

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018050541

DECISION

Student filed an amended due process hearing complaint with the Office of Administrative Hearings on July 18, 2018, against Antioch Unified School District. OAH continued this matter on August 10, 2018. Administrative Law Judge Cynthia Fritz heard this matter in Antioch, California, on October 23, 24, 31, and November 8, 2018.

Christian Knox, Attorney at Law, represented Student. Mother attended the hearing on October 23 and 24, 2018. Father attended the hearing on October 24, 2018. Parents did not attend the hearing on October 31, and November 8, 2018. Student did not attend the hearing.

Kidd Crawford, Attorney at Law, represented Antioch. Dr. Ruth Rubalcava, Antioch's Senior Director of Special Education, attended the hearing on Antioch's behalf on October 23, 24, and November 8, 2018. Dr. Valerie Lopes, Assistant Special Education Director, attended a portion of the October 23, 2018 hearing, in Dr. Rubalcava's stead. No Antioch representative attended the hearing on October 31, 2018.

At the parties' request, OAH continued the hearing to November 19, 2018, for written closing arguments. Closing arguments were timely filed, the record was closed,

and the matter was submitted on November 19, 2018.

ISSUES

1. Did Antioch deny Student a free appropriate public education during the 2017-2018 school year and extended school year, and the 2018-2019 school year to the date of hearing, by failing to assess him in all areas of suspected disability and need, namely:

- a. failing to conduct a legally compliant psychoeducational assessment;
- b. failing to conduct a legally compliant academic achievement assessment;
- c. failing to conduct a speech and language assessment; and
- d. failing to conduct an occupational therapy assessment?

2. Did Antioch deny Student a FAPE during the 2017-2018 school year and extended school year, and the 2018-2019 school year to the date of hearing, by:

- a. failing to find him eligible for special education and related services;
- b. failing to provide him a safe learning environment;
- c. failing to offer him a special education placement with services, goals and accommodations; and
- d. denying Parents meaningful participation in the individualized education program process by: (1) excluding her from Antioch's decision to place Student in a K-1 classroom for the 2017-2018 school year; and (2) providing inadequate information in its assessments?

SUMMARY OF DECISION

The Decision finds that Student was eligible for special education under the eligibility categories of specific learning disability and other health impairment on September 8, 2017. Antioch denied Student a FAPE by failing to provide Student with special education and related services during the 2017-2018 school year and 2018-2019

school year through the time of the hearing, with the exception of the 2018 extended school year.

Student also proved that Antioch was required and failed to conduct a legally compliant speech and language assessment, that included standardized testing, rather than just screening and observing Student.

Student failed to meet his burden of demonstrating that Antioch: (1) conducted psychoeducational and academic assessments that were not legally compliant; (2) should have conducted an occupational therapy assessment; (3) failed to find Student required speech and language related services; (4) failed to provide Student a safe learning environment; and (5) denied Parents meaningful participation in the IEP process by providing inadequate information in its assessments and excluding Parents from Antioch's decision to place Student in a K-1 classroom for the 2017-2018 school year.

FACTUAL FINDINGS

1. Student is a seven-year-old boy who lives with Parents within Antioch's boundaries. Antioch has never found Student eligible to receive special education and related services.

2. Parents exposed Student to the alphabet, numbers, and phonics with workbooks and computer programs when he was approximately three or four years of age, and worked more regularly with him when he started preschool at age five.

3. In Spring 2017, when Student was five years old, Mother enrolled him in preschool. Student attended preschool for approximately five weeks until the preschool terminated him from the program due to behavioral issues. Student had no other formal education until he began attending school as an Antioch student at the beginning of the 2017-2018 school year. As will be discussed below, Student has not attended school in Antioch since April 2018.

4. Student was diagnosed with attention deficit hyperactivity disorder in

Spring 2017. At approximately the same time, Mother registered Student for school in Antioch and asked that he be evaluated for special education services, and placed in kindergarten.

5. Antioch agreed to conduct an initial special education evaluation. Although the assessment plan was not offered as evidence, the testimony at hearing established that Antioch provided an assessment plan to which Parents consented. Sharlene Eldredge, school psychologist, conducted Student's psychological testing in August 2017. Ms. Eldridge, recommended Student be "screened," by a speech and language pathologist. That initial screening was conducted at the beginning of the 2017-2018 school year by Carmina Tongol, an Antioch speech and language pathologist. Nicole Matsutani, an Antioch resource specialist, administered Student's educational evaluation. The legal sufficiency of the testing will be discussed thoroughly below.

6. Antioch denied Parents request to designate Student as a kindergartener for the 2017-2018 school year. Although Student had not previously attended kindergarten, because he turned six in August 2017, Antioch designated him as a first grader.

2017-2018 SCHOOL YEAR

7. Antioch's first day of the 2017-2018 school year was August 16, 2018. That same day, Mother sent Antioch a letter refusing to send Student to school until he was placed in a kindergarten class. In response, Antioch placed Student in a general education kindergarten-first grade combination class, and Student began attending school soon after. Mother informed the school that Student would only attend school half-days because he had never before attended a full day program. Antioch allowed Student to attend school until 11:30 a.m. each day and left with the kindergarteners. Thus, Antioch sanctioned Student's half-day educational program.

September 8, 2017, IEP Team Meeting

8. Student's IEP team meeting convened on September 8, 2017, with Parents present. Antioch reviewed the academic and psychoeducational assessment reports at the meeting but failed to review the speech and language observation report or the informal letter identification assessment results from the academic testing. The reports showed that Student met the criteria for special education eligibility under the categories of specific learning disability and other health impairment.

9. Despite meeting eligibility criteria in two categories, the Antioch members of Student's IEP team determined that Student was not eligible for special education services because of his lack of adequate schooling prior to entering first grade. The Antioch team members concluded that Student could be educated in a general education setting without special education and related services. Further, the IEP team did not recommend a 504 plan.¹

10. Antioch enrolled Student as a first grader because he had turned six in August, and would normally have been assigned to first grade. During the IEP team meeting, Antioch team members encouraged Mother to complete paperwork for "kindergarten retention" so he could be "reclassified" as a kindergarten pupil. Mother did not fill out the paperwork for kindergarten retention, because by that time, she wanted him to remain in the kindergarten-first grade combination as a first grader. The

¹ A Section 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

Antioch IEP team members believed Mother was satisfied with Student's placement in the kindergarten-first grade classroom as a first grader.

Student's Classroom Behavior and Performance

11. Kayla Catalan, was Student's first grade teacher for the 2017-2018 school year. A substitute teacher taught Student's class at the beginning of the school year until Ms. Catalan took over the class in September or October 2017. This was Ms. Catalan's first year as a credentialed teacher.²

12. Student's class consisted of approximately 16 kindergarten students and 10 first grade students. A typical class day started with silent reading, then grade-level language arts, recess, math, and whole group language arts. Kindergarteners' day ended at 11:30 a.m. First graders would go to lunch, then participate in first grade language arts curriculum, science, physical education, or music. School ended for first graders at 2:30 p.m. The math portion of the day was divided by grade, with one group for the kindergartners and another for the first graders.

13. The first graders attended math with Ms. Barbara Converse, approximately 60 minutes daily. Student was included with this group. This began when Ms. Catalan started at Antioch and continued throughout the 2017-2018 school year. Ms. Converse has been a credentialed teacher for 17 years. Student had attention problems during Ms. Converse's math class. He struggled to keep his math book open, and had difficulties staying focused on the page and lesson. Approximately twice a week, Student's classwork was sent home because he could not finish it in class. At times, Student had a hard time keeping his hands to himself. Ms. Converse sat Student close to her, provided manipulatives, redirected him, and had peers help him.

² Ms. Catalan's name during the 2017-2018 school year was Kayla Wristen.

14. During Fall 2017, Student participated in a general education pull-out reading program, 30 minutes daily, for one month. He was sent back from the reading program two or three times in the one-month period due to his inattentive and off-task behavior. Antioch terminated Student from the program after one month due to his behavior which disrupted other students.

15. Ms. Catalan could understand Student's expressive language throughout the year. Student had behavior issues at school during the first trimester. He would not remain seated and walked around the room. He would tap his pencil and occasionally had verbal outbursts. Student made animal noises. He poked other children in line; sometimes he pushed them with his body. He could only stay seated for up to two minutes at a time and his distractibility was disruptive to other children. Ms. Catalan considered these "minor disruptions" that occurred on a daily basis, up to 10 to 15 times. Ms. Catalan reached out to staff regarding Student's behavior and it was suggested she could work with Student more effectively with one-on-one instruction, and should break up his day into smaller segments.

16. Ms. Catalan provided direct instruction, small group language arts instruction, visual reminders, self-talk, verbal cues and reminders, a sticky note on his desk to tally when got out of his seat, and a behavior flip chart. She also used positive reinforcement strategies such as a treasure chest and attention getters, and steps for transitions in class.

17. The first trimester ended November 9, 2017. Despite Ms. Catalan's interventions, Student's received low first trimester grades. Antioch uses a standards based report card. The California Department of Education has established standards for each grade. Grade-level standards are expectations of what a student in a certain grade should achieve educationally in terms of skills, understanding concepts, and the application of those skills by the end of that school year. Each grade level has its own set

of standards, with multiple standards for most courses of study. Student received six grades of "one" in mathematics, and English language arts and literacy. A grade one means the student is "Needing Support." Student received one grade of two in speaking and listening, which means "Emerging." Student received all four's, in history/social science, science, physical education, and music which means "Mastering", but science, physical education, and music were taught in the afternoon when he was not attending school. In Student's lifelong skills grades, he received four grades of "Needs Improvement" in displays self-discipline and control, stays on task and uses time effectively, demonstrates problem solving skills, and works independently. All other effort scores were graded as "Developing Appropriately." Ms. Catalan explained that "Needing Support" means a student requires one-to-one support by the teacher in those areas.

