

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. 2018121008

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on December 28, 2018, naming San Marcos Unified School District.<sup>1</sup> On February 19, 2019, OAH granted the parties' joint request to continue the hearing.

Administrative Law Judge Paul H. Kamoroff heard the matter in San Marcos, California, on May 1, 2, 3, and 22, 2019.

Meagan M. Nunez and Jennifer L. Varga, Attorneys at Law, represented Student. Mother attended the hearing. Student testified but did not attend the hearing.

Tiffany M. Santos, Attorney at Law, represented San Marcos. Dawn Dully, San Marcos' Executive Director of Special Education, and Nicole Sestina, San Marcos' Coordinator, Secondary Special Education, attended the hearing.

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<sup>1</sup> District filed its response to Student's complaint on January 11, 2019, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

At the request of the parties, OAH continued this matter for closing briefs. The record closed on June 10, 2019, upon receipt of written closing briefs.

## ISSUES<sup>2</sup>

1. Did San Marcos deny Student a free appropriate public education during the 2017-2018 school year, by:

- a. Failing to provide Parents prior written notice of its decision to reduce Student's speech and language services; and
- b. Failing to file for due process upon denying Parents' request for an independent educational evaluation?

2. Did San Marcos deny Student a FAPE during the 2018-2019 school year, by:

- a. Failing to offer appropriate supports and services in (i) specialized academic instruction and (ii) transition;
- b. Failing to offer an appropriate placement;
- c. Failing to offer a transition plan; and
- d. Failing to consider independent evaluations?

## SUMMARY OF DECISION

Student had cognitive, social, and emotional deficits. From preschool until the eighth grade, San Marcos provided Student placement primarily in special day classes.

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<sup>2</sup> At the beginning of the hearing, Student withdrew several issues without prejudice. 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.)

For eighth grade, San Marcos placed Student primarily in general education classes. San Marcos offered Student a similar general education program for the 2018-2019 school year, ninth grade, at a large comprehensive high school.

Student requests a small, structured placement. She asserts she was unable to benefit from general education classes, and would be overwhelmed by the large high school offered by San Marcos. San Marcos disagrees, citing that Student did not have behavior problems and received passing grades while in general education classes.

A preponderance of evidence showed that Student required placement in small, structured, special education classes, in light of her circumstances. Consequently, the Decision finds that Student's IEPs were not reasonably calculated to provide her a FAPE. The Decision also finds that San Marcos failed to properly respond to Parents' request for independent educational evaluations.

## FACTUAL FINDINGS

### THE STUDENT

1. Student was a fifteen-year-old girl who resided with her parents within San Marcos's boundaries during the applicable time frame. Student received special education and related services since she was two and a half years old, initially under the eligibly category speech and language impairment, and later, under specific learning disability.
2. Student had diagnosed sensory problems, apraxia, ataxia, developmental coordination disorder, hypotonia, visual processing delays, vision deficits, social-emotional delays, and low intellectual functioning.
3. Student also had delayed self-help skills and was not toilet trained until age 13. She continued to have self-help difficulty related to toileting and menstruation

through high school. At fifteen, Student had the mental capacity of someone much younger and required constant adult supervision.

4. As a result of her disabilities, student demonstrated delayed academic, social, and emotional skills. Her disabilities impacted her ability to access general education even with accommodations, modifications, and related services. As of the hearing, Student was in the ninth grade with significantly delayed academic abilities.

5. Student was pleasant and eager to please. However, she had limited ability to focus and required frequent prompts for most tasks. As a result, through the middle of the seventh grade, San Marcos provided Student an individual aide for the entire school day, including during small, structured, special day classes.

6. Student also experienced emotional difficulty. Because of emotional and psychological problems, San Marcos provided Student educationally related mental health services and psychological services.

7. Until the time-frame in dispute, San Marcos provided Student placement in small, structured, mild-to-moderate special day classes, with an aide, speech and language services, occupational therapy, educationally related mental health services, and psychological counseling.

8. While in special day classes, Student was a good pupil, had friends, and enjoyed going to school. She consistently earned high scores for in-class assignments and tests, and demonstrated social and emotional progress.

#### THE MARCH 30,2017 IEP

9. On March 30, 2017, San Marcos convened an IEP team meeting for Student's 2017-2018 school year, eighth grade. Mother attended the meeting. San Marcos IEP team members included case manager Jessica Hammen; school speech-language pathologist Amber Hoffman; general education teacher James Taylor; school district representative Garth Phillips; administrator Gary Pope; and school

occupational therapist Patricia Phillips. San Marcos provided Mother a copy of her procedural safeguards at the beginning of the meeting.

10. The IEP team reviewed Student's present levels of performance. Student had deficits in fluid reasoning, visual processing, and comprehension-knowledge, which impacted her in all academic areas, with significant delays in reading, writing, and math. Student also had delays in articulation and expressive language.

11. The team next reviewed Student's progress toward prior annual goals. Student met six of ten prior annual goals, including two in reading, one goal in managing assignments, and two writing goals. Student did not meet goals in writing, math, and articulation.

12. The IEP team developed nine new annual goals in similar areas, including reading, writing, organization, math, articulation, and expressive language.

13. To meet those goals, San Marcos offered Student various accommodations and the following services: 1,204 minutes per week of specialized academic instruction in a separate classroom for the remainder of the 2016-2017 school year, with a reduction to 512 minutes per week of specialized academic instruction in a separate classroom, only for language arts and Math, for the 2017-2018 school year;; 512 minutes per week of specialized academic instruction in general education classes, history and science, for the 2017-2018 school year; 2240 minutes per year of speech and language, in a small group; 180 minutes of per year of occupational therapy collaboration; 270 minutes yearly of educationally related mental health counseling; and 300 minutes per year of psychological services. Unlike past IEPs, San Marcos did not offer Student an aide.

14. The IEP offered Student accommodations, goals and related services, similar to those offered in prior IEPs, but increased Student's time in general education

by placing her in general education classes for history, science, physical education, and elective courses.

15. San Marcos offered modifications to the curriculum for history and science, which were co-taught classes. Co-taught classes were large general education classes, with approximately 40 students and two adults, including a teacher and an educational specialist. The presence of the educational specialist in the history and science general education classes accounted for 512 minutes per week of specialized academic instruction.

16. Mother was concerned by the transition from special day classes to a primarily general education program. She was fearful that Student would not understand the classroom material and would be overwhelmed by the large number of students in the general education classrooms. Mother requested that Student remain in special day classes, including for history and science.

17. However, Student was not disruptive and had done well in her special day classes. Therefore, San Marcos did not change its offer, despite Mother's objections. Mother consented to the IEP.

#### PARENTS' REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

18. By email on March 28, 2018, Mother informed San Marcos that Parents disagreed with San Marcos's most recent evaluations and requested that San Marcos fund independent educational evaluations in the areas of psycho-education and speech. San Marcos last assessed Student in April 2016, as part of a triennial evaluation. Parents' disagreement related to San Marcos' April 8, 2016 speech and language assessment, and April 13, 2016 psycho-education assessment.

#### THE MARCH 29, 2018 TRANSITION IEP

19. San Marcos convened a transition IEP team meeting on March 29, 2018.

Student was matriculating to ninth grade, high school, the following school year. It was normal for San Marcos to have a separate IEP team meeting to assist special needs students' transition from middle school to high school.

20. Mother and Student attended the transition IEP team meeting. San Marcos IEP team members included case manager Ms. Hammen; school administrator Lisha Brunache; speech-language pathologist Ms. Hoffman; middle school special education teacher Kyle Johnson; a general education teacher; a high school special education teacher; and a high school speech instructor.

21. To assist Student's transition to high school, San Marcos offered Student a field trip to San Marcos High School; a presentation at the high school; and participation during the transition IEP team meeting.

#### THE MARCH 30, 2018 ANNUAL IEP

22. San Marcos convened Student's annual IEP team meeting the next day, March 30, 2018. The purpose of the IEP team meeting was to develop Student's IEP for the 2018-2019 school year, ninth grade.

23. The IEP team included Mother; Ms. Hammen; Ms. Hoffman; Ms. Brunache; general education teachers Jessica Broom and Bryan Todd; and an assistant principal.

24. At the beginning of the IEP team meeting, San Marcos offered Mother a copy of procedural safeguards, and to summarize the safeguards.

25. The IEP team reviewed Student's progress on the prior annual goals. Student met three of nine goals. She did not meet six goals in reading, writing, math, and articulation.

26. The IEP team developed eight new goals in similar areas, including reading; writing; speech; math; and, because Student had difficulty making friends in the eighth grade, added a social-emotional goal.

27. To meet those goals, for the 2018-2019 school year San Marcos offered

similar accommodations as the last IEP, and a similar program. San Marcos continued to offer specialized academic instruction in a separate classroom for language arts and math, 570 minutes per week; 285 minutes per week of specialized academic instruction in a co-taught general education science class; 180 minutes per year of occupational therapy consultation; 270 minutes annually of educationally related mental health services; and 300 minutes per year of psychological services. San Marcos reduced the speech and language services it offered, from 2240 minutes annually to 900 minutes per year.

28. Similar to the eighth grade, San Marcos offered Student placement primarily in general education classes for the ninth grade. San Marcos offered specialized academic instruction for English and math, and general education for the remaining five classes.

29. San Marcos offered Student placement at San Marcos High School. San Marcos High School was a comprehensive high school on a large, sprawling campus. Physically, San Marcos High School was the largest high school campus in San Marcos. With 4,500 pupils, it also had the largest student population of any San Marcos school. Classes were large, and it was normal to have 40 students in general education classes.

30. A week before the IEP team meeting, on March 23, 2018, Mother emailed Ms. Hammen to express concerns that Student was misplaced in general education. Student was frustrated by the faster pace of the general education instruction and had difficulty completing assignments. Mother requested that Student be allowed to resume special day classes the next school year.

31. During the IEP team meeting, Mother repeated those concerns. She reported that Student was frustrated in her general education classes during eighth grade. Student was unable to keep up with the pacing of general education classes or to independently complete classroom assignments. Parents and Student's neuro-typical



twin brother completed all of Student's homework and take-home projects. Student did not understand the classroom material in her history and science classes. She was unable to participate during general education physical education due to poor motor skills. She was bullied daily in her general education choir class. She ate lunch alone each day. Student felt isolated, had no friends, no longer wanted to go to school, and cried each night.

32. Mother was also concerned about the size of San Marcos High School. Student was normally anxious and easily overwhelmed by others. Although she was a teenager, she could not be left alone and needed constant adult supervision, even to go to a neighbor's house. Student required an individual aide during most of middle school, which was a much smaller school, to help her navigate the school campus and to redirect her focus during smaller, special day classes. Given the larger and more complex campus, greater student population, and larger class sizes at San Marcos High School, Mother was reasonably troubled that general education classrooms without an aide at San Marcos High School was not appropriate to meet Student's needs.

33. Mother did not agree with the IEP offer. She requested that San Marcos return Student to a placement in special day classes and keep the same level of speech and language services as the year before. San Marcos denied Mother's requests and Mother did not consent to the IEP.

#### SAN MARCOS'S DENIAL OF INDEPENDENT EDUCATIONAL EVALUATIONS

34. On April 11, 2018, Ms. Sestina responded to Parents' March 28, 2018 request for independent educational evaluations. In a prior written notice letter, San Marcos denied Parents' request for the independent educational evaluations because the disputed school assessments "occurred nearly two years ago," in April 2016. The prior written notice letter did not request additional information from Parents regarding which independent educational evaluations they were requesting or why Parents

disputed the school's assessments. During hearing, Ms. Sestina testified that she understood which assessments Parents disputed.

35. San Marcos did not file for due process to defend its assessments.

#### SAN MARCOS'S REQUEST TO ASSESS STUDENT

36. In the April 11, 2018 prior written notice letter, San Marcos requested that Parents agree to allow San Marcos to reassess Student. The letter included an assessment plan for assessments in the areas of academic achievement, intellectual development, speech and language, motor development, social-emotional functioning, adaptive behavior, and sensory processing, and a special circumstances independence assessment to determine whether Student required an individual aide. All were areas of suspected deficit for Student. The letter also included a copy of the required notice of parental procedural rights.

37. The purpose of the proposed assessments was for San Marcos to obtain additional information regarding Student's educational needs. Student's triennial evaluation was not due until April 2019. However, Mother had expressed substantive concerns about Student's educational program and had refused to consent to the March 30, 2018 IEP. Also, San Marcos's last assessments were two years old. Given these factors, San Marcos reasonably proposed to move up the triennial evaluation. However, Parents refused to consent to the assessment plan. Had Parents consented, San Marcos could have had the reassessments completed by mid-June 2018, prior to the commencement of the next school year.

38. On May 4, 2018, Ms. Sestina sent Parents another letter requesting Parents' consent to the assessment plan, with another copy of the plan and procedural safeguards. Parents again refused to consent to the assessment plan.

## SAN MARCOS' MISTAKEN BELIEF THAT PARENTS HAD WITHDRAWN THEIR REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS

39. In May 2018, Parents retained Jill Weckerly, Ph.D., to conduct an independent psycho-educational evaluation. However, Parents did not withdraw their request for San Marcos to fund the independent educational evaluations. Although Parents self-funded Dr. Weckerly's assessment because they wanted to begin the testing before the school year ended, they did not convey in writing or orally to anyone at San Marcos that they had withdrawn their request for independent educational evaluations in the areas of psycho-educational or speech and language.

40. Ms. Sestina testified San Marcos believed that Parents' funding of Dr. Weckerly's assessment meant they had withdrawn their request for independent educational evaluations. Yet, she could not point to any evidence that supported this belief. San Marcos relied upon this mistaken belief as the basis for its decision not to file for due process after it denied Parents' request for the independent educational evaluations. As of the hearing, San Marcos had not agreed to fund the independent educational evaluations or filed for due process to defend its assessments.

## THE MAY 17, 2018 AMENDMENT IEP

41. On May 17, 2018, San Marcos convened an amendment IEP team meeting. The meeting was held to discuss Parents' concerns with the March 2018 IEP offer and the April 11, 2018 assessment plan.

42. Mother attended the meeting. San Marcos attendees included Ms. Hammen; Ms. Hoffman; Ms. Brunache; Mr. Todd; Ms. Sestina; school psychologist Megan Ambrose and, by telephone, an educational specialist from San Marcos High School.

43. Mother was still concerned that the IEP placement offer was not appropriate for Student. Student functioned far below what was expected of general education high school students. For example, Student had done poorly on recent statewide assessments. She was far below grade level in each area tested, with the highest score at the middle of fifth grade level, in reading.

44. In addition, Student had done poorly in her eighth grade general education classes. For example, the IEP team agreed that Student had not passed her general education history tests.

45. In general education science, San Marcos misstated that Student had passed most of her tests and was performing above grade level. In fact, Student had passed only one test during the school year, even with substantial accommodations and a modified curriculum. In science, Student's in-class exam scores were 63 percent, 40 percent, 61 percent, and 72 percent, respectively.

46. In sum, Mother repeated her request for special education classes for high school instead of general education classes.

