

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014120518

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on December 8, 2015, naming Antioch Unified School District (Student's case) as respondent.¹ The matter was continued for good cause on January 9, 2015.

Antioch filed a due process hearing request with OAH on February 4, 2015, naming Student (Antioch's Case) as respondent.² On February 11, 2015, Antioch's Motion to Consolidate Student's case with Antioch's case was granted, and the timeline for issuing a decision was based on the filing date in Student's case. During the hearing, Antioch withdrew its case. The matter was dismissed under separate order and this Decision concerns only the issues raised by Student.

Administrative Law Judge B. Andrea Miles heard this matter in Antioch, California, on April 21 through April 23, 2015 and April 27 through April 30, 2015. Thereafter, a continuance was granted for the parties to file written closing arguments and the record

¹ OAH case number 2014120518.

² OAH case number 2015020258.

remained open until May 21, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

Brett Allen and Laura Benghal, Attorneys at Law, represented Student. Student's mother and father attended the hearing. The hearing was interpreted into Spanish.

David Mishook, Attorney at Law, represented Antioch. On April 21 through April 23, 2015, Karen Mates, Director of Special Education attended the hearing on behalf of Antioch, and on April 27 through April 30, 2015, Kimberly Parrott, Special Education Coordinator, attended the hearing on behalf of Antioch.

On May 29, 2015, Antioch filed a motion to strike three "issues" which were raised in Student's closing brief on the basis that they were not within the jurisdiction of OAH to decide or were not pled in Student's complaint. On June 2, 2015, Student filed an opposition to Antioch's motion. Antioch's motion is granted. Student may not raise new issues for the first time in a closing brief and the issues in the case are limited to those listed herein. However, where applicable, Student's contentions regarding enforcement of the Office of Civil Rights complaint, stay put, and goals are considered as part of Student's arguments for the issues already identified, to the extent possible.

ISSUES³

1. During the 2013-2014, beginning February 7, 2014, and the 2014-2015 school year did Student experience bullying such that he was denied a free appropriate public education because Antioch:

- a. failed to evaluate the impact of bullying on Student's educational participation and performance;
- b. failed to convene an individualized education program team meeting to discuss the impact of the bullying on Student's educational participation and performance;
- c. failed to provide a safe and appropriate learning environment; and
- d. failed to provide appropriate supports and services to address the bullying?

2. During the 2013-2014 school year, beginning February 7, 2014, did Antioch deny Student a FAPE by:

- a. failing to offer a one-to-one aide to assist Student with behavior and/or personal safety issues;
- b. failing to offer an appropriate bullying response plan;
- c. failing to offer appropriate school-based counseling; and

³ At the start of the hearing Student moved to make certain amendments to the issues previously memorialized in the April 16, 2015 Order Following Prehearing Conference. Student withdrew two of his issues in their entirety. Student moved for and was permitted to make changes to the remaining issues. Here, the ALJ has reorganized and renumbered the remaining issues for clarity. These are the issues heard and decided. The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- d. failing to offer an appropriate placement because Antioch should have offered Student home-hospital instruction, home-instruction in an alternative setting, an alternative public placement, or a non-public school?
- 3. During the 2014-2015 school year, did Antioch deny Student a FAPE by:
 - a. failing to offer a one-to-one aide to assist Student with academics, behavior, and/or personal safety issues;
 - b. failing to offer an appropriate bullying response plan;
 - c. failing to offer appropriate school-based counseling;
 - d. failing to offer one-to-one tutoring; and
 - e. failing to offer an appropriate placement because Antioch should have offered Student home-hospital instruction, home-instruction in an alternative setting, an alternative public placement, or a non-public school?

SUMMARY OF DECISION

This decision holds that Student was not denied a FAPE as a result of bullying during the 2013-2014 school year, beginning February 7, 2014, and during the 2014-2015 school year. Antioch did not deny Student a FAPE during the 2013-2014 school year, beginning February 7, 2014, by failing to offer: a one-to-one aid, an appropriate bullying response plan, appropriate school-based counseling, and an appropriate placement. Antioch is found to have denied Student a FAPE for the last two weeks of the 2013-2014 school year by failing to offer Student appropriate school-based counseling services.

This decision further holds that Antioch did not deny Student a FAPE during the 2014-2015 school year by failing to offer: a one-to-one aide, an appropriate bullying response plan, one-to-one tutoring, and an appropriate placement.

For these reasons, Student did not prevail on any of the issues heard and decided, other than that referenced above.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 14-year-old boy who resided within the geographical boundaries of Antioch Unified School District at all relevant times with his mother, father, and two younger sisters. Originally, Student was found eligible for special education services in preschool due to speech articulation issues and a developmental coordination disorder. Student currently qualifies for special education under the primary category of specific learning disability and the secondary category of speech and language impairment.

PARTIES' PRIOR SETTLEMENT

2. On January 2, 2014, Student filed a due process complaint with OAH alleging various procedural and substantive violations of the IDEA by Antioch. On February 6, 2014, the parties entered into a settlement agreement, whereby, the parties agreed that Student's August 29, 2013 IEP would continue to be implemented pending the completion of several assessments including, an independent psychoeducational evaluation by Melanie Johnson, an independent speech and language evaluation by Speech Pathology Group, an occupational therapy evaluation by one of Antioch's occupational therapists, and an assistive technology evaluation by the Contra Costa County Office of Education. The agreement specified that in the event that Melanie Johnson was not available to begin the independent assessment within 60 days of February 6, 2014, another mutually agreeable assessor would be retained to conduct the independent psychoeducational assessment of Student.

3. As part of the agreement, Antioch agreed to have an adult monitor Student during nutritional and lunch breaks from at least a four foot distance, to provide Student with access to two Alpha Smart keyboarding devices for use at home and

school, and to provide Student with access to his teachers one hour before and after the regular school day for assistance and support in understanding and completing homework. Antioch agreed to the terms of the agreement in exchange for Student's waiver of all known and unknown educational and civil claims against Antioch up to and including the date of the agreement.

AUGUST 29, 2013 IEP

4. Student's August 29, 2013 IEP included four goals in the areas of social and emotional; speech and language; algebra and graphing; and algebra. It offered Student 60 minutes a week of group speech and languages service; 30 minutes a week of group counseling services; 30 minutes a week of individualized counseling services; and 100 minutes, four times a week of specialized academic instruction in math and English⁴. Additionally, Student received the accommodations of teacher prompts and the opportunity for self-review of his work. The IEP provided placement in a general education classroom for the implementation of the specialized academic instruction and in a special education classroom for the implementation of the speech and language and counseling services.

5. During the August 20, 2013 IEP team meeting, the inclusion of the services of a one-to-one aide in the IEP was a point of contention. During the 2012-2013 school year, Student had received the part-time assistance of a one-to-one aide to prevent bullying. Antioch's members of the IEP team believed that Student no longer required

⁴ The offer for special academic instruction for English was made despite the IEP team's determination that Student's needs did not require the inclusions of any English language arts goals in Student's IEP. This discrepancy was due to Barry Tesar, Student's case manager, mistakenly including English language arts as part of the specialized academic instruction.

the services of a one-to-one aide and that the presence of a one-to-one aide created a social stigma for Student. Initially, Mother, who was a participating member of the IEP team, disagreed with elimination of the services of a one-to-one aide, because she believed that the assistance of a one-to-one aide continued to be necessary in order to protect Student from potential bullying. At the time of the August 29, 2013 IEP team meeting, Student had not experienced any bullying during that school year, but school had only recently resumed after summer break.

6. Ultimately, Mother agreed that the assistance of a one-to-one aide need not be included as a service in the August 29, 2013 IEP, provided that certain steps were taken to prevent Student from being subjected to bullying and to insure his safety. In order to address Mother's concerns, the IEP team included in Student's IEP that he receive 30 minutes of individual counseling and 30 minutes of group individual counseling per week and that Student be provided access to either the school psychologist or the speech and language pathologist to report any incidents of bullying. In the event that Student reported any incident of bullying to the speech and language pathologist or school psychologist, they were to report the incident to the administration. The IEP team meeting notes, which were incorporated as part of the August 29, 2013 IEP, indicated that the administration would notify teachers and all of the other members of the administration staff that Student was being monitored regarding potential harassment. Additionally, the IEP specified that if "bullying continues" an IEP team meeting was to be held.

7. Parents accepted and signed the August 29, 2013 IEP offer, with the exception of the elimination of the individualized speech and language services. Based on the parties' February 6, 2014 settlement agreement, Antioch continued to implement Student's August 29, 2013 IEP, along with the additional services specified in the

settlement agreement.⁵ The agreement specified that Student's IEP would not be amended to include those services.

FEBRUARY 7, 2014 THROUGH APRIL 25, 2014

Student's Social Emotional Needs

8. Despite the parties' settlement agreement, in order to determine Student's needs as of February 7, 2014, it is necessary to have some historical context and background.

9. Since preschool Student has had difficulty with peer interaction. Student's difficulty stemmed in part from his weak pragmatic skills and his limited ability to understand others' intentions.

10. In April 2011, Dr. Carina Grandison conducted a neuropsychological assessment of Student and determined, based in part on her observation, that Student has school-based anxiety due to his peer interaction difficulties.

11. Dr. Grandison concluded that Student struggled to understand everyday social scenarios and how to solve social dilemmas. Those deficits impacted Student's ability to successfully form friendships with his peers.

12. In February 2011, Student became a patient of Contra Costa Behavioral Health. Irma Lerma, a licensed marriage and family therapist, acted as Student's case manager from February 2011 through December 2012 at Contra Costa Health Services.

⁵ At some point prior to February 7, 2014, Terri Powell unilaterally decided to stop providing Student with the 30 minutes of weekly group counseling. After discontinuing the group counseling, Ms. Powell increased Student's individual counseling to 60 minutes per week. Student did not allege that Antioch failed to implement the August 2013 IEP so no findings regarding this change are made in this decision.