18. Antioch's general education interventions were unsuccessful with Student because he was unable to access his pull-out reading instruction due to his behavior, distracted other students in class, and needed one-to-one teacher support in many subject areas. On November 17, 2017, Antioch convened a 504 meeting due to Student's attention deficit hyperactivity disorder affecting his learning and developed the following accommodations: taking one-on-one assessments; full days starting November 27, 2017; giving Student a class job; frequent breaks; sitting next to a higher performing peer; small group instruction; walking in the front of the line; and daily behavior cards. Student began to attend school full days; however, the 504 plan did not adequately address Student's specific needs as he required special education supports, such as one-on-one support as explained by Ms. Catalan.

19. In the second trimester, Student continued to have trouble keeping his hands to himself. Ms. Catalan began giving oral behavior reports to Mother and then using a sticker system with smiley, sad, or mad faces based on the color flip chart to

communicate to Parents. Student received a sad or mad face more than 10 times during the second trimester.

20. By the end of the second trimester, March 2, 2018, Student continued to receive three grades of one "Needing Support" in reading foundational skills, writing, and operations and algebraic thinking. In lifelong skills, his grades worsened with "Needs Improvement" in 9 areas including: accepts responsibility for choices and/or actions; follows school and classroom rules; displays self-discipline and control; demonstrates problem solving skills; listens to and follows directions/classroom routines; works independently; stays on task and uses time effectively; and puts forth best effort. Ms. Catalan reported his lifelong skills "worsened"; however, his skills were consistent with the first trimester, she more accurately identified them second trimester after becoming more familiar with Student's deficits.

21. Antioch's general education interventions did not improve Student's behavior lifelong skill development. He continued to need support in reading, writing, and math after the second trimester. Although Ms. Catalan believed that Student's behavior was similar to that of several of her students, his behavior failed to improve with the classroom strategies she employed.

22. Mother pulled Student out of school on April 10, 2018, due to safety concerns that will be discussed below. Antioch considered Student on independent home study. No teacher was provided by Antioch. Rather, work packets were sent home and family members worked with Student to complete the packets. Ms. Catalan based her third trimester grades solely on Student's independent study packets. Student's lifelong skills report card remained the same as second semester but his academic grades were all raised to either "Approaching" or "Mastering." Student's progress was solely attributed to family support during the third trimester.

23. Antioch argued that Student's lack of progress was due to poor school

attendance. However, Antioch excused all of Student's absences and continued to provide work packets during the third trimester when he was on independent home study.

Mother's Safety Concerns

24. Mother began observing Student's classroom in February 2018, because Ms. Catalan reported approximately three to four times a week that Student was agitating other students. Mother observed Student's classroom approximately five to six times for two hours each.

25. On February 13, 2018, after Mother observed the classroom, she raised a concern to Ms. Catalan about another student bothering Student. Mother's perspective was that Student was reacting to other students' surreptitious instigating behavior. The teacher then "caught" and reprimanded Student. Ms. Catalan believed Student was bothering about three to four students around this time by tapping and pushing them on a weekly basis and instigating some behaviors in the classroom which resulted in multiple verbal warnings. In Ms. Catalan's opinion, a couple of students were instigating each other, which included Student.

26. On February 20, 2018, Ms. Catalan observed Student on top of another student horse playing. She gave both students time-outs. About 5 minutes later, Student had a bloody nose and said student hit him, which she did not observe. She did not believe the bloody nose was related to the incident between the students, and there was no persuasive evidence to show that Student's bloody nose was caused by another student.

27. On March 26, Student came home complaining about a headache and later started throwing up. Mother believed another student caused Student's injury. Antioch investigated the incident by questioning Student, the other student, teachers, and staff, including a staff member on the playground. It was determined that Student

fell to the ground on the playground during recess and the other student was not near him when he fell. After the incident, Student provided a doctor's note that excused Student from attending school until March 30. Student claims that he had a concussion, but there was no medical diagnosis evidence presented at hearing. Spring break began the following week so Student did not return to school until April 9, 2018.

28. On April 9, 2018, Mother complained that Student received another injury due to another student pushing him to the ground in the classroom. Ms. Catalan did not observe this happen in her classroom that day. Mother took Student to the doctor on April 10, 2018, and Student was diagnosed with a concussion and excused from school until April 13, 2018. Mother's claim that Student was injured by another student on April 9, 2018, was not proven.

29. Mother pulled Student out of school on April 10, 2018, due to safety concerns. Antioch staff met with Mother soon after the April 9, 2018 incident. Mother requested that Student be switched out of his class and returned to half-day attendance. Antioch was open to any of Mother's suggestions and requested time to determine which classroom was available for Student. Mother, however, decided that Student should complete the school year on home study instruction to which Antioch agreed. As of the date of the hearing, Student continued on home study for second grade and had not returned to school.

30. Ms. Catalan credibly testified Student was not being bullied in her classroom. The evidence established that Student instigated behaviors and needed conflict resolution support. Mother's testimony regarding safety concerns was not credible as she overemphasized, to a fault, other student's behavior and did not personally observe any other student physically harm Student throughout her observations at Antioch. As Mother's concerns increased in February 2018, Antioch had the principal and school counselor observe Student's classroom and speak to him.

Student never expressed any safety concerns and appeared happy. No staff member observed any children hurt Student. Mother's allegations were in direct conflict with all other evidence, including an investigation by Antioch. Only Mother complained about the behavior of other children as it related to Student. The evidence did not establish that Student's injuries were caused by other students at school or that he was being bullied.

ANTIOCH'S 2017 ASSESSMENTS AND STUDENT'S 2018 ASSESSMENTS

31. Antioch assessed Student for special education services in August and September 2017, and completed psychoeducational and academic assessments, and a speech and language screening.

Antioch's Academic Assessment

32. Nicole Matsutani, is a credentialed resource specialist for Antioch, and she evaluated Student to determine his level of academic achievement. Ms. Matsutani holds a bachelor's degree in child development and a master's degree in education, and has over 15 years of experience as a resource specialist.

33. For Student's assessment, Ms. Matsutani completed: test observations; an informal letter identification assessment; the Woodcock-Johnson Test of Achievement, Fourth Edition; and the Brigance Inventory of Early Development, third edition. Ms. Matsutani was trained and qualified to administer the tests to Student. She did not know or work with Student prior to assessing him.

34. The Woodcock-Johnson measures a student's level of academic achievement in Broad Reading, Broad Mathematics, and Broad Written Language. A standard score between 85 and 115 is in the average range, with scores on the high end considered to be in the high average range, and scores on the lower end considered to be in the low average range. Scores between 70-79 are in the low range, scores below

69 are in the very low range. Student had a standard score of 76 in Broad Reading, a standard score of 73 in Broad Mathematics, and a standard score of 58 in Broad Written Language.

35. The Brigance measures a student's academic skills compared to his same age peers. Student scored in the low range in all three domains, with a composite score of 77 in the Academic/Cognitive domain, 72 in Literacy, and 77 in Mathematics.

36. Based on Student's scores on the Woodcock-Johnson and Brigance, Ms. Matsutani concluded that Student was working below the instructional level of first grade in reading, writing, and math. She also noted that the determination of special education eligibility would be left to the IEP team.

37. The Woodcock-Johnson and Brigance convert standard scores into grade-levels and age-levels. Ms. Matsutani reported standard scores rather than grade-level and age-level equivalency scores because that is her practice and most commonly used for score comparisons in the field of education. She established that in this case, standard scores were more reliable measures of Student's achievement rather than the age and grade equivalencies. Ms. Matsutani was not required to include grade and age equivalency scores in her report.

38. The informal letter identification assessment determined if Student could identify upper and lowercase letters and letter sounds. Based on this assessment, Student identified 23 out of 26 upper case letters, 17 out of 26 lower case letters, and 3 out of 26 letter sounds. Ms. Matsutani failed to give Parents the informal letter identification assessment results in her report and at the September 2017 IEP team meeting. The information, however, did not contradict her ultimate finding about Student's academic weaknesses, and thus was harmless to Student and to Parents' participation at the IEP team meeting.

39. Ms. Matsutani opined at hearing that although Student was academically

below his grade level, he could be successful in the general education setting at Antioch. In order for Student to be successful in first grade, she testified at hearing that she would have expected to see modifications for Student in the general education classroom in the following ways: (1) small group pullout; (2) phonological awareness teaching; (3) phonics teaching; (4) direct instruction in phonics; (5) reading aloud; (6) building vocabulary; and (7) exposing Student to numbers. Ms. Matsutani did not know what modifications were made for Student for first grade. The lack of specific knowledge of Student's first grade classroom interventions rendered her opinion regarding his success rate in the general education setting less persuasive.

Antioch's Psychoeducational Assessment

40. Ms. Eldredge, is a credentialed school psychologist for Antioch with six years of experience, and she conducted Student's psychological testing for the psychoeducational assessment. Ms. Eldredge holds a bachelor's degree in math education and a master's degree in school psychology.

41. For Student's assessment, Ms. Eldridge completed a records review; interviewed Mother; observed Student in the classroom and during testing; and administered and scored psychological tests. Ms. Eldredge did not know or work with Student prior to assessing him but was able to understand his speech throughout the testing process, and observed him articulate and express himself in the classroom without difficulty. She also noted that Student was in constant motion during her observations.

42. Ms. Eldredge's testing included the following tests in cognition, processing, and social emotional behavior: (1) Differential Ability Scales, Second Edition; (2) Developmental Neuropsychological Assessment, Second Edition; (3) Test of Auditory Processing Skills, Third Edition; (4) Comprehensive Test of Phonological Processing, Second Edition; (5) Test of Visual Perception Skills, Third Edition; (6) Beery-Buktenica

Developmental Test of Visual-Motor Integration, Sixth Edition; (7) Behavior Assessment System for Children, Second Edition; (8) Conners, Third Edition;³ and (9) Vineland Adaptive Behavior Scales, Second Edition.

43. The Ability Scales measured Student' cognitive and intellectual abilities. Ms. Eldredge reported the standard scores from these tests. Scores from 85 to 115 are in the average range. Student scored low, 78, in the Verbal Ability cluster, which measured his knowledge of verbal concepts, level of vocabulary development, expressive language ability, general knowledge base, and retrieval of factual information from long term memory.⁴ The scores suggested Student had weaker receptive and expressive language skills. He scored average, 102, in the Nonverbal Reasoning Ability cluster, which measured inductive reasoning, understanding of simple verbal instructions and visual cues, and use of visual mediation strategies. The scores showed Student had effective analytical reasoning abilities on visual tasks and was able to conceptualize visual patterns and apply these patterns. He scored average, 93, in the Spatial Ability cluster, which measured his ability to perceive and remember spatial relationships and shapes, and suggested Student had effective visual processing abilities for tasks that involve spatial relations and effective skills when using visual-motor integration.

³ The specific Conners, third edition, test name was not provided.

⁴ A "cluster" is comprised of a group of subtests that are administered and scored separately, and then the scores are combined to create a cluster score. Composite scores are combined scores of various clusters that form a specific composite. Some subtests will be used in more than one cluster, and some clusters may be used in more than one composite.

44. Ms. Eldredge concluded that because of the variability of the cluster scores, the better estimate of Student's abilities was his Special Nonverbal composite score of 97, in the average range, which consisted of scores from the Nonverbal Reasoning and the Spatial Ability clusters. His General Ability composite score 88, was in the below average range, and included his Verbal Ability, Nonverbal Reasoning Ability, and Spatial Ability cluster scores. The use of the Verbal cluster would have depressed the score and Ms. Eldredge believed the Special Nonverbal composite to be more reflective of Student's actual abilities. Based upon the discrepancy between Verbal Ability score, 78, and Nonverbal Reasoning score, 102, Ms. Eldredge referred Student to the Antioch speech and language pathologist to determine whether a speech and language assessment was warranted.

45. Ms. Eldredge used the Auditory Processing test to assess Student's auditory processing skills. Student scored in the low range with a standard score of 73 on the phonologic index. Ms. Eldredge also administered the Phonological Test, which consisted of composites in Phonological Awareness, Phonological Memory, and Rapid Symbolic Naming. Student's standard score was 73, in the poor range for the Phonological Awareness composite, and a standard score 88, below average, in Phonological Memory. Ms. Eldredge was unable to complete the Rapid Symbolic Naming composite because Student could not correctly identify some of the letters. Dr. Rubalcava, Antioch's Senior Special Education Director, confirmed that the tasks required on the phonological processing testing were not dependent upon the ability to read or write.

46. Ms. Eldredge concluded, based upon Student's scores on the auditory processing and phonological processing, that Student had a psychological processing disorder in phonological processing. Moreover, she opined that the weakness in Phonological Awareness composite could be dyslexia, although he did well on the

Phonological Memory composite which is also indicative of dyslexia when it shows weaker scores.

47. Ms. Eldredge found Student struggled to sustain attention throughout the assessment process and also observed him in the classroom as impulsive and distracted. This was corroborated by Student's below-expected level score, scaled score of 4, for the Auditory Attention subset on the Neurological Assessment⁵. The Neurological Assessment tested for executive functioning skills but Ms. Eldredge did not conduct those subsets because his age precluded it. Additionally, Student's inconsistencies in his performance during the testing suggested inattention and not executive functioning issues.

48. Moreover, Mother rated inattention as an area of concern in the home setting based on the results from her Conners rating scales. The Conners testing is designed to assess attention deficit hyperactivity disorder, conduct disorder, and oppositional defiant disorder. Mother rated Student in the Very Elevated range in the Inattention, Hyperactivity/Impulsivity, Learning Problems, Executive Functioning, Defiance/Aggression, and Peer Relations content scales.

49. Ms. Eldredge sent the rating scales for the Behavior Assessment and Vineland to Mother to give to Student's preschool teacher and acknowledged that she neither received rating scales from Student's preschool teacher nor interviewed any of Student's teachers for the assessment. Ms. Eldredge also did not personally contact the preschool. However, Student attended preschool months before, for only five weeks, so it was not established that the preschool teacher could accurately complete the rating scales. The assessment was conducted during the first two weeks of the school year, so Ms. Eldredge decided not to ask Student's teacher to complete the rating scale because

⁵ The average range for a scaled score is between eight and 12.

the teacher was not yet familiar with Student. Nevertheless, through her own observations, current teacher interview, and Mother's completed rating scales, it provided sufficient information to Ms. Eldredge to render a qualified opinion to Student's current social-emotional and behavioral functioning.

50. The Behavior Assessment measures concerns in the areas of Externalizing Problems, Internalizing problems, School Problems, and Adaptive Behavior. The tests also yields a Behavior Symptoms index reflecting overall level of problem behavior. Scores in the Clinically Significant range indicate a high level of maladjustment, which is a score of 70 or higher. The At-Risk range of 60-69 also suggests Student is exhibiting difficulties in these areas more than other students his age. Mother rated Student in the Clinically Significant range and At-Risk range in Hyperactivity, Aggression, Anxiety, Depression, Somatization, and Attention. The teacher rating scale was not returned.

51. Based upon Ms. Eldredge's observation and results on the Conners, Behavior Assessment, and the Auditory Attention subset on the neurological assessment, she opined that Student had a psychological processing disorder in the area of attention.

52. The Beery assessed Student's visual and motor integration skills and abilities as required for paper and pencil tasks. Student scored in the average range, with a standard score of 92. Based upon the Student's score, Ms. Eldredge did not conduct the supplemental Visual Perception and Motor Coordination tests. Ms. Eldredge established there was no need for further consultation on Student's motor abilities, and he did not need to be assessed in the area of occupational therapy, because she did not notice Student's hands shake or issues with his tripod grip. Further, the evidence established that the Beery score did not warrant an occupational therapy assessment, and given Student's attention difficulties, there was no reason to believe Student's score was related to fine motor deficits that affected his educational performance.

53. One method for determining whether a student has a specific learning disability is where a significant discrepancy exists between intellectual ability and achievement in a certain area. This is known as the severe discrepancy approach, and is determined by measuring the difference between a student's ability or cognitive scores, and his scores in specific areas of academic achievement. Based on Antioch's academic and psychological testing, Student had a severe discrepancy in his cognitive scores and his academic scores in reading, written expression, and math. He also had psychological processing disorders in attention and phonological processing. Student met the eligibility criteria for a specific learning disability.

54. Ms. Eldredge agreed at hearing that Student had a severe discrepancy between his ability and achievement, and he had psychological processing disorders. She concluded, however, that his eligibility needed to be considered in light of no previous kindergarten experience, because she believed the tests that were administered were normed by looking at the scores of children who attended kindergarten. No evidence was submitted, however, that the norm-referenced sample for the testing instruments was a comparison of Students who previously attended kindergarten.

55. Ms. Eldredge further believed that Student was not appropriately exposed to school and should have been placed in a kindergarten class, especially since he had been diagnosed with attention deficit hyperactivity disorder. She believed he could catch up to his peers in the general education setting. Moreover, Ms. Eldredge believed Student was functioning well in his combined kindergarten first grade classroom based upon her observations at the beginning of the year. Although he had some maladaptive behaviors, he adapted to redirection such that the general education curricula with interventions was appropriate for Student.

56. Ms. Eldredge opined in her report that Student should be: (1) given

preferential seating; (2) modified assignments (as needed); (3) assignments broken into segments; (4) visual and auditory input paired to assist with retention and understanding; (5) a consistent reading program to reinforce basic phonics skills and help foster greater reading comprehension; (6) additional time on assessments and assignments, as appropriate; (7) clear and consistent classroom routines and procedures; and (8) a preferred organizational systems or note taking strategies.

57. At hearing, Ms. Eldredge opined that generally Student: (1) should be exposed to consistent basic reading skills, letters, and sounds; (2) exposed to constant and vowel blends; and (3) given step-by-step instruction. Ms. Eldredge was unaware of Student's current academic performance levels and performance, including behavior, in first grade, thus her opinion regarding Student's functioning in the first grade general education setting was given less weight.

58. Ms. Eldredge acknowledged Student's attention deficit hyperactivity disorder diagnosis and found that Student met the criteria for a documented health problem that resulted in limited strength, vitality, or alertness with respect to the educational environment, because Student was observed in the school setting exhibiting behavior associated with attention deficit hyperactivity disorder. She also concluded that the health problem adversely affected Student's educational performance because the behavior associated with attention deficit hyperactivity disorder could be a factor in his lack of academic progress. Children with attention deficit hyperactivity disorder may meet the eligibility criteria for other health impairment. Ms. Eldredge, however, ultimately concluded that Student was not eligible for special education under either category because Student did not attend kindergarten. Ms. Eldredge believed school staff needed to be given enough time to implement general education interventions to determine their effectiveness before eligibility could be established or ruled out. Attention deficits, however, manifest regardless of education. Further, Ms. Eldredge

knew that Student was terminated from preschool due to his behaviors. Thus, her opinion in this regard was less persuasive.

59. Ms. Eldredge shredded the testing protocols after the IEP team meeting which is the practice at Antioch.

Antioch's Speech and Language Screening

60. Carmina Tongol, is a board-certified speech pathologist with over 15 years of experience as a speech and language pathologist. She conducted Student's speech and language screening. Ms. Tongol holds a bachelor's and master's degree in speech pathology.

61. As previously noted, based on the results of certain cluster results when she tested Student using the Ability Scales, Ms. Eldredge recommended Student be referred to Antioch's speech and language pathologist for a consult. Antioch has a pre-referral process in place when a request is made for a speech and language consult. Unless a speech and language assessment is included on an assessment plan signed by a parent, Antioch has a speech and language pathologist conduct a "screening" of the student.

62. For this initial screening, the speech and language pathologist observes the student in the classroom, conducts playground observations, interviews teachers, and informally tests the student in the classroom. For the testing, the speech and language pathologist uses an age-appropriate skills checklist that includes articulation, fluency, voice, language, use of sentences and words, grammatical structures, and how a student expresses himself. If more information is needed after the initial screening, a more in-depth screening takes place which requires parent's consent and includes Student participating in an in-depth out-of-classroom screening and informal testing. If even more information is needed, Antioch conducts a formal assessment, which includes parent's consent, records review, standardized and informal tests, observations and

interviews.

63. Ms. Tongul received a referral for a consult from Ms. Eldredge because she found Student had weak verbal ability scores and possible pragmatic language issues. Ms. Tongul conducted an initial screening and observation of Student without parental consent.

64. Ms. Tongul observed and interacted with Student on August 25 and 28, 2017, for a total of 90 minutes, about 45 minutes each day. She observed him in his classroom and on the playground, had 30 minutes of interaction with him, and a teacher interview to discuss any concerns. Ms. Tongul determined Student had age-appropriate language skills by observing, listening, hearing his voice, spending 30 minutes showing words, pictures, and stories to Student and having him describe them back. Ms. Tongul further concluded through her checklist screening and classroom observations that Student was able to express himself and ideas, answer questions, use age-appropriate vocabulary and sentence structure, and follow oral directions. He understood categories and relationship to words, body parts, colors and numbers. Ms. Tongul observed Student requesting a drink of water in class which showed he was able to express his needs. On the playground, Student socialized with peers.

65. When Ms. Tongul conducted her screening Student appeared intelligible, spoke in sentences, and exhibited fluent speech throughout the screening. Student used his articulators, which are his speech organs that produce the sounds of language. Ms. Tongul did not observe any articulation errors and understood him throughout the process.

66. Ms. Tongul conducted a motor exam of Student. Student successfully completed different movements with his articulators. Student followed three directions in succession including clap your hands, give me the book, and point to the door that he finished.

67. Ms. Tongol found through her screening that Student exhibited age-appropriate receptive, expressive and pragmatic language skills at that time, and determined that a speech and language assessment was not needed.

Independent Educational Assessment

68. Lisa Pippin, a licensed educational consultant, conducted an independent educational evaluation and social-behavioral observation and interviews in October 2018, at Student's request, and reported her findings in a written report. Ms. Pippin has been a school psychologist since 2004 and a private educational consultant since 2013, with a focus on autism and emotional disturbance.

69. Ms. Pippin conducted the assessment at Student's home on October 8, 2018. She conducted: a records review; medical history review; parent report; student interview; student observations; and administered the Wechsler Intelligence Scale for Children-Fifth Edition. She also assessed for social-emotional and behavior through her observations and interview on October 8, 2018, but did not conduct any testing or rating scales. Ms. Pippin never met or worked with Student before and spent approximately three and one-half hours with him.

70. Ms. Pippin observed Student at home before testing and saw that he had attention and impulsivity issues and responded well to structure and positive reinforcement. However, she did not interview Student's former teachers or observe him in a classroom setting, thus, was unable to give persuasive opinion on Student's classroom behavior and performance.

71. The Wechsler test assesses the intelligence of children. Student was administered 10 subtests. The subtests contribute to the composite index scores which represent intellectual functioning in five cognitive areas: Verbal Comprehension; Visual Spatial; Fluid Reasoning; Working Memory; and Processing Speed. Index scores of 90 to 109 are considered average. On the Wechsler indexes, Student received a standard

score of 89, low average, in Verbal Comprehension; 94, average, in Visual Spatial; 100, average; in Fluid Reasoning; 79, very low; in Working Memory; and 60, extremely low, in Processing Speed. Different combinations of subtests also contribute to the composite ancillary index scores that supply additional information regarding a child's cognitive abilities. Student's Nonverbal ancillary index score was 86, low average. He scored 94, average, in General Ability, and 66, extremely low, in Cognitive Proficiency. Pippin's General Ability Score was closely aligned with Antioch's Special Nonverbal Composite score of 97.

72. Based on Ms. Pippin's test results, Student's areas of need were working memory, processing speed, and verbal expression of abstract reasoning. She opined at hearing that Student should receive special education services in the form of specialized academic instruction, and required 40 minutes per day of specialized academic instruction, four times per week to address his reading deficits, using an Orton-Gillingham approach. She also recommended an additional 40 minutes per day, four times a week to address written expression and math. She also concluded that Student should receive 100 to 150 hours of compensatory education in reading, and 100 to 150 hours of compensatory education split between math and written expression deficits.

73. Ms. Pippin's recommendations in her report to address his attention deficits were exclusively related to general education interventions including: a quiet place to work away from other students; motor breaks; standing breaks; doing errands during class; a wiggle seat or stress ball; offering self-talk techniques; keeping track of off-task behavior; a non-punitive signal to bring Student back on task; giving low and high interest tasks; giving short tasks or tasks broken up into steps; giving eye contact with instructions; using multiple teaching modalities; having a well-planned structured learning environment; pausing when giving instruction; providing verbal, visual and written cues; providing visual supports; introducing key concepts before reading and

reviewing them after reading; and writing and posting steps for transitions.

74. The cost of the independent educational examination was \$2917.50 with an additional \$2500 to \$3000 to complete the assessment.

Validity of Antioch's Psychoeducational Assessment

75. Ms. Pippin criticized Antioch's psychoeducational assessment at hearing because: (1) it failed to test for working memory, processing speed, and executive functioning deficits; (2) failed to obtain teacher rating scales; (3) used some outdated testing instruments; (4) failed to assess for speech and language and occupational therapy; (5) should have found Student eligible for special education under the eligibility categories of specific learning disability and other health impairment; and (6) it shredded the testing protocols.

76. When she testified, Ms. Pippin acknowledged that the working memory and processing speed results are embedded in the Auditory Processing and Phonological Processing Assessment instruments. Antioch did not administer the executive functioning tests on the Neuropsychological Assessment because Student was too young to be administered those subtests, and Student did not produce evidence that there were other executive functioning tests for his age group.

77. Student claims that the use of the older versions of the Behavior Assessment and the Vineland, instead of the newer editions, invalidated the results of Antioch's psychoeducational assessment. There is a "grace period" when a test publisher issues a new edition of a test. Using the older version during this time period is fine. There was conflicting testimony between Ms. Eldredge and Ms. Pippin as to how long the grace period extended, between 12-18 months, and when the older tests became obsolete. Thus, Student did not establish when the grace periods for either test specifically began or expired through other corroborating evidence. Further, Ms. Pippin conceded that Antioch's Behavioral Assessment and Vineland testing had validity,

despite the newer published editions.

78. Ms. Pippin testified at hearing that she would have liked to review the testing protocols in some areas to determine if they were correctly calculated; however, she did not state that she needed the protocols for her assessment and conducted educational testing only.

79. Ms. Pippin suggested in her report that Student be further assessed in speech and language, based on the independent speech and language assessor's opinion and due to some articulation problems that she observed during testing. She also believed Student needed an occupational therapy assessment due to some letter reversals that may be indicative of a potential dyslexia diagnosis. Antioch's assessors, however, did not notice articulation issues in 2017, or a need for occupational therapy including shaky hands or problems with grip. Ms. Pippin also suggested further psychoeducational assessments to rule out dyslexia; however, Antioch's assessor already opined that some of Student's test scores were indicative of dyslexia and others were not, suggesting inattention as the primary cause.

80. Ms. Pippin concluded that Student should have been found eligible for special education under the eligibility areas of specific learning disability and other health impairment at the September 2017 IEP team meeting.

Independent Speech and Language Assessment

81. Larissa Boyer-Reagh, conducted an independent speech and language assessment in October 2018, at Student's request. Ms. Boyer-Reagh has a master's degree in speech pathology and her certificate of clinical competence from the American Speech-Language Hearing Association. She has conducted approximately 200 speech and language assessments in her four-year career as a speech language pathologist.

82. Ms. Boyer-Reagh assessed Student in October 2018 at her office, and

wrote a report which is dated October 15, 2018. For Student's assessment, she completed: the Clinician Evaluation of Language Fundamentals, fifth edition, an informal language sample, the Goldman Fristoe Test of Articulation, second edition, Beckman Oral Motor Examination, and an informal observation for voice and fluency.

83. Ms. Boyer-Reagh observed Student's testing behavior as impulsive with increased movement during the assessment process. He needed redirection, sensory breaks, and a token chart to increase focus and provide motivation during the assessment. Ms. Boyer-Reagh was unable to conduct a classroom observation because Student was on home independent study at the time of her evaluation. She failed to provide the Clinical Evaluation observation rating scales to Student's former teacher and Parents, observe Student in the classroom, or interview teachers, thus, was unable to give a persuasive opinion on Student's classroom communication and language skills performance.

84. The Clinical Evaluation measures the subject's expressive and receptive language skills. Student's scores were as follows: Core Language index standard score of 79, 8%, borderline/marginal skills; Receptive Language index standard score of 76, 5%, low/moderate impairment; Expressive Language index standard score of 81, 10%; borderline/marginal skills; Language Content index standard score of 80, 9%, borderline/marginal skills; and Language Memory index standard score of 79, 8%, borderline/marginal skills.

85. Ms. Boyer-Reagh opined that Student's overall language skills were severely below the norm when compared to his same-aged peers based upon the results in the Clinical Evaluation. She later stated in her report that Student had severely delayed expressive and receptive language skills based on the Clinical Evaluation and language sample. Her opinion in this regard was given little weight since none of Student's scores fell in the severe impairment range. Further, the assessor was unaware

that two standard scores of 7% or below were necessary to qualify for special education under speech and language, and her testing showed one score only below 7%. Additionally, she failed to conduct more than one standardized test for expressive and receptive language skills, which is also required for eligibility. For these reasons, her testimony was less persuasive.

86. Ms. Boyer-Reagh conducted a two and one-half minute language sample of Student's spontaneous speech, consisting of 21 utterances in order to determine Student's mean length of utterance. The mean length of utterance is a measure of linguistic productivity in children. A morpheme is the smallest unit in language. An assessor collects utterances spoken by the child and divides the number of morphemes by the number of utterances. A higher scores shows a higher level of language proficiency. Student's sample yielded a mean length of utterance of 3.9 within a range of one through 11, which she opined was below normal limits for his age.

87. Ms. Tongol, however, credibly established that at least 50 utterances for a reliable sample. Ms. Boyer-Reagh conceded that most language samples require a 50 utterance sample, but she was unable to obtain a sample that size in the three-hour evaluation process, but failed to give any reasonable explanation for this. Because the sample size was small and unreliable, her opinions regarding the language sample were given less weight.

88. The Goldman-Fristoe is a standardized test which assesses a child's articulation as it compares to other children of the same age. Student received a standard score of 100, 50%, for sounds in words, and a standard score of 103, 58%, both in the average range. Ms. Boyer-Reagh, gave Student an intelligibility rating of 20% but stated that she understood him 70 to 75% of the time. The inconsistency was unexplained at hearing and further diminished the assessor's persuasiveness.

89. The Beckman oral motor examination was not completed due to Student's

gagging three times during the examination. Ms. Boyer-Reagh's report also indicated that the Student had pain in his mouth during the examination possibly due to a cavity. She opined at hearing student had a tight jaw during this exam but did not state that in her report. Ms. Boyer-Reagh found Student's voice and fluency within normal limits based upon her clinical observations.

90. Ms. Boyer-Reagh opined that Student needed one-to-one speech and language therapy 60 minutes a week because his speech and language issues affected his educational performance. She also stated at hearing that Student needed an occupational therapy assessment but failed to mention this in her report. Ms. Boyer-Reagh's opinions appeared inflated and in some instances, contrary to her test results. Additionally, she never observed Student in public, school, or any educational setting. Because of this, her testimony was given little weight.

91. The cost of Student's independent speech and language assessment was \$450.

Occupational Therapy Assessment

92. Student's independent assessors all claimed that Student needed an occupational assessment in 2017; Antioch assessors disagreed. Ms. Pippin observed sensory seeking behavior of Student in his home during testing in 2018, and also believed the Woodcock-Johnson Spelling subtest standard score of 82, low average, warranted an occupational therapy assessment. Ms. Boyer-Reagh did not recommend occupational therapy in her report, however, at hearing, she claimed an occupational therapy assessment was warranted due to sensory seeking behavior and issues with shaky hands and his grip in 2018. Mother also stated that Student could not draw a circle, had sensory seeking issues, and shaky hands while writing in the home environment.

93. Ms. Eldredge and Ms. Matsutani did not note shaky hands or problems

with his tripod grip in 2017, and believed the test scores did not warrant an occupational therapy evaluation. Further, Ms. Catalan observed some sensory seeking behavior in the classroom but nothing outside of what some typical kindergarteners and first graders exhibit.

EVIDENCE PROVIDED BY MOTHER

94. Mother stated that Student could not draw a circle and his hands shook when he wrote. She provided three writing samples of Student in April 2017, and March 2018, which consisted of one letter, a tick tack toe game, and a few shapes written at home. The samples were unreliable because they were not completed in a school setting and it was unclear what conditions were when the writing samples were taken. The writing samples were considerably different than the writing displayed in Student's homework packets that displayed as Mother conceded, very good work, and showed repeatedly good penmanship and writing over multiple pages of work. Mother testified that her husband made Student redo the writing in the homework packets but this information was not corroborated. The packets showed a more accurate depiction of Student's writing ability in a homework and school setting. Thus, the writing samples provided by Mother were given little weight.

95. On October 25, 2018, Mother made a video of Student at home to show his speech. Mother filmed Student on the couch with her cellphone approximately three to four feet away. Student was shirtless with television noise in the background. Student appeared distracted by the background noise. It was unclear what time of day he was filmed and how he was feeling. Within days, Student was diagnosed with a serious illness and hospitalized for emergency surgery. Additionally, the video failed to show Student's speech in a classroom environment. The video was not a reliable as an accurate sample of Student's speech and was given little weight.

96. Thus, there was insufficient evidence to establish that an occupational

therapy assessment was warranted in 2017 in light of the testimony and evidence in this case. Antioch considered Student's occupational therapy needs in its 2017 assessments and did not note significant problems. Student's assessors failed to show that an occupational therapy assessment was warranted in 2017, based on the Student's 2017 test scores and information they obtained at a later date.

MISCELLANEOUS

97. Student presented no evidence regarding Student's likelihood of regression in his educational program over the 2018 summer, and his abilities for recoupment of lost skills upon return to school in the fall.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, §

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

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 California, related services are also called designated instruction and services].) 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 a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*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.) 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. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950, fn. 10.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) (2017) 580 U.S.____ [137 S.Ct. 988] (*Endrew F.*) reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof on all issues.

ISSUES 1A AND 1B: FAILURE TO APPROPRIATELY ASSESS IN THE AREAS OF

PSYCHOEDUCATION AND ACADEMICS

5. Student challenges Antioch's psychoeducational assessment because it: (1) failed to obtain rating scales from any of Student's former or current teachers; (2) failed to thoroughly assess in working memory, cognitive abilities, processing speed, and executive functioning; (3) used obsolete tests instruments when it administered the Behavior Assessment and Vineland; and (4) shredded the test assessment protocols.

6. Student's criticism of the academic assessment consists of Antioch's failure to provide: (1) the academic assessment protocols; (2) age and grade-level equivalencies in the academic assessment report; and (3) the informal letter identification assessment information at the IEP team meeting, in the assessment report, or provide Parents the results.

Assessments

7. Before any action is taken to place a student in a special education program, an assessment of the student's educational needs must be conducted.⁸ (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*).

8. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1)

⁸ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (2) caused a deprivation of educational benefits to the student, thus denying him a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

9. An assessment must be conducted "by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student's suspected disability. (Ed. Code, § 56320, subd. (g).) An assessment must be administered in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3).) An assessment must be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; and used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) The determination of what tests are required is made based on information known at the time. (See, *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1158.) The assessors must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is eligible for special education. (34 C.F.R. § 300.304(b)(1). No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational

programming. (Ed. Code, § 56320, subds. (c), (e).)

10. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) Within 60 days of parental consent to the assessment, the assessment report must be provided to the parent (Ed. Code, § 56329, subd. (a)(3)), and an IEP team meeting must be held to consider the assessment. (Ed. Code § 56302.1, subd. (a).)

11. Antioch's psychological and educational assessors had the necessary experience to conduct their assessments, and used multiple assessments and a variety of assessment tools including observation, interview, and standardized and non-standardized instruments to evaluate Student. Moreover, the assessment instruments chosen were designed to provide information about Student's special education eligibility, related services, and accommodations, administered in Student's dominant language, and were not racially, culturally, or sexually biased.

PSYCHOEDUCATIONAL ASSESSMENT

12. Antioch did not obtain rating scales from Student's former or current teachers. However, no evidence was presented establishing the assessments' instructions required such to be valid. While Student's witness, Ms. Pippin, testified that this information was important to determine eligibility, no evidence was elicited that

rating scales were required for eligibility determination, or that a particular testing instrument required rating scales to be completed by specific people. Further, Student had attended preschool for five weeks, several months before, and it was unlikely that the teachers would have been able to complete the scales accurately due to the shortness of time Student attended preschool, and the length of time since he had attended. Young children change rapidly. In regards to his current teacher, she only worked with him for approximately two weeks, which was insufficient time to have provided reliable information.

13. Ms. Eldredge observed Student in the classroom and on the playground, interviewed him and his current teacher, and received rating scales from Mother. This provided sufficient information to enable Ms. Eldredge to form qualified opinions as to Student's current social-emotional and behavioral functioning. Moreover, Ms. Pippin also did not solicit teacher rating scales for her own social-emotional assessment. Thus, Student failed to prove that the lack of teacher rating scales was an error or invalidated the assessment.

14. Student presented no persuasive evidence to support a finding that Antioch failed to assess in working memory, cognitive abilities, and processing speed. Ms. Pippin admitted that Antioch's psychoeducational assessment tested for working memory and processing speed through the Phonological Processing test and the Auditory Processing test. The Ability Scales measured Student's cognition. Although Student's age precluded the administration of specific executive functioning subtests on the Neuropsychological Assessment, Ms. Eldredge conducted the auditory and attention subtest and determined that Student had a psychological processing disorder in attention. Student failed to present evidence that Student could even be tested for executive functioning deficits at his age. Thus, Antioch adequately assessed in these areas given Student's age.

15. Student provided no persuasive evidence that the Behavior Assessment and the Vineland were obsolete when given. The precise publication dates of the newer test versions are not in evidence. Additionally, Ms. Pippen conceded that Antioch's Behavior Assessment and Vineland testing had validity, despite the newer published editions.

16. In regards to the failure of Antioch to retain the testing protocols, Education Code, section 56504, provides, in pertinent part, that "[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies ... five business days after the request is made by the parent, either orally or in writing."

17. "Educational records" under the IDEA are defined by federal statute and Supreme Court decisions to mean institutional records kept by a single central custodian, such as a registrar. (See Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b); *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426, 434-435 [122 S. Ct. 934, 151 L.Ed.2d 896].) Typically these records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 751-755.) "[FERPA] was directed at institutional records maintained in the normal course of business by a single, central custodian of the school." (*Id.* at pp. 751-754.)

18. Educational records under Section 56504 include assessments and assessment protocols that are personally identifiable to the child, and must be disclosed to the parents if they exist. (*Newport-Mesa Unified Sch. Dist. v. State of Calif. Dept. of Educ.* (C.D. Cal. 2005) 371 F.Supp.2d 1170, 1175 (*Newport-Mesa*)). Copies of assessment protocols include work copyrighted by the assessment test publishers, but provision of protocols to parents under Section 56504 is a fair use exception to copyright laws pursuant to Title 17 United States Code section 107. (*id.* at p. 1179.)

19. The evidence established that Antioch shredded its psychoeducational assessment test protocols after the report and IEP team meeting were completed according to Antioch's policy. Test protocols are not routinely maintained in a student's cumulative file and, due to the sensitive nature of the test documents and copyright obligations set forth in *Newport-Mesa*, are often kept in the assessor's files. The test protocols should have been provided to Parents, but there is no bright-line statutory, regulatory, or case law that requires a school district to retain the protocols, although certain guidance letters from the U.S. Department of Education suggest that. However, others do not.

20. Additionally, both Ms. Eldredge and Ms. Pippin agreed that Antioch's test scores showed a severe discrepancy between academics and cognition, and Student met the legal criteria for other health impairment. Ms. Pippin further agreed that her General Ability score, 94, was closely aligned with Antioch's Special Nonverbal Composite score of 97. While Ms. Pippin argued that she would have liked to review the testing protocol for certain tests to determine validity, the main disagreements stem from whether Student could be educated in a general education setting, if he was appropriately educated, and what accommodations and further assessments should be given, not the validity of the test results. Thus, the destruction of the protocols did not invalidate the assessments in this case.

21. Even if the failure to provide Parents with protocols was a procedural violation, in this case such a violation did not significantly impede Parent's opportunity to participate in the IEP development process or deprive Student of educational benefit. Ms. Pippin did not require the protocols from Antioch's assessment to conduct her own assessment, and she conceded that the testing had validity. She wanted to review the protocols to determine if the test results were correctly calculated; however, she did not opine they were not. Moreover, Ms. Pippin relied on Antioch's

psychoeducational test scores, rather than conducting her own, when concluding that Student was eligible for special education, in contradiction to complaints of its inadequacy. Student cannot rely on Antioch's psychoeducational assessment testing for eligibility, then claim its incompliant as well. Accordingly, the lack of protocols in the educational records was a minor procedural error under these facts, and per *Target Range*, does not rise to the level of a denial of FAPE.

ACADEMIC ASSESSMENT

22. Student failed to meet his burden of proof that the academic assessment was not legally compliant. Antioch's academic assessment was conducted by a credentialed school resource specialist, Ms. Matsutani. Student did not establish that Antioch failed to assess Student thoroughly in the area of academic achievement.

23. Antioch provided the Woodcock-Johnson protocols, Brigance protocols, and an informal letter identification assessment score sheets at hearing. Ms. Pippen did not testify that she required the protocols from Antioch's assessment to conduct her own assessment.

24. Additionally, Student did not establish that age or grade-level equivalencies were required in the academic assessment report to be legally compliant. Ms. Eldredge persuasively testified that for Student these equivalencies were less reliable than standard scores. The evidence established that Mother understood that Student was below the kindergarten level in academics.

25. Antioch did not procedurally violate the IDEA with respect to the informal letter identification assessment at the initial IEP team meeting by failing to review it. It did, however, procedurally violate the IDEA by failing to ensure that the informal letter assessment was documented and considered by the entire IEP team, and by failing to furnish Parents with the data.

26. Antioch's failure to provide this information to Parents and consider it,

however, does not warrant an independent educational evaluation. The informal letter identification assessment was not the test mechanism used to identify if Student was eligible for special education. The data was corroborating evidence of Student's below grade-level performance. The IEP team, including Parents, knew that Student was below grade-level based on the formal test results. Parents did not need the information from the informal letter identification assessment to meaningfully participate in the September 2017 IEP team meeting, and the lack of this information did not deprive Student of an educational benefit.

ISSUES 1C AND 1D: FAILURE TO ASSESS FOR SPEECH AND LANGUAGE AND OCCUPATIONAL THERAPY

27. Student contends that Antioch was on notice of a suspected disability in speech and language and occupational therapy when it assessed Student in 2017. Antioch disputes Student's contentions.

Duty to Assess in All Areas of Suspected Disability

28. Notice of a suspected disability may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (Id. at p. 13 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary Sch. Dist.* (9th Cir. 2008) 541 F.3d 1202].) Once a school district has notice that a child has displayed symptoms of a covered disability, the district cannot circumvent its responsibility to assess by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119.)

29. The threshold for suspecting that a child has a disability is relatively low. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d

1190, 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (*See Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

30. To assess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. § 1414(b)(1), 1415(c)(1); Ed. Code, §§ 56321, subd. (a).)

31. Screening of a child by a teacher or specialist to determine appropriate instructional strategies is not an assessment for eligibility for special education and related services. (20 U.S.C. § 1414(a)(1)(E); Ed. Code, § 56321, subd. (f).)

SPEECH AND LANGUAGE

32. Here, Antioch had notice that Student may have a speech and language disability. Ms. Eldredge referred Student to Antioch's speech and language pathologist for further evaluation based upon concerns with Student's weak verbal ability test scores and possible pragmatic issues. Thus, Antioch suspected Student had a speech and language impairment.

33. Although Antioch's speech and language pathologist conducted a "screening," and observed Student in several settings, she did no formal testing. Ms. Tongol appeared knowledgeable and credible; however, Antioch was required to

conduct a full assessment once it was on notice of a suspected disability by the school psychologist. Nothing in the IDEA, or its implementing statutes and regulations permits a school district to substitute a screening for an assessment when a student is suspected of having a disability. Thus, Antioch failed to conduct a complete speech and language assessment. If Ms. Tongul's observations and screening can be construed as an assessment, it was completed without parental notice or consent, and thus would violate the IDEA. Student met his burden of proving by a preponderance of evidence that Antioch failed to properly assess him in speech and language.

OCCUPATIONAL THERAPY

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

35. Student did not establish that Antioch was on notice of a suspected disability which required an occupational therapy assessment when it assessed him in 2017. Student contends that Antioch should have conducted an occupational therapy assessment due to Student's fine motor deficits and his sensory seeking needs which were observed during his 2018 independent assessments. Both Ms. Boyer-Reagh and Ms. Pippin recommended an occupational therapy assessment for Student due to sensory seeking behavior and possible motor deficits during their assessments, however, neither assessor interviewed his teachers or observed Student in a school setting in 2018 or 2017. Thus, the recommendations were not persuasive. Further, neither his teacher nor Antioch assessors described any sensory seeking or fine motor concerns in 2017.

36. Student argues that his performance on the 2017 Woodcock-Johnson Spelling subtest should have put Antioch on notice of a suspected disability. Mother also stated he could not draw a circle and his hands shook when he wrote. Antioch, however, established that Student's Woodcock-Johnson Spelling subtest score was in

the low average range and his performance on the Beery was in the average range, indicating he did not have a suspected disability that would warrant an occupational therapy assessment. Instead, Antioch established that there was no reason to suspect Student's scores were related to occupational therapy needs affecting his educational performance, but rather were due to his attention deficits. Further, there was insufficient expert testimony to show that the scores, standing alone, warranted further assessment. Moreover, Antioch assessors did not notice at the time of the assessments that Student's hand shook or grip issues. And, the evidence presented by Mother regarding his handwriting was not persuasive since he was not writing in a school setting, and the conditions when he was writing were unknown.

37. Student had the burden to show that Antioch was on notice that further assessment was warranted in the area of occupational therapy. Student failed to meet that burden. There was no denial of a FAPE in this regard.

ISSUES 2A AND C: SPECIAL EDUCATION ELIGIBILITY AND PLACEMENT WITH SERVICES, GOALS AND ACCOMMODATIONS

38. Student argued that Antioch should have found him eligible for special education services under the category of specific learning disability and other health impairment based on its own assessment results. Because Student contends he was eligible for special education services, Antioch needed to develop an IEP and offer him a special education placement with services, goals, and accommodations, so he could receive a FAPE.

39. Antioch contends that: (1) Student was not adequately educated and this was the reason for his low scores, which excluded him from special education; (2) he could be educated through general education services and interventions, despite his disabilities; and (3) his excessive absences contributed to his lack of progress in first grade.

Eligibility

40. Under the IDEA, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).)

41. In California, an “individual with exceptional needs” meets four criteria. First, the pupil must be a “child with a disability” within the meaning of federal law. (Ed. Code, § 56026, subd. (a).) Second, the pupil’s impairment must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b).) Third, the pupil must be within the ages of three and 21. (Ed. Code, § 56026, subd. (c).) Fourth, the pupil must meet the eligibility criteria set forth in regulations adopted by the state Department of Education. (Ed. Code, § 56026, subd. (d).)

42. The decision as to whether or not the impairment requires special education shall be made by the IEP team, in accordance with Education Code section 56431(b). The IEP team shall take into account all the relevant material which is available on the child. No single score or product of scores shall be used as the sole criterion for the decision of the IEP team as to the child’s eligibility for special education.

43. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is “a snapshot, not a retrospective.” (*Id.* at p. 1149.) It must be

evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) Also, after-acquired evidence “may shed light” on the adequacy of the program a public agency proposed, although such evidence is not outcome determinative. (*Adams, supra*, 195 F.3d at p. 1149.) The holding of *Adams* “that exclusive use of hindsight is forbidden does not preclude consideration of subsequent events. [Citation to *Adams, supra*, 195 F.3d at p. 1149-1150, quoting *Fuhrmann, supra*, 993 F.2d at p. 1041.] The clear implication of permitting some hindsight is that additional data, discovered later in the evaluation process, may provide significant insight into the child’s condition, and the reasonableness of the school district’s action, at the earlier date.” (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006.)

44. Not every child who is impaired by a disability is eligible for special education. (*Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1106 (*Hood*)). A student may have a qualifying disability, yet not be found eligible for special education, because the student’s needs are able to be met with appropriate accommodations in and/or modification of the general education classroom. (*Hood, supra*, 486 F.3d at pp. 1107-1108, 1110.) In the *Hood* case, the court instructed that “Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard.” (*Id.* at p. 1107.) Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a “child with a disability,” who is defined in part as a child with an impairment “who, by reason thereof, needs special education and related services.” (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).) “A pupil shall be referred for special education instruction and services only after the resources of the regular education

program have been considered, and where appropriate, utilized.” (Ed. Code, § 56303.)

45. In making a determination of eligibility, a child shall not be determined to be a child with a disability if there is a lack of appropriate instruction in reading, including the essential components of reading instruction, lack of instruction in math, or limited English proficiency. (20 U.S.C. § 1414(b)(5); Ed. Code, § 56026, subd. (e).)

46. Attendance in preschool and kindergarten is not compulsory in the State of California. (Ed. Code., § 48200.)

47. In addition to special education instruction and services during the regular school year, extended school year services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106 (2006); Ed. Code, § 53645, subd. (b)(3).) California Code of Regulations, Title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Extended school year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).) Students to whom extended school year services must be offered under section 3043 “.... Shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1209-1210.)

SPECIFIC LEARNING DISABILITY ELIGIBILITY

48. A child qualifies for special education under the category of specific learning disability if he or she has “a disorder in one or more of the basic psychological

processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or perform mathematical calculations.” (Ed. Code, §56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression. (Cal.Code Regs., tit. 5, § 3030, subd. (j)(1).) To be eligible for special education, it must be shown that the specific learning disability cannot be addressed with accommodations and supports in a general education program. (Education Code § 56031, subd. (a).)

49. California law provides three alternative methods that a school district may use to determine whether a child requires special education due to specific learning disability. (Ed. Code, § 56337.) A district may use a “process that determines if the pupil responds to scientific research-based intervention” as part of the assessment procedures (the RTI approach). (Ed. Code, § 56337, subd. (c).) Alternatively, a district may “take into consideration whether a pupil has a severe discrepancy between achievement and intellectual disability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning,” by computing and measuring mathematical differences between ability and achievement scores on standardized testing (the severe discrepancy approach).⁹ (Ed

⁹ When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A

Code, § 56337, subd. (b); see *E.M. v Pajaro Valley Unified School Dist.* (N.D. Cal. March 16, 2012, No. C-06-4694 MMC) 2012 WL 909514, ** 4-10.) Third, when standardized tests do not reveal a severe discrepancy, “the [IEP] team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more basic psychological processes,” and identifies the area, the degree, and the basis and method used in determining the discrepancy after consideration of: (1) data obtained from standardized assessment instruments; (2) information provided by the parent; (3) information provided by the pupil’s present teacher; (4) evidence of the pupil’s performance in the regular and/or special classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil’s age, particularly for young children; and (6) any additional relevant information. (Cal. Code Regs., tit 5, § 3030, subd. (j)(4)(C).)

50. Specific learning disability eligibility does not include a learning problem “that is primarily the result of visual, hearing, or motor disabilities, or mental retardation, or emotional disturbance, or of environmental, cultural, or economic disadvantage.” (Ed. Code, § 56337, subd. (a).) In addition, a discrepancy “shall not be primarily the result of limited school experience or poor school attendance.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(5).)

51. Student established that Antioch should have found him eligible for

computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score point, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples as appropriate.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).)

special education under the category of specific learning disability. According to Antioch's own psychoeducational and academic assessments, Student exhibited a severe discrepancy between ability and achievement. Student's cognitive abilities, demonstrated by his standard score of 97 on the Special Nonverbal Composite of the Ability Scale was based on his standard scores on the Nonverbal Reasoning cluster (102) and the Spatial Ability cluster (93) scores. Further, Ms. Eldredge determined that Student exhibited psychological processing disorders in attention and phonological processing. There was a severe discrepancy between his standard score of 97 on the Special Nonverbal Composite of the Ability Scales, and his standard scores on the various parts of the Woodcock-Johnson which tested his academic achievement. He had a standard score of 73, for broad mathematics (low range), a standard score of 58 in broad written language (very low range), and a standard score of 76 in broad reading (low range). He had similar standard scores on the Brigance. Antioch's own test results showed that Student met the criteria for a specific learning disability.

52. Based upon the information contained in Antioch's assessments, Student qualified for special education under the eligibility category of specific learning disability. Antioch members of the IEP team, however, determined Student was ineligible because he did not attend kindergarten and could be appropriately educated in the general education setting.

OTHER HEALTH IMPAIRMENT ELIGIBILITY

53. The California Code of Regulations includes "other health impairment" as a disability category. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) This regulation provides as follows: "a pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological

disorders such as sickle cell anemia and hemophilia which adversely affect a pupil's educational performance." (*Ibid*, see also 34 C.F.R. § 300.8(c)(9)(2006).)

54. In California, a pupil "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder and who meets the eligibility criteria for other health impairment under Education Code section 56337 and California Code of Regulations, tit. 5, section 3030, subdivision (b)(9), is entitled to special education services. (Ed. Code, § 56339, subd. (a); see also 34 C.F.R. § 300.8(c)(9). A medical diagnosis alone is not sufficient to support a finding of eligibility for special education. (See, *E.J. v. San Carlos Elem. Sch. Dist.* (N.D.Cal. 2011) 804 F.Supp. 2d 1024, 1032.)

55. Student established that Antioch should have found him eligible for special education under the category of other health impairment. Here, it is undisputed that Student had a diagnosis of attention deficit hyperactivity disorder at the time he enrolled in Antioch. Ms. Eldredge knew Student was terminated from his preschool after five weeks due to his maladaptive behaviors. Additionally, Student was in constant motion when Ms. Eldridge conducted her testing of him, and she determined that he had limited strength, vitality, or alertness that affected his educational performance, meeting the other health impairment criteria. The evidence persuasively showed that Student could not be educated without special education supports.

56. In her report, however, she indicated he was not eligible and relied on California Code of Regulations, title 5, section 3021, subdivision (b)(2) and California Education Code section 56303. Section 3021, subdivision (b)(2) of title 5 of the California Code of Regulations requires school staff to utilize general education resources before a referral to special education, as does section 56303.

57. California Code of Regulations, tit. 5, section 3021, subdivision (b)(2) is not applicable and relates to a referral for assessment made by school staff, and requires

them to provide information concerning resources of the regular education program that have been considered, modified, and the results of any intervention. Education Code section 56303 also relates to a student being referred for special education only after the resources of the regular education program have been considered, and where appropriate, utilized. Here, parent requested testing for special education, not an Antioch staff member. Both sections, therefore, are inapplicable in this context.

INADEQUATE EDUCATION, EXCESSIVE ABSENCES, AND THE ABILITY TO EDUCATION IN THE GENERAL EDUCATION SETTING

58. Antioch contends that Student was inadequately educated because he did not attend kindergarten and thus, was properly excluded from special education eligibility. Kindergarten, however, is not mandatory in California. Had Student failed to attend first grade or later, this may have been an appropriate argument, but Student cannot be penalized for something not required. Further, Mother requested at the beginning of the year for Student be placed in kindergarten. Additionally, Student's family exposed Student to the alphabet, numbers and phonics prior to entering Antioch. Moreover, Student's processing deficits were not caused by the fact that he had not previously been in an academic educational program. Attention deficits are not connected to academics, and the phonological processing assessments that were conducted did not require Student to read or write at a certain level.

59. Student attended half-days for much of the school year, but Antioch agreed to this arrangement and condoned it. Antioch argues that Student had excessive absences in first grade that contributed to his lack of progress. Student contends that his absences were medical and likely a precursor to his October 2018 medical diagnosis. The evidence established that all absences were excused by Antioch. Thus, Student cannot be penalized for Antioch's allowance of his personalized half-day educational program and excused absences.

60. Although, Antioch's actions cannot be judged in hindsight, some information is useful to determine the accuracy of Antioch's decision to not find Student eligible for special education. It was established that Student engaged in maladaptive behavior 10-15 times a day, and was removed from his pull-out reading group after one month, because he distracted other students. His teacher believed he was instigating bad behavior of other children in the classroom and bothering other students. Further, Student's report card showed life skills scores worsened in the second trimester when Student was attending school and third trimester when receiving home instruction. Student was not making adequate progress in behavior. Additionally, although Antioch believed Student was making adequate progress, the evidence suggested otherwise. Student continued to need support in a number of academic areas including reading and math, and improved in his grades only after receiving one-to-one support by his family members at home. Further, his teacher did not know his academic levels at the end of the year to determine if progress was made. The evidence showed, however, that Student was not making adequate progress in reading, writing, and math at the end of the school year.

61. Student established by a preponderance of the evidence that he was eligible for special education under the categories of specific learning disability and other health impairment when the IEP team met on September 8, 2017, and should have been offered an IEP with services, goals and accommodations.

62. Student failed to prove that he required extended school year in 2018. Student failed to submit any evidence that Student would likely regress during an interruption in his educational program over the summer and would have limited recoupment capacity of lost skills upon return to school in the fall. Thus, Student failed to meet his burden of proof that he was entitled to special education and related services for extended school year 2018.

Speech and Language Related Services

63. Related services, or designated instruction and services as described in California, include speech and language pathology services, and other services that may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a).)

64. As to speech language services, Student did not present credible evidence that Student requires them. The measurement by Ms. Boyer-Reagh of Student's mean length of utterance was unreliable due to the small sample size. Her statements about unintelligibility were not supported or explained in the report or at hearing. She did not observe Student in an academic setting or interview teachers to give her some idea about Student's speech and language in school. She classified Student's impairment as severe, yet, the test results suggested otherwise. Finally, Mother's video of Student speaking at home did not demonstrate that Student had speech and language deficits at school. The aggregation of these flaws rendered Ms. Boyer-Reagh's recommendations unconvincing. Further, Parent never communicated any concerns about Student having speech and language deficits to Antioch in 2017. All accounts from teachers and Antioch assessors were that Student was understandable and articulate, participated, and voiced his needs at school, and Student did not present evidence that persuasively contradicted this information. Thus, Student failed to prove by a preponderance of the evidence that he requires speech and language related services.

ISSUE 2B – UNSAFE ENVIRONMENT DURING THE 2017-2018 SCHOOL YEAR

65. Student contends that Antioch denied him a FAPE due to an unsafe learning environment during the 2017-2018 school year because of three alleged incidents: (1) the February 13, 2018 incident, where Student was instigated by another

student; (2) the March 26, 2018 incident, of Student getting injured on the playground; and (3) the April 9, 2010 incident, of Student getting a concussion in the classroom. Antioch denies all of the allegations.

66. All students have a right “to be safe and secure in their persons.” Cal. Const., Art. I § 28. The California Education Code defines bullying as “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils ... directed toward one or more pupils” that causes or is “reasonably predicted” to cause a reasonable student to experience one or more of the following: (a) fear of harm to his or her person or property; (b) a substantially detrimental effect on his or her physical or mental health; (c) a substantial interference with his or her academic performance; or (d) a substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school. (Ed. Code, § 48900, subd. (r).) A “reasonable student” is a pupil, including an exceptional needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, and with his or her special needs. (Ed. Code, § 48900, subd. (r)(3).)

67. In a 2013 joint letter providing guidance on the IDEA, the U.S. Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as the use of real or perceived power over a target where the aggression is repeated, or has the potential to be repeated, over time. Acts of bullying include physical, verbal, emotional, or social behaviors ranging from blatant aggression to subtle and covert behaviors. (*Dear Colleague Letter*, (OSERS/OSEP August 20, 2013) 61 IDELR 263; 113 LRP 33753 (*Dear Colleague 2013*).) The bullying of a student with a disability that results in the student not receiving meaningful educational benefit may constitute a denial of a FAPE under the IDEA. (*Dear Colleague 2013, supra* at p. 2.) This applies whether or not the bullying is related to the student’s disability. (*Ibid.*) Therefore, a determination of whether bullying has denied a student a FAPE requires a

two-step analysis: whether the bullying occurred, and whether the bullying resulted in the student not receiving educational benefit within the meaning of Rowley.

68. Mother claimed to be concerned about Student's safety at school, but her rendition of the events was not persuasive. Student's teacher did not believe Student was being bullied. When school personnel interviewed Student after Mother complained about his safety in school, Student did not report anything that supported Mother's belief. Additionally, Mother never observed other student's physically harm Student. Thus, Student's failed to establish by the preponderance of the evidence any bullying or unsafe environment during the 2017-2018 school year.

ISSUE 2D – DENYING PARENT MEANINGFUL PARTICIPATION IN THE IEP BY EXCLUDING HER FROM ANTIOCH'S DECISION FOR FIRST GRADE PLACEMENT AND FAILING TO PROVIDE ADEQUATE INFORMATION IN ITS ASSESSMENTS

69. Student contends that Antioch did not provide Parents grade and age-level equivalencies from the Woodcock-Johnson and informal letter assessment information. Further, Student argues that Parents were not included in the decision to place Student in first grade for the 2017-2018 school year. Finally, Student contends a general education teacher and administrator were not present at the IEP team meeting on September 8, 2017.¹⁰

70. A parent has meaningfully participated in the development of an IEP when the parent is informed of the student's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions to the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.)

71. Student provided no authority for the contention that Antioch was

¹⁰ Student asserted that the IEP was deficient because it was not a legally comprised IEP team; however, this was not pled and is not reached in this Decision.

required to provide grade level equivalencies in reading, writing, and math for Student. Ms. Matsutani established that Student's standard scores provide a more accurate description of his then present levels of performance than grade level equivalencies. For that reason, Antioch personnel did not provide reports of Student's grade and age-level equivalencies. Instead of grade and age-level equivalencies, Antioch assessors reported on Student's present levels using standard scores. Antioch is not required to provide age and grade-level equivalencies of Student's test results. Antioch personnel explained what the scores meant at the IEP team meeting on September 8, 2017, and Mother recalled when she testified that she understood Student was below a kindergarten level for academic achievement.

72. It is understandable that Mother wants to know Student's grade level equivalents. However, the facts in this case show that the information provided by Antioch assessment reports was sufficient. The standard scores presented provided the proper information about Student's present levels of performance. Thus, Antioch did not deny Student a FAPE when assessors failed to include grade and age-level equivalencies in reporting the results of testing in reading, writing, and math.

73. Antioch did not procedurally violate the IDEA with respect to the informal letter identification assessment at the initial IEP team meeting by failing to review it. "[A]s part of the initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP team and other qualified professionals, as appropriate, shall review existing evaluation data on the child, including ... current classroom-based, local, or State assessments" to "identify what additional data, if any, are needed" to determine eligibility or other needs. 20 U.S.C. § 1414(c)(1). The qualifier "if appropriate," negates an express statutory requirement to review existing evaluation data as part of the initial evaluation. (See. *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842.) Thus, Antioch did not violate the IDEA by failing to review the informal letter identification

assessment at the 2017 IEP team meeting.

74. "In interpreting evaluation data for the purpose of determining [both] if a child is a child with a disability...and the educational needs of the child, each public agency must [d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and [e]nsure that information from all of these sources is documented and carefully considered." 34 C.F.R. § 300.306(c)(1). Antioch procedurally violated the IDEA by failing to ensure that the informal letter assessment was documented and considered by the entire IEP team, and failing to furnish Parents with the informal letter assessment data.

75. The failure of Antioch to provide this information to Parents and consider it, however, did not deny Student a FAPE. The informal letter identification assessment was not the test mechanism used to identify if Student was eligible for special education. It was data that corroborating evidence of Student's below grade-level performance. The IEP team, including Parents, knew that Student was below grade-level from the formal testing results. Thus, the failure to provide the informal letter identification assessment data did not deprive Parents meaningful participation in the September 2017 IEP team meeting or deprive him of an educational benefit.

76. Antioch witnesses credibly testified that Student's placement in first grade versus kindergarten was discussed at the IEP team meeting and Mother was told about the procedures for filling out the paperwork to retain Student in kindergarten. Mother failed to fill out the paperwork and acknowledged that she wanted Student where he was placed, in the K-1 classroom. Thus, Antioch did not deny Student a FAPE by failing to place Student in kindergarten for the 2017-2018 school year because Mother participated and gave input into the decision.

77. Student failed to prove by a preponderance of the evidence that Antioch denied Parents meaningful participation at the IEP team meeting.

REMEDIES

1. Student prevailed on issues 1c, 2a and 2c, and established that Antioch should have found Student eligible for special education in the categories of specific learning disability and other health impairment at the September 2017 IEP team meeting. Student also established that he remained eligible for special education up to the time of hearing with the exception of the extended school year. Student further showed that Antioch should have assessed Student in speech and language.

2. In summary, as remedies, Student sought independent educational evaluations in psychoeducation, academics, speech and language, and occupational therapy. Student additionally requested that he be found eligible for special education, and that Antioch hold an IEP team meeting and include Ms. Pippin's recommendations in the IEP. Student also asked that the IEP include speech and language therapy as a related service, and Antioch allow the independent assessors to attend the meeting and fund their attendance. Moreover, Student requested compensatory education.

3. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359 at pp. 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d 1489, 1497.)

4. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts

may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist. supra*, 31 F.3d at p. 1497.) The award must be fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. Dist. of Columbia, supra*, 401 F.3d. at p. 524.)

5. Antioch denied Student a FAPE in the 2017-2018 school year and the 2018-2019 school year through the time of the hearing, with the exception of the extended school year, by failing to find Student eligible for special education under the categories of specific learning disability and other health impairment, and failing to offer an IEP with services, goals and accommodations, as well as an appropriate placement. Because of this, Student is entitled to compensatory education in reading, written expression, and math by a credential special education teacher. Student provided evidence that a range between 100-150 hours in reading and 100-150 hours combined in math and written expression was appropriate compensatory education. After considering all evidence presented at hearing, it is determined that 125 hours in compensatory education in reading, and 125 hours in compensatory education in combined math and written expression is appropriate.

6. Antioch shall also convene an IEP team meeting to determine Student’s current needs, appropriate goals, and necessary accommodations. The IEP team shall also determine an appropriate placement.

7. Antioch failed to assess in speech and language, thus, Student's request for reimbursement for Ms. Boyer-Reagh's speech and language assessment is granted in the amount of \$450. However, Student's request to have Ms. Boyer-Reagh at the IEP team meeting is denied because no speech and language related services were awarded.

8. Because Antioch's psychoeducational and academic assessments are found to be legally compliant, Student's request for reimbursement for Ms. Pippin's independent assessment is denied. Further, Student's request to have Ms. Pippin at the IEP team meeting is also denied.

9. All of Student's remaining claims for relief were carefully considered and are denied.

ORDER

1. Student is eligible for special education under the categories specific learning disability and other health impairment.

2. Antioch shall convene an IEP team meeting within 30 days of the date of this Decision to develop Student's IEP in light of this Decision.

3. Student is entitled to reimbursement in the amount of \$450 for his independent speech and language assessment. No further receipts are needed and payment shall be provided to Parents within 45 days of the date of this Decision.

4. In addition to any educational services called for in the Student's IEP, Antioch, as compensatory education, will provide Student with individual academic instruction, in the total amount of 125 hours for reading and 125 hours combined for math and written expression. The instruction shall be provided by a nonpublic agency, funded by Antioch, and provided by a credentialed special education teacher. The instruction will be completed by the end of the 2020-2021 school year, unless the parties agree otherwise. Parents and Antioch may, if they wish, alter the provisions of

this compensatory education order, provided that they both agree to the change in writing.

5. All of Student's other requested relief is 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 on issues 1c, 2a and 2c. District prevailed on issues 1a, 1b, 1d, 2b, and 2d.

RIGHT TO APPEAL THIS DECISION

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

DATE: December 28, 2018

/s/

CYNTHIA FRITZ

Administrative Law Judge

Office of Administrative Hearings