47. Mother's concerns were serious and warranted reassessment of Student. Accordingly, the IEP team reviewed the assessment plan and discussed Mother's concerns regarding the assessment process. The IEP team described that, although the school year was close to ending, San Marcos could quickly begin the assessments and have them completed at the beginning of the next school year.

48. During hearing, Ms. Sestina persuasively testified that, if Parents had agreed to the April 11, 2018 assessment plan as of the May 17, 2018 amendment IEP team meeting, San Marcos would have completed the reassessments within the first 30 days of the 2018-2019 school year.

49. However, Mother wanted Student to first complete state-wide testing which was still underway, and an independent assessment, before Parents would consent to the assessment plan.

50. San Marcos did not offer any changes to the March 30, 2018 IEP. Parents did not consent to the IEP or assessment plan.

#### STUDENT'S PROGRESS DURING THE 2017-2018 SCHOOL YEAR

51. Student did not benefit academically in general education during the eighth grade. Student could not keep up with the faster pace of the general education classes. She did not understand the material in her general education classes and was unable to independently complete assignments or pass tests. And Student met only three of her nine annual IEP goals.

52. Nonetheless, during hearing, San Marcos witnesses, including Ms. Dully, Ms. Sestina, Ms. Carr, Mr. Johnson, Mr. Kruger, Ms. Hoffman, Mr. Degtyarev, and Ms. Hammen, pointed to Student's quiet demeanor and passing grades as evidence that Student benefited from general education. Each was an experienced and qualified educator. However, there were problems with their testimony that impacted San Marcos's ability to show that the March 2018 IEPs offered Student an appropriate placement.

53. For example, Ms. Dully and Ms. Sestina were school directors who had never taught or assessed Student. They credibly testified regarding school procedures, but were not directly familiar with Student's ability to benefit from general education classes.

54. Ms. Carr was an assistant principal at San Marcos High School, a school Student had not attended. She had never taught or assessed Student, and had no independent knowledge regarding Student's needs or disabilities.

55. Mr. Johnson provided Student some specialized academic instruction

during middle school. His testimony supported the conclusion that Student did well in a small, structured, special day class. However, he was not familiar with Student's performance in general education classes. His testimony was therefore not informative regarding the March 30, 2018 annual IEP offer.

56. Mr. Kruger was a special education case manager at San Marcos High School and had completed portions of Student's 2019 triennial evaluation. As part of the assessment process, he observed Student individually in a clinical setting, and once at The Winston School, where Parents placed Student at the start of the 2018-2019 school year. The testing Mr. Kruger completed was acquired after the IEPs in dispute and not submitted as evidence during the hearing.

57. Mr. Kruger's testimony was brief. He did not report how Student did on the 2019 triennial testing that was completed, other than describing that Student was able to follow him to the testing room at San Marcos High School. Mr. Kruger testified that Student did well at Winston. She could navigate the small campus and performed well in the small classrooms. In sum, Mr. Kruger's testimony was not probative regarding the appropriateness of general education classes for Student or her functioning levels at the time San Marcos offered the March 2018 IEP.

58. Ms. Hoffman was a school speech-language pathologist who also testified briefly. Ms. Hoffman provided Student speech and language services, outside of the classroom, during middle school. She testified that Student had made progress on her speech and language goals. However, Ms. Hoffman provided little insight regarding Student's progress in general education classes.

59. Mr. Degtyarev was an experienced school psychologist. However, his testimony did not support the adequacy of the March 2018 IEP. Mr. Degtyarev last assessed Student as part of the 2016 triennial evaluation. Following his 2016 assessment, San Marcos offered to continue Student's placement in mild-to-moderate

special day classes with an aide for the remainder of the 2015-2016 school year, and for the 2016-2017 school year. Mr. Degtyarev had not observed Student for several years, and had not observed Student in a general education class. He did not attend the March 2018 IEPs, or participate in the development of the IEP offers. Mr. Degtyarev's testimony supported that Student did well in special day classes. His testimony also supported Dr. Weckerly's finding that Student had impaired cognitive functioning.

60. Ms. Hammen was Student's case carrier during middle school. She emphatically supported the March 2018 IEP offer. However, she was not a persuasive witness because her testimony was often inconsistent with evidence submitted from both parties. Ms. Hammen was retired from San Marcos and did not appear to be relying on her independent knowledge of Student during her testimony.

61. For example, Ms. Hammen testified that Student was a visual learner. Yet, evidence from San Marcos and Student overwhelmingly showed that Student was not a visual learner and had received accommodations for that deficit. Student was significantly impaired in vision, visual processing, and visuospatial skills. Each IEP, including the March 29 and 30, 2018 IEPs, stated that Student had a visual processing deficit that impacted her academic functioning.

62. Ms. Hammen also testified that Student did well in general education history and achieved grade level work. Yet, the May 17, 2018 amendment IEP stated Student did not pass her history tests.

63. Ms. Hammen's testimony that Student did not have motor delays was also inconsistent with other evidence. San Marcos provided Student occupational therapy, in part, for motor delays. And Student had a documented history of motor delays, including the March 2017 annual IEP, which stated Student had impaired visual-motor integration skills.

64. Another example included Ms. Hammen's testimony that Student often self-advocated in the classroom by asking for help from the teacher or peers. This statement was wholly inconsistent with testimony by witnesses from both parties, who described Student as quiet and withdrawn in the classroom. For these reasons, little weight was given to Ms. Hammen's testimony.

65. San Marcos's various witnesses did not include a general education teacher who had taught Student during eighth grade.

66. Nonetheless, some evidence supported San Marcos's position that Student did well during the eighth grade in general education. For example, Student's report card indicated she received passing grades in each class. And, because she was normally quiet, Student did not disrupt any class or call attention to herself.

67. However, the totality of the evidence revealed that Student failed her in-class assignments and tests throughout the school year. Student's overall grades were bolstered by good attendance and homework completed by her parents and neuro-typical twin brother. Student's grades were therefore not a credible indicator of her academic abilities and supposed success in general education.

68. During hearing, Mother and Student more persuasively testified that Student was lost and confused during the eighth grade. During hearing, Student could not recall learning anything from her eighth grade general education classes.

69. Student also failed to benefit socially and emotionally while in general education. For example, Student had difficulty establishing friendships with her neuro-typical peers. Although shy, Student was kind and had friends in her special education classes. However, during eighth grade, Student was isolated from peers. She had no friends, ate lunch alone, and was routinely bullied by peers. For example, peers stole her sheet music each day of her general education choir class.



70. Student internalized feelings of sadness and anxiety at school, and broke down each night crying at home.

71. During her testimony, Student demonstrated low cognitive skills and appeared traumatized by her experience in general education classes. Student was bewildered by the conduct of her peers and why they were mean to her. Student cried and required a break when recounting her general education classes.

72. Following the March 2018 IEP team meetings, Student toured San Marcos High School. She was overwhelmed by the size of the school, navigating the large campus, and the prospect of attending general education classes where she was lost in the work and afraid of her peers. Student cried during her testimony and pleaded not to be sent to San Marcos High School.

73. Each Student and San Marcos witness who was familiar with Student described her as honest and forthright. Student's appearance during hearing matched that description. For those reasons, significant weight was given to Student's testimony. In sum, Student credibly testified that she had not received an educational benefit from general education classes.

74. Consequently, the same evidence showed that Student would be unable to benefit educationally from the general education placement San Marcos offered Student for the ninth grade. San Marcos High School was a much larger campus than Student's middle school, with a larger student population, and larger class sizes. During hearing, Mother, Student, and Dr. Weckerly persuasively testified that Student's emotional fragility and inability to benefit from general education would be magnified at San Marcos High School.

## STUDENT'S NOTICE OF UNILATERAL PLACEMENT AND SAN MARCOS' PRIOR WRITTEN NOTICE

75. By email on July 20, 2018, Parents informed San Marcos that they disagreed with the IEP offer of placement and they intended to privately place Student at a nonpublic school, and seek tuition reimbursement from San Marcos. Parents' notice of unilateral placement was timely as it predated Student's unilateral placement by 10 days.

76. On August 3, 2018, Ms. Dully sent a prior written notice letter to Parents. The notice denied Parents' request for placement at a nonpublic school. Ms. Dully described the March 29 and 30, 2018 IEP offers, including San Marcos's offer to reduce speech and language services. The notice also explained the basis for the IEP offers, including that the IEP team had based its offer upon consideration of Student's present levels of performance, progress on goals, and relevant information from IEP team members.

77. In addition, the August 3, 2018 prior written notice letter again requested that Parents consent to the April 11, 2018 assessment plan. Ms. Dully described her belief that reassessments were warranted to allow San Marcos to identify Student's present unique needs, and to help resolve the dispute regarding Student's educational placement. The letter included another copy of the assessment plan and Parents' procedural rights.

78. During the hearing, Ms. Dully persuasively testified that San Marcos would have completed the triennial evaluation within the first 60 days of the 2018-2019 school year, had Parents consented to the assessment plan in response to Ms. Dully's August 2018 letter. Parents again refused to consent to the assessment plan.

## THE WINSTON SCHOOL

79. Prior to the commencement of the 2018-2019 school year, Parents

contracted with The Winston School for Student to attend there for the school year. Parents drove Student to Winston each school day, or hired a driver when they were unavailable, two round trips daily for drop off and pick up, during the 2018-2019 school year. Student was attending Winston at the time of the hearing.

80. Winston was a nonpublic school that was certified to provide special education by the California Department of Education for over 30 years. Winston was located in San Diego county and had 100 students attending its small campus. Each class had a maximum of ten students and two adults. Each teacher had a special education teaching credential.

81. Students worked on the common core curriculum, but at a much slower pace than a general education class. All students at Winston had an IEP, but Winston did not admit students with behavior problems. At least half of the students were placed there by a public school district, including some students from San Marcos.

82. At Winston, Student still demonstrated educational delays and fell in the low-middle range ability level compared to her nonpublic school peers. However, Student progressed academically in the small classes with repetitive instruction, and was able to independently pass in-class assignments and tests.

83. Winston science teacher John Weber testified that Student was quiet and withdrawn when she first began attending class. However, she grew in her ability to understand the classroom material and to participate during classroom discussions.

84. Student also progressed socially and emotionally at Winston. She developed friendships, was not bullied, and no longer ate lunch alone. She was invited to events outside of school, and participated on the school's softball team, albeit with difficulty due to motor delays. Student enjoyed going to Winston and, during her testimony, was terrified by the prospect of leaving Winston for San Marcos High School.

85. Mother, Student, Dr. Weckerly, Winston director Holly Reed, and Mr.

Weber each persuasively testified in support of Student's placement at Winston. Each witness credibly opined that Winston was appropriate for Student based upon her cognitive abilities, and academic, social, and emotional delays. San Marcos did not impeach the credibility of these witnesses or their testimony, and a majority of evidence submitted at hearing supported the conclusion that Winston was an appropriate placement for Student in light of her circumstances.

#### DR. WECKERLY'S ASSESSMENT

86. Dr. Weckerly testified in support of her assessment and Student's request for tuition reimbursement for Winston. Dr. Weckerly had a master's degree in linguistics and two doctorate degrees, one in cognitive science and linguistics and the second in clinical psychology. She worked as a psychologist since 1999. Her professional experience included working as a staff psychologist, an assistant professor of psychology at the University of California San Diego, a private clinical psychology practice, and working in the mental health department for the San Diego Unified School District. Dr. Weckerly published numerous peer-reviewed articles in her areas of expertise. She provided deliberative and persuasive testimony. For these reasons, significant weight was given to Dr. Weckerly's assessment and testimony.

87. Dr. Weckerly assessed Student over three days in April, May, and July 2018. She reviewed Student's school and medical records; interviewed Parents; observed Student clinically and at school; and assessed her using various standardized assessments and rating forms.

88. Testing included the Wechsler Intelligence Scale for Children - Fifth Edition; Kaufman Test of Educational Achievement, Third Edition; Gray-Oral Reading Test, Fifth Edition; Test of Word Reading Efficiency, Second Edition; Test of Written Language, Fourth Edition; Test of Everyday Attention for Children; Comprehensive Test of Phonological Processing, Second Edition; Expressive One Word Picture Vocabulary

Test, Fourth Edition; Subtests from the Wide Range Assessment of Memory and Learning, Second Edition; inventories from the Child and Adolescent Symptom Inventory, Fifth Edition; Connor Rating Scales, Third Edition; and Beck Youth Inventories.

89. Dr. Weckerly used the Wechsler Intelligence Scale for Children - Fifth Edition, to assess Student's cognitive functioning. The Wechsler measured five cognitive domains, including verbal comprehension, visuospatial skills, fluid reasoning, working memory, and processing speed. Student was low average in working memory; impaired in verbal comprehension and processing speed; and significantly impaired in visuospatial and fluid reasoning. The testing used a mean of 100, with a fifteen-point standard deviation. Student's full scale intelligence quotient was 71, indicating a moderate intellectual disability.

90. Overall, testing found that Student struggled in the area of visuospatial skills, with a score at the first percentile, meaning that of 100 peers tested, 99 peers scored better than Student. Student fell in the second percentile in fluid reasoning, and fifth percentile in processing speed. Student had problems in visual memory, and scored at below the first percentile in executive functioning.

91. Student was also delayed in expressive vocabulary and phonological processing.

92. Student had significant impairments in fluid reasoning, visuospatial skills, and perceptual organization, which impacted her ability to progress in higher level academic skills, including reading comprehension, written organization, and word problems.

93. Dr. Weckerly opined that Student's deficits in visuospatial skills and fluid reasoning, in particular, would impact her ability to function in a large class setting. She carefully noted that Student's relative strength in verbal functioning, compared to her more significant impairments in perceptual and fluid reasoning, could mislead others

into viewing Student as having more understanding than she had. When combined with Student's quiet and pliable demeanor, it was easy for a teacher to miss Student's distress or misunderstanding of material.

94. Dr. Weckerly recommended that, in light of Student's cognitive disabilities and emotional delays, Student attend a small, structured learning program, with small group teaching and repetitive instruction.

95. Dr. Weckerly credibly testified that Winston's structure, small class size, and slower paced instruction better suited Student's functioning ability than a larger, faster paced general education class.

96. During the hearing, no San Marcos witness impugned the credibility of Dr. Weckerly's experience or testing. Rather, school psychologist Mr. Degtyarev testified that Dr. Weckerly's testing was valid and a reliable reflection of Student's functioning levels.

97. Dr. Weckerly's findings were also similar to past testing. For example, in 2014, Rienzi Haytasingh, Ph.D., who did not testify, used the Cognitive Assessment Test to find that Student had a full scale intelligence quotient of 70, demonstrating an intellectual disability. Following this testing, San Marcos continued placing Student in mild-to-moderate special day classes. Similarly, in 2016, San Marcos used the Kaufman Test of Educational Achievement, which yielded a composite score of 76, to find that Student had below average academic abilities. As a result, San Marcos continued to place Student in mild-to-moderate special day classes at that time.

98. Consequently, Dr. Weckerly's testing and testimony was consistent with Parents' belief that the March 2018 IEP offers were not appropriate to meet Student's unique needs.

#### THE NOVEMBER 14, 2018 AMENDMENT IEP

99. On November 14, 2018, San Marcos convened an amendment IEP team

meeting for Student. The purpose of the meeting was to review Dr. Weckerly's independent assessment.

100. Mother attended the amendment IEP team meeting with an advocate. Each actively participated during the meeting. Dr. Weckerly did not attend the meeting.

101. The following people attended for San Marcos: Ms. Sestina; Ms. Carr; Mr. Kruger; program specialist Peggy Zapata; speech-language pathologist Joanne Navielliat; occupational therapist Neika Maryn; school psychologist Troy Sauvageau; and school nurse Beth Lawson.

102. San Marcos provided a copy of Dr. Weckerly's assessment to school team members prior to the meeting.

103. The meeting was short and ended with no changes to the March 2018 IEPs based upon Dr. Weckerly's assessment or recommendations. During hearing, San Marcos witnesses testified that no changes were made to the IEP because, with the exception of placement, Dr. Weckerly's recommendations resembled the accommodations and services already included in Student's IEP.

104. In sum, San Marcos and Parents had a fundamental disagreement concerning Student's placement. Dr. Weckerly's independent assessment supported Parents' belief that Student's impairments necessitated placement in a small, structured classroom. San Marcos disagreed, and that dispute was not resolved at the amendment IEP team meeting.

105. Mother shared that Student was doing well at Winston and expressed her desire to keep her there for the remainder of the school year.

106. The IEP team again discussed the April 11, 2018 assessment plan, and San Marcos repeated its request to assess Student. Mother refused.

107. San Marcos did not offer any changes to the March 2018 annual IEP during the November 2018 amendment IEP team meeting. Parents did not consent to

the IEP and filed their request for due process shortly thereafter, on December 28, 2018.

108. On January 2, 2019, San Marcos filed a complaint against Student in OAH Case No. 2019010076, to assess Student under the April 11, 2018 assessment plan, without Parents' consent. Parents consented to the April 11, 2018 assessment plan on January 9, 2019. Based upon this consent, San Marcos withdrew its complaint and the matter was dismissed by OAH.

109. Following their consent to the assessment plan, Parents only intermittently made Student available for assessments. Mother testified that it was difficult to coordinate her work schedule with the school testing.

110. San Marcos was unable to fully complete the triennial evaluation and some testing was still pending at the time of the due process hearing.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)<sup>4</sup>; 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

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

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



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 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).

#### ISSUE 1(A): FAILURE TO PROVIDE PRIOR WRITTEN NOTICE TO REDUCE SPEECH AND LANGUAGE SERVICES

8. Student alleges that San Marcos denied her a FAPE by failing to provide prior written notice when it proposed reducing Student's speech and language services during the March 30, 2018 IEP team meeting.

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. Prior written notice must be given by the public agency to the parents of an individual with exceptional needs "upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a free appropriate public education to the child." (Ed. Code, § 5650 .4, subd. (a); *see also* 20 U.S.C. § 1415(b)(3), (4) & (c)(1); 34 C.F.R. § 300.503.)

11. The notice must contain: (1) a description of the action refused by the agency; (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal; (3) a statement that the parents of the disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; (4) sources of assistance for parents to contact; (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

12. The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that the parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect. (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation of educational the violation is not a substantive harm under the IDEA. (*Ibid*)

13. Mother attended the March 30, 2018 IEP team meeting, when San Marcos proposed reducing Student's speech and language services from 2240 minutes per year

to 900 minutes per year. San Marcos provided Mother a copy of procedural safeguards at the beginning of the meeting and offered to summarize the safeguards.

14. San Marcos speech-language pathologist Ms. Hoffman attended the IEP team meeting, along with necessary San Marcos team members. Ms. Hoffman was knowledgeable about Student's speech and language needs, having directly provided her speech and language services during the school year.

15. Mother, Ms. Hoffman, and the rest of the IEP team discussed Student's present levels of performance and progress towards past IEP goals, including in speech and language. Mother participated in this discussion, was free to ask questions, and did so. Along with the rest of the IEP team, Mother participated in the formulation of new IEP goals, including in speech and language.

16. San Marcos offered to reduce Student's speech and language services. The description of related services in the written IEP document was clear and Parents were not confused by the IEP offer.

17. Mother disagreed with the IEP offer and did not sign consent to the IEP. Accordingly, San Marcos did not reduce Student's speech and language services. San Marcos maintained the same level of services, 2240 minutes per year, until Parents unilaterally placed Student at Winston. Consequently, there was no actual reduction in the provision of speech and language services.

18. On August 3, 2018, Ms. Dully sent Parents a prior written notice letter that categorically summarized the March 30, 2018 IEP offer. The notice included the reduced speech and language services. Ms. Dully adequately described the speech and language services and the basis for the IEP offer; including that the IEP team had considered Student's present levels of performance, progress towards goals, and input from the IEP team members.

19. Given the foregoing, San Marcos provided Parents lawful notice of its

decision to reduce Student's speech and language services and no further notice was necessary.

20. Student failed to present any evidence that showed Parents were not informed of the IEP offer and the reduction of speech and language services. Parents did not agree to the change and no actual change in services transpired. Moreover, Parents failed to present evidence that showed they were limited in their ability to participate during the March 30, 2018 IEP team meeting.

21. Consequently, Student failed to establish by a preponderance of the evidence that she was denied a FAPE because San Marcos failed to provide Parents prior written notice of its decision to reduce speech and language services.

#### ISSUE 1(B): FAILURE TO FILE FOR DUE PROCESS UPON DENYING PARENTS' REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS.

22. Student complains that San Marcos violated Student's procedural rights by failing to file for due process after it denied Parents' request for independent educational evaluations.

23. Student does not challenge the appropriateness of San Marcos's April 2016 assessments. Rather, Student's issue is technical and pertains solely to whether San Marcos failed to file for due process after denying Parents' March 28, 2018, request for independent educational evaluations in the areas of psycho-education and speech and language.

24. A parent has the right to obtain an independent educational evaluation if the parent disagrees with a school district's assessment. (Ed. Code, § 56329, subd. (b).) But the obligation for a school district to fund the independent educational evaluation is not automatic. When a parent requests an independent educational evaluation, a school district must either fund the independent educational evaluation at public expense or file, without unnecessary delay, for a due process hearing to show that its assessments

were appropriate. (Ed. Code, § 56329, subd. (c).) This requirement is described as a school district's "fund or file" obligation. While a school district may select either option, it is not permitted to do neither. If it fails to do either, the student is entitled to the IEE whether the school district's assessment was appropriate or not. (*J.P. v. Ripon Unified School District* (E.D. Cal. April 14, 2009, No 2:07-cv-03084) 2009 WL 1034993; *Pajaro Valley Unified School District v. J.S.* (N.D. Cal Dec. 15, 2006, C-06-0380) 2006 WL 3734289.)

25. Here, by email on March 28, 2018, Mother informed San Marcos that she disagreed with San Marcos's most recent assessments and requested that San Marcos fund independent educational evaluations in the areas of psycho-education and speech and language.

26. On April 11, 2018, San Marcos sent a prior witness notice letter to Parents denying their request. The notice acknowledged that San Marcos understood the disputed assessments were part of San Marcos' April 2016 triennial evaluation. During hearing, Ms. Sestina testified that San Marcos understood that Parents disagreed with its April 2016 psycho-educational and speech and language evaluations. Consequently, the facts show that San Marcos had sufficient information as of March 28, 2018, to discern which assessments Parents disagreed with and what specific independent evaluations Parents requested.

27. Thus, San Marcos had sufficient information to determine whether to fund the independent educational evaluations or to file for due process to defend its assessments, as required by the above authority.

28. San Marcos unlawfully elected to do neither. To date, San Marcos has not agreed to fund the independent educational evaluations or filed for due process to defend its assessments.

