January 2018, to review San Marcos triennial and cognitive assessments. Yet, Parents did not request an independent educational evaluation during any IEP team meeting.

73. In addition, Parents communicated with San Marcos teachers and staff by weekly and monthly communication logs, and almost daily, by emails. Parents did not express dissatisfaction with a particular school assessment or request an independent educational evaluation in any of these written communications. Nor was any evidence provided which showed that Parents had orally requested an independent educational evaluation from San Marcos during the time frame in dispute.

74. On June 25, 2018, Mother sent an email to San Marcos staff discussing various concerns. Embedded in the email was the following: "As we saw a lot of inconsistencies from previous triennial evaluations, we hope to see more comprehensive pictures of his cognitive ability from IEE [*sic*]." The email failed to describe what school assessment Parents disagreed with, what type of independent educational evaluation was being requested, or whether Parents were going to conduct their own private assessments.

75. On July 3, 2018, San Marcos denied Student's request for an independent educational evaluation. During hearing, San Marcos director Ms. Dully persuasively testified that it was not possible to discern from the June 25, 2018 email which school assessment Parents disagreed with, or what type of independent educational evaluation was being requested.

76. On October 11, 2018, San Marcos received additional information, contained in Student's amended complaint, regarding Student's request for

independent educational evaluations. Accordingly, on October 11, 2018, Ms. Dully sent Parents a letter agreeing to fund independent educational evaluations in the areas of psycho-education and functional behavior. Ms. Dully requested that Parents forward the names and contact information of the proposed assessors to her office. However, Parents did not respond to Ms. Dully's letter. San Marcos therefore did not have adequate information to fund the requested independent educational evaluations.

77. On November 9, 2018, Student's attorney sent San Marcos a letter identifying the proposed assessors but failed to provide their contact information.

78. On November 16, 2018, Ms. Dully sent Parents a letter stating that San Marcos would fund Dr. Freeman and Mr. Elsky's assessments, if the assessors met school guidelines for independent assessments, and again requested contact information for the assessors.

79. By letter on November 30, 2018, eleven days prior to the start of the hearing, Student's attorney provided San Marcos contact information for Dr. Freeman. The letter did not provide contact information for Mr. Elsky, as repeatedly requested by San Marcos.

80. On December 10, 2018, the night before the commencement of the hearing Student provided an invoice to San Marcos for Dr. Freeman's assessment. Dr. Freeman's invoice for \$5,000 described it was for an assessment and her testimony at the hearing. It did not separate the fees incurred. There was no evidence provided during hearing that Mr. Elsky had assessed Student or that Student had submitted his contact information to San Marcos.

81. Student failed to present any evidence that San Marcos would not pay for the independent educational evaluations it had agreed to fund, if given adequate time and if the assessments met lawful school guidelines for an independent educational evaluation.

82. Given the totality of the facts for this matter, San Marcos did not unnecessarily delay filing a due process hearing request. Parents failed to describe what school assessments they disagreed with, or what independent educational evaluations they were requesting. San Marcos only obtained this information through Student's amended complaint. Because of the lack of information as to the basis of Parents' independent educational evaluation request, San Marcos had a right to obtain more information before determining whether to grant Parents' independent educational evaluation request.

83. Courts have held that a two-month delay in filing to defend a school district assessment is not an unnecessary delay. (*J.P. v. Ripon Unified School District* (E.D. Cal. 2009) 2009 WL 1034993, 52 IDELR 125, 109 LRP 22025.) By analogy, San Marcos should have that same time period to fund an independent educational evaluation it has agreed to fund. Any delay in funding the agreed-upon independent educational evaluations by the time of the due process hearing was the result of Student's failure to identify the assessments in dispute and to respond to San Marcos' requests to identify the proposed assessors and provide their contact information.

84. For the foregoing reasons, a preponderance of evidence does not support Student's allegation that San Marcos failed to timely file for due process to defend its assessments.

ORDER

Student's claims for relief are denied.

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 each issue heard and decided.

RIGHT TO APPEAL

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

Dated: January 18, 2019

/s/

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearing