UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G.G., a minor, by and through his parents, RACHEL GOOD, and DARREN GOOD, and on their own behalf, Plaintiffs, v. CONEJO VALLEY UNIFIED SCHOOL DISTRICT, Defendant.	CV 21-9135 DSF (MARx) ORDER AFFIRMING DECISION OF THE ADMINISTRATIVE LAW JUDGE

Plaintiff G.G.[1] and his parents, Rachel and Darren Good, filed a complaint seeking review of an administrative law judge's determination under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA) that the Conejo Valley Unified School District did not deny G.G. a free and appropriate public education (FAPE).

The Court heard arguments from the parties on August 30, 2022. After considering the administrative record, the briefs, and arguments of counsel, the Court makes the following findings of fact and

[1] G.G.'s claims are brought by his guardian ad litem, Darren Good. G.G. is also sometimes referred to as "Student," and his parents are also sometimes referred to as "the Goods" or "Parents." The Court sometimes refers to G.G. even though all Plaintiffs have asserted the claim.

conclusions of law and affirms the decision of the administrative law judge.

I. FINDINGS OF FACT

A. Procedural History

On February 9, 2021, the Student[2] filed a due process complaint with the California Office of Administrative Hearings (OAH). A.R. at 1. In this complaint, the Student alleged that the District violated the IDEA by denying the Student a FAPE. The Student first alleged that the District denied his procedural due process rights by denying the parents a "right to meaningful participation" in the development of the individualized education program (IEP). The procedural claim is based on the District's "fail[ure] to take into consideration Parent's concerns in the determination of the development of Student's program in regard to placement" and "fail[ure] to provide [prior written notice (PNW)] with all required information based on the District's proposal to change Student's placement." A.R. at 21-22. The second allegation was that "the District denied Student a FAPE by failing to conduct appropriate assessments in all areas of suspected disability," namely "Recreational Therapy," "Central Auditory Processing Disorder," and "Functional Behavior Assessment." A.R. at 22. The final allegation was that the District substantively did not offer a FAPE because the December 2020 IEP failed to "meet [G.G.'s] unique needs and provide him with educational benefit." A.R. at 23. On February 22, 2021, the District submitted a response. A.R. at 76-82.

On March 23, 2021, the District filed its own request for a due process hearing asserting that "the District's psychoeducational assessment of Student is appropriate in all respects such that Student is not entitled to a psychoeducational [independent educational evaluation (IEE)] at public expense." A.R. at 163. On April 2, 2021, the

[2] G.G. was referred to in the administrative proceeding as "Student" and the Goods were referred to as "Parents." The Court uses both terms to refer to each here.

District consolidated this complaint with the Student's complaint. A.R. at 168-170.

A due process hearing occurred remotely on June 8, 9, 15, 16, and 17, 2021 in front of Administrative Law Judge (ALJ) Kara Hatfield. A.R. at 142. On August 25, 2021, ALJ Hatfield issued her decision on the Student's eight issues and the District's single issue. She found the following:

1. "Issue 1: Conejo Valley did not significantly impede Parents' opportunity to participate in the decisionmaking process regarding providing Student a FAPE, or deprive Student of educational benefits, by failing to provide Parents an assessment plan within 15 days of Parents' request for an assessment for central auditory processing disorder and of Student's need for recreational therapy." A.R. at 920; see also id. at 849-50.

2. "Issue 2: Conejo Valley did not significantly impede Parents' opportunity to participate in the decisionmaking process regarding providing Student a FAPE by failing to provide all of Student's educational records within five days of Parents' January 5, 2021 request." A.R. at 920; see also id. at 850-51.

3. "Issue 3: Conejo Valley did not significantly impede Parents' opportunity to participate in the decisionmaking process regarding providing Student a FAPE, or deprive Student of educational benefits, by failing to include in the December 14, 2020 IEP, a description, individualized for Student, of the means by which the special education and related services of the IEP would be provided during emergency conditions when instruction or services could not be provided to Student either at school or in-person for more than 10 school days." A.R. at 920; see also id. at 852-857.

4. "Issue 4: Conejo Valley did not significantly impede Parents' opportunity to participate in the decisionmaking process regarding providing Student a FAPE, or deprive Student of educational benefits, in the December 14, 2020 IEP by failing to

consider Parents' concerns regarding placement." A.R. at 920; see also id. at 857-59.

5. "Issue 5: Conejo Valley did not significantly impede Parents' opportunity to participate in the decisionmaking process regarding providing Student a FAPE, or deprive Student of educational benefits, in the December 14, 2020 IEP by failing to provide Parents prior written notice with all required information related to Conejo Valley's proposed change of placement." A.R. at 921; see also id. at 859-66.

6. "Issue 6: Conejo Valley did not deny Student a FAPE by failing in the December 14, 2021 psychoeducational assessment to conduct appropriate assessments in all areas of suspected disability." A.R. at 921; see also id. at 866-97.

7. "Issue 7: Conejo Valley did not deny Student a FAPE by failing to assess Student in all areas of suspected disability, specifically: a. Student's need for recreational therapy; b. Central auditory processing disorder; and c. Behavior, through a functional behavior assessment." A.R. at 921; see also id. at 897-901.

8. "Issue 8: Conejo Valley did not deny Student a FAPE by failing in the December 14, 2021 IEP to: a. Develop appropriate goals in all areas of unique need; b. Offer appropriate placement; c. Offer appropriate and sufficient accommodations; d. Offer an appropriate behavior support plan based on assessment of Student's needs; and e. Offer Student special education and related services for the 2021 extended school year." A.R. at 921; see also id. at 901-19.

9. "Issue 9: Conejo Valley's December 14, 2020 psychoeducational assessment complied with legal requirements such that Student is not entitled to an independent educational evaluation in psychoeducation at public expense." A.R. 922; see also id. at 866-97.

On November 22, 2021, G.G. filed a request for judicial review of the administrative decision issued by the OAH. The Student alleges that procedural violations denied the Goods' ability to meaningful participate in the December 2020 IEP, that the District failed to assess all areas of suspected disability, and that the December 2020 IEP failed to make a FAPE available to the Student. Dkt. 1 (Compl.) ¶¶ 97-119. The Student requests reimbursement for the "unilateral services and placement provided to the Student from January 2021 forward." Compl. ¶¶ 120-24. On January 27, 2021, the District filed its Answer. Dkt. 13.

B. Background

1. Prior Settlement

G.G. had filed a different due process complaint against the District on March 27, 2020. That complaint asserted "that the District denied Student a FAPE by failing to appropriately assess Student and offer him a FAPE." A.R. at 191. On May 15, 2020, the parties entered a Settlement Agreement and Release of Claims to resolve the dispute. A.R. at 191-202. The agreement reflected a final resolution to all claims through December 31, 2020 "except as to any disagreement as to the assessment results and IEP that may result from Parents' request for an assessment and IEP." A.R. at 191-92. "Nothing in [the] Agreement precludes the Parents from seeking an assessment and IEP for Student for the second semester of the 2020-2021 school year." A.R. at 197.

2. Enrollment in Bridges

For the 2018-2019 school year, G.G. was a fourth grader at a school in the District. A.R. at 1974:3-13. The next school year, 2019-2020, the Goods placed G.G. in a private school, Bridges Academy. G.G. remained enrolled at Bridges for the course of the proceedings. A.R. at 1545:9-13; 1974:3-13.

On May 5, 2020—after this action was filed with the OAH, but before the due process hearing—the Goods signed an enrollment

contract with Bridges for the 2020-2021 school year. A.R. at 529. This contract indicates that the Goods owe $48,650 in tuition and fees for the 2020-2021 school year and specifies that there are "no refunds on contracts cancelled after June 30, 2020." A.R. at 529. The Goods do not appear to have cancelled or altered the contract by the June 30, 2020 cut-off. Indeed, the Goods made a $31,000 tuition payment for the 2020-2021 school year on September 1, 2020, and they continued to make further payments over the subsequent months. A.R. at 531-32.

3. IEP Request and Assessment

On September 17, 2020, the Goods emailed the District requesting an assessment. A.R. at 728-29. The email specifically requested that the District "conduct testing that addresses: *Psycho/educational, social/emotional, Occupational Therapy (OT), LAS (language), Recreation Therapy (RT), and Central Auditory Processing (CAPD).*" A.R. at 729.

On September 29, 2020, the District held a Student Study Team (SST) meeting. This meeting was attended by "Mr. and Mrs. Good, Robin Habif-Rieger, Speech Pathologist, Monika Agrawal, School Psychologist, John Braaten, General Education Teacher, Kim Chopp, School Counselor, and Fatima Hernandez, School Counseling Intern." A.R. at 570.

On October 5, 2020, the District's psychologist, Monika Agrawal emailed the Goods an "assessment plan" for the student to complete and the parents to sign, a "copy of the prior written notice and parental rights," and "release forms" for the student's school. A.R. at 731-33. Agrawal also invited the parents to "include any outside providers on the release forms that you would like me to speak with as part of the evaluation." A.R. at 731-33. The Goods promptly signed and returned the assessment plan on or around October 8, 2020. A.R. at 731-32. On November 3, 2020, Agrawal followed up on her original email, drawing attention to the unsigned release forms and stating that "until [she] receive[d] the release form to speak with an outside provider" she could not "observe [G.G.] or talk to teachers at his current school." A.R. at

736. The release for Agrawal to speak to Bridges was not received until November 16, 2020. A.R. at 571. Agrawal then promptly reached out to Bridges to gather information about the student and schedule an observation of G.G. A.R. at 744-62.

On December 7, 2020, Agrawal followed up with the Goods on the release forms for G.G.'s providers, stating that "[y]ou returned a release form for us to communicate with Bridges Academy but I want to make sure that there are no other outside providers that you would like us to communicate with." A.R. at 772. Rachel Good replied stating "I am not sure who you want to talk to." Agrawal indicated that she was "happy to reach out to any outside provider that you want to have their input included as part of the evaluation!" A.R. at 771-73. Agrawal did not receive the release to speak to G.G.'s outside providers until December 11, 2020. A.R. at 571-572; 790-794. The releases provided were for Dr. Marc Rosenthal, M.D., Psychiatrist; Stephanie Neri, Center of Autism and Related Disorders; and Dr. Stazan Sina Ph.D., Psychologist. A.R. at 584-85. As the IEP was to take place the following Monday, December 14, 2020, Agrawal did not obtain or review information from G.G.'s outside providers until after the December 14, 2020, IEP meeting. A.R. at 1404-05.

4. IEP

Agrawal's initial assessment totaled 67 pages. A.R. at 570-636. It included various assessments and incorporated input from the Goods and current teachers. *See, e.g.*, A.R. at 581-85. The Goods received the assessment just prior to the meeting. A.R. at 650. The District did not deliver the report earlier because of issues with scheduling an observation of G.G. at Bridges and delays with the releases. A.R. at 650.

The IEP meeting occurred via video conference on December 14, 2020, and was scheduled to last two hours. A.R. at 650-656. At the IEP meeting, the team determined that G.G. was eligible primarily under other health impairment and secondarily under emotional disturbance. A.R. at 652.

The IEP forms provided for: 60 minutes a week of specialized academic instruction (SAI) for English; 88 minutes a week of SAI for study skills; 45 minutes a week of counseling and guidance; 45 minutes a week of individualized counseling; 88 minutes a week of intensive individualized services for special education class through January 15, 2021; 1438 minutes a week of intensive individualized services for general education class through January 15, 2021; 60 minutes a week of SAI for academic through March 15, 2021; and 60 minutes of SAI for social and behavioral through March 15, 2021. A.R. 638, 653. The IEP set eight annual goals for G.G. and provided him twenty-five different accommodations. A.R. at 642-46

5. Post IEP activity

On January 28, 2021, the Goods signed the IEP, agreeing G.G. was "eligible for special education under OHI and ED"; however, they disagreed "with the District's offer of placement and services." A.R. at 656. They indicated that given their disagreement with the District's offer of a FAPE, they would keep G.G. enrolled at Bridges. A.R. at 656.

On May 7, 2021, the District sent the Student a prior written notice (PWN). A.R. at 798. This was in response to the request that the District reimburse the Bridges tuition. A.R. at 797-804. The PWN characterizes the December 2020 IEP offerings as a:

> FAPE consisting of placement in 6th grade general education at Colina with the following special education supports and services: [1] 148 minutes per week of SAI, [2] 45 minutes per week of counseling and guidance, [3] individual counseling for 45 minutes per week, [4] one to one aide for [G.G.'s] transition from Bridges to Colina for 1446 minutes per week until at least January 15, 2021, and [5] consultation and collaboration services for [G.G.]'s teachers and service providers as [G.G.] transitioned from Bridges to Colina for 120 minutes per month until at least March 15, 2021.

The same day that the District sent out the PWN, Rachel Good requested to "to see the SAI Study Skills CORE Class which has been offered to my son, [G.G.] as part of his IEP." A.R. at 807.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

The Court has original jurisdiction under 20 U.S.C. § 1415(i)(3)(A).

Venue is proper under 28 U.S.C. § 1391(b)(1). The events giving rise to Student's claim occurred in the Central District of California.

B. Standard of Review

The applicable standard of review is set forth in 20 U.S.C. § 1415(i)(2)(C). The reviewing court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

In applying the preponderance of evidence standard, reviewing courts must grant "due weight" to "the administrative decision below" and "must not substitute their own notions of sound educational policy for those of the school authorities which they review." Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 817 (9th Cir. 2007) (internal citations omitted).

The amount of deference afforded to the hearing officer's decision is subject to the discretion of the court. Gregory K v. Longview School District, 811 F.2d 1307 (9th Cir. 1987). "The amount of deference accorded the hearing officer's findings increases where they are thorough and careful." Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995) (internal quotations and citation omitted). "[S]ubstantial weight" should be given to the hearing officer's decision "when it 'evinces his careful impartial consideration of all the evidence and demonstrates his sensitivity to the complexity of the issues presented.'" County of San Diego v. California Special Educ. Hearing

Office, 93 F.3d 1458, 1466 (9th Cir. 1996) (quoting Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1476 (9th Cir. 1993)).

C. Burden

"The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 62 (2005). "The burden of proof in the district court rests with the party challenging the administrative decision." M.S. v. L.A. Unified Sch. Dist., 913 F.3d 1119, 1124 (9th Cir. 2019) (internal citations omitted).

G.G., as the party who challenged the IEP, bore the burden of proof in the administrative hearing. As the party challenging the administrative decision, he once again bears the burden of proof.

D. Waiver

"[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived." Arpin v. Santa Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001). G.G. has not raised specific arguments as to Issues 1, 2, 3, 6, 7(c), 7(b), or 9, so those issues are waived.

E. Request to Supplement the Administrative Record

G.G. filed a motion to supplement the administrative record on April 13, 2022, proposing twenty-one new exhibits. Dkt. 25. On May 16, 2022, this Court denied the motion to supplement without prejudice. Dkt. 32. On June 16, 2022, three days after filing his opening trial brief, G.G. filed a new motion to supplement. Dkt. 34 (Mot. to Suppl. 2). After meeting and conferring with opposing counsel, G.G. proffered a single supplemental exhibit -- a June 21, 2021 Recreational Therapy Assessment Report. Dkt. 34-4 (RT Assessment). G.G. asserts that this evidence is relevant to whether the "ALJ erred by finding that Defendant denied Student a FAPE by failing to conduct a recreational therapy assessment." Dkt. 34-1 (Mem. ISO Mot. To Suppl. 2) ¶ 36; see Section II(G) (analyzing Issue 7(a)).

The "IDEA mandates that, on review of an administrative decision, the district court shall hear additional evidence at the request of a party. But not all evidence is 'additional evidence.'" E.M. v. Pajaro Valley Unified School Dist., 652 F.3d 999, 1004 (9th Cir. 2011) (citation and internal quotation marks omitted). "[J]udicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." Id. at 1004-05. Rather, with the IDEA there was an "intent that federal courts enforce the minimum federal standards IDEA sets out" and "consider additional evidence when evaluating" appeals. Id. at 1005. The additional evidence to be considered "includes, inter alia, evidence concerning relevant events occurring subsequent to the administrative hearing." Id. (internal citations omitted). Still, evidence that is cumulative, irrelevant, or otherwise inadmissible should be excluded and a court should not admit evidence "that changes the character of the hearing from one of review to a trial de novo." Id. at 1004 (internal citations omitted).

In light of the IDEA's generous approach to supplementation of the record, G.G.'s motion is granted.

F. Procedural Violations

When analyzing whether a school district is in compliance with the IDEA, the Court first examines whether the district has complied with the procedures set forth in the IDEA. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Second, the Court examines whether the IEP developed through these procedures was reasonably calculated to enable the child to receive educational benefits. "A state must meet both requirements to comply with the obligations of the IDEA. Doug C. v. Haw. Dep't of Educ., 720 F.3d 1038, 1040 (9th Cir. 2013). But "[n]ot all procedural flaws result in the denial of a FAPE." L. M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 910 (9th Cir. 2009). A "procedural violation may be harmless" so long as it did not result "in a loss of educational opportunity or significantly restricted parental participation." Id.

1. Meaningful Participation (Issue 4)

The first alleged procedural violation is that the District failed to consider the Goods' concerns regarding placement. This allegation fails. "A core principle throughout the IDEA is meaningful participation by parents and informed parental consent"; Congress placed "great emphasis on procedural safeguards to ensure that the rights of children with disabilities and parents of such children are protected." M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 851 (9th Cir. 2014). "Parental participation in the IEP and educational placement process is critical to the organization of the IDEA." Doug C., 720 F.3d at 1043. "Parents are included as members of IEP teams, [t]hey have the right to examine any records relating to their child," and they should "be notified in writing of the procedural safeguards available to them under the Act." Schaffer, 546 U.S. at 53 (internal citations omitted).

Rachel and Darren Good were afforded the opportunity to meaningfully participate in this process and be a part of the IEP team. As an initial matter, the ALJ applied the correct standard. Plaintiff alleges that the ALJ found an *opportunity* for the parents to participate was sufficient rather than evaluating whether it was a *meaningful opportunity*. Dkt. 33 (Pl. Op. Tr. Brief) at 4. But this is not so. The ALJ specified that the District was required "to conduct a *meaningful IEP* meeting" and acknowledged that the parent must have the opportunity to "*meaningfully participate[]* in the development of an IEP." A.R. at 857-58 (citing W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) and N.L. v. Knox County Schs., 315 F.3d 688, 693 (6th Cir. 2003) (emphasis added).

G.G. cannot meet his burden to show the District denied the Goods an opportunity to meaningfully participate in the IEP process. G.G. argues that the District denied meaningful participation in two ways. First, G.G. contends that the District denied meaningful participation by not reconvening once Agrawal spoke with his outside providers. Pl. Op. Tr. Brief at 5. Ignoring that this was not a basis raised before the ALJ, the argument is not persuasive. The Goods' delay in providing a

release for Agrawal to speak with G.G.'s outside providers caused this issue. The record provides ample support for this fact. In emails dated October 5, 2020, November 3, 2020, and December 7, 2020, Agrawal attached release forms for outside providers and stated that she was "happy to reach out to any outside provider that [the Goods] want[ed] to have their input included as part of the evaluation!" A.R. at 731-33, 736, 771-73. No outside provider releases were provided by the Goods until December 11, 2020—the last business day before the IEP meeting. A.R. at 571-72; 584-85; 790-94. Agrawal still sought out G.G.'s outside providers, gathering input from all three in December of 2020 and January of 2021. A.R. at 584-85. The reason the provider input was not incorporated earlier was due to the Goods' two-month delay in providing the release. The District can only offer participation; the Goods' lack of cooperation does not equate to a denial of meaningful participation.

The second allegation is that the District failed to "to consider Parents' concerns regarding placement" and the "ALJ erred by placing the onus on [the] Parent at the time of the December 2020 IEP to request alternative appropriate school placements." A.R. 857; Pl. Op. Tr. Brief. at 6. This is unpersuasive. Plaintiffs' argument is that the District should have been the one to bring up private school placement and failing to do so prevented the Goods from meaningfully participating in the IEP. Pl. Op. Tr. Br. at 5. But the District "could never [have] offer[ed] Bridges, which is a noncertified private school and not a certified non-public school," because the California Constitution prohibits public funds going to "'any school not under the exclusive control of the officers of the public schools . . . .'" Dkt. 38 (Def. Answer Tr. Brief) at 22 (quoting Cal. Const., art. IX, § 8); see also A.R. 1077:15-25 (ALJ Hatfield: "Bridges is a private school that is not certified by the California Department of Public -- excuse me -- California Department of Education as a nonpublic school, [it] could never be a placement that the District would offer nor would it be a placement that I could order the District to send him to."); Cal. Educ. Code §56034 (defining certified nonpublic schools).

Even if Bridges were an option, the Goods have provided no case law supporting their apparent position that in order for parents to be able to meaningfully participate, the District must present alternative placements. Rather, the law requires that parents be included in the IEP team and that their concerns, questions, and input be taken seriously. There is no evidence that the Goods' concerns about an alternative placement were not taken seriously because there is no evidence they ever brought up private placement or asked questions about it. And, for any concerns they did raise, the ALJ properly found that the District was receptive and responsive to the Goods' concerns. The IEP meeting notes "reflected that Parents attended the meeting and actively participated" and "testimony did not contradict the IEP team meeting notes regarding the questions Parents asked and the comments Parents made during the meeting . . . ." A.R. at 858.

After review of the record, the Court finds that G.G. has not shown by a preponderance of the evidence that the Goods were denied the opportunity to meaningfully participate in the December 2020 IEP. The ALJ's ruling as to Issue 4 is UPHELD.

2. PWN (Issue 5)

The ALJ found that the 2020 Settlement Agreement waived the Goods' right to a PWN, that the IEP fulfilled the PWN requirements, and that any lack of a PWN did not deny G.G. a FAPE or impede the Goods' ability to meaningfully participate. A.R. at 859-66. The protests to each of these conclusions are unavailing.

A PWN, one of the "procedural safeguard[s]" of the IDEA, "requires that local educational agencies provide written notice to a child's parents whenever the agency 'proposes to initiate or change' or 'refuses to initiate or change the identification, evaluation, or educational placement of the child.'" Compton Unified Sch. Dist. v. Addison, 598 F.3d 1181, 1183 (9th Cir. 2010) (citing 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)). "The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what

placements were offered, and what additional educational assistance was offered to supplement a placement, if any." Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 2010). Pursuant to 20 U.S.C. § 1415(c)(1), a PWN should contain:

> (A) a description of the action proposed or refused by the agency;
>
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
>
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
>
> (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;
>
> (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
>
> (F) a description of the factors that are relevant to the agency's proposal or refusal.

"Procedural flaws do not automatically require a finding of a denial of a FAPE. They may be harmless if they do not result in a loss of educational opportunity or significantly restrict parental participation." Marcus I. v. Dep't of Educ., 583 Fed. Appx. 753, 755 (9th Cir. 2014). A procedural violation resulting from an inadequate PWN may be harmless. For example, in Marcus I, the Ninth Circuit found that a PWN did not make a sufficiently specific formal placement offer. But, amid "contradictory testimony," the Ninth Circuit concluded that the fact that the plan was discussed at an IEP meeting by an individual who understood the program was sufficient. There was no denial of a FAPE. Id.

a. Whether a PWN Claim was Waived

A PWN claim was waived by the May 15, 2020 Settlement Agreement. The ALJ found: "Student is barred from asserting procedural compliance claims that arose before December 31, 2020, if they are unrelated to results or an IEP resulting from any assessment Parents requested pursuant to paragraph 8 of the May 2020 settlement." A.R. 861.

The Settlement Agreement signed on May 15, 2020 reflected a final resolution of all claims through December 31, 2020 "except as to any disagreement as to the assessment results and IEP that may result from Parents request for an assessment and IEP." A.R. at 191-92. The parties' dispute is essentially whether an IEP includes a PWN. G.G. makes two interpretation arguments. First, the language in the administrative code requires a PWN both when educational placement is *initiated* or changed, thus it is part and parcel with the IEP. 34 C.F.R. § 300.503(a)). Pl. Op. Tr. Brief at 10. But the language of the Agreement is clear that the Goods waived all claims except for "disagreements as to the assessment and IEP." While a PWN may typically accompany an IEP, it is not the IEP nor is it an assessment. The second argument is one of contract interpretation. Plaintiff says the "mutual intention" of the parties' would have included the PWN. Id. at 7-8. G.G. does not meet his burden to show by a preponderance of the evidence what the mutual intention of the parties was when they entered into the contract.

b. Whether the IEP Fulfilled the PWN Requirements

Even if the PWN was not waived, the IEP fulfilled the PWN requirement. The ALJ found that the District "was not required to provide Parents a separate [PWN] of the initial offer of placement and services the IEP team proposed." A.R. at 862. The legislative history of the IDEA supports the conclusion that an IEP may fulfill the PWN notice requirements: "There is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet

all the requirements in Sec. 300.503." See 71 Fed. Reg. 46,691 (2006). G.G contends that the IEP here could not serve as a substitute for a PWN because it was "so unclear it could not have provided Parents with reasonable notice of what Defendant intended to offer as FAPE." Pl. Op. Tr. Brief at 9-10. Presumably this is an allegation that the IEP does not meet the requirement that a PWN contain a "a description of the action proposed or refused by the agency." 20 U.S.C. § 1415(c)(1)(A).

The Court is not persuaded that the IEP was too unclear to provide reasonable notice of the District's offerings. The parties dispute whether witness testimony speaks to the IEP's lack of clarity. Def. Answer Tr. Brief. at 12-13; Pl. Op. Tr. Brief at 9-10. But Rachel Good testified that she did not ask anyone at the District to see the program offered before signing the January 28, 2021 agreement because she was "very familiar with Colina because [her] daughter had just graduated the May before and [she] was on the PSA and very involved in the school, so [she] *knew exactly the program at Colina*." A.R. at 1825:10-1825:15 (emphasis added). In light of this testimony and the IEP, G.G. cannot plausibly claim that the IEP did not provide "sufficient detail to give Parents the opportunity to fully consider the proposal and to have enough information to respond." Pl. Op. Tr. Brief at 9-10.

c. Whether any Procedural Error Deprived the Student of a FAPE or the Parents of a Meaningful Opportunity to Participate

The Court agrees with the ALJ that even if the IEP did not meet all the requirements of a PWN, "Student still failed to show how any failure by Conejo Valley to comply with a prior written notice obligation not only affected Parents' participation in educational decisionmaking, but rose to the level of significantly impeding that participation." A.R. at 864. Failure to provide a PWN is "harmless" if it does "not result in a loss of educational opportunity or significantly restrict parental participation." Marcus I., 583 Fed. App'x. at 755; see also J.P. ex rel. Popowitz v. Los Angeles Unified Sch. Dist., No. CV 09-01083 MMM MANX, 2011 WL 12697384, at *20 (C.D. Cal. Feb. 16, 2011) (finding

plaintiffs were not prejudiced by the failure to provide a PWN because "the parents were active participants in the IEP meeting and contributed to and acquiesced in the conclusions reached and recommendations made"). Nothing in the record supports a finding that any PWN issues denied a FAPE or denied the Goods the opportunity to meaningfully participate in the IEP.

At the tail end of her analysis on this issue, the ALJ also found that any PWN issue did not impede the Goods' ability to participate, nor did it deprive G.G. of a FAPE because the Goods never actually intended to participate in the IEP and take G.G. out of Bridges. A.R. 864-66. This is evidenced by the contract the Goods signed that obligated them to pay the full Bridges tuition and direct testimony from G.G. Id. Plaintiff argues that this was improper for the ALJ to consider. Dkt. 42 at 15-18. Whether the District offered a FAPE is determined by looking at the actions of the school district. Whether the Goods intended to accept the offer is irrelevant. Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994) ("We find that a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement."); J. W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 431 (9th Cir. 2010) (similar). The Court does not consider whether the Goods actually intended to participate in the IEP. Removing this from the analysis, however, does not change the outcome.

The Court finds that G.G. has not shown by a preponderance of the evidence that there was a failure to give a PWN that resulted in denial of a FAPE or a denial of the ability to meaningfully participate. The ALJ's ruling as to Issue 5 is UPHELD.

G. Areas Not Assessed (Issue 7(a))

The ALJ did not err in finding that "Student failed to demonstrate Conejo Valley denied him a FAPE by failing to assess Student's need for recreational therapy." A.R. at 897-98. "Under the IDEA, the school district must conduct a 'full and individual initial evaluation,' one

which ensures that the child is assessed in 'all areas of suspected disability,' before providing that child with any special education services." Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1119 (9th Cir. 2016) (citing 20 U.S.C. §§ 1414(a)(1)(A), 1414(b)(3)(B)). A "disability is 'suspected,' and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability." Id. A district may have notice from experts, their own observations, or the "informed suspicions of parents, who may have consulted outside experts." Pasatiempo by Pasatiempo v. Aizawa, 103 F.3d 796, 803 (9th Cir. 1996).

Recreational therapy is just that—therapy. It is not itself a disability, but a potential way to treat disability. As the Ninth Circuit stated in Timothy O., suspected disabilities display "symptoms." Timothy O., 822 F.3d at 1119. But here, the briefing makes clear that the Goods were looking for "recreation services" to address an underlying disability related to social skills. Pl. Op. Tr. Brief. at 12-13 (citing A.R. 1831:21-23). Rachel Good testified that she thought G.G. "had a disability in the area of recreational therapy" because "I see him in social situations. I see his inability to interact with peers without support." A.R. at 1831:19-23. The evidence identified from outside providers recognizes that G.G. needed assistance with "social skills and social communication." Pl. Op. Tr. Brief. at 14. Agrawal did assess the underlying suspected disability using the following assessment tools: "(1) Autism Spectrum Rating Scale, which examined social/communication, self-regulation, peer socialization, adult socialization, and social/emotional reciprocity; (2) Behavioral Assessment Scale for Children, 3rd Edition, which examined social stress, interpersonal relations, and social skills; (3) Revised Children's Manifest Anxiety Scale, 2nd Edition, which examined social anxiety; and (4) Piers-Harris Children's Self-Concept Scale, 3rd Edition, which examined social acceptance." Def. Answer Tr. Br. at 17 (citing A.R. 598-612; 1357:18-1369:15).

The supplemental evidence G.G. submitted – the June 21, 2021 Recreational Therapy Assessment Report -- does nothing to change this outcome. The Goods seem to believe that this evidence shows that the

ALJ was incorrect when she "determined that recreational therapy was not an area of suspected disability" because "Jennifer Mayer, who is a Certified Therapeutic Recreation Specialist, determined at the time of her assessment that G.G. did have needs in that area." Dkt. 35-1 (Mem. ISO Mot. To Suppl. 2) ¶ 38. This new evidence, however, only reinforces the ALJ's finding. The assessment concludes that "recreation therapy services" would be beneficial because G.G. has a "deficit" in "social functioning" and "perspective taking." RT Assessment at 12. Mayer is not presenting recreational therapy as an underlying disability that needs assessing. Rather she discusses it as a way of treating underlying disabilities, namely, the already suspected and evaluated disabilities related to social functioning.

After review of the record and evidence, the Court finds that G.G. has not shown by a preponderance of the evidence that the District denied a FAPE by failing to assess recreational therapy as an area of suspected disability. The ALJ's ruling as to Issue 7(a) is UPHELD.

H. Substantive Denial of a FAPE (Issue 8)

"To provide a FAPE, the educational agency must ensure that the child's IEP is reasonably calculated to enable the child to receive educational benefits." Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1057 (9th Cir. 2012) (internal citations omitted). The Supreme Court has "concluded that states must provide a 'basic floor of opportunity' to disabled students, not a 'potential-maximizing education.'" J. L. v. Mercer Island Sch. Dist., 592 F.3d 938, 947 (9th Cir. 2010) (citing Rowley, 458 U.S. at 197 n.21). "The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit." R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1122 (9th Cir. 2011).

"A school district provides a free appropriate public education" if it "addresses the child's unique needs" and "provides adequate support services so the child can take advantage of the educational opportunities." Forest Grove Sch. Dist. v. Student, 665 Fed. Appx. 612,

614 (9th Cir. 2016) (internal citations omitted). "The term 'unique educational needs' [shall] be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996).

G.G. failed to prove his claim that the "December 2020 IEP did not offer a program that would meet his unique needs and provide meaningful educational benefit." Pl. Op. Tr. Brief at 15. The ALJ analyzed the eight substantive issues identified by G.G. As to each issue, the ALJ properly found that "Conejo Valley did not deny Student a FAPE." See A.R. at 901-19.

1. Appropriate Goals (Issue 8(a))

The District properly provided goals for identified areas of unique need. On appeal, G.G. contends that the District did not provide goals for "social skills deficits," "stereotypical behavior related to hand sniffing," and "difficulty with transitions." Pl. Op. Tr. Brief at 15-17. An IEP team is required to develop measurable annual goals in each identified area of need. 20 U.S.C. § 1414 (d)(1)(A)(i)(III). But an "IEP is not required to contain every goal from which a student might benefit." Capistrano Unified Sch. Dist. v. S. W., 21 F.4th 1125, 1133 (9th Cir. 2021).

The ALJ correctly found that the "two goals for writing, three goals for social-emotional functioning, and three goals for academic study skills" were "sufficient to afford Student the opportunity to receive educational benefit appropriate in light of his circumstances." See A.R. at 903-08. Specifically, goals five and six addressed social skill deficits, setting a goal for G.G., within the year, to "maintain 4-6 exchanges on another persons perspective or topic by asking questions or making positive comments" and "control impulsive behaviors by raising his hand and waiting to respond (without calling out) with no more than 1 prompt in 3 out of 4 opportunities across a 20 minute period. A.R. 642-45. Goal three was designed to help G.G. "learn a coping strategy to address the hand sniffing" as the hand sniffing appears to be an

inappropriate response "due to feelings of anxiousness." A.R. at 642-45; 1284:23-1286:20. Regarding G.G.'s contention that "difficulty with transitions" was a problem not addressed by any goal, G.G. cites no evidence that this was even an identified problem. Pl. Op. Tr. Brief at 17. The only supposed evidence pointed to is a quote from Agrawal during her testimony in front of the OAH. The transition discussed in this testimony was the transition to remote learning. Agrawal said "that information about the difficulty that [G.G.] was having with distance learning was important for the IEP team" because it provided "data that he was having a difficult time working on schoolwork from home." Pl. Op. Tr. Brief at 17 (citing A.R. at 1268). G.G. has not shown by a preponderance of evidence that the District failed to provide goals for identified areas of unique need.

2. Appropriate Placement (Issue 8(b))

The District offered proper placement. G.G. contends that placing him largely in "general education classes" ignores his need to be in a "small academic setting" like Bridges. Pl. Op. Tr. Brief at 17. But he ignores a key legal consideration: a "placement must be in the least restrictive environment—in other words, the Student must be placed with non-disabled peers to the maximum extent appropriate." A.R. v. Santa Monica Malibu Sch. Dist., 636 Fed. Appx. 385, 386 (9th Cir. 2016).

There is a four-factor balancing test that courts consider when determining compliance with the least restrictive environment requirement: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class, and (4) the costs of mainstreaming [the student]." Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & through Holland, 14 F.3d 1398, 1404 (9th Cir. 1994). The ALJ properly weighed these factors and found that the IEP "struck a reasonable balance." See A.R. at 908-15. As to factor one, prior to the transfer to Bridges, G.G. maintained a "B average in 3rd and 4th grade." A.R. at 575. This shows he can obtain educational benefits in a traditional classroom. As

to factor two, there is a non-academic benefit to being educated alongside and socializing with nondisabled peers. All of the Bridges students are not considered "neurotypical." A.R. at 1637:11-19. G.G.'s provider agreed that it "would be of benefit to [G.G.] if he were around neurotypical peers." A.R. at 1083:10-21. As to factor three and four, Plaintiff has presented no evidence that G.G.'s behaviors had a negative impact on classmates or that the costs of mainstreaming G.G. are an issue.

The evidence that G.G. should be at Bridges is nothing more than claims that Bridges has some potential benefits for a student like him. But the IDEA is about ensuring the "basic floor of opportunity to disabled students, not a potential-maximizing education." J. L., 592 F.3d at 947 (internal citation omitted). And the question here is not whether Bridges would have been a better placement or a more ideal placement. When reviewing whether a district offered a FAPE, a court "must focus primarily on the District's proposed placement, *not on the alternative that the family preferred*." Gregory K., 811 F.2d at 1314 (emphasis added). The real issue is whether the District provided that basic floor of opportunity. The ALJ properly found that it did. G.G. has failed to show by a preponderance of the evidence that the placement offered by the IEP was not appropriate.

3. Appropriate Accommodations (Issue 8(c))

G.G. complains that the IEP "does not contain accommodations to allow Student to move around the room or provide for visual cues during auditory tasks." Pl. Op. Tr. Brief at 20. But this allegation is simply not true. The IEP provides for accommodations to "[a]llow for fidgeting /fidget object," to "[a]llow for extra movement," and for "[d]irections given through visual cues." A.R. at 646. G.G. has failed to show by a preponderance of the evidence that the accommodations offered by the IEP were not appropriate.

4. Behavior Support Plan (Issue 8(d))

The record does not show that the District needed to develop a behavior support plan. G.G. contends that he "had behaviors that

interfered with his learning including hand-sniffing, attention, and impulsive behaviors" and these should have been "addressed via a BSP." Pl. Op. Tr. Brief at 21. In "the case of a child whose behavior impedes the child's learning or that of others," IEP teams are to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). If an IEP "does not address appropriately behavior that impedes a child's learning," it "denies a student a FAPE." W.A. ex rel S.A. v. Patterson Joint Unified Sch. Dist., No. CV F 10-1317 LJO SMS, 2011 WL 2925393, at *11 (E.D. Cal. July 18, 2011) (internal citation omitted). G.G. alleges only that the hand sniffing and impulsive behaviors exist. Pl. Op. Tr. Brief at 21. There is no evidence that these behaviors impede G.G.'s learning. The ALJ was correct in finding that G.G. has "failed to demonstrate he required a behavior support plan in the December 14, 2020, IEP to receive a FAPE." A.R. at 916-17.

5. Special Education and Related Services (Issue 8(e))

The District did not deny a FAPE by failing to offer special education and related services for the 2021 extended school year (ESY). An ESY provides services over school breaks to "prevent regression and recoupment difficulties during the summer break." A.R. at 918; see also 34 C.F.R. §300.106(a)(2). G.G presents no evidence that an ESY was needed to provide him a FAPE. There are no recommendations from providers that this was needed and no indication that G.G. previously regressed over summer breaks. He simply complains that Agrawal did not ask G.G.'s providers about extended school year services and disagrees with Agrawal's determination that ESY was not needed. Pl. Op. Tr. Brief at 22-23. But ultimately the IEP discussed "whether or not [G.G.] required ESY placement or services" and found that G.G. did not "require extended school year services" after accounting for "Teacher input and report card grades and comments." A.R. at 1297:1-1298:16. There was no "data to suggest that [G.G.] regresses without the ability to recoup those skills within a reasonable amount of time" and if "over the school year, it appeared that he did," the IEP would have "have regrouped as an IEP team to discuss adding extended school year services." A.R. at 1398:14-1399:6. G.G. has not

met his burden to show that the District's failure to provide an ESY resulted in denial of a FAPE.

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After review of the record, the Court finds that G.G. has not shown by a preponderance of the evidence that the IEP substantively denied him a FAPE. The ALJ's ruling as to all of Issue 8 is UPHELD.

I. Reimbursement

The Good's fourth claim for relief requests reimbursement for G.G.'s placement. Reimbursement may be available "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. §1412(a)(10)(C)(ii). The District did not deny G.G. a FAPE.

The Court DENIES G.G.'s request for reimbursement for unilateral placement in Bridges Academy.

J. Attorneys' Fees and Costs

The Goods' fifth claim of relief requests reimbursement of attorneys' fees and costs. The IDEA gives the Court discretion to "award reasonable attorneys' fees" to "a prevailing party who is the parent of a child with a disability." 20 U.S.C. §1415(i)(3)(B)(i). The Goods have not prevailed on any of their claims.

The Court DENIES G.G.'s request for reimbursement of attorneys' fees and costs.

K. Bias

Throughout G.G's briefing there are continuous allegations that ALJ Hatfield was biased against him. To the extent this is some formal allegation of bias, the Court finds no evidence of bias. After a five-day hearing, ALJ Hatfield issued an 85-page decision. A.R. at 838-924. The Court finds that ALJ Hatfield's opinion was thorough, sensitive to the issues, comprehensive, careful, and thoughtful, warranting

substantial weight and deference. County of San Diego, 93 F.3d at 1466 (9th Cir. 1996) ("This circuit gives the state hearing officer's decision 'substantial weight' when it 'evinces his careful, impartial consideration of all the evidence and demonstrates his sensitivity to the complexity of the issues presented.'") (quoting Ojai, 4 F.3d at 1476).

III. CONCLUSION

For the foregoing reasons, the Goods request for reversal of the California Office of Administrative Hearing's August 25, 2021, Decision and all requests for relief are DENIED.

IT IS SO ORDERED.

Date: November 2, 2022

Dale S. Fischer
United States District Judge