29. San Marcos primarily argues that it did not "fund or file" because Parents

elected to pay for Dr. Weckerly's independent psycho-educational assessment. During hearing, Ms. Sestina testified that San Marcos interpreted this conduct as a withdrawal of Parents' request for independent educational evaluations in psycho-education and speech and language. San Marcos relied upon this argument in its closing brief.

30. In addition, San Marcos argued in its closing brief that it was not required to "fund or file" because Parents' request for independent educational evaluations was not genuinely related to a dispute with the school assessments, and cited to a number of non-precedential cases.

31. San Marcos reliance on these arguments is not well taken. Regarding the first argument, all evidence showed that Parents did not withdraw their request for independent educational evaluations verbally or in writing at any time. San Marcos's belief that the act of a parent self-funding an assessment operated to extinguish a request for an independent educational evaluation is not reasonable. It also fails to explain how Parents self-funding a psychoeducational evaluation by Dr. Weckerly extinguished their request for the speech and language independent educational evaluation. Regardless, San Marcos's argument is not based on fact or authority.

32. San Marcos's second argument is inapposite to applicable law. While a school district may ask why a parent disagrees with a school assessment, a parent is not required to explain to a school district the reasons why they disagree with a school assessment. (34 C.F.R. § 300.502(b).)

33. The issue presented is not complex. The law is clear that a public agency may not unreasonably delay either providing the independent educational evaluation at public expense, or initiating a due process hearing to defend the public evaluation.

34. San Marcos's obligation to "fund or file" is well settled and it failed to do either. Consequently, San Marcos failed its duty to file for due process upon denying Parents' request for independent educational evaluations, a procedural violation.



35. A procedural violation of the IDEA constitutes a denial of a FAPE “only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits.” (Ed. Code, § 56505(f)(2); *Target Range, supra*, 960 F.2d at p. 1484.) Here, San Marcos’s failure to fund the requested independent educational evaluations or to, without necessary delay, file for due process to defend its own assessments, deprived Student of educational benefits, and, accordingly, denied Student a FAPE on that basis. (*Carrie I. ex rel. Greg I. v. Dep’t of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247 (“The lack of assessments alone is enough to constitute a lost educational opportunity.”).)

36. For the forgoing reasons, Student proved by a preponderance of evidence that San Marcos denied her a FAPE by failing to file for due process upon denying Parents’ request for independent educational evaluations at public expense.

#### ISSUES 2(A)(I) AND (B): FAILURE TO OFFER AN APPROPRIATE PLACEMENT

37. Student alleges San Marcos denied her a FAPE during the 2018-2019 school year by failing to offer appropriate levels of specialized academic instruction and an appropriate placement. The allegation stems from the March 30, 2018 IEP, which remained unchanged by the May 17, 2018 and November 14, 2018 amendment IEPs. The IEPs offered placement primarily in general education classes at a large, comprehensive high school.

38. Student asserts San Marcos should have offered placement primarily in smaller, structured, special day classes, which provide specialized academic instruction, at a physically smaller campus, which may have necessitated nonpublic school placement.

39. San Marcos avers that general education classes at San Marcos High School was the least restrictive environment for Student.

## THE LEAST RESTRICTIVE ENVIRONMENT

40. 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).)

41. 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.)

42. Parents are not requesting to place Student in a mainstream, general education classroom, the least restrictive environment on the continuum of placement options. Rather, as a remedy, Student requests tuition and transportation reimbursement for Winston, a non-public school.

43. Hence, the core of this issue is whether San Marcos's offer for general education classes was reasonably calculated to enable Student to make progress appropriate in light of her circumstances, in accord with *Andrew F.*, while considering the factors prescribed by *Rachel H.*

#### STUDENT'S DISABILITIES

44. Although Student received special education under the eligibility category specific learning disability, she had multiple disabilities.

45. Student had diagnosed sensory problems, apraxia, ataxia, developmental coordination disorder, hypotonia, visual processing delays, and vision deficits. Student had impaired visuospatial skills, fluid reasoning, visual memory, and executive functioning skills. She was delayed in all academic areas.

46. Student also had social-emotional delays and required educationally related mental health services and psychological counselling. In addition, Student had limited ability to focus and required frequent prompts for most tasks.

47. With a full scale intelligence quotient of 71, Student had a moderate cognitive impairment. At fifteen, Student had the mental capacity of someone much younger and required constant adult supervision.

48. As a result of her disabilities, Student demonstrated delayed academic, social, and emotional skills. Her disabilities impacted her ability to access general education even with accommodations, modifications, and related services.

49. For those reasons, San Marcos placed Student in small, structured special day classes for most of her educational career. San Marcos experimented increasing Student's mainstreaming by placing her primarily in general education classes during the 2017-2018 school year, eighth grade. An examination of how Student did in general education classes during the eighth grade is therefore necessary to determine whether

San Marcos's offer for a similar program at a larger high school for the 2018-2019 school year, ninth grade, was appropriate.

#### Student Did Not Receive An Academic Benefit In General Education

50. On the surface, it appeared Student did well during the eighth grade in her general education classes. Student received passing grades and did not disrupt any class.

51. However, a closer look revealed that Student failed her in-class assignments and tests throughout the school year. For example, the May 17, 2018 IEP reported that Student did not pass any in-class tests in general education history. In general education science, Student passed just one test during the school year. Student's overall grades were bolstered by homework and take-home projects completed by her parents and neuro-typical twin brother, and were therefore not a credible indicator of her academic abilities.

52. Mother and Student persuasively testified that Student could not keep up with the faster pace of general education. Student did not understand the material in her general education classes and was unable to independently complete school work.

53. Even with accommodations and modifications, Student was far below what was expected of general education high school students. State testing showed that she was far below grade level in each academic area tested.

54. Student did not benefit from general education physical education due to poor motor skills. In general education choir, Student was isolated and bullied by her peers.

55. Student met just three of nine annual IEP goals during the school year. She did not meet goals in core academic areas, including reading, writing, and math.

56. Dr. Weckerly's assessment and credible testimony showed that Student had impaired cognitive abilities. She had significant impairments in verbal

comprehension, visuospatial skills, fluid reasoning, visual memory, processing speed, and executive functioning. Dr. Weckerly persuasively opined that these impairments impacted Student's ability to progress in higher level academic classes that required reading comprehension, written organization, and word problems. In particular, Student's deficits in visuospatial skills and fluid reasoning, would impact her ability to function in a general education class.

57. Dr. Weckerly's thoughtful and deliberative testimony supported the conclusion that Student required a small, structured learning program, with small group teaching and repetitive instruction to benefit academically. That type of placement was not consistent with the large general education classes at San Marcos High School.

58. In response, San Marcos's witnesses, who were experienced educators, were not persuasive in showing that Student benefited academically from general education classes. For example, directors Ms. Dully and Ms. Sestina, and vice principal Ms. Carr, had not assessed or taught Student. Speech-language pathologist Ms. Hoffman was not familiar with Student's ability to benefit in general education classes. School psychologist Mr. Degtyarev confirmed Student did well in special day classes, but was unfamiliar with her functioning in general education classes. School psychologist Mr. Kruger had recently assessed Student, but was conspicuously quiet regarding the results of his testing. And he provided little insight as to whether Student would benefit from general education classes at San Marcos High School. Case carrier Ms. Hammen's testimony was frequently at odds with the majority of evidence submitted by both parties for this matter, and therefore given little weight. Noticeably absent from San Marcos's witnesses were any of the general education teachers that taught Student during the 2017-2018 school year.

59. In sum, San Marcos' witnesses failed to impeach the credibility of Dr. Weckerly's testimony or testing. To the contrary, Mr. Degtyarev testified that Dr.

Weckerly's testing was valid and consistent with prior testing. Nor did the San Marcos witnesses diminish the persuasiveness of Mother's and Student's testimony.

60. The foregoing evidence demonstrated that Student did not receive an academic benefit from general education classes during the eighth grade, a factor under *Rachel H.*

#### Student Did Not Receive A Non-Academic Benefit In General Education

61. Student had emotional difficulty and required educationally related mental health services and psychological counseling for many years. Her emotional difficulty was compounded with delayed social skills and low cognitive abilities. As a result, she had difficulty socializing with or understanding her typical peers. In response, her typical peers ignored or bullied her. Student made friends in her special day classes and at Winston. However, in general education, Student was isolated and friendless.

62. During the 2017-2018 school year, Student internalized feelings of sadness and anxiety at school, and broke down each night crying at home.

63. During testimony, Student demonstrated that she was traumatized by her experience in general education. Student cried and required a break when recounting her general education classes. She pleaded not to be sent to San Marcos High School. Her testimony was credible and moving.

64. In sum, Mother and Student persuasively established that Student did not progress socially or emotionally while in general education.

65. Consequently, a preponderance of evidence also showed that Student did not benefit socially or emotionally from general education, another *Rachel H.* factor.

66. There is no dispute that Student was not disruptive in her general education classes. Nor was there any consideration by either party regarding whether it was cost prohibitive to educate Student in general education classes. Each are important factors under *Rachel H.* However, Student's inability to benefit academically or non-

academically in general education classes outweighed those factors. Therefore, a preponderance of evidence showed that Student required a more restrictive placement than general education classes.

67. During hearing, Mother, Student, and Dr. Weckerly persuasively testified that Student's emotional fragility and inability to benefit from general education would be magnified at San Marcos High School. San Marcos High School was a much larger campus than Student's middle school, with a larger student population, and larger class sizes. Student required a small, structured placement in light of her circumstances, and general education classes at San Marcos High School were not appropriate in light of those circumstances. Consequently, San Marcos's March 30, 2019 offer of placement for the 2018-2019 school year was not appropriate for Student, and San Marcos denied her a FAPE on that basis.

68. For the foregoing reasons, Student showed by a preponderance of evidence that San Marcos denied her a FAPE during the 2018-2019 school year by failing to offer appropriate specialized academic instruction and placement.

#### ISSUES 2(A)(II) AND 2(C): THE TRANSITION SERVICES AND PLAN

69. Student contends San Marcos failed to offer school transition services and a school transition plan during the 2018-2019 school year, as required by a state law.

70. When a special needs child transfers from a nonpublic school into the general education setting, the IEP must include "provision for the transition into the regular class program." (Ed. Code, § 56345, subd. (b)(4).) When the child moves into a regular class for any part of the school day, the provision for transition must include "a description of the activities provided to integrate the pupil into the regular education program. The description shall indicate the nature of each activity, and the time spent on the activity each day or week." (Ed. Code, § 56345, subd. (b)(4)(A).)

71. On March 29, 2018, San Marcos convened a transition IEP team meeting for Student to assist her matriculation into high school. Mother and Student attended the transition IEP team meeting, along with necessary San Marcos staff.

72. For Student's transition to high school, San Marcos offered Student a field trip to San Marcos High School; a presentation at the high school; and participation during the transition IEP team meeting.

73. On March 30, 2018, San Marcos convened an annual IEP team meeting for Student. Student was attending a public middle school and San Marcos offered San Marcos High School, a public high school, for the 2018-2019 school year. As such, Student was not transitioning from a nonpublic school into a general education setting. San Marcos therefore had no obligation to offer Student a school transition plan.

74. Similarly, when San Marcos convened the May 17, 2018 amendment IEP team meeting, Student was attending the public middle school, not a nonpublic school.

75. On November 14, 2018, San Marcos held an amendment IEP team meeting. Although Student was attending Winston, a nonpublic school, there was no indication that Parent intended to transition her from Winston to San Marcos High School. To the contrary, Mother made clear her intent to keep Student at Winston. Rather, the sole purpose of the amendment IEP team meeting was to review Dr. Weckerly's independent assessment.

76. During hearing, Student failed to present persuasive evidence that Student was denied a FAPE because San Marcos did not provide sufficient school transition services or a school transition plan. Rather, the substance of testimony provided by Student's witnesses was that the IEP placement offer was not appropriate; not that San Marcos failed to offer adequate school transition planning for a placement with which Parents did not agree.

77. For example, Dr. Weckerly's assessment did not recommend a school



transition plan. And, during testimony, she was not critical of the March 29, 2018 transition IEP, other than the offer of placement in general education classes.

78. This was consistent with Student's complaint and closing brief, wherein Student requested the following remedies: (1) independent educational evaluations funded by San Marcos; and (2) reimbursement for placement at Winston, with related transportation costs. Student did not request compensatory education or a school transition plan for any of the issues. Moreover, neither party submitted evidence to support an additional or alternative remedy.

79. Therefore, Student failed to prove by a preponderance of evidence that she was denied a FAPE because San Marcos failed to offer school transition services or a school transition plan.

#### ISSUE 2(D): FAILURE TO CONSIDER INDEPENDENT EVALUATIONS

80. Student asserts that San Marcos denied her a FAPE by failing to consider Dr. Weckerly's 2018 independent assessment.

81. If a parent obtains an independent assessment at public expense, or shares with the school district an evaluation obtained at private expense, the results of the evaluation must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of a FAPE. (34 C.F.R. § 300.502(c); Ed. Code §§ 56341, subd. (b)(1) and 56381, subd. (b).)

82. San Marcos convened an amendment IEP team meeting on November 14, 2018, for the purpose of reviewing Dr. Weckerly's assessment. Mother attended the amendment IEP team meeting with an advocate. San Marcos permitted Mother and her advocate to actively participate during the meeting. Although Dr. Weckerly did not attend, she was not prevented from doing so by San Marcos.

83. San Marcos ensured that all necessary staff attended the meeting, including school psychologist Mr. Sauvageau, and provided a copy of Dr. Weckerly's

assessment to each team member prior to the meeting. Although Mr. Sauvageau did not testify during the hearing, Student failed to present any evidence that impugned the qualifications of Mr. Sauvageau, or the qualifications of any IEP team member.

84. San Marcos did not offer to amend the March 29 and 30, 2018 IEP offers, primarily because Dr. Weckerly's findings were consistent with past testing. With the exception of a small, structured classroom placement, Student's IEP accommodations and services resembled the recommendations contained in Dr. Weckerly's report.

85. San Marcos and Parents had a disagreement concerning Student's placement and that dispute was not resolved at the November 2018 amendment IEP team meeting. But that does not mean that San Marcos did not consider Dr. Weckerly's independent assessment.

86. Consequently, Student failed to show by a preponderance of evidence that Student was denied a FAPE because San Marcos failed to consider independent educational evaluations.

## REMEDIES

87. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide 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 Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*)).

88. In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.).

89. An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

90. Parents may also be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at 369-71; *Forest Grove, supra*, 557 U.S. at p. 2493-2494.) However, parents are not required to have procured an exact proper placement under the IDEA to be entitled to reimbursement. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c).)

91. Student proved by a preponderance of evidence that San Marcos denied Student a FAPE by failing to file for due process to defend its assessments upon denying Parents' request for independent educational evaluations in the areas of psycho-education and speech and language. Student is therefore entitled to a remedy for that violation.

92. During hearing, Mother testified that she paid \$3,500.00 for Dr. Weckerly's independent assessment. Dr. Weckerly was a qualified assessor and there was no evidence presented during hearing that impugned her qualifications or the validity of her report. It is therefore equitable to order San Marcos to reimburse Parents \$3,500.00 for Dr. Weckerly's independent assessment.