13. In September 2012, Ms. Lerma referred Student to Dr. Edward Lau, a clinical psychiatrist at Contra Costa Behavioral Health, for evaluation and treatment. At that time Dr. Lau diagnosed Student with anxiety and prescribed Student medication to treat the symptoms. However, after several months, the medication was discontinued by Mother.

14. As Student transitioned into middle school in the fall of 2011, Student's difficulties with peer socialization continued. Student experienced some success with socializing with his classmates at Dallas Ranch Middle School; however, Student's socializing was limited to school hours and social media. Student's limited socialization resulted in Student feeling isolated.

15. While attending Dallas Ranch, Student experienced some traumatizing incidents at school that deeply affected Student. Several of the incidents that had the most significant impact on Student occurred during the 2011-2012 and 2012-2013 school years. During therapy sessions with Ms. Lerma in May 2014, Student created drawings of those three incidents in a book entitled "The Book of Bullying." Student created drawings of three of those incidents. It was evident from the drawings that despite the passage of time, Student remained very affected by those past incidents. Those three incidents depicted in Student's drawings are summarized below.

16. In April 2012, Student was in the school's bathroom when another student put a belt around Student's neck and threatened to kill Student. Student, who was very upset by the incident, reported the incident to his mother. In turn, his mother reported the incident to the school's administration. No action was taken against the offending student because Student was unable to identify him in the school yearbook and Student never saw the offending student again.

17. In August 2012, during art class, a classmate told Student that he was going to cut off Student's head with a guillotine and post pictures of Student's

beheading on the Internet. Student, who was very frightened by the threat, reported the incident to his mother. Mother reported the incident to the school's administration. A member of the school's administration later notified Mother that disciplinary action had been taken against the offending Student, but for confidentiality reason Mother could not be informed of the action taken.

18. In May 2013, during physical education class, Student was standing in line waiting for his turn at bat during a softball game. A younger, male student wanted to take his turn at bat before Student. The softball team captain told the younger student that he had to wait because it was Student's turn to bat. The younger student became upset and told Student that he would "kill" him. It is unknown whether Student's one-to-one aide was present at the time of the incident.

19. Mother detailed other incidents of harassment which she testified occurred during the 2012-2013 school year. The incidents described by Mother involved students making fun of Student, touching Student in an unwanted manner, or in some way threatening Student. Generally, the negative comments from the other students were focused mainly on Student's appearance, more specifically, on size of Student's nose.

20. Although, Student has not alleged any violations of FAPE which pre-date February 7, 2014, the impact of the above referenced incidents on Student remains relevant to the case at hand because the prior incidents had a deep and lasting emotional impact on Student, which shaped his future needs.

Student's Claims of Bullying

21. Parents filed a complaint with the United States Department of Education's Office of Civil Rights (OCR) in 2012, alleging, in part, that Antioch discriminated against Student on the basis of his disability. As a basis for the complaint, Parents cited several incidents they characterized as bullying. OCR investigated the complaint and in August

2013, Antioch signed a Resolution Agreement which resolved the allegations in Parent's complaint. Little weight has been given to OCR's findings and report as it remains unknown to the extent OCR investigated Student's complaints and Antioch's actions. Although Student wanted to use OCR's findings to establish what would constitute appropriate special education services for Student under the IDEA, there was no evidence that OCR made any findings using the IDEA and associated case law. Neither party chose to call James Wood, the OCR team leader who investigated the case, to testify regarding his investigation. Although, Mr. Wood's report contained some summarized statements of Student, it is unclear to what extent the accuracy of Student's statements was examined.

22. Following the OCR Resolution Agreement, Mother relayed additional peer-related incidents to Student's IEP team in November 2013. Student told her that his classmate, Ryan, had put his hand over Student's mouth and told Student that he had smeared "boogers" on Student's face. The classmate then broke Student's pencil in half. Student reported the incident to his mother.

23. In a second incident, which Student related to Mother, that same classmate, Ryan, slowly patted Student's face with his hands. Mother expressed that Student was bothered and frustrated by Ryan's behavior. Mother reported the incident to the school and to Antioch's special education department. As a result, Ryan was moved to a different seat in that class in order to prevent Ryan from further bothering Student.

24. Mother also testified about two incidents of students making fun of the size of Student's nose during lunchtime.

25. On October 31, 2013, Student contacted his mother by telephone sometime around noon. Mother testified that Student was upset because at lunch some students had called Student "gay," "retarded," and "mentally ill," and that they had

"pushed" him. Mother reported the incident to the school administration.

26. During the November 4, 2013 IEP team meeting, the IEP team discussed reducing Student's feeling of isolation by helping Student to develop friendships at school and by encouraging Student to join various school clubs and other school activities. Although Student reported to Mother that he did not have any friends, he regularly socialized with the same group of students at school. The school psychologist felt that Student's upset was due to his failure to understand the difference between "teasing" and "bullying."

Student's Needs Pursuant to December 2014 Triennial Assessment Data

27. As part of Student's triennial assessment, Student was assessed in the areas of academic, psychoeducational and speech and language. In order to review the results of the assessment, an IEP team meeting was held on December 15, 2013. During that IEP team meeting, the psychoeducational assessment and the academic assessment were presented by the evaluators.

28. At the meeting, Terri Powell, the school psychologist at Dallas Ranch, presented the results of Student's psychoeducational assessment, which she had conducted in October and December 2013. The purpose of the assessment was to determine whether Student continued to qualify for special education eligibility and to assess his academic progress. As part Student's assessment, Ms. Powell administered the Wechsler Intelligence Scale for Children Fourth Addition, the Test for Auditory-Perceptual Skill Third Addition, the Developmental Test of Visual-Motor Integration, the Developmental Test of Visual Perception-Adolescent and Adult, and the Behavior Assessment System for Children.

29. The Weschler is a test which yields an estimate of Student's current level of intellectual functioning in verbal comprehension, perceptual reasoning, working memory, and processing speed, as well as, providing an overall intelligence quotient (IQ)

for general intellectual functioning. Student scored in the average range for verbal comprehension and working memory and in the low average range for perceptual reasoning and process speed. Student's test scores indicated that Student's full-scale IQ was 85, placing Student in low average range when compared to his peers.

30. The Auditory-Perceptual Skills test was used to measure Student's functioning in various areas of auditory perception. Student scored in the low average range on the portions of the test which required Student to use short-term memory skills to remember and repeat sentences and a progressive series of numbers. Student scored in the average range when asked to answer questions using logic and reasoning. Overall Student's test scores placed him in the average range when compared to his peers.

31. The Visual-Perceptual test consisted of six subtests which measured different, but interrelated, visual-perceptual and visual-motor abilities. Visual perception ability is the capacity of an individual to interpret or give meaning to what is seen, and includes recognition, insight and interpretation. Visual motor ability involves complex eye-hand coordination tasks. The test revealed that Student had significant weakness in his visual-motor speed. The results of the Visual-Motor Integration test indicated that Student's visual integration skills were in the low average range. The combination of both tests results indicated that Student had a visual processing deficit.

32. Ms. Powell utilized the Behavior Assessment System for Children test to assess Student's behavior as observed in the home or classroom. The Behavior Assessment is comprised of parent forms, teacher forms, and student self-answered forms. The test's scales are used to measure levels of negative or undesirable behaviors and the levels of positive behaviors (adaptive skills) as compared to Student's same-age peers.

33. The test results from teachers' and Parents' questionnaire indicated that

Student was "at risk" for several areas of negative behavior, such as anxiety, depression somatization, attention problems, learning problems, atypicality and withdrawal.

Student's "at risk" scores indicated Student needed to be monitored to determine whether those negative behaviors developed to the level where formal treatment was needed. Additionally, Parents' and teachers' questionnaires indicated that Student was "at risk" due to a deficits in his social skills, leadership ability and activities of daily living. These results were in direct contrast to the results of Student's self-evaluation. Student's self-evaluation did not indicate that Student was "at risk" for developing the listed negative behaviors or for having deficits in the listed adaptive skills.

34. Ultimately, Ms. Powell concluded that Student did not have any significant, health, behavioral, or emotional issues which would have warranted the IEP team to consider student's eligibility under any other category than specific learning disability and/or speech and language.

35. At the time of the December 2013 IEP team meeting, Student was performing well academically. Student was even tied with another student for the top grade in math class. Although, it is unknown whether this situation was due to the modifications and supports Student was receiving through special education. Student regularly experienced difficulty with certain areas in math and required the assistance of either the Resource Specialist Program (RSP) teacher or RSP instructional assistant. Socially and emotionally Student was progressing with Student appearing more confident and happy in his school environment.

36. The triennial assessment review was continued to January 9, 2014, so that the speech and language therapist could present the speech and language assessment report and an update on Student's performance. On January 9, 2014, the IEP team resumed the triennial review. The speech and language therapist reviewed the speech and language assessment and the draft goals for speech and language.

37. During the meeting, Kim Parrott, Antioch's special education coordinator, proposed that additional visual and auditory, memory, and social and emotional assessments be conducted, because despite Student scoring in the average range on his academic assessment, Student was still having difficulty completing his homework and still requiring some assistance during class.

38. At that time, Parents declined to consent to additional testing as they wanted time to discuss the implication of the testing. Before the meeting ended, The IEP team recommended that Student remain eligible under the category of speech and language and that Student's special education services continue pending additional testing.

Student's Needs From February 7, 2014, Through April 10, 2014

39. In compliance with the February 6, 2014 settlement agreement, beginning February 11, 2014, Student was continuously observed by an adult staff member during lunchtime. Student and the other students were unaware of the surveillance as the observing adults remained at least four feet away from Student throughout lunchtime. Ms. Combs, an instructional assistant at Dallas Ranch, was primarily responsible for observing Student during lunchtime, although Mr. Tesar, Student's RSP teacher, and the principal at Dallas Ranch were responsible for observing Student on several days.

40. Ms. Combs took pains to observe Student from afar to prevent Student and other students from becoming aware that she was monitoring Student. During lunch time, Student primarily ate lunch with a group of four or five boys. Ms. Combs's own son was a member of Student's lunchtime group. At times girls would also join the group at lunch. At no point did the monitors observe any student bullying Student. On the contrary, Ms. Combs observed Student to be smiling, talking, and laughing with this group of friends at lunchtime on a consistent basis.

41. Student did not present any evidence showing that Student did not

continue to make educational progress during the time period beginning February 7, 2014, and ending April 10, 2014. It is determined that Student's social and emotional needs did not change during this time such that Antioch would have been required to hold an IEP team meeting offer Student something other than what was contained in his August 2013 IEP.

42. Student did not present any convincing evidence that Student experienced any harassment or bullying by other students at Dallas Ranch during the time period beginning February 7, 2014, and ending April 10, 2014. At one point during her testimony, Mother testified that Student complained of being teased or harassed three to four times a week, but she failed to define the time period to which she was referring. Mother did not provide details of incidents of harassment or teasing which were alleged to have been committed after February 7, 2014, except for the incidents which are discussed in the section below. Conversely, Mother recorded details of other incidents which Student alleged occurred prior to February 7, 2014, and after April 10, 2014, but never between those dates. Additionally, Antioch presented convincing evidence that Student appeared to have positive interactions with his peers during that time period at lunchtime. Therefore, the weight of the evidence shows that Student was not subject to any harassment or bullying from February 7, 2014, through April 10, 2014.

Effect of Incidents That Occurred on and After April 11, 2014, on Student

43. On April 11, 2014, Student was struck in the nose by a fellow student during physical education class. The other student, who was part of Student's regular lunch group, was teasing Student about liking the girl who was standing next to them at the time. Student believed that the other student was actually the one who liked the girl, so Student made a comment to that effect. It is unclear as to whether Student intended to engage in teasing the other student or whether Student was just stating what he believed to be fact. Either way, the other student became upset and embarrassed so he

struck Student in the nose, causing Student to become dizzy and for his nose to bleed.

44. Once Student informed a teacher of the incident, he was taken to the school office where Mother was notified about the incident by telephone. Before Mother arrived at the school, Student agreed to participate in the Dallas Ranch's restorative justice program with the offending student once he returned to school. The school's restorative justice program was a form of conflict resolution which allowed students to resolve problems together.

45. Paula McEvoy, Vice Principal at Dallas Ranch, investigated the April 11, 2014 incident. On the day of the incident, Student acknowledged that the offending student was his friend. Student also told Mother, in front of Ms. McEvoy, that the offending student was his friend. During the investigation, the offending student indicated that Student was his "best friend." Ms. McEvoy, who testified credibly at the hearing, confirmed that Student and the offending student were friends. She based her opinion on her observations of Student and the offending Student's interactions prior to April 11, 2014.

46. As a result of the April 11, 2014 incident, the offending student was suspended from school and moved to a different physical education class. The offending student did not appear upset about being disciplined over the incident. When the student returned from the disciplinary suspension, the student indicated that he felt remorse over the situation and wished to apologize to Student.

47. Right after the April 11, 2014 incident, Dallas Ranch began its spring break. After spring break concluded, Student returned to school for approximately one week. During that week, Student was observed socializing and joking around with the same group of friends with whom Student had previously socialized with at lunch. The offending student was not at school during that week because the student had been suspended due to the April 11, 2014 incident.

48. On April 25, 2014, during the middle of the school day, Student telephoned Mother complaining of chest pain and asking to go home. That same day, Mother took Student to see Student's primary care physician, Abraham Rice. Due to Student's complaint of chest pain, Dr. Rice ordered that Student receive an electrocardiogram test. The test results indicated that Student was not experiencing any issues with his heart. However, Dr. Rice noted that Student was particularly fearful and anxious that day.

49. Student told Dr. Rice that he was upset because the student who had hit him on April 11, 2014, had returned to school that day. Dr. Rice provided Mother with a letter to share with the school which indicated that Student could return to school, but that Dr. Rice was very concerned about the "bullying" that Student was experiencing. Mother provided Dr. Rice's letter to either someone in the administration at Dallas Ranch or to Antioch's special education department.

50. Student has not returned to school since April 25, 2014. At some point after April 25, 2014, a meeting was held with Parents to discuss the April 11, 2014 incident. Parents were concerned that Student would not be safe if he returned to Dallas Ranch for the remainder of the school year. During the meeting, Mother indicated that the offending student had posted something "online" about wanting to hurt Student.

51. The school counselor explained that Student had reported that incident to staff the prior week and that the situation had been investigated. Student had reported that a student (student C) had told him that the student from the April 11, 2014 incident had sent student C a text message right after the April 11, 2014 incident indicating that he wanted to punch Student. As a result of Student's report, student C was interviewed regarding the alleged text message. Student C was unable to produce the text message, claiming to have erased it. The student from the April 11, 2014 incident was not questioned about the situation when he returned to school because at that time he

expressed credible remorse over the situation and a legitimate desire to apologize to Student.

52. Due to Parents' concerns, it was agreed that the school counselor would conduct a further investigation in the alleged text message in an effort to help alleviate Student's anxiety over the issue. The IEP team members agreed that a conflict management session would be conducted upon Student's return to school. In the event that Student was not comfortable meeting in person with the student from the April 11, 2014 incident, the conflict resolution session would be conducted with the students in separate rooms. Mother indicated that she would encourage Student to return to school to finish out the remainder of the school year.

53. Student continued to be absent from school. At that point Student's needs had changed as he had become too fearful and anxious to return to school. On May 8, 2014, Dr. Rice wrote a letter recommending that Student be provided home schooling due to Student's high level of anxiety. Sometime after May 8, 2014, Mother provided Antioch with Dr. Rice's letter and an IEP team meeting was scheduled for May 19, 2014.

54. On May 15, 2014, Student and a female Dallas Ranch student had a private "chat" through Facebook's messaging system. As evidence of the content of the chat, Student provided a photo of a cell phone which depicted a portion of the chat. The chat mentioned a "threat" against Student. From the conversation it can be inferred that until this chat, Student knew nothing of a threat. Student contends that the message constituted bullying or was evidence of other incidents of bullying. However, the evidence shows that there is clearly more to the conversation than is depicted in the photo. Student had the ability to present evidence of the complete chat conversation, but chose only to present this portion. No other evidence was presented which explained the reason for offering a truncated version of the conversation or which provided the missing context to the conversation. Thus, no weight has been given to this evidence.

55. To deal with his anxiety, Student began attending psychotherapy sessions with Ms. Lerma in May 2014. During her therapy sessions with Student, Ms. Lerma utilized Cognitive Behavioral Therapy and art therapy to help Student process his feelings about the negative incidents Student experienced at Dallas Ranch. Cognitive Behavioral Therapy is a form of psychotherapy which works on changing a patient's unhealthy thoughts and feelings by helping the patient to understand situations from an outside perspective. Although Student's anxiety is not solely connected to the school environment, most of the time in Student's psychotherapy sessions was spent working on Student's feelings about how he had been treated by the other students at Dallas Ranch. Ms. Lerma believed that Student was suffering from Post Traumatic Stress Disorder (PTSD) as a result of being bullied at Dallas Ranch.

56. Prior to starting therapy with Ms. Lerma, Student had resumed treatment with Dr. Lau in January 2014. While under his care, Dr. Lau has prescribed various medications for Student in an attempt to treat Student's mental health symptoms. Dr. Lau's specific diagnosis of Student has changed over time. However, at no time did Dr. Lau diagnose Student with PTSD. Despite the varying diagnoses, Dr. Lau's diagnosis of Generalized Anxiety Disorder and Obsessive Compulsive Disorder remained consistent.

May 19, 2014 IEP Team Meeting

57. On May 19, 2014, an IEP team meeting was held. At the meeting, the IEP team discussed Parents' request for home-hospital instruction, the results of the outstanding assessments, and a potential placement for the 2014-2015 school year. Antioch's occupational therapist presented her report and her opinion that Student did not require occupational therapy services. The assistive technology specialist presented her report and provided her opinion that Student could benefit from the use of a computer for longer assignments and the use of a graphic organizer. The speech and

language assessment had not been completed because Student had not been available for the assessment. Melanie Johnson presented her report and her opinion that Student met the criteria for a Specific Learning Disorder as outlined in the Fifth edition of the Diagnostic and Statistical Manual of Mental Disorders.

58. Ms. Johnson, a California licensed clinical psychologist, conducted a psychoeducational assessment of Student on March 11, 2014, and March 25, 2014. Dr. Johnson's assessment consisted of the administration of a variety of formal testing, review of prior assessments of Student, and her observations of Student. Dr. Johnson did not testify at the hearing.

59. The tests assessed Student's cognitive abilities, executive functioning abilities, academic abilities, and social/emotional functioning. The cognitive testing indicated that Student tended to operate in a "more concrete fashion" owing to his deficits in holistic and non-linear thinking. These deficits resulted in Student having difficulty seeing "the big picture" in situations.

60. The testing also revealed that Student had significant deficits in visual spatial organization and construction. This finding was consistent with Dr. Grandison's finding in her 2011 assessment report and Ms. Powell's finding in her recent assessment of Student. Dr. Johnson opined that Student's deficit in understanding visual-spatial information contributed to his difficulties with peer interactions by causing Student to misread other's facial expressions and allowing him to read more into a situation than existed. She also believed that Student's deficits in this area made him more vulnerable to teasing, bullying and manipulation.

61. In her report, Dr. Johnson expressed her concern about the level of anxiety which Student was experiencing. Student's fears and anxiety were not limited to the school environment. Student reported a long list of things which made him anxious or frightened, including that: someone would come and shoot his parents when they took

out the trash, someone would poison his father at work, someone would rape his mother, a demon would come and kill him, the devil would be reborn as somebody else, and someone was stalking him. At one point during the assessment, Student's demeanor changed drastically because he became worried that there were "snipers in the trees" outside of the office windows. After a while, Dr. Johnson was able to talk Student through his fears and redirect him to the task at hand.

62. The testing showed that Student had deficits in his executive functioning skills. Executive functioning refers to cognitive processes involving planning, executing and monitoring performance in complex tasks. A diverse set of higher level skills are typically used in these tasks, such as planning, organizing, emotional and behavioral regulation, initiation, working memory, self-monitoring, as well, as conceptual skills. The testing showed that Student experienced trouble planning and carrying out complex tasks which led to slower and less accomplished output. Student seemed to have more difficulty with open-ended tasks where he was required to create his own structure and organization for completing tasks. Student's deficits in his executive functioning skills combined with the anxiety Student experiences when confronted with more complex task presented as academic obstacles for Student.

63. Based on the seriousness of Student's visual-spatial processing issues, combined with Student's uneven performance on the math tasks, Dr. Johnson found that Student presented with a Specific Learning Disorder, as outlined in the Fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, which adversely affected his math skills and the consistency and quality of his work on other academic tasks. Dr. Johnson believed that Student continued to require special education services.

64. Dr. Johnson felt that an individualized approach to Student's learning when working on certain math concepts and larger more complex assignments, such as longer papers and research assignments would be beneficial to Student. She also found

that Student required continued clinical support for his anxiety. Dr. Johnson stressed the importance of working with Student to identify potential misunderstandings and conflicts with peers and to teach Student the skills for reading and responding appropriately to those interactions. Dr. Johnson believed that providing Student with a “safe haven” at school with a trusted adult was important to help Student manage his anxiety and stress as it arose during the school day.

65. In support of Parents’ request for home-hospital instruction, Parents provided the letter from Dr. Rice. Dr. Rice’s letter did not specify the anticipated date in which Student would return to school, but at the time of the IEP team meeting only approximately two weeks of school remained for the school year. The IEP team collectively agreed for Student to be placed in home-hospital instruction for the remainder of the school year. It was agreed that Mr. Tesar would provide the home-hospital instruction.

66. After the April 11, 2014 incident, Student’s mental health gradually decompensated. Student’s anxiety increased to the point that his needs changed. Beginning April 25, 2014, Student’s anxiety was at such a level that it would have been too difficult for Student to return to Dallas Ranch for the remainder of the school year.

2014-2015 SCHOOL YEAR

Antioch’s Placement Offer For The 2014-2015 School Year

67. During Student’s May 19, 2014 IEP team meeting, the team began to prepare for Student’s transition to high school. In light of Student’s newly identified needs, the Antioch members of Student’s IEP team believed that the counseling enriched classroom at Deer Valley High School may have been an appropriate placement for Student in the fall. Therefore, the coordinator of Antioch’s counseling enriched classroom at Deer Valley High School presented the IEP team with information

regarding the program. The IEP team discussed whether the counseling enriched classroom program would be an appropriate placement for Student during the 2014-2015 school year, but no formal offer of placement was made at that time.

68. Without the social outlet of school, Student became even more isolated. Student expressed having suicidal ideations to Parents and also posted similar comments on the social media website, Facebook. During that time Student continued to receive weekly counseling with Irma Lerma and continued to take his prescribed medications.

69. On August 6, 2014, Karen Mates, Antioch's Director of Special Education, sent Parents a letter specifying the offer for the 2014-2015 school year.⁶ The letter detailed the components of the counseling enriched program at Deer Valley High School. Parents were aware at the May 19, 2014 IEP team meeting of Antioch's intention of offering Student the counseling enriched classroom program as placement for the upcoming school year.

70. The counseling enriched program offers students an academic program with an integrated counseling component. The program is designed for students who, like Student, experience internalized anxiety and social phobias. The program has been successful in working with students who experience extreme anxiety. Although, the counseling enriched program is at Deer Valley High School, which serves approximately 2500 students, the counseling enriched classrooms are set away from the main part of

⁶ Although, Antioch made an offer of placement outside of the IEP team process by sending Parents the letter, no findings will be made as to whether Antioch procedurally violated the IDEA as Student has not placed it at issue. Nevertheless, findings will be made as to appropriateness of the placement offer as Student has alleged a substantive denial of FAPE.

the campus in order to create a place for students to feel safe.

71. The program is comprised of two classes of eight to nine students. The two credentialed special education teachers tailor the method of teaching to fit each student's learning needs. The classes are comprised of ninth through twelfth grade students, but the lessons are designed for the appropriate grade level of the students. All of the students in the program are on a diploma track.

72. Two instructional assistants assist students in each of the two classrooms. A student can attend general education classes for a portion of the school day or a student can remain in the counseling enriched classroom for the entire school day, depending on the student's needs. The counseling enriched program is capable of providing students with elective classes in the counseling enriched environment. Instructional assistants accompany students when they attend general education classes on campus. In the event that the program needed additional instructional assistants, Antioch would make them available.

73. Students are allowed to eat their lunch in the classroom if it makes them more comfortable. Students, who are anxious about going to the cafeteria, are allowed to go to the cafeteria to get their food before the rest of the school's students arrive. The program's flexibility allows students the most comfortable environment to fit their unique needs.

74. Deer Valley has three psychologists on campus and multiple guidance counselors. One of the psychologists is specifically assigned to the counseling enriched classroom. One time a week the psychologist provides group social skills training to the class. The psychologist works with the Students on accepting others' feelings and reactions. Individual counseling with the psychologist is also available to students. The program utilizes Cognitive Behavioral Therapy combined with Mindfulness. Mindfulness is based on the principal of being aware of one's environment. Cognitive Behavioral

Therapy has been successful for people suffering from anxiety.

75. Students are able to access the services of the psychologists easily by either visiting the psychologists' offices or when the psychologists come to the classroom. The psychologists' offices are located in a building about 50 yards from the counseling enriched classrooms and the instructional assistants accompany the students to the psychologists' office. The designated psychologist comes to the classroom regularly to check-in with students to make sure that their mental health needs are being met.

76. Besides the counseling services from the psychologists, each morning the class comes together as a group to discussing any issues of concern for the students. The class members form close bonds and look out for each other on campus. In the event that a conflict arises in the class, the class utilizes conflict resolution with peer mediation to resolve the conflict.

Parents' Rejection of Offer For Counseling Enriched Classroom Placement

77. Parents rejected Antioch's offer of placement because they were afraid that Student would not be safe at Deer Valley. Since most of Dallas Ranch's students matriculate into Deer Valley for high school, Parents were afraid that the students who had harassed Student would also attend be attending Deer Valley. Parents continued to request that Student be provided with home-hospital instruction for the 2014-2015 school year.

78. Parents provided Antioch with two letters from Dr. Rice, dated July 22 and August 26, 2014, each recommending that Student be home-schooled. The July 22, 2014 letter from Dr. Rice, indicated that home schooling was being recommended because the "principal student who bullied" Student would be at Deer Valley. In both letters, Dr. Rice did not indicate that Student had a particular diagnosis, but instead stated that Student had "significant anxiety and PTSD." At the hearing, it was revealed

that Student had never been diagnosed with PTSD and that Dr. Rice was relying on the opinion provided to him by Ms. Lerma. Further, it was discovered that Dr. Lau not only disagreed with Ms. Lerma's opinion, but he believed that it was in Student's best interest to return to school.

79. In Dr. Rice's July 22, 2014 and August 26, 2014 letters, Dr. Rice failed to indicate that the severity of Student's condition was such that it prevented student from attending a lesser restrictive placement than home-hospital. Additionally, neither letter provided a date for Student's return to school.

October 1, 2014 IEP Team Meeting

80. During the meeting, Parents reiterated their request for Student to be placed in home-hospital instruction. However, Parents refused to provide Antioch with permission to speak with Dr. Rice about his recommendation for home- hospital placement.

81. Antioch's special education representative reiterated Antioch's offer of the counseling enriched program. One of the teachers from the counseling enriched classroom program attended the IEP team meeting. She explained the nuisances of the counseling enriched class room program to Parents and the other members of the IEP team members.

82. The October 1, 2014 IEP offered Student 60 minutes weekly of group speech and language services, 60 minutes twice a week of group and individual counseling, and 360 minutes of specialized academic group instruction per day in the counseling enriched classroom setting, and transportation to and from Deer Valley. The offer was made for Student to gradually reintegrate into school by attending a partial day until he felt comfortable attending a full day of school. Parents did not accept the offer, but at the end of the meeting Parents agreed to visit the counseling enriched classroom. Student continued to be absent from school because Parents disagreed with Antioch's offer of placement.

November 12, 2014 IEP Team Meeting

83. Student's annual IEP team meeting was held. The IEP team reviewed Student's present levels of performance, but as Student had not attended school during the 2014-2015, Student's levels of performance from when he last in school were used. The IEP team reviewed the speech and language independent evaluation which had been completed by Speech and Language Pathology Group. The IEP team worked together to establish IEP goals for Student. The IEP established seven goals in the areas of: intelligibility, pragmatics, mathematical reasoning, reading comprehension, writing strategies, punctuality and attendance, and anxiety.

84. The IEP recognized Student's school-based anxiety as a need, so the IEP created an "Anxiety Reduction" goal for Student. The goal's established baseline referenced the finding in previous evaluations that Student "experiences a great deal of stress and anxiety with relation to the school environment." Student's goal included learning to identify "triggers" of Student's anxiety at school, learning coping strategies, and demonstrating an ability to apply coping skills within the school environment. Student's success was to be measured by his ability to utilize those strategies in 8 out of 10 circumstances.

85. Student did not present any evidence that Student could not meet his IEP goals while placed in the counseling enriched classroom at Deer Valley. Nor did Student present any evidence that the goals contained in Student's IEP could not be accomplished without the services of a one-to-one aide or one-to-one tutor.

86. Antioch's offer of placement and services did not change from the October 1, 2014 IEP. At the time of the IEP team meeting, Parents had not yet visited the program. At the meeting, Parents declined to comment on their intentions regarding visiting the counseling enriched classroom program. Mother inquired whether Student

could attend Antioch High School instead of Deer Valley. The Antioch members of the IEP team explained that the current offer was for the counseling enriched program at Deer Valley and that Antioch High School did not have a counseling enriched program. However, the Antioch members of the IEP team were willing to discuss Antioch High School as a possible placement for Student provided the appropriate services and supports could be put in place. The meeting was continued so representatives of Antioch High School could be present for the IEP team meeting and a visit to the campus could be arranged for Parents.

87. Mother did not indicate during that meeting that Student was experiencing suicidal idealizations. Mother was instead focused on requesting Antioch High School as a placement. Antioch High School was situated on a large campus with nearly as many students as Deer Valley.

December 15, 2014 IEP Team Meeting

88. Prior to the December 15, 2014 IEP team meeting, Student and Mother toured the Antioch High School campus. During the tour, Student was overheard saying that he wanted to attend school at Antioch High School.

89. Student's annual IEP team meeting was reconvened on December 15, 2014. At the meeting, the IEP team discussed the possibility of offering Student a 90 day diagnostic placement at Antioch High School with additional services and supports in place. During that conversation, Mother stepped away from the meeting to take a telephone call from an advocate with whom she had been in communication regarding Student's special education needs. When Mother rejoined the other IEP team members, she indicated that she was no longer requesting Antioch High School as a placement for Student and that Parents were requesting home-hospital instruction or a private school.

90. Based on Mother's representations to the other members of the IEP team, Antioch's offer remained the counseling enriched program at Deer Valley. The IEP team

discussed the possibility of Student attending the on-line school, California Virtual Academy because mother wanted Student to remain at home and Student had not attended school during the 2014-2015 school year. Mother indicated that they would look into that program.

Ms. Lerma's Opinion Regarding Placement and Student's Mental Health

91. Ms. Lerma was reticent to provide an opinion regarding the appropriateness of the counseling enriched program as a placement or the appropriateness of any other placement option. At the hearing, Ms. Lerma indicated that educational placement was something for the educational professionals to decide. However, Ms. Lerma did provide information about Student's mental health and an opinion regarding his mental health status.

92. In November 2014, Mother reported concerns about Student's suicidal ideations to Ms. Lerma. Ms. Lerma conducted a threat assessment of Student to determine whether Student was at risk for suicide. She recommended that Parents take Student to Psychiatric Emergency Services in the event that Parents continued to be concerned that Student may harm himself. Parents chose not to take Student to Psychiatric Emergency Services because they felt that Student had "calmed down."

93. Ms. Lerma testified that she believed that Student was at risk for suicide at that point, so she formed a suicide contract with Student and Parents. The contract laid out things that Student and Parent would do in order to avoid that situation. Ms. Lerma believed that Student's suicidal feelings stemmed from his fear of attending Deer Valley High School.

94. However, if Student had truly been in crisis, Ms. Lerma's course of action would not have been the proper crisis protocol. During Ms. Lerma's testimony, she appeared to exaggerate the potential for Student to commit suicide, until she was asked whether it was proper protocol to have Student return home with Parents instead of

immediately directing Student to Psychiatric Emergency Services. At that point, Ms. Lerma began to minimize the potential for Student for committing suicide.

95. Although Student experienced generalized anxiety and exhibited anxiety over highly unlikely scenarios, such as French terrorist coming from France and killing his family, Ms. Lerma spent the bulk of Student's time in counseling focusing on the "bullying" that Student experienced at Dallas Ranch. Ms. Lerma has become so entrenched in her theory that the incidents at Dallas Ranch caused Student to experience PTSD that she has failed to look beyond those incidents to Student's high level of anxiety over implausible and imaginary scenarios. Yet, no other health care professional, including Student's psychiatrist, has diagnosed Student with PTSD. For this reason and the above referenced reasons, Ms. Lerma's testimony has been given little weight.

Incidents of Bullying During 2014-2015 School Year

96. Student did not attend school during the entire 2014-2015 school year and Student did not present any evidence that Student was subject to any incidents of bullying during the 2014-2015 school year. Thus, it is found that Student did not experience any incidents of bullying during the 2014-2015 school year.

97. Student argued that the counseling enriched classroom was not appropriate to meet Student's needs. In support of that position, Dr. Grandison, a developmental neuropsychologist, testified. Parents retained Carina Grandison to evaluate Student. Dr. Grandison assessed Student on April 6, 2015. As part of her assessment, Dr. Grandison reviewed Dr. Johnson's neuropsychological report, a letter from Ms. Lerma dated August 29, 2014, Dr. Rice's letters from 2014, and a letter from Dr. Lau regarding Student's diagnosis and treatment.

98. Dr. Grandison conducted intellectual testing of Student. Her test results indicated that Student's non-verbal IQ was in the average range, which she found was

consistent with her 2011 evaluation. Dr. Grandison believed that due to Student's history of language challenges that this score proved the most accurate representation of Student's intellectual potential.

99. Consistent with prior testing, Student presented with weak receptive and expressive skills. She also noted that Student's articulation had declined such that his intelligibility was reduced. Student's performance on the visual processing testing suggested that Student's visual organization and memory was weak. These test results were consistent with Dr. Johnson's findings.

100. The testing showed that Student had significant struggles with his reading skills and writing. Dr. Grandison placed Student at a fourth grade reading level. These results indicated that Student's academic skills had regressed. Previously, Student had experienced some issues in these areas but not to the level described by Dr. Grandison.

101. Dr. Grandison assessed Student's social-emotional functioning. As in her last report, Dr. Grandison noted that "although Student wants to please, there is much anxiety under the surface." Student reported to her that he felt "depressed." Based on a scale of 1 to 10 Student rated himself at a 10 for level of both depression and anxiety. However, when Student was asked to measure his happiness on a scale of one to 10, he rated his happiness as 6. The results of Student's self-assessment were incongruent.

102. The Behavior Assessment System for Children, Second Edition, revealed that Student's social stress was at a high level. Student felt that others were against him and said "bad" things about him. Student expressed his dislike of school during the assessment. On a project drawing test, Student showed that he felt happy in the company of his parents, but angry, sad and worried when he recalled attending school.

103. As part of her assessment, Dr. Grandison toured the counseling enriched classroom program at Deer Valley. Both in her report and during her testimony, Dr. Grandison provided her opinion that the counseling enriched program was not

appropriate for Student. She believed that since Student's "traumatizing experiences" occurred on a large campus that sending Student back to a large campus would trigger "significant PTSD [post traumatic stress disorder] symptomology" and that "suicidality could be triggered." This portion of Dr. Grandison's opinion is given little weight, as Dr. Grandison gleaned much of the information she used to form this opinion from a one page letter from Ms. Lerma and the letters from Dr. Rice. Dr. Rice erroneously based at least a portion of his opinion on the information provided to him by Ms. Lerma. Ms. Lerma had disseminated the misinformation that Student had a diagnosis of PTSD that was the result of being bullied at Dallas Ranch to both Dr. Grandison and Dr. Rice.

104. Additionally, Dr. Grandison based her opinion of the inappropriateness of the counseling enriched program on erroneous assumptions. Dr. Grandison indicated that "mainstreaming is not appropriate for [Student] at this time." This assertion ignored the fact that Student would not have been mainstreamed immediately. The counseling enriched program is specifically designed for students to move to mainstream only when they feel ready to make that change.

105. Dr. Grandison did not believe that the program would meet student's needs because Student required individualized academic support from a trained teacher, not an aide. When Dr. Grandison visited the program she was not present for the portion of instruction which was directly provided by the certified special education teachers. After the instruction portion, the class breaks into smaller groups which are based on the Student's academic levels. The groups are assisted by both the teachers and the classroom assistants.

106. Although she is not a speech and language pathologist, Dr. Grandison felt that Student needed individualized speech and language services. In the event that the IEP team made the determination that Student needed individualized speech and language services, those services could be provided through the speech and language pathologist at Deer Valley.

107. Dr. Grandison felt that the counseling enriched program was not appropriate because Student needed to have Community Mental Health Services integrated into his educational program. Dr. Grandison did not provide support for this opinion. The counseling enriched program is designed to have counseling services embedded into the program in order to provide support for students who have the same or similar needs as Student.

108. At the hearing, Dr. Grandison provided her opinion that the non-public school, Bayview Academy, would be an appropriate placement for Student. The only clear difference between Bayview and the counseling enriched program which Dr. Grandison provided was that Bayview was a small school.

109. On August 6, 2014, Antioch sent Parents a letter explaining the requirements under the California Code of Regulations for placing Student in home-hospital instruction. The letter requested for Parents to provide permission for personnel from Antioch to speak with Dr. Rice for clarification purposes. In response, Parents sent Antioch another letter from Dr. Rice, dated August 26, 2014, again recommending that Student be placed on home-hospital instruction. On September 19, 2014, Antioch sent Parents a letter setting an IEP team meeting for October 1, 2014, to address Parents' request for home-hospital instruction.

Pamela Mill's Psychological Assessment and Opinion

110. Antioch retained Dr. Mills, a licensed educational psychologist, to perform a psychological assessment of Student. On February 25, 2015, Dr. Mills completed her assessment. At the hearing, Dr. Mills provided her opinion that the counseling enriched classroom at Deer Valley was an appropriate placement for Student as it would meet Student's counseling and academic needs in the least restrictive environment. Dr. Mills was familiar with the counseling enriched classroom program at Deer Valley as she had observed the program.

111. Mother provided Dr. Mills with a detailed list of the incidents which she believed occurred at Dallas Ranch. Dr. Mills incorporated Mother's detailed list into her report. Parents and Mr. Tesar also provided information about Student through questionnaires. Dr. Mills utilized that information as part of her assessment.

112. When Ms. Mills interviewed Student he denied being anxious and nervous, although, Student bounced his leg throughout the assessment. Student openly stated that he suffers from anxiety, that he feels lost and alone, and that he "loses control." Student explained that he wanted to return to school. Student also discussed some of the prior incidents which occurred at Dallas Ranch. Student specifically told Dr. Mills that the person who hit him in the nose was a "friend."

113. The assessment showed that Student suffered from low self-esteem, social anxiety, and low levels of depression. Student's responses to the self-assessment portion indicated that Student's anxiety was triggered by feelings of humiliation, rejection, and poor performance. Ultimately, Dr. Mills found that Student fit the criteria for emotional disturbance. Student had not been previously found eligible for special education under that category.

Appropriate Offer of Placement

114. The weight of the evidence shows that Antioch's offer of placement in the counseling enriched classroom program at Deer Valley was reasonably calculated to provide educational benefit to Student in the least restrictive environment. The counseling enriched program would have met Student's unique needs by providing Student with the counseling he required, the individualized academic support recommended by Dr. Johnson, and a supportive and safe environment. The students who participate in the counseling enriched classroom program struggle with the same type of mental health concerns as Student. That situation would give Student the best

chance of forming friendships in the school environment, as the other students would have empathy regarding Student's feelings.

115. Student's contention that a one-to-one aide was necessary to provide Student with a FAPE was not supported by the evidence. The counseling enriched program provided the assistance of two classroom instructional assistants per class. The instructional assistants would have been able to provide Student with direct assistance with his academics as well as being available to accompany Student around campus.

116. Student's contention that Antioch denied Student a FAPE by failing to offer Student appropriate counseling services was not supported by the evidence. The counseling enriched classroom program has embedded counseling services and additional individual counseling was offered to Student. Student did not present any evidence of what would constitute adequate counseling services.

117. Student failed to support his claim that a one-to-one tutoring or a one-to-one aide to assist Student with academics was necessary for Student to receive a FAPE. Student had progressed academically during the 2013-2014 school year. Student's failure to attend school during the 2014-2015 school year may have caused a regression in Student's academic skills, but Student failed to present evidence to support that one-to-one tutoring was necessary to address that regression.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁷

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it.

⁷ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

(20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁸ 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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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.

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

§§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

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) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. §

1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student carried the burden of persuasion.

ISSUE 1 (A), (B), (C), AND (D): DURING THE 2013-2014 SCHOOL YEAR, BEGINNING FEBRUARY 7, 2014, AND THE 2014-2015 SCHOOL YEAR, DID STUDENT EXPERIENCE BULLYING SUCH THAT HE WAS DENIED A FAPE?

2013-2014 School Year beginning February 7, 2014

5. Student contends that he was denied a FAPE because he was subject to bullying beginning February 7, 2014 through the end of the 2013-2014 school year due to various failures on Antioch's part. Conversely, Antioch contends that Student was not subjected to bullying during that time period. The threshold question which must be addressed is whether any incidents of bullying occurred during this specific timeframe. Student contends that the April 11, 2014 incident, the subsequent text message, and the Facebook chat conversation constituted bullying. Student also contends in his closing brief that Student was subjected to daily bullying.

6. Under the California Education Code, bullying is defined 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).)

7. In a 2013 joint letter, the Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as, "characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time."⁹ (*Dear Colleague Letter*, 61 IDELR 263 (OSERS 2013).) This letter explained that bullying includes, "overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors." (*Ibid*.)

8. 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 Letter*, OSERS (August 20, 2013) 113 LRP 33753 (*Dear Colleague 2013*).) This applies whether or not the bullying is related to the student's disability. (*Id.*, at p. 2.) Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis: (i) whether the bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley*.

9. Under the California Education Code, the April 11, 2014 incident did not constitute bullying. Student and the offending Student were friends at the time of the

⁹ These offices are a division of the United States Department of Education and are charged with administering the IDEA and developing its regulations.

incident. The offending Student became upset over Student's comments and reacted, however poorly, by hitting Student. The perpetrator, in this case, did not take any action which was "reasonably predicted" to cause Student fear of harm to his person or property; a substantially detrimental effect on his physical or mental health; a substantial interference with his academic performance; or a substantial interference with his ability to participate in or benefit from school. The perpetrator was not engaging in bullying, but instead was reacting to his anger over Student's comment. By no means should this be interpreted as an excusal or mitigation of the offending Student's use of physical violence, nonetheless, the incident simply does not constitute bullying under California Education Code section 48900, subdivision (r).

10. The finding that the April 11, 2014 incident does not constitute bullying is further supported by a review of the definition of bullying provided by the Office of Special Education and Rehabilitative Services and the Office of Special Education Programs in the 2013 joint letter. Within the letter, bullying is described as "characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time." In the case at hand, Student and the aggressor were friends. Until the incident, the aggressor had even viewed Student as his "best friend." Theirs was not a relationship which was characterized by aggression where the aggressor had more real or perceived power. Theirs was a friendship which ended very badly due to a misunderstanding and poor self-control on the part of the aggressor.

11. After the April 11, 2014 incident, at least two other incidents occurred that Student contends rose to the level of bullying. First, Student reported that the offending Student from the April 11, 2014 incident posted on-line that he wanted to punch Student. Further investigation revealed that there had not been any threat posted on-line and that after the incident the offending student had possibly sent a text message

to a mutual friend stating that he was upset and wanted to punch Student. The only reason that Student became aware of the offending student's comment was because the mutual friend had told Student of it. Nothing in that scenario indicates that the offending Student had any intent that the message be passed on to Student.

12. Under the California Education Code, in order for behavior to constitute bullying the behavior has to be "reasonably predicted" to cause student one of the innumerate types of harm. Since the text message was sent privately to a third party, it could not be reasonably predicated to cause harm to Student. This situation was clearly not an incident of bullying, but an incident of the mutual friend engaging in gossip and meddling.

13. The second incident was the May 15, 2014 private Facebook chat messages which were exchanged between Student and a female student, who attended Dallas Ranch. As discussed above in the Findings of Fact, Student did not present compelling evidence showing those messages to constitute bullying. Nothing about that private Facebook chat conversation indicated that the female student intended to pass along a threat or make a threat of her own. The conversation lacked context because Student only presented a limited portion of the Facebook messaging conversation. Thus, Student's argument is not compelling and that incident is not found to constitute an act of bullying.

14. Student's contention that Student was subject to bullying almost every day, as referenced in Student's closing brief, is simply not supported by the evidence which was presented in this case. Student did not provide any specific information regarding other incidents of alleged bullying within this time frame.

15. The weight of the evidence shows that these three incidents did not constitute bullying. However, there is no doubt that the April 11, 2014 incident and the two subsequent incidents of the text message and the Facebook chat did have a

substantial impact on Student's needs. Student's predisposition to internalize the negative actions of others and to experience high levels of anxiety over peer interaction caused these incidents to affect Student's psyche far more than it may have affected other students in the same or similar situation.

16. Since Student has not met his burden of proving by a preponderance of the evidence that incidents of bullying occurred between February 7, 2014, and the ending of the 2013-2014 school year, no analysis of the sub-issues is necessary.

2014-2015 School Year

17. In Student's closing brief Student does not directly address whether any incidents of bullying occurred during the 2014-2015 school year. It can be implied from Student's arguments that Student believes that the lasting effects of the prior bullying caused Student to "experience bullying" during the 2014-2015 school year. This contention is erroneous. The threshold question which must be addressed in this issue is whether any incidents of bullying occurred during the 2014-2015 school year. Student can only "experience" incidents of bullying during the 2014-2015 school year if incidents of bullying occur during the 2014-2015 school year.

18. Student did not attend school during the 2014-2015 school year and Student did not present any evidence that Student was subjected to any incidents of bullying during that time period. Thus, Student failed to prove by a preponderance of the evidence that Student experienced incidents of bullying during the 2014-2015 school year. Accordingly, this issue's sub-issues need not be addressed.

EFFECT OF FEBRUARY 6, 2014 SETTLEMENT AGREEMENT

19. The February 6, 2014 Settlement agreement, which was formed between the parties, did not contain a prospective waiver of claims. The settlement agreement specified that Antioch would continue to implement the August 29, 2013 IEP until the

agreed upon assessments were completed. Without a prospective waiver of FAPE, or an acknowledgement that the August 29, 2013 IEP did not constitute FAPE, Antioch had a duty to continue implementing the August 29, 2013 IEP, until Student's needs changed such that a revision of the IEP was necessary.

20. Once Antioch became aware of the significant change in Student's mental health status, Antioch had a duty to hold an IEP team meeting and address Student's needs. Once Mother provided Antioch with Dr. Rice's letter indicating that Student could not return to school, Antioch held an IEP team meeting to address Student's needs.

ISSUE 2 (A): DURING THE 2013-2014 SCHOOL YEAR, BEGINNING FEBRUARY 7, 2014, DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER A ONE-TO-ONE AIDE TO ASSIST WITH BEHAVIOR AND/OR SAFETY?

21. Student contends that in order for Student to have received a FAPE during the 2013-2014 school year, Antioch needed to offer Student the services of a one-to-one aide to assist Student with behavior and/or safety. In essence, Student believed that a one-on-one was necessary to protect Student from bullying and harassment. Antioch contends that Student is barred from asserting this claim due to the terms of the February 6, 2014 settlement agreement.

22. "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)).

23. Student did not provide compelling evidence that a one-to-one aide was necessary for Student to benefit from special education during the 2013-2014 school year, beginning February 7, 2014. Student was able to make meaningful progress in his education until Student stopped attending school on April 25, 2014.

24. Student presented no evidence that the April 11, 2014 incident would have been averted if a one-on-one aide had been present. In that incident, Student and the

offending student were friends who were joking around prior to the offending Student becoming angry and hitting Student. It is unclear how the presence of an aide would have prevented that situation or the subsequent two incidents which occurred through text messaging and social media.

25. After Student left school on April 25, 2014, a one-to-one aide for behavioral or safety purposes would not have been necessary for Student to receive a FAPE as Parents refused to return Student to school. Once Student was provided with home-hospital instruction an aide would have been completely unnecessary. Therefore, for these reasons and those referenced above, Antioch did not deny Student a FAPE during the 2013-2014 school year, beginning February 7, 2014 by failing to offer Student a one-to-one aide.

26. Antioch contends that it was under no obligation to provide Student with a one-to-one aide because of the terms of the February 6, 2014 settlement agreement. The August 29, 2013 IEP did not offer Student a one-to-one aide. Due to the parties' agreement to continue implementing the August 29, 2013 IEP, Antioch was under no obligation to provide Student with a one-to-one aide until Student's needs changed such that his IEP needed to be amended. Although, Student was involved in an altercation on April 11, 2014, his needs did not change until on or after April 25, 2014, when his anxiety and fear prevented him from attending school. Antioch only became aware of Student's change of needs once Mother provided Antioch with the letter from Dr. Rice, dated May 8, 2014, recommending home schooling for Student. Once Antioch was aware of Student's change in needs, Student was placed into home-hospital instruction. Student would not require an aide for home-hospital instruction.

ISSUE 2 (B): DURING THE 2013-2014 SCHOOL YEAR, BEGINNING FEBRUARY 7, 2014, DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER AN ADEQUATE BULLYING RESPONSE PLAN¹⁰?

27. Student has alleged that due to the OCR Resolution Settlement Agreement Antioch was required to offer Student a plan for responding to any bullying which Student experienced.¹¹ Antioch argues that Student is barred from presenting his argument due to the terms of the February 7, 2014 settlement agreement.

28. A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

29. "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)).

30. Student's deficits in holistic and non-linear thinking resulted in Student having difficulty seeing "the big picture" in situations. Additionally, Student's deficit in

¹⁰ The term "bullying response plan" is not a term of art. This term was arrived on during the Prehearing Conference through discussion with Student and Antioch.

¹¹ In Student's closing brief, he appears to be arguing not that Antioch failed to offer an adequate bullying response plan, but that the bullying response plan was not properly implemented because Student did not feel comfortable reporting the incidents to the school psychologist, who was one of the points of contact and that the school psychologist failed to recommend that the IEP team discuss revising the IEP to address new ongoing concerns. However, implementation of the bullying response plan was not pled by Student in his complaint.

understanding visual-spatial information contributed to his difficulties with peer interactions by causing Student to misread other's facial expressions and allowing him to read more into a situation than existed. These deficits made it difficult for Student to socialize effectively with his peers and made Student vulnerable to potential bullying.

31. In an effort to meet Student's needs, Student's August 29, 2013 IEP, which was the last effective IEP for the 2013-2014 school year, offered Student additional supports and services to address social skill deficits and his vulnerability to bullying. The IEP offered Student 60 minutes of both group and individual counseling to address Student's social skill deficits. It addressed Student's needs by providing a contact point for Student in case he experienced any incidents of bullying. The IEP established a plan that upon report of incidents of bullying, the contact point person was to report the incidents to Dallas Ranch administration so that the administration could investigate the incidents. The IEP also indicated that an IEP team meeting would be held in the event that any further bullying occurred.

32. Student's argument that the OCR Resolution Agreement required Antioch to create a different bullying response plan is not a viable argument in this forum. Instead, it must be determined whether Student's unique needs required that a response plan be in place in the event that any potential incidents of bullying occurred. Student's unique needs, in light of his placement at Dallas Ranch, did require that Antioch offer Student some sort of plan to respond to potential bullying while also addressing Student's social skill deficits, which contributed to Student's sensitivity and vulnerability to bullying. No credible evidence was produced to show that services and supports offered in Student's August 29, 2014 IEP failed to address those unique needs. Thus, Student did not prove by a preponderance of the evidence that Antioch failed to offer an adequate bullying response plan during the 2013-2014 school year, beginning February 7, 2014.

ISSUE 2 (C): DURING THE 2013-2014 SCHOOL YEAR, BEGINNING FEBRUARY 7, 2014, DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER ADEQUATE SCHOOL-BASED COUNSELING?

33. In Student's closing brief, Student argues more of a failure to properly implement the school-based counseling program instead of the lack of propriety of the offer for school-based counseling. Student's August 29, 2013 IEP offered Student 30 minutes of individualized counseling and 30 minutes of group counseling per week. Student focuses most of his argument on Ms. Powell's inability to implement the counseling services and not on the actual offer. Antioch contends that Student is barred from asserting this issue under the terms of the February 6, 2014 settlement agreement.

February 7, 2014 through May 7, 2014

34. Student's needs did not change between February 7, 2014, and April 25, 2014. However, on April 25, 2014, Student's needs changed. Student experienced such a level of anxiety about the impending return of the student from the April 11, 2014 incident, that he experienced chest pains that required medical treatment. Antioch did not become aware of Student's change in needs until Student stopped attending school and Mother provided Antioch with Dr. Rice's letter, dated May 8, 2014, recommending that Student receive home schooling services due to the anxiety that Student was suffering. Student did not present any testimony or evidence regarding what would have constituted an adequate offer of counseling. Therefore, Student did not meet his burden of proving that Antioch failed to offer Student adequate counseling services from February 7, 2014, through May 7, 2014.

May 8, 2014, Through the End of the 2013-2014 School Year

35. Once Antioch was aware that Student's mental health had declined, it had a responsibility to provide Student with additional counseling to address Student's

unique mental health needs. Instead of increasing counseling services, Antioch discontinued providing Student with counseling services once Student was placed on home-hospital instruction. Thus, Antioch denied Student a FAPE from May 8, 2014, through the end of the 2013-2014 school year by failing to offer Student adequate counseling services.

ISSUE 2 (D): DURING THE 2013-2014 SCHOOL YEAR, BEGINNING FEBRUARY 7, 2014, DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT AN APPROPRIATE PLACEMENT?

36. Student contends that Antioch should have offered Student home-hospital instruction, home instruction in an alternative setting, an alternative public placement, or a non-public School. Antioch argues that its offer of placement was adequate for Student's needs. Additionally, Antioch argues that Student was barred from asserting this claim due to the February 6, 2014 settlement agreement, barring some change in circumstance.

Period from February 7, 2014, through April 10, 2014

37. *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. (*Rowley, supra*, 458 U.S. 176, 203-204.)

38. Student's August 29, 2013 IEP placed Student in general education classes with a 100 minutes of specialized academic instruction four times a week. During the time period beginning February 7, 2014, and ending April 10, 2014, the evidence showed that Student was making educational progress and was making strides with his social and emotional goal. Nothing occurred during this time period which caused a change in Student's needs. As the offered placement was conferring some educational benefit upon Student, under the *Rowley* standard, Student was receiving a FAPE.

Period from April 11, 2014, through the End of the 2013-2014 School Year

39. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).)

40. Both federal and state law requires a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) ; Ed. Code, § 56040.1.) "Least restrictive environment" reflects the preference by Congress that an educational agency educates a child with a disability in regular classroom with their typically developing peers.

(Sacramento City School Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398, 1403 (Rachel H.))

This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) ; Ed. Code, § 56040.1.)

41. After the April 11, 2014, incident Student's needs began to gradually change. Initially, after Student's return to school after the Spring break, Student did not show any indication that his needs had changed. At that time, Student did not show signs that the incident had caused Student to become isolated or withdrawn. To the contrary, Student was observed at lunch socializing with his small group of friends.

42. On April 25, 2014, Student's needs changed. Student experienced such a level of anxiety of the impending return of the student from the April 11, 2014 incident, that he experienced chest pains that required medical treatment. Antioch did not become aware of Student's change in needs until Student stopped attending school and Mother provided Antioch with Dr. Rice's letter, dated May 8, 2014, recommending that

Student receive home schooling services due to the anxiety that Student was suffering. Within a reasonable time of receiving that letter, Antioch held an IEP team meeting on May 19, 2014 to address Student's request for home-hospital instruction.

43. Both federal and state law requires a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) ; Ed. Code, § 56040.1.) A student may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) ; Ed. Code, § 56040.1.)

44. In this case, Student was placed on home-hospital instruction with Student's RSP teacher providing the teaching services for the remainder of the school year. Home-hospital instruction was a far more restrictive placement than the placement provided under Student's August 29, 2013 IEP. This change to a more restrictive placement was necessary because the severity of Student's anxiety prevented Student from being educated in general classes, even with the use of supplementary aids and services. Additionally, Student did not argue that he should have been placed in any other type of placement for the remainder of the school year. Therefore, the preponderance of the evidence shows that Antioch did not fail to offer Student an appropriate placement because Antioch should have offered Student home-hospital instruction, home instruction in an alternative setting, an alternative public placement, or a non-public School.

ISSUE 3 (A): DURING THE 2014-2015 SCHOOL YEAR DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER A ONE-TO-ONE AIDE TO ASSIST WITH ACADEMICS, BEHAVIOR AND/OR SAFETY?

45. Student contends that Antioch denied Student a FAPE during the 2014-

2015 school year by failing to offer Student a one-to-one aide to assist with academics, behavior and/or safety. Antioch argues that that Student did not present any evidence to support that Student would be in jeopardy of being bullied at the placement offered by Antioch.

46. During the 2014-2015 school year, Antioch did not offer Student a one-to-one aide. However, the counseling enriched classroom program at Deer Valley included certain embedded services, such as the support of classroom assistants. The services of the four classroom assistants would have been available to Student as part of the counseling enriched program. The classroom assistants provide students with academic support throughout the school day.

47. The counseling enriched classroom is primarily a self-contained program. Students remained in the two classrooms throughout the day, unless students elected to attend mainstream classes or needed to go to the school psychologist. The classroom assistants would have accompanied Student to counseling sessions at the school psychologists' offices, which are approximately fifty yards away from the counseling enriched classrooms, and to any mainstream classes, which Student may have elected to attend in the future. Student provided no compelling evidence that this level of aide assistance would have been insufficient to meet the *Rowley* standard of providing some educational benefit to Student. Accordingly, Antioch did not deny Student a FAPE during the 2014-2015 school year by failing to offer Student a one-to-one aide to assist with academics, behavior, or safety.

ISSUE 3 (B): DURING THE 2014-2015 SCHOOL YEAR DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER AN ADEQUATE BULLYING RESPONSE PLAN?

48. Student contends that Antioch denied Student a FAPE by failing to provide an adequate bullying response plan during the 2014-2015 school year, and that the OCR Resolution Agreement mandated that Antioch provide a bullying response plan. Antioch

did not directly offer Student a bullying response plan in any of the IEP offers during the 2014-2015 school year. Instead Antioch's offer of placement at Deer Valley's counseling enriched classroom with additional counseling services was designed to meet Student's unique needs as outlined above in the analysis of Issue 3 (a). The counseling enriched classroom provided group counseling on social skills and managing social anxiety. The program utilized conflict resolution in the event that any type of conflict occurred between students. That program would have given Student the opportunity to address any issues of harassment or teasing which he may have felt occurred.

49. Student's argument that the OCR Resolution Agreement required Antioch to create a bullying response plan is not a viable argument in this forum. Instead, it must be determined whether Student's unique needs required that Antioch offer a plan to respond to any potential incidents of bullying. In light of the unique services of Antioch's offered placement in combination with the additional individual and group counseling services, a formalized bullying plan was not necessary for Student to receive a FAPE.

ISSUE 3 (C): DURING THE 2014-2015 SCHOOL YEAR DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER ADEQUATE SCHOOL-BASED COUNSELING?

50. Student's argument about counseling services focused on Antioch's alleged failure to offer any counseling goals in any of the IEP s for the 2014-2015 school year. However, Student did not put at issue in his complaint a failure to offer appropriate counseling goals. Antioch contends that its offer of counseling services and the embedded counseling services of the counseling enriched classroom constituted an adequate offer of counseling services.

51. The weight of the evidence shows that Student's needs were such that he required counseling services. No expert specifically addressed how much school-based counseling Student would have considered appropriate for Student. Antioch's offered

placement, the counseling enriched classroom program, utilizes both Cognitive Behavioral Therapy and Mindfulness. Cognitive Behavioral Therapy has been a successful form of therapy for individuals experiencing anxiety. The counseling which is embedded in the program would provide Student with group social skills counseling on a weekly basis.

52. The class spends the first part of every school day discussing their feelings and concerns as a group. The 30 minutes a week of individualized counseling, which was reflected in the November 12, 2014 IEP, would have allowed Student the time to work on his individual concerns. Access to individualize counseling would not have been limited to the amount of time defined in Student's IEP because of the nature of the counseling enriched program. The designated school psychologist visit the classroom regularly to check-in on students and students are permitted to access counseling services as need. Thus, the preponderance of evidence showed that Antioch's offer of school-based counseling was appropriate to meet Student's unique needs.

ISSUE 3 (D): DURING THE 2014-2015 SCHOOL YEAR DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER ONE-TO-ONE TUTORING?

53. Student argues that Student required one-on-one tutoring as remediation for the loss of instructional time during the 2014-2015 school year when Student was not attending school. Antioch argues that Student was not in need of one-to-one tutoring services.

54. "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].)

55. Student did not present any evidence that Student required a one-to-one tutor in order to be able to benefit from special education. Student's argument appears

more applicable to Student's demand for compensatory education services. The counseling enriched classroom provided Student with the opportunity to receive individualized and small group instructions with all of his course work. In previous years, Student received the support of an RSP teacher and teaching assistant for math and English. The counseling enriched classroom's more intensive style of instruction would have provided Student with the instructional support to address any remediation which may have occurred. Thus, Antioch's failure to offer one-to-one tutoring did not result in a denial of FAPE.

ISSUE 3 (E): DURING THE 2014-2015 SCHOOL YEAR DID ANTIOCH DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT AN APPROPRIATE PLACEMENT?

Offer of Counseling Enriched Classroom

56. Student contends that the counseling enriched classroom did not constitute an offer of FAPE for multiple reasons and that Student needed to be placed at a non-public school. Student primarily argues that Student would not be safe at Deer Valley because Student's former antagonists attended Deer Valley and Student would not feel safe in that environment. Antioch contends that the offer of placement at Deer Valley's counseling enriched classroom constituted a FAPE in the least restrictive environment.

57. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Gregory K. v. Longview School Dist.*, *supra*, 811 F.2d at 1314.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley*, *supra*, 458 U.S. 176, 208.)

58. Here, Parents want Student to be placed at the non-public school, Bayview Academy. Even if Bayview would provide greater educational benefit to Student, Antioch

is not required to place Student there if Antioch is able to provide another placement which would allow Student to benefit from his education in the least restrictive environment. Antioch's offer of placement in the counseling enriched classroom at Deer Valley would meet Student's unique needs and allow Student to benefit from his education. There has not been any evidence presented to show that Student would be subjected to bullying on the campus. Although, the counseling enriched classroom is part of the Deer Valley campus, it is set off away from the main part of the campus to provide a safe haven for students. The small class size would provide an appropriate learning environment for Student. Most importantly, the program is designed to serve students who have similar needs as Student. The counseling enriched classroom could either provide Student with the bridge to mainstreaming or it could remain a self-contained learning environment for Student. The program's flexibility is part of the reason that it would meet Student's unique needs.

Least Restrictive Environment

59. One of the key policy motivations behind the enactment of special education laws was to move special needs children out of segregated programs. In *Rowley*, the Supreme Court noted the intent of the Education of the Handicapped Act (the predecessor to IDEA) was "to open the door of public education to handicapped children on appropriate terms" (*Rowley, supra*, 458 U.S. at p. 192.) California special education laws also emphasize the importance of keeping special education pupils with their typically developing peers. For this reason, special education law mandates that disabled children remain in the general education setting *whenever appropriate*. (20 U.S.C. § 1412(a)(5)(A))

60. The continuum of program options available for special education students includes all, or any combination, of the following, *in descending order of restrictiveness*: (a) regular education programs; (b) a resource specialist program; (c)

designated instructional services; (d) special day classes; (e) nonpublic, nonsectarian school services; (f) state special schools; (g) instruction in nonclassroom settings; (h) itinerant instruction; (i) instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions. (34 C.F.R. § 300.115 (emphasis added); Ed. Code §§ 56360, 56361.)

61. Student contends that placement at a non-public school would constitute a less restrictive placement than placement at Deer Valley's counseling enriched classroom. Student's contention is rejected. On the continuum of placements, placement in a special day class, such as the counseling enriched program, is less restrictive than instruction in a non-public school.

Home-Hospital Instruction

62. Student contends that Antioch should have offered Student home-hospital instruction for the 2014-2015 school year. Antioch contends that Student did not meet the requirements for home-hospital and that it was not the least restrictive environment for Student.

63. When recommending placement for home-instruction for a pupil with exceptional needs, the IEP team *shall* have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. (Cal. Code Regs., tit. 5, § 3051.4, subd (d) (Section 3051.4(d)) (emphasis added).) The report *shall* include a projected calendar date for the pupil's return to school. (*Id.* (emphasis added).) The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the pupil's return to school. (*Id.*)

64. Although Dr. Rice provided two letters recommending home-hospital instruction, neither of the letters certified that the severity of Student's condition

prevented Student from attending a less restrictive placement. Nor did the letters contain a projected date for Student's return to school. Under California Code of Regulations, title 5, section 3051, the IEP team was prevented from recommending home-hospital instruction placement for Student.

65. In determining placement, school districts must ensure, to the maximum extent appropriate: (1) that children with disabilities are educated with non-disabled peers; and (2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a); Ed. Code, § 56031.) In the continuum of program options available for special education students in-home placement is one of the most restrictive placements. (34 C.F.R. § 300.115 (emphasis added); Ed. Code §§ 56360, 56361.)

66. Additionally, home-hospital instruction was not appropriate placement for Student during the 2014-2015 because in the continuum of placements options available to Student, it constituted the most restrictive placement, while other appropriate less restrictive placements would have been available for Student.

67. Student has failed to meet its burden of proving by a preponderance of the evidence that District denied Student a FAPE by failing offer an appropriate placement because Antioch should have offered Student home-hospital instruction, home instruction in an alternative setting, an alternative public placement, or a non-public school.

REMEDIES

1. Student prevailed as to a portion of Issues 2 (c). As a remedy, Student requests compensatory school-based counseling.

2. 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] (*Burlington*); *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.)

3. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Id.* at 1497.) 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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

4. An award of compensatory education need not provide a “day-for-day compensation.” (*Student W. v. Puyallup School Dist., supra*, at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

5. Student was on home-hospital instruction for approximately two weeks. Student was not offered any counseling services during that time period, despite Antioch’s knowledge that Student’s mental health had declined to the point that it was preventing Student from attending school. The August 29, 2013 IEP specified that Student was to receive the 30 minutes a week of individual counseling services and the

30 minutes a week of group counseling services.

6. That two week period Student was in need of more intensive counseling services to help Student deal with anxiety which had been increased by his recent negative peer interactions. Student should have received one hour of individual counseling per week and one hour of group counseling during those two weeks. Therefore, Antioch shall provide Student with four hours of individual counseling and four hours of group counseling with a certified school psychologist. The eight hours of counseling will expire if not used by June 29, 2016, or when Student is no longer a resident of the Antioch Unified School District.

ORDER

1. Antioch shall provide four hours of compensatory individualized counseling services and four hours of compensatory group counseling services. The counseling services are to be provided to Student by a certified school psychologist.

2. The counseling shall be made available to Student within 30 days of the date of this decision.

3. The compensatory counseling awarded by this Decision must be used by June 22, 2016, or it will be forfeited. In addition, District's obligation to provide compensatory counseling services under this Decision will end if Student is no longer a resident of Antioch Unified School District.

4. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on a portion of Issue 2 (c) and Antioch was the prevailing party on all other issues heard and decided.

RIGHT TO APPEAL

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

DATED: June 29, 2015

/s/

B. ANDREA MILES

Administrative Law Judge

Office of Administrative Hearings