93. Parents had not obtained an independent speech and language assessment. Therefore, due to San Marcos' failure to file to defend its April 2016 speech and language assessment, it is also equitable to order San Marcos to fund an

independent educational evaluation in the area of speech and language, by a qualified assessor of Parents' choosing.

94. A preponderance of evidence also established that the March 30, 2018 IEP denied Student a FAPE, by failing to offer an appropriate placement with appropriate specialized academic instruction. As a remedy, Student requests reimbursement for tuition at Winston, along with related transportation costs. Evidence established that Parents paid \$30,968.00 to Winston for tuition for the 2018-2019 school year.

95. Dr. Weckerly credibly testified that Winston's structure, small class size, and slower paced instruction was appropriate for Student in light of her circumstances. Mother, Student, Ms. Reed, and Mr. Weber also persuasively testified that Winston was appropriate for Student based upon her unique needs. Winston was a certified nonpublic school with contracts with various school districts, including San Marcos. A preponderance of evidence submitted at hearing therefore demonstrated that Winston was an appropriate placement for Student.

96. For the foregoing reasons, it is equitable to order that San Marcos reimburse Parents for Student's tuition at Winston for the 2018-2019 school year, and related transportation costs.

#### REDUCTION OF REMEDIES

97. San Marcos argues that, if a remedy is ordered, it should be denied or reduced based upon Parents' conduct.

98. While an Administrative Law Judge may require a school district to reimburse a parent for the cost of tuition at a private school if the school district did not offer student a FAPE, the Administrative Law Judge may reduce or deny that reimbursement under certain circumstances. (34 C.F.R. § 300.148(d)(1) (2006).) Here, the Decision finds that San Marcos denied Student a FAPE and therefore tuition reimbursement is an appropriate equitable remedy. However, San Marcos' argument

that Parents' noncooperation with its right to assess Student warrants a denial or reduction in reimbursement has some merit.

99. A local educational agency must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).) The agency must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

100. Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. §§ 1414(b)(1); 1415(b)(3), (c)(1); 34 C.F.R. § 300.304(a); Ed. Code, §§ 56321, subd. (a).) The notice consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and related state laws. (Ed. Code, § 56321, subd. (a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

101. It is well settled that parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

102. On April 11, 2018, San Marcos provided Parents an assessment plan that included proposed reassessments in the areas of academic achievement, intellectual development, speech and language, motor development, social-emotional functioning,

adaptive behavior, and sensory processing, and a special circumstances independence assessment to determine whether Student required an individual aide. All were areas of suspected deficit for Student. The purpose of the reassessments was for San Marcos to obtain additional information regarding Student's educational needs. The letter also included a copy of parental procedural rights under the IDEA and related state laws. Parents refused to consent to the assessment plan until January 2019, after San Marcos filed a request for a due process hearing to obtain authorization.

103. During the hearing, Student failed to allege or show any defect with the assessment plan, the areas of reassessment proposed, or the qualifications of San Marcos's assessors, which might have explained Parents' refusal.

104. Rather, Mother testified that she was not opposed to San Marcos reassessing Student, but failed to consent to the assessment plan because she wanted to first have Student complete state-wide testing and to obtain a private assessment, before signing the assessment plan. However, parents may not place conditions on a school district's ability to assess or reassess. Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent. For example, in *Student R.A. v. West Contra Costa Unified Sch. Dist.* (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.], a parent approved an assessment plan on the modest condition that she be allowed to observe the assessment when conducted. The District Court found that condition vitiated the mother's consent: "The request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate." (*Id.* at p. 3.) Consequently, here, Mother's explanation for not consenting, no matter how well intended, did not excuse her obligation to cooperate with San Marcos' right to reassess Student.

105. Additionally, conditions warranted reassessment. Mother had expressed serious concerns about the appropriateness of Student's IEP placement by email on March 23, 2018, and during the IEP team meetings held on March 29 and 30, 2018. Student was last assessed two years earlier, in April 2016, and her classroom placement had changed significantly since then as she was primarily now in general education classes, not special day classes. Parents refused to consent to the March 2018 IEPs, and San Marcos desired to obtain additional information to determine whether Parents' concerns were legitimate.

106. San Marcos was vigilant in its attempts to reassess Student. Yet, Parents failed to sign the April 11, 2018 assessment plan. Had Parents consented to reassessments at that time, San Marcos could have reviewed updated testing and data, and reexamined its placement offer on that basis, prior to the commencement of the next school year. While this Decision determined that Parents' placement concerns were well-founded, the due process hearing could, perhaps, have been avoided if Parents had cooperated with San Marcos' request to reassess Student in April 2018.

107. On May 4, 2018, San Marcos sent Parents another letter requesting Parents' consent to the assessment plan, with another copy of the plan and procedural safeguards. Parents again refused to consent to the assessment plan.

108. On May 17, 2018, San Marcos convened an IEP team meeting, during which the IEP team discussed the April 11, 2018 assessment plan. The team reviewed the assessment plan and Mother participated in the discussion. San Marcos again requested that Parents consent to the assessment plan and Parents again refused to do so.

109. By letter on August 3, 2018, San Marcos again described its belief that reassessments were warranted to allow San Marcos to identify Student's then-present unique needs, and to help resolve the dispute regarding Student's educational

placement. San Marcos again requested that Parents sign the assessment plan. Parents again refused.

110. By letter on October 25, 2018, San Marcos again requested that Parents consent to the assessment plan, and included another copy of the plan. Parents did not sign the assessment plan.

112. On November 14, 2018, San Marcos convened an amendment IEP team meeting, during which the IEP team again discussed the April 11, 2018 assessment plan. Again, San Marcos requested that Parents consent to the plan. Again, Parents refused.

113. On January 2, 2019, San Marcos filed a complaint against Student in OAH Case No. 2019010076, to assess Student under the April 11, 2018 assessment plan, without Parents' consent. Parents consented to the assessment plan on January 9, 2019. Based upon this consent, San Marcos withdrew its complaint. However, following their consent to the assessment plan, Parents only intermittently made Student available for assessments. San Marcos was unable to fully complete the triennial evaluation and some testing was still pending at the time of the due process hearing.

114. The foregoing illustrates that Parents were not cooperative and infringed on San Marcos's right to assess Student. This conduct warrants a reduction in the tuition reimbursement and related transportation costs awarded in this matter.

115. Based upon the foregoing, a balancing of Parents' conduct and San Marcos' failure to offer Student an appropriate placement, warrants a reduction of tuition reimbursement and related transportation costs, to half of the 2018-2019 school year.

## ORDER

1. Within 60 days of this Decision, San Marcos shall pay Parents \$15,484.00, as reimbursement for Student's attendance at Winston for half of the 2018-2019 school year.



2. Within 30 days of this Decision, Student shall submit mileage costs for two round trips of daily attendance at Winston for half of the 2018-2019 school year, based upon the current internal revenue services' rate for mileage reimbursement. Within 60 days of receiving those costs, San Marcos shall reimburse Parents for those costs.

3. Within 60 days of receiving this Decision, San Marcos shall pay Parents \$3,500.00, as reimbursement for Dr. Weckerly's independent educational evaluation.

4. Within 30 days of this Decision, Parents shall identify to San Marcos a qualified speech-language pathologist that meets San Marcos's assessment costs guidelines, to conduct an independent speech and language evaluation for Student. Within 45 days of that identification, San Marcos shall contract with the assessor to conduct the independent evaluation for Student.

5. Student's remaining 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, Student prevailed in issues 1(b), 2(a)(i), and 2(b). San Marcos prevailed on issues 1(a), 2(a)(ii), 2(c), and 2(d).

## 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: June 26, 2019

\_\_\_\_\_/s/

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearing