

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018060264

DECISION

Parents filed a due process hearing request with the Office of Administrative Hearings on June 4, 2018. Parents filed an amended due process hearing request, deemed filed on June 15, 2018, naming Antioch Unified School District.¹

Administrative Law Judge Rita Defilippis heard the matter in Antioch, California, on August 9, 14, 21 and 22, 2018.

Martha Millar, Attorney at Law, represented Student at hearing. Father attended days one and four of the hearing on Student's behalf. Mother attended days two and three of the hearing on Student's behalf.

¹ District filed its response to Student's amended complaint on June 14, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

Sally Dutcher, Attorney at Law, represented Antioch Unified School District at hearing. Dr. Ruth Rubalcava, Senior Director of Special Education attended the hearing on Antioch's behalf.

OAH granted a continuance at the parties' request to submit written closing arguments. The parties timely submitted written closing arguments and the record was closed on September 12, 2018.

ISSUES²

1. Did Antioch deny Student a FAPE during the 2017-2018 school year from November 23, 2017, to August 9, 2018, by failing to offer or provide him with appropriate specialized academic instruction and/or aide support?
2. Did Antioch deny Student a free appropriate public education during the 2017-2018 school year from November 23, 2017, to August 9, 2018, by refusing to offer or provide him with placement in the least restrictive environment?
3. Did Antioch deny Student a FAPE during the 2017-2018 school year from November 23, 2017, to August 9, 2018, by failing to offer him a continuum of placement options?
4. Did Antioch deny Student a FAPE during the 2017-2018 school year from November 23, 2017, to August 9, 2018, by failing to offer or provide him with appropriate transportation to and from school?
5. Did Antioch deny Student a FAPE during the 2017-2018 school year from November 23, 2017, to August 9, 2018, by failing to offer him an educational placement

² The issues were reorganized for the purpose of analysis and clarity of this decision. No substantive changes were made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

at no cost to Parents?

6. Did Antioch deny Student a FAPE during the 2017-2018 school year from November 23, 2017, to March 6, 2018, by failing to provide him with any speech and language services?

7. Did Antioch deny Student a FAPE during the 2017-2018 school year from February 6, 2018, to March 6, 2018, by failing to indicate in his IEP the location of his services?

SUMMARY OF DECISION

Parents proved by a preponderance of the evidence that Antioch denied Student a FAPE from his third birthday until August 9, 2018, by failing to offer or provide appropriate specialized academic instruction and aide support, by failing to offer Student a placement in the least restrictive environment, failing to offer or provide Student with speech and language services and transportation. Parents proved by a preponderance of the evidence that Antioch denied Student a FAPE by failing to provide Student a placement at no cost to Parents from March 6, 2018 to August 9, 2018.

Parents failed to prove by a preponderance of the evidence that Antioch failed to indicate the location of Student's services in his IEP from February 6, 2018, to March 6, 2018. Lastly, Parents failed to prove that Antioch was required to offer Student a continuum of placement options from his third birthday to August 9, 2018.

FACTUAL FINDINGS

JURISDICTION

1. Student is a three year old boy who resides with his Parents in Antioch, California, within Antioch Unified School District. Student was found eligible for special education services upon his third birthday under the eligibility categories of autism, as his primary eligibility and speech and language impairment, as his secondary eligibility.

EARLY START SERVICES

2. On March 29, 2017, when Student was two years, four months old, Autism Spectrum Disorders Evaluation Center at Kaiser Permanente diagnosed him with Autism Spectrum Disorder with an accompanying language impairment. He was referred for Kaiser applied behavior analysis services in relation to his diagnosis and to Regional Center of the East Bay for assessment for early start services³, including a speech and language assessment.

3. Kaiser approved Student for 20 hours of in-home applied behavior analysis a week, provided by a nonpublic agency called Milestones. Mr. Darian Aghily, a behavior interventionist at Milestones, became Student's primary ABA aide. He has worked with Student, under the supervision of a direct supervisor as well as Mr. Patrick Jung, the Milestones Board Certified Behavior Analyst, since spring of 2017. Student's ABA services focused on areas including social communication with adults and peers, appropriate play, following directions, and self-regulation.

4. On April 3, 2017, Regional Center of the East Bay conducted a speech and language evaluation. Student was 28 months old at the time of the evaluation. Student had a 46 percent delay in his receptive language with an age equivalency of 15 months; and a 39 percent delay in his expressive language with an age equivalency of 17

³ Regional Centers operate under authority of the Lanterman Developmental Disabilities Act (Welf. & Inst. Code, § 4500 et seq.), and provide daily living services and supports to persons with developmental disabilities. Under the IDEA (20 U.S.C. § 1400 et seq.), states can receive funding to provide IDEA part C "early start" services to enhance the development of infants and toddlers up to three years old who have disabilities. Regional Centers provide such services, but the "early start" services do not correspond to those required for provision of a FAPE to children older than three.

months. Student qualified for 60 minutes a week of early start home-based speech therapy. Student's goals included: following one step directions; identifying familiar objects and photographs; imitating vocal models; using verbal labels to request common objects; and labeling familiar objects. The goals included using three to five word phrases to communicate wants and needs; maintaining social interactions for three to five turns; and attending to task for five minutes. Parents were advised to increase Student's communication and improve his developmental skills by providing Student with a language-rich home environment and opportunities for interaction with typically developing same-age peers, through learning opportunities in a community based setting or site.

5. Each Parent testified at hearing in detail regarding Student's developmental history. Each communicated Student's joyful personality, strengths, and details regarding his social and communication needs. Both Parents are highly involved in Student's daily life. Parent's testimony evidenced their love for Student and commitment to understanding Student's disability related needs. They demonstrated their willingness to implement all of the recommendations of Student's professional service providers, and their active and persistent engagement in the IEP process to advocate for recommended services on behalf of Student. Parents' testimony was sincere, detailed and was consistent with other witnesses' testimony and with documentary evidence. For those reasons, Parents' testimony was given great weight.

6. Student is Parents' only child. Upon learning how they could foster Student's development, they immediately implemented all recommendations. Parents provided a language rich home environment by narrating everything they did at home, labeling objects, and by verbally modeling more expanded versions of Student's verbal and nonverbal communications throughout his day. Parents also increased Student's opportunities to interact with same aged typically developing peers by enrolling him in

a once-a-week early start class and regularly taking him to the park and arranging play dates with other children. Student expressed interest in his peers but did not always know how to interact due to his communication delays.

7. Ms. Karen Mowers testified as Student's expert witness at hearing. Ms. Mowers is an independent licensed Speech and Language Pathologist and she provides early start services for Regional Center of the East Bay. Ms. Mowers received her Master's Degree in Communicative Disorders in 1984 and has been providing early intervention speech and language therapy to children for 34 years. She has received three Ace Awards, each one a symbol of dedication to the field and each one representing completion of 70 continuing education hours in a 36 month period. Her last award was given this year. She has focused her entire career and training in the area of early intervention with an emphasis on autism and apraxia. Ms. Mowers attends initial IEP team meetings for 95 percent of her young clients and is frequently called for consultation by public school speech and language therapists regarding preschool aged students. Ms. Mower's dedication and professional knowledge regarding the assessment and communication development of preschoolers, including Student, was evidenced throughout her testimony. Her testimony was therefore given great weight.

8. Ms. Mowers provided one hour of speech and language therapy sessions in Student's home from May 2017, to Student's third birthday. Sessions included both parent training and direct services to Student. The purpose of her services was to directly assist Student to develop his ability to communicate but also to give Parents the skills necessary to assist Student to develop language throughout his time in the home environment. When she began working with Student, he had significant expressive language delays. He understood much more of what was said to him than he was able to express through language. After six months of early intervention services, Student made impressive progress. By the end of the six months, Student demonstrated the

ability to ask and answer questions and to speak, although inconsistently, in phrases of over five words and in sentences. He used plurals, adjectives, conjunctions, present progressive verbs, and past tense verbs. He understood two and sometimes three-step directions. He knew all his colors and numbers, had a rich vocabulary for labeling and an overall strong foundation for language. To support Student's transition for early start services to special education services, Ms. Mowers participated in three out of four IEP team meetings for Student.

9. In early August, 2017, Parents enrolled Student in a private preschool called Cornerstone two days a week from 8:30 a.m. to 4:30 p.m., to give Student time with typically developing peers as recommended by their service providers. Cornerstone was three and six-tenths miles from their home. When Student began attending preschool, Milestones provided Student's one-to-one ABA support from 8:30 a.m. to noon, in the classroom, instead of in the home setting.

10. Mr. Aghily worked with Student in the school setting implementing Student's ABA goals to enhance his behavioral, social communication, and basic learning skills, including listening; following directions; sharing; and appropriate play and peer interactions. In the school setting, Student's peers engage in typical preschool social behavior, sometimes appropriate, sometimes not appropriate. Mr. Aghily uses these real-life opportunities to facilitate Student's peer interactions and social skill development in the least intrusive manner possible. Mr. Aghily stressed that the school setting is the appropriate setting to work with Student on these skills as opposed to the home setting, which does not have typical peer interaction opportunities. Mr. Aghily found Student to be extremely bright, and in some ways more developed than the younger students in the class.

11. During Student's first exposure to the classroom setting in the early start class one day a week and then at Cornerstone, Student explored, pushed boundaries,

and became upset when things were not going his way. He had difficulty dealing with his frustration and emotions. With ABA supports, Student progressed in his ability to use his words to express himself, and to handle being in a setting with his peers. At first, he needed frequent prompts and close supervision. As he gained skills, he needed fewer prompts and less close supervision. Student successfully functioned in the classroom in afternoons without any ABA aide support. Student has loved attending preschool, evidenced by his daily request to Parents to go to school, including on weekend days. Student indicated his school enthusiasm and interest in other children by his comments, "Go school", "See Nolan", "See Angelo", referring to his classmates. Parents wanted to send Student to Cornerstone five days a week to allow him time with typical peers, but there were no openings for more than two days a week at that time.

12. On August 16, 2017, a final transition individual family service plan meeting was held to discuss and plan the transition of Student from early start to special education services when he turned three on November 23, 2018. Parents, Antioch school psychologist Sigrid Sundet, and Student's regional center service coordinator attended. The team discussed Student's early start goals, which would be worked on up to his third birthday.

13. At this time, Student had just begun attending preschool and was adjusting well to the transition. His teacher enjoyed having him in class and commented on his progress. Student preferred to play around other children rather than playing alone, about 50 percent of the time. Student was using two word phrases and some memorized three word phrases to communicate. He was able to verbally interact with adults, but had difficulty interacting with peers, and communicating his wants, and needs, and emotions. Student required prompts to sustain attention more than two minutes.

ANTIOCH'S INITIAL EVALUATION OF STUDENT FOR SPECIAL EDUCATION SERVICES

14. On August 21, 2017, Parents completed a developmental history questionnaire provided by Antioch as part of Antioch's initial evaluation of Student for special education services. Student was 33 months of age when the questionnaire was completed. Parents reported that Student has a history of good health, typical behavior and positive personality characteristics. Parents reported that Student has a high vocabulary of single words. When asked what Father meant by this at hearing, he explained that he and his wife stopped documenting Student's new words after Student reached 150 words. Student quickly memorized many words, including all of his numbers and words like "thermostat," "engine," and "air conditioner." The only concern on the questionnaire was that Student demonstrates limited use of sentences for communication with an age equivalency of 30 months. Parents wrote that they are most pleased about Student's happy disposition and his progress since his diagnosis. Parents' goals and hopes were expressed as, "seeing Student integrate into normal classes and succeed in his education and ability to care for himself."

Antioch's Initial Speech And Language Assessment

15. On August 21, 2017, Parents consented to a comprehensive assessment of Student for special education services. The assessment plan included academic achievement; health; intellectual development; speech and language; motor development; social/emotional and adaptive behavior.

16. On October 2, 2017, Ms. Dawn Morales, Speech and Language Pathologist for Antioch, conducted Student's speech assessment. Student was two years, 10 months of age when the speech evaluation was conducted. Student's test results determined an age equivalency of 3.6 in the area of articulation; 18th percentile on the Expressive One Word Picture Vocabulary Test-Fourth Edition; and 84th percentile on the Receptive One

Word Picture Vocabulary Test-Fourth Edition. The report also included regional center's April, 2017 scores on the Preschool Language Scales-5 test, obtained before early speech intervention, showing a 39 percent delay in expressive language and a 46 percent delay in auditory comprehension. The Pragmatic Checklist indicated below age level expectancy in all areas in a one-to-one setting. 11 Utterances of a language sample were included in the report, including Student's use of single words and two to three word phrases in his spontaneous speech productions. Ms. Morales concluded that Student met the special education eligibility criteria as a student with a speech and language impairment.

Antioch's Initial Psychoeducational Assessment

17. Ms. Sundet conducted a psychoeducational evaluation of Student in September 2017. Student was two years, nine months of age at the time of the assessment. His home school is listed as MNO Grant, an Antioch elementary school. Test results indicate that Student's cognitive scores were all in the average range. His school readiness Composite score on the Bracken Basic Concepts Scale-Revised, was age three years and seven months. On this subtest, Student identified all ten colors, 14 upper and lower case letters out of 15, and several numbers and shapes. His visual motor integration was at the 12th percentile with an age equivalency of two years, four months. Student scored in the mild to moderate range for symptoms of autism as measured by the Childhood Autism Rating Scale, Second Edition, with a score of 31, which was just one point above the cutoff for a finding of autism. Student was assessed using the Developmental Profile-Third Edition, Parent/Caregiver form and his scores were in the average range in all areas, including physical; adaptive behavior; social-emotional; cognitive; and communication.

18. Ms. Sundet observed Student in his class at Cornerstone, at his home, and during her test session at a local elementary school. Cornerstone staff reported that

Student has adjusted well to their program and that he enjoys attending. In that setting, Student glanced at the examiner and smiled frequently. He completed a puzzle, lined up for transition to the playground stating, "Let's go!" He smiled when arriving on the playground. Ms. Sundet observed Student visually scrutinizing toys, at times, that he also played with appropriately. For example, he traced the perimeter of a number puzzle with his finger a few times and pushed onto the handles, before removing the puzzle pieces and completing the puzzle. He twirled a circle shape and said, "It's spinny!"

19. In the home setting, Student responded to playful overtures, followed directions, spoke in one to five word phrases using contractions, adjectives and nouns. He requested to play with the examiner's ball and commented when it ran under the couch, "Oh no, green ball!" When the examiner asked where it could be, Student responded, "Is under couch, I want." Student sang songs with Ms. Sundet and at the end of the session imitated blowing a kiss goodbye.

20. During her test session at a local elementary school, Student interacted with Ms. Sundet, initially asking, "What we doin?" Student participated in most directed activities. He correctly pointed to all colors and spontaneously named some and reciprocated a "high five." He engaged in imaginative play by feeding a baby and talking on a toy phone. He pointed to the wall clock and commented, "The clock, oh my gosh!"

21. The evidence established that Student's cognitive ability is in the average range. Student's autism impacts his expressive, receptive, and social communication. By October 2017, Student made significant progress in those areas. He continued, however, to have behavior, social communication, and expressive and receptive language needs. The evidence further established that due to these deficits, Student required a language rich environment, and access to same age, typically developing peers to model verbal and non-verbal communication. Additionally, the evidence established that Student had needs in the area of school readiness including listening, following directions, sharing,

and appropriate peer interaction. He required one-to-one instruction to learn those skills and adult interaction to practice and generalize the learned skills in a school setting with typically developing peers.

OCTOBER 23, 2017 INITIAL IEP MEETING

22. On October 23, 2017, Antioch convened Student's initial IEP team meeting to review the assessments and to discuss eligibility and placement. Parents attended, as did Ms. Sundet; Student's regional center case worker; Ms. Morales; and Ms. Mowers. The team determined that Student met the educational criteria for autism and speech and language impairment. The IEP team agreed a preschool class with speech therapy was needed by Student to address his on-task behavior, following directions, and to increase Student's expressive language and to address academic readiness and social emotional skills.

Offer Of FAPE At The October 23, 2017 Meeting

23. Student's IEP included two speech goals. The first speech goal was for Student to participate in speech group time activities/language activities that involve following simple directions; staying on task; putting two and three word phrases together; and engaging in familiar songs and stories with no more than two prompts in three of four trials, as measured by the speech therapist observations and data collection. The second speech goal required Student to name 20 new nouns and 20 new verbs in three out of four trials across two consecutive settings, given modeling and minimal phonemic/verbal cues and prompts, as measured by a clinician's observations or informal testing. Ms. Morales designed Student's speech goals so that they can be implemented in any setting. No academic, behavior, peer interaction, or school readiness goals were developed or presented.

24. Student's IEP offered placement in a special day class at Turner Elementary

School, 180 minutes a day, five days a week, for 100 percent of the school day⁴; 30 minutes, twice a week of group speech therapy; transportation⁵; and extended school year services⁶. There was no discussion or consideration of any placement for Student other than the offered special day class, for 100 percent of the time Student was in

⁴ Dr. Ruth Rubalcava testified that although student's IEP's may indicate special education 100 percent of the school day, students nonetheless participate in cafeteria, recess, and whole school activities as they happen throughout the year.

⁵ The "yes" box next to "special education transportation" was checked. Underneath a note was written, "Eligible if attending SDC at other than home school." Dr. Rubalcava, Director of Special Education, agreed at hearing that the decision regarding Student's eligibility for special education transportation was based on Student's need for transportation due to his unique disabilities, which also considered the distance traveled from Student's home to his school placement, since Turner was not his home school. It is also Antioch's policy to provide transportation services if a Student's special day class is not located at Student's home school.

⁶ The "yes" box underneath the section of the IEP entitled "Extended School Year" was checked. Underneath, was noted: "Rationale: ESY is embedded in preschool SDC to prevent regression." Dr. Rubalcava agreed that Student qualified for extended school year services because Student was at risk of regression over the extended summer break due to the effects of student's unique disability. The "embedded" language meant that all preschool SDC class sites provided extended school year services for any students at the site that qualified for extended school year services so they would not have to attend a different school in summer. Not all Students at Turner's special day class placement qualify for extended school year services.

school. The offered special day class was located at Turner Elementary School. Student's home school was MNO Grant Elementary School.

25. Parents agreed that they want to access the speech therapy services but declined Antioch's special day class placement offer. Parents requested the opportunity to observe the offered placement. Parents rejected the placement offer because they did not feel that the special day class setting was appropriate for Student for his entire school day. Parents requested other placement options or placement at the Cornerstone Preschool or the possibility of accepting speech services only. Parents were encouraged to visit the proposed placement.

TESTIMONY OF MS. SUNDET AT HEARING

26. At hearing, Ms. Sundet, discussed only two possible scenarios for Student's placement: a special day class without typically developing peers or general education without any special education services. She agreed that Student would make progress in any setting because he is a bright child and because cognitive ability is highly correlated with achievement. She also agreed that Student could learn and develop in a typical preschool setting, but felt that his development would be quicker if he had IEP goals and trained special education teachers to assist Student. She recommended a special day class placement so that Student could access special education staff, who are required and accountable to provide services under an IEP, which a typical preschool setting would not have. Ms. Sundet never considered the possibility of providing special education staff and services in a typical preschool to implement Student's IEP. A general education setting with IEP goals and trained staff, was not an option that was considered by Ms. Sundet or discussed by Antioch members of the IEP team.

27. Ms. Sundet's testimony appeared defensive of Antioch's only offered placement. Her conclusion regarding her special day class placement recommendation was given little weight because it was based on her assumption that Student could not

be provided special education supports and services in a typical preschool setting. Her testimony regarding Student's need for a special day class was also inconsistent with Student's functioning, reflected in Ms. Sundet's assessment scores, her detailed report of her direct observation of Student, and Ms. Sundet's express acknowledgement that Student was bright and would make progress in any placement including Cornerstone.

TESTIMONY OF MS. MORALES AT HEARING

28. Ms. Morales confirmed that the October 23, 2017 IEP team did not discuss or consider any placement for Student other than the offered special day class placement. The team members were all aware that Student had been attending a private preschool with typically developing peers. Ms. Morales testified that her recommendation of Student's placement in a special day class, as opposed to a general education classroom, was based on Student's need for special education providers who would be accountable to provide services and required to adhere to an IEP. Her reasoning and placement justification, like Ms. Sundet's, assumed that the choice of placement was either a general education class without special education services, or a special day class placement. Ms. Morales did not consider the possibility of Student's placement in a general education preschool class with an IEP and special education staff required to adhere to the IEP. Her testimony regarding her recommendation of a special day class over a typical preschool for Student's placement was not based on Student's needs but on her misperception of two competing programs. It therefore is given little weight.

TESTIMONY OF PATRICK JUNG AT HEARING

29. Patrick Jung, Director and Board Certified Behavior Analyst at Milestones, testified as an expert at hearing regarding his observation of Student, his opinion regarding an appropriate placement for Student, and Student's needed behavior

supports. Mr. Jung holds a Bachelor's Degree in Psychology and a Master's Degree in Education. He became a Board Certified Behavior Analyst in 2012. Mr. Jung also has one year experience as a special education teacher in a moderate to severe special day class. Mr. Jung has over ten years working with students in the provision of ABA services. In June of 2017, he began working at Milestones as Director of Clinical Operations. Since July 2017, Mr. Jung was directly involved in the development of ABA goals for Student and provided and continues to provide supervision and guidance to Student's ABA aide and the aide's supervisor. He personally observed Student at Cornerstone Preschool five or six times and more frequently in the home setting, to monitor his ABA program. Each observation was at least an hour in length. Based on Mr. Jung's ABA training, frequent observations and direct involvement with Student in the provision of ABA services, his testimony was given great weight.

30. On November 3, 2017, Mr. Jung conducted an observation of Student at Cornerstone from 3:00 to 4:30 p.m. for the purpose of evaluating Student's functioning in the preschool at times he is without ABA aide support. At the beginning of the observation, Student was engaged in parallel play with multiple peers during play with wooden blocks. Parallel play is age appropriate for two and three year olds. Student showed interest in his peers throughout the observation. Student attempted to pick up a toy that another classmate was playing with, and when the peer pulled the toy away, Student stopped and pursued another activity without any negative behavior. Student was very observant and protected himself by physically avoiding a peer who had created an unsafe situation. Other peers were not sharing and required teacher intervention. Student did not require teacher intervention during the observation.

31. Mr. Jung observed Student independently transition from indoor play to snack, and then to the playground. Student refused the offered snack appropriately by saying, "No" when asked. However, he took one bite when asked to do so by a peer.

After the snack, Student transitioned independently to outdoor play by following his teacher's verbal direction to line up, with no behavior problems. Student chose a tricycle to play with, mostly pushing the tricycle along with his feet instead of using the pedals appropriately. When prompted to use the pedals, he did so. Student demonstrated age appropriate play, interacting with peers making car noises and "beeping" which he continued for 15 minutes until the end of the observation. Student responded well to peer interactions and teacher's classroom direction throughout the observation.

32. From the beginning of Mr. Jung's involvement with Student, Student has been excited to work with ABA providers and has been very engaged when working with his ABA providers in the home and at school. Overall, Student has evidenced age appropriate behavior, with supports, in the Cornerstone Preschool setting. Mr. Jung established that in November 2017 Student required three hours of aide support in a classroom setting to facilitate his skill development and would need three hours of aide support each day in the classroom even if he had attended preschool five days a week. Based on Mr. Jung's expert opinion, because Student functioned so well in a general preschool class with supports, placement in a special education special day class 100 percent of the time would have been inappropriate and too restrictive. Student made significant communication, social, and behavioral progress with the supports of ABA services while attending Cornerstone, thus demonstrating Student's need for a general education setting for Student to implement IEP goals.

33. As found above, Student evidenced his readiness for a general education preschool curriculum. Observations of Student in Cornerstone evidenced his readiness and interest in interacting with his same aged typically developing peers. Student's speech and language assessments identified that his pragmatic language needs required a general education environment with typically developing peers to develop his skills. Mr. Jung's observations and direct experience with Student over the course of

four months established that a general education environment was necessary to meet Student's needs.

34. Antioch's offer of 180 minutes a day, five days a week of specialized academic instruction may have been a sufficient amount of time to address Student's specialized instruction needs. However, no academic goals or school readiness goals were offered and no further explanation given for how the specialized academic instruction would be implemented. Antioch's 60 minutes a week of group speech therapy was appropriate to address some of his communication needs. However, as found above, Student required typically developing peers to meet his communication needs. The initial IEP offer did not provide access to such peers. Student required ABA aide support of three hours a day to facilitate Student's skill development and to assist Student to access the general education preschool services. No ABA services or aide support was offered.

NOVEMBER 7, 2017 ADDENDUM IEP TEAM MEETING

35. On November 7, 2017, an IEP meeting was held to review and discuss Parents' concerns. Parents had not yet observed the placement offered at the October IEP meeting. Meeting participants included Parents; Student's regional center case manager; Ms. Mowers, who participated by phone; and Ms. Beverly Jenkins, Antioch's program coordinator, who also participated by phone.

36. Parents again expressed their concerns that the offered SDC placement is too restrictive as Student is currently successful in a private preschool for typically developing preschoolers. Ms. Mowers expressed that Student's assessment scores do not warrant a special day class placement. Parents asked for other placement options. Parents shared that Student is participating in the preschool class without an aide and that they are not requesting an aide. Goals were still not developed by Antioch to implement Student's offered specialized academic instruction services. Parents again

declined Antioch's continued offer of placement in a special day class for 100 percent of the school day and requested a private preschool placement funded by Antioch. Parents renewed their prior request to observe the offered placement.

37. Ms. Mowers asked Antioch to explain the basis for the placement offer. Antioch explained that Antioch does not provide preschool general education settings. Antioch informed Parents' that a written response to Parents' request will be provided within 15 days.

38. Student's needs, as found above, remained the same. Antioch's IEP offer remained the same. Accordingly, the deficiencies described above continued. Parents signed the IEP in agreement to services with the exception of specialized academic instruction services. Parents thus accepted speech and language services and goals, transportation, and extended school year services and declined the special day class placement and specialized academic services.

39. No speech and language services, transportation services, or mileage reimbursements for Student's attendance at Cornerstone Preschool were initiated by Antioch following the Parents' consent to these services.

PARENT OBSERVATION OF ANTIOCH'S OFFERED SPECIAL DAY CLASS

40. Approximately two weeks after the November 7, 2017 IEP meeting, Mother visited the noon to three p.m. special day class placement which Antioch had offered for Student's placement. She arrived before Antioch's school psychologist and observed students working on academics. There were two teachers and two aides present in the classroom at the time of the observation. Parent observed students exhibiting behaviors including flapping, and screaming, and yelling, which Student did not display. She observed that most of the children appeared to be nonverbal and were working on beginning sound production. The students in the classroom had more pronounced disabilities than Student, and Parent concluded that Student would be the most

advanced student in the classroom, leaving no appropriate models for Student's communication development. Antioch's school psychologist arrived later and had stayed only ten minutes at which time Parent left stating that she has seen enough.

NOVEMBER 21, 2017 EARLY START SPEECH AND LANGUAGE EXIT REPORT

41. On November 21, 2017, just before Student's third birthday, Ms. Mowers assessed Student's speech and language skills and wrote an exit report for the purpose of transitioning Student from early start to Antioch's special education services on Student's third birthday. Her assessment corroborates her testimony regarding Student's impressive progress. In the six months of early start intervention services, Student was found to have made outstanding progress in his communication with adults. Student's play skills were solid through 33-36 months of age. His receptive language skills were solid through 30-33 months of age and his expressive language skills were solid through 27-30 months of age. Student developed an extensive vocabulary and used phrases and short sentences. He demonstrated age appropriate play including pretend play and frequently narrated his play. He answered simple questions; participated in two consecutive communication exchanges, occasionally three; responded to his family's communication by looking at them when they called his name; and he requested assistance from them. Student occasionally sang with his therapist or parent. The recommendation going forward was for Student to have opportunities to use his skills with typically developing peers.

ANTIOCH'S NOVEMBER 27, 2017 PRIOR WRITTEN NOTICE

42. On November 27, 2017, Ms. Jenkins provided Antioch's written response to what Antioch claimed to be Parents' requests to fund Student's current private preschool placement with half day support from an ABA therapist, and to access speech and language therapy services absent the rest of Antioch's offer of FAPE. Antioch

declined Parents' requests because Antioch was unable to implement or monitor Student's IEP at the requested placement; the private preschool is not a nonpublic school and the private school does not have special education staff to meet Student's individual and specialized needs. Antioch declined to implement speech therapy separate and apart from Antioch's offer of a special day class, claiming that the services were part of one comprehensive offer of FAPE at the October 2017 initial IEP team meeting.

43. Antioch's prior written notice description of Parents' requests made at the November 7, 2017 IEP team meeting was inconsistent with Parents' requests and acceptance of services as documented in the notes of the November 7, 2017 IEP. Parents did not request Cornerstone. They requested Antioch to fund a preschool placement with typically developing children. Parents also did not request an aide for Student at school.

44. Antioch's prior written notice did not amend its originally offered IEP. The deficiencies determined above, therefore, persisted. Specifically, the IEP did not meet Student's behavior, communication, academic, and school readiness needs in that he required typically developing peers and ABA aide services to meet his unique needs.

FEBRUARY 6, 2018 ADDENDUM IEP TEAM MEETING

45. Ms. DiBerardino testified at hearing on behalf of Antioch. She has a Master's Degree in Education, a Bachelor's Degree in Communications and an Associate's Degree in Sociology. She has a multiple subject teaching credential and an Education Specialist, Mild to Moderate, Credential with autism authorization. Ms. DiBerardino has 19 years of experience working for Antioch. Currently she is both a resource specialist and a program coordinator. Formerly she was Program Specialist for Antioch for two and a half years. As Program Specialist, she supported families and teachers and case managed special education students throughout the district at

nonpublic schools, private schools, and at the elementary sites. She supported parents and elementary teams in placement decisions and toured potential placements with parents. Prior to that, Ms. DiBerardino was a special education teacher of a special day class for six years. She also held a position as a general education teacher in Antioch. Ms. DiBerardino became involved with Student and his family in January 2018. Ms. DiBerardino's testimony communicated her knowledge and experience regarding the needs of special education students; the continuum of placements in Antioch; and the implementation of special education services in the continuum of special education placements. For these reasons her testimony was given great weight.

46. Ms. DiBerardino's first task in Student's case was to schedule an IEP team meeting for Student. In preparation for the meeting, she reviewed all of Student's records including early start evaluations, Antioch's evaluations, and prior IEP team meeting notes.

47. On February 6, 2018, Student's third IEP team meeting occurred. The purpose of the meeting was to have all required IEP team participants discuss goals for all areas of suspected disability and to clarify Antioch's offer of FAPE. Meeting participants included Parents; Student; SELPA Representative; a general education teacher, a special education teacher; a speech therapist; Ms. Sundet; Student's regional center case manager; Ms. Sally Dutcher, Antioch's counsel; and Ms. Mowers. The speech and language goals had already been approved and accepted by Parents at the November 7, 2017 IEP team meeting. Goals for Student's specialized academic instruction were developed, discussed and approved by Parents. The four goals were for Student to initiate peer interaction; to follow an adult directive with no prompts; to share materials upon request from a peer without protest; and to copy symbols (for example, +, /), given a model, to prepare Student to write letters. The person responsible for these goals is a special education teacher.

48. Following Parents' acceptance of IEP goals, the IEP team discussion turned to the placement appropriate for Student to implement the goals. Parents requested a placement that allowed for Student to be with typical peers at least 50 percent of the time. The general education teacher and speech therapist agreed that Student's goals could be implemented in a typical classroom. The team brainstormed regarding identification of typical preschool placements but none of them were offered. Parent agreed to apply for the Headstart Preschool. Antioch agreed to continue to look for placements options with typical peers for Student. Antioch's offer of services remained unchanged.⁷

49. Following the February 6, 2018 IEP team meeting, goals for specialized academic instruction were in place but the offer of services continued to be inadequate to meet Student's needs because there was no opportunity for Student to interact with typically developing peers.

50. During the meeting, the IEP team was observing Student who was present and interacting with Ms. Sundet. He was sustaining joint attention, engaging in reciprocal play and initiating play with Ms. Sundet. Ms. DiBerardino found this to be significant and she agreed to accept Parents' offer to observe Student at Cornerstone to better understand Parents' disagreement with Antioch's offered placement. Parent consented to the new IEP goals, the 180 minutes of specialized academic instruction, 60 minutes of speech therapy, and extended school year services, but again declined the special day class location for services. Parents informed Antioch that until Antioch offers a less restrictive setting for the location of services, Student will continue to attend Cornerstone Preschool.

⁷ Parents applied for the Headstart Preschool but Student did not qualify due to Parents' income.

ANTIOCH'S OBSERVATION OF STUDENT AT CORNERSTONE

51. At some point after the February 6, 2018 IEP team meeting, Ms. DiBerardino and Ms. Erin Peterson, Antioch's behaviorist, observed Student at Cornerstone Preschool for approximately two hours. Ms. Peterson and Ms. DiBerardino each testified regarding their observation of Student and their testimony was similar in all respects regarding their observations and conclusions based on their observations.

52. Ms. Peterson is a Licensed Marriage and Family Therapist. She has been a licensed clinician for almost six years. She has been doing applied behavioral analysis for the last 12 years in a variety of settings. She also has a private psychotherapy practice. For the last 12 years she has been doing a blend of ABA and therapeutic work with clients primarily in school settings. Her testimony was clear, consistent with Ms. DiBerardino's testimony, and was given great weight.

53. Ms. Peterson did not review any records prior to her observation so that she would not have any preconceived expectations for Student. She was also not given specific instructions regarding what behavior to observe. She went in looking for any behavior that Student was isolating, not following directions, or engaging in any behavior that made him stand out in any way or that indicated he is not accessing his services. No such behavior was observed. During the two hour observation, one teacher was present in the classroom and Student had no aide support. The teacher approached Student and invited him to smell cinnamon. Student followed her direction and approximated the word cinnamon as he sniffed. Student followed the teacher's directions and responded appropriately to her, using two and three word phrases. She and Ms. DiBerardino observed Student's transition from free play to lunch by getting in line and proceeding to the lunch area in another room without any difficulty. Although the teacher gave Student more prompts than other students during the observation, it was not clear to the observer that he needed such prompts. Teacher directions may

have been given to allow the observers to see if Student would comply. Student interacted with his peers and engaged in reciprocal play, including rolling a toy car back and forth, and engaging in sword fighting.

MARCH 6, 2018 ADDENDUM IEP TEAM MEETING

54. On March 6, 2018, an IEP team meeting was held to discuss Antioch's observation of Student at Cornerstone and to discuss his placement and services. Participants included Parents; Student; SELPA Coordinator; Headstart general education preschool teacher; Ms. Dutcher; Elise Chavez, Antioch's speech therapist; Ms. Sundet; a special education teacher; Erin Peterson, and Christie DiBerardino. Both Ms. DiBerardino and Ms. Peterson shared their observations of Student at Cornerstone, reporting Student's age appropriate pretend play with typically developing children; reciprocal conversations between Student and his teacher; no stereotyped movements or play; and ability to follow classroom routines with prompts. They shared the feedback of the preschool teacher including that Student has made significant progress since starting at the preschool in August 2017; has improved in advocating for himself; has decreased his need for prompts for compliance; requires more prompts than his peers; and will need support for play interactions if he transitions to the three to four year old Cornerstone preschool class.

Antioch's March 6, 2018 Revised Iep Offer

55. After considering the information provided by Ms. DiBerardino and Ms. Peterson, the IEP team then considered what services and supports were appropriate for Student. The IEP team agreed that specialized academic instruction through resource services was appropriate to meet Student's needs, and a full time special day class as previously offered was too restrictive for Student. Ms. Peterson recommended one hour of push-in behavior support per day. The IEP offered two hours of push-in resource

services per week, 60 minutes of group speech therapy per week, and 60 minutes per week of behavior consult, direct and indirect. The location for the offered services was noted on the addendum IEP as "to be determined."⁸ Although the team was considering Cornerstone as the location, it was not offered. Parent inquired if tuition for Cornerstone is part of the offer of FAPE. Parent declined the amended IEP offer because the location and responsibility for cost had not been determined. Parent requested either tuition reimbursement or a district general education preschool location for services. Antioch agreed to respond to Parents' requests in writing.

56. Mr. Jung's recommendation at hearing that Student receive three hours of ABA services a day for the number of days he attends a general education preschool, differed from Ms. Peterson's recommendation at the March 6, 2018 meeting of one hour a day of ABA services. Ms. Peterson's recommendation was based on her one day, two hour, observation of Student. Given that Mr. Jung is a board certified behavior analyst, observed Student many more hours than Ms. Peterson, and developed and monitored Student's ABA goals for several months, Mr. Jung's recommendation was given much more weight than Ms. Peterson's.

57. The evidence established that by March 2018, Student's educational needs had not changed since his third birthday. Student continued to demonstrate his ability

⁸ Antioch's evidence binder contained a March 6, 2018 addendum IEP that was significantly different than the IEP which Parents received at the March 6, 2018 meeting. Parents never saw the document in Antioch's binder until evidence was exchanged for this hearing. The addendum in Antioch's binder appears to have been changed after the meeting to correspond with Antioch's proposed offer in its March 8, 2018 prior written notice. For that reason, Student's binder's March 6, 2018 addendum IEP is the only evidence considered herein regarding that meeting.

to participate in his general education preschool and he continued to require the same amount of services. Student required three hours of specialized academic push-in instruction per day. The March 6, 2018 IEP team offer was for 2 hours of push-in services per week. He required three hours of direct ABA support a day. The March 6, IEP team offered 60 minutes per week of direct and indirect behavior consult. Student required 60 minutes of pull-out group speech therapy a week, which Antioch did offer on March 6, 2018. The March 6, 2018 IEP failed to identify a location for services and placement. The offer of services at the March 6, 2018 IEP team were inappropriate and inadequate to meet Student's educational needs.

MARCH 8, 2018 PRIOR WRITTEN NOTICE

58. On March 8, 2018, Antioch provided prior written notice proposing to change student's preschool placement and refusing three Parent requests that Antioch stated were made by Parents at the March 6, 2018 addendum IEP team meeting. Ms. DiBerardino prepared the prior written notice. The prior written notice proposed to change Student's preschool placement from general education to general education with the related services of 120 minutes per week of specialized academic instruction in the Cornerstone private preschool program, 60 minutes per week of speech and language services in the Cornerstone private preschool program, and 60 minutes per week of behavior consult between the behaviorist, general education teachers, and related service providers.

59. The prior written notice refused the following Parents' requests with stated reasons for the refusals: 1.) to fund the full cost of placing Student for five hours a day in Cornerstone because Antioch made an appropriate offer of FAPE of general education with related services and supports in Cornerstone, and therefore Antioch will not fund Parents' unilateral placement of Student at Cornerstone Preschool for five hours a day; 2.) to fund the cost of special education transportation because Student attends the

school Student would attend if not disabled and is able to participate in transportation available to nondisabled students, and 3.) to fund Parents' request for extended school year services for the reason that there is no evidence that Student demonstrates a regression of skills or a limited ability to benefit from re-teaching of skills after an extended school break.

60. Antioch's March 8, 2018 prior written notice description of Parents' requests at the March 6, 2018 IEP team meeting was inconsistent with the notes of the meeting. Parents did not request Antioch to place Student at Cornerstone at the March 6, 2018 meeting; they requested tuition reimbursement for Cornerstone or for Antioch to determine a location for a general education preschool program. Parents did not request transportation or extended school year services at the March 6, 2018 addendum IEP team meeting. Parents had already accepted transportation services and extended school year services and there was no evidence that these services were discussed by the IEP team at the March 6, 2018 meeting.

61. Once Parents consented to transportation and extended school year services, Student's disability needs did not change between his third birthday and the March 8, 2018 prior written notice in a way that would justify removal of transportation services. Student's disability needs also did not change to justify removal of extended school year services, since the February 6, 2018 IEP team meeting when Antioch again offered extended school year services and thereby determined he was still at risk of regression. Antioch's prior written notice to remove these services through a claim that they were responding to a Parent request for the services is disingenuous and rejected.

62. In its prior written notice, Antioch expressly proposed to place Student in a general education setting with related services. For such an offer to be facilitated, a general education setting with typical peers would be needed as well as the special education and related services. Student required a placement with typical peers to

access his special education services and to work on his goals. The March 8, 2018 prior written notice suggests that Antioch offered Student's service in a general education setting and therefore refused to fund Parent's preferred private preschool, Cornerstone. That assertion is not supported by the evidence. Antioch never identified or offered Student placement in a general education preschool. Rather, Antioch offered to implement Student's related services at Cornerstone and then refused to fund the placement indicating parental preference. Antioch's prior written notice, while never identifying a general education preschool, attempted to avoid the cost of Cornerstone (a sectarian school) tuition, and the costs of extended school year and transportation.

SPEECH SERVICES PROVIDED AFTER MARCH 12, 2018, AND PROGRESS ON SPEECH GOALS

63. Dr. Ruth Rubalcava, Antioch's Director of Special Education, testified at hearing. Dr. Rubalcava established that Antioch began providing one-to-one compensatory speech services, as well as regular speech services of 30 minutes of group therapy, twice a week, pursuant to Student's IEP, on March 12, 2018. The speech services were provided at Sutter Elementary School. Antioch provided 240 minutes of compensatory services and 540 minutes of regular speech services. Antioch conceded that it still owes Student nine hours of compensatory speech services at a cost of \$80.00 an hour. Student's progress report dated June 5, 2018, documented that Student has not yet met his two speech goals.

64. Up until hearing in this matter, Antioch has not provided Student with specialized academic instruction services, aide support, transportation, or extended school year services.

PARENTS' OUT OF POCKET EXPENSES

ABA Services

65. From Student's third birthday to January, 2018, Student's Kaiser Insurance covered the cost of his ABA services because Parents had already met their out-of-pocket cap of \$1500.00 for 2017. From January to July 2018, Parents funded \$1500.00 of Student's ABA services by paying a co-pay of \$20 per day of service, and reached their out of pocket cap under their insurance. Parents' total out of pocket cost for Student's ABA services from Student's birthday to the date of hearing is \$1500.00.

Cornerstone Tuition And Mileage

66. From Student's third birthday until hearing, Student attended Cornerstone on Thursdays and Fridays. Parents paid a flat rate of \$475 per month for Student to attend school two days a week, regardless of how many of those days he attended. In November there was only one day that fell after Student's third birthday. The pro-rated cost of that one day at Cornerstone was \$79.17, calculated as one sixth of the tuition rate, as Student only attended one out of the six days of the two day a week program in November. From December 2017, to the end of May, 2018, Parents paid \$475 a month for Cornerstone tuition regardless of Student's days of attendance. On June 12, 2018, Student began attending Cornerstone four days a week at a tuition cost of \$675 per month. Parents paid a total amount of \$595.15 for Cornerstone tuition in June 2018 and \$675 for tuition in July. Student's last day at Cornerstone was August 10, 2018. Parents paid a pro-rated amount of \$225 for tuition at Cornerstone in August. The total tuition paid by Parents at Cornerstone from Student's third birthday to August 10, 2018 was \$4,424.32.

67. Student lives three and six tenths miles from Cornerstone. Parents transported Student to and from school, requiring two round trips per day for days

attended. Student's attendance sign in sheets documented that, between Student's third birthday and June 7, 2018, Antioch's last day of school, Parents made 53 round trips for days Student attended Cornerstone. Parents made 26 round trips to transport Student to Cornerstone between June 8, 2018 and July 31, 2018. Neither Antioch nor Parents provided any evidence regarding the dates for Antioch's extended school year, but the evidence presented at hearing established that the extended school year contained 20 school days. Parents did not provide attendance records of Student at Cornerstone for August 2018. Parents transported Student to school on the 79 days between his third birthday and July 31 of Student's attendance. One round trip a day is 7.2 miles.

STUDENT'S PLACEMENT AT CHILD DAY SCHOOL ON AUGUST 13, 2018

68. Cornerstone informed Parent that it could not accommodate Antioch's special education services because they required a separate space, which it did not have. Since Antioch expressed concerns that it could not use its public funds to pay the tuition costs of Cornerstone, a Christian sectarian preschool, Parents found Child Day School, a private, non-sectarian, preschool which offers preschool classes for various ages, through fifth grade. The Child Day School has space to accommodate push-in special education services and some of the students who attend the school have IEP's. Student enrolled in the Child Day School and has been attending preschool there since August 13, 2018⁹. The cost of Child Day School's five day a week program from 8:30 a.m. to noon for the 2017-2018 school year was \$225 a week, and \$975 a month. Student is enrolled in Child Day School's full time, four day a week program.

⁹ Child Day School is only discussed in this decision as it relates to the availability of a private general education preschool in Antioch and close to Student's home. No determination of appropriate prospective special education services was at issue in the current case or contemplated or decided in this decision.

LEGAL CONCLUSIONS

LEGAL FRAMEWORK UNDER THE IDEA¹⁰

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031, subd. (a).) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will

¹⁰ Unless otherwise indicated, the legal citations in this section are incorporated by reference into the analysis of each issue decided below.

be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

4. In *Endrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. __ [137 S.Ct. 988, 996], the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably

calculated to enable the child to achieve passing marks and advance from grade to grade.” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at 999 (citing *Rowley*, *supra*, 458 U.S. at pp. 203-204).) The Court went on to say that the *Rowley* opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at 1000.) For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 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, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 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].)

ISSUE 1: DID ANTIOCH DENY STUDENT A FAPE FROM STUDENT'S THIRD BIRTHDAY ON NOVEMBER 23, 2017 TO AUGUST 9, 2018, BY FAILING TO OFFER OR PROVIDE HIM WITH APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION AND/OR AIDE SUPPORT?

6. Parents contend that Antioch's initial October 23, 2017 offer of specialized academic instruction was not appropriate because it did not contain specialized academic instruction goals, it did not consider Student's need for interaction with typically developing peers, or consider whether Student needed the related services of ABA aid support to access his education. Parents contend that Antioch continued in its failure to offer or provide specialized academic instruction and related aid support services at the three addendum IEP team meetings either because the IEP teams failed to consider Student's need for typically developing peers and ABA aid support to make progress on his goals or because Antioch failed to specify a location to implement the services. Parents maintain that these failures denied Student a FAPE because he never received any of the required services from his third birthday to August 9, 2018. Antioch contends that it offered Student specialized academic instruction in a special day class, which Parents declined. Antioch contends that it refused to provide services at Cornerstone from Student's third birthday until the March 8, 2018 prior written notice, because Cornerstone is not a certified nonpublic school and there would be no way for Antioch to implement or monitor Student's services due to Cornerstone's lack of special education staff. On March 8, 2018, Antioch purported to offer the specialized academic instruction services only, at Cornerstone, claiming that Parents were obligated to fund the location of the services.

7. Specialized academic instruction must be 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, subd. (a).) In determining a student's services at an IEP meeting, the IEP team must describe the child's needs, academic and functional goals related to those needs, and specify the special education that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).) The IEP team must also identify the related services required to assist him to benefit from his services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

Specialized Academic Instruction

8. In the present case, Student was offered 180 minutes, five days a week, of specialized academic instruction to be provided by a special education teacher in a special day class for 100 percent of Student's day. To be deemed appropriate, specialized academic instruction must be utilized to implement goals designed to meet a Student's unique needs. The October 23, 2017, and November 7, 2017 IEP's contained no goals regarding Student's academic, behavior, social, or school readiness needs. The IEP's only contained two speech and language goals. As there was no description in the IEP's whatsoever of what the specialized academic instruction would comprise for Student, the specialized academic instruction services in the IEP's were not appropriate.

9. The preponderance of the evidence presented at hearing established that Antioch failed to offer or provide Student with appropriate specialized academic instruction. Antioch's offers of services at Student's initial IEP team meeting and the November 7, 2017 meeting were not appropriate, did not address Student's unique educational needs, or offer any goals to implement the specialized academic instruction.

10. During the February 6, 2018, IEP team meeting, goals addressing Student's academic and school readiness needs were proposed and accepted by parents. The amount of specialized academic instruction services was not challenged. The March 6,

2018 IEP team reduced specialized academic instruction services from three hours a day, five days a week to two hours per week of push-in services. This offer as inappropriate because the evidence established that Student's educational needs had not changed since his third birthday. Additionally, the services were inappropriate because there was no location identified for the services. On March 8, 2018, Antioch's prior written notice offered Student's services at Cornerstone, which remedied the lack of a location for services, but the services continued to be inadequate to meet Student's educational needs. Student's need for three hours a day of specialized academic instruction, including typically developing peers, remained constant from his third birthday to August 9, 2018. No specialized academic instruction was provided to Student. The additional failure to offer these services in the least restrictive environment will be discussed below.

Aba Aide Services

11. As determined above, Student established that he required ABA aide support to benefit from his special education services. Specifically, the expert testimony of Mr. Patrick Jung established that student required the related service of three hours a day of ABA aide support in the general education preschool classroom each day of his attendance, to receive educational benefit and to access his educational services. Based on the information available to the IEP team on October 23, 2017, Student needed the daily support of an ABA aide in that setting to assist him to access his educational services due to his apparent educational needs related to his expressive language deficits and his autism.

12. Had Antioch correctly determined Student's educational needs at his initial IEP team meeting, the preponderance of the evidence presented at hearing established that the appropriate academic and related services to meet Student's unique needs to enable him to progress in his goals, and receive educational benefit, included

180 minutes per day, five days per week of specialized academic instruction and three hours per day of ABA aide support. Student's need for an ABA aide was constant from the time asserted, namely November 23, 2017, through August 9, 2018. No such aide services were offered.

13. The evidence established that Student required specialized academic instruction and ABA aide services from November 23, 2017, through August 9, 2018. Antioch denied Student a FAPE by not offering these services throughout that entire period.

ISSUE 2: DID ANTIOCH DENY STUDENT A FAPE FROM HIS THIRD BIRTHDAY ON NOVEMBER 23, 2017, TO AUGUST 9, 2018, BY REFUSING TO OFFER OR PROVIDE STUDENT WITH PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT?

14. Parents contend that through four IEP team meetings, Antioch did not offer or provide any settings for Student other than the special day class, which included no mainstreaming opportunities. Parents maintain that Antioch's March 8, 2018 prior written notice offer to provide special education services in Cornerstone also denied Student a FAPE because Antioch would not fund the cost of Cornerstone's tuition, and the offer did not include transportation or extended school year services which were already determined to be appropriate for Student and accepted by Parents. Parents contend that this denied Student a FAPE because he was unable to access any services and Parents were therefore forced to fund the cost of a program for Student to receive some educational benefit. Antioch contends that it considered Student's placement in the general education setting and determined that his needs could only be met in a special day class. Antioch also contends that although Student's IEP states that he is outside the regular class and extracurricular and nonacademic activities 100 percent of the time, Student actually had mainstreaming opportunities including cafeteria, recess, and participation in whole school activities as they happen throughout the year. Antioch

asserts that it offered Student a placement in the least restrictive environment of his Cornerstone preschool in the March 8, 2018 prior written notice but was not required to fund the cost of Cornerstone's tuition.

Legal Requirements Relating To Least Restrictive Environment

15. In determining the educational placement of a child with a disability, a school district must ensure that: (1) the placement decision is made by a group of persons, including the parents, knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; (2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; (3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; (4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

16. An IEP for a disabled child is measured at the time that it was created. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Department of Educ., Hawaii*, 715 F. Supp. 2d 1093, 1112 (D. Haw. 2010). A school district must ensure that children with disabilities are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This "least restrictive environment provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.).

17. Special education classes, separate schooling, or other removal of

individuals with exceptional needs from the regular educational environment occurs only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Ed. Code, § 56040.1, subd. (b).)

18. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of fulltime placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Rachel H.*, *supra*, 14 F.3d at p. 1404.) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050.].

Duty To Educate Disabled Children Ages Three Through Five

19. Under the IDEA and California special education law, school districts must offer an IEP to a pupil who turns three years of age. (20 U.S.C. §1412(A)(1); 34 C.F.R. § 300.101(a); Ed. Code, §§ 56001, subd. (b); 56026, subd. (c)(2).) For the period between three and six years of age, California does not mandate compulsory education for typically developing preschool children. (Ed. Code, § 48200.) However, if a preschool child requires special education and related services in order to receive a FAPE, school districts must offer the child an appropriate program. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56345, subd. (a)(1)(B).) A private, nonsectarian, preschool program can be an appropriate setting for a district to provide such a student. (Ed. Code, § 56441.4, subd. (a).) If a public agency determines that placement in a private preschool program is necessary for a child to receive a FAPE, the public agency must make that program available at no cost to the parent. (*Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education and Ryan B* (7th Cir. 1999) 184 F. 3d 912, 917.)

20. The evidence established that at all times from November 23, 2017, through August 9, 2018, Student required placement with typically developing peers throughout the day to meet his behavior, communication, and academic readiness needs. Student's IEP team was aware of his needs. The evidence established that despite such knowledge, Antioch IEP team members failed to consider Student's needs, believing only two options were available: a special day class with no typically developing peers or a general education preschool with no special education services. Rather than focus on Student's needs, this misperception led Antioch to offer Student placement in a special day class for 100 percent of the time from November 2017 through March 2018. Antioch simply dismissed Parents' request for a general education preschool setting at the November 7, 2018 addendum IEP team meeting, by informing Parents that Antioch does not provide preschool general education settings.

21. Once the IEP team decided that Antioch could not provide a general education setting, the IEP team members again failed to offer, or even discuss or consider any mainstream opportunities for Student during his school day if placed in the offered special day class. Although Antioch claims that it is their practice to include Students in non-academic activities such as whole school activities or recess or lunch, the IEP as written and presented to Student, would not have included these mainstream opportunities. There was no evidence presented at hearing that these mainstream opportunities were discussed or offered at any of the IEP team meetings.

22. Even when Ms. Morales and Ms. Sundet, who were each present at Student's initial IEP meeting, were given the opportunity at hearing to discuss why they recommended the special day class and not a general education class as the location for Student's services, neither one discussed the possibility of special education supports and services in a general education setting. It was clear that neither of these witnesses ever considered that scenario as a possibility for a preschool placement for Student.

23. Accordingly, Student established that Antioch failed to offer placement in the least restrictive environment from November 23, 2017, through March 6, 2018.

24. On March 6, 2018, Students IEP team finally determined that a private preschool was appropriate to meet his needs. However, again, Antioch did not identify or offer a location for such services.

25. Once the March 6, 2018 IEP team decided that Student's least restrictive placement was a general education preschool with push-in special education and related services, Antioch should have and failed to make that offer, because Antioch had no public general education environment to implement the services. There was no evidence presented at hearing that Antioch looked for a non-sectarian private preschool to serve Student. Instead, in the two days following the meeting, Antioch issued a prior written notice that erroneously indicated it offered a general education preschool setting when it had not. It further offered to keep Student at Cornerstone with push-in special education services, but required Parents to bear the tuition costs of Cornerstone. That cannot be considered a FAPE given that the offered placement was not *free*.

26. Applying the *Rachel H., supra.* factors, in light of the least restrictive environment legal requirements, the least restrictive environment for Student from Student's third birthday to August 9, 2018, was a private nonsectarian general education preschool with supports and services.

Academic and Non-Academic Benefits of a General Education Preschool Setting with Supports and Services

27. The only reasonable conclusion that the IEP team could reach, given the mountain of information before it in this case, was that Student would benefit from placement in a general education preschool with supports and services. In the months leading up to his consideration for special education services Student and his family worked diligently to assist Student to make significant progress across the board in his

school readiness skills which resulted from his increased participation with peers, the language-rich environment that Parents provided to Student through their implementation of service provider recommendations, and ABA services in the home and at school.

28. By the time of Student's initial IEP, IEP team members had reviewed Student's early start service records which demonstrated that Student was successfully participating in a general education preschool with ABA support for three hours of his eight hour preschool day. The team also had Ms. Sundet's initial assessment report with scores indicating that Student's school readiness skills were already 10 months beyond his two years, nine months of age at the time of his assessment. Student knew his colors, numbers, and had an extensive one word vocabulary.

29. Ms. Sundet's observation of Student documented his appropriate use of toys, age appropriate parallel play, social nonverbal communications including smiling, high fives, and blowing kisses; following directions to line up and transition to another activity; participation in all directed activities; use of four and five word phrases, including nouns, adjectives, and verbs to communicate with and ask questions of the examiner, and to comment about what he was seeing and discovering while playing.

30. Student's August 2018 early start Individual Family Service Plan documented that that Student was interested in his peers and was seeking out peer social interaction 50 percent of the time. There was no information that Student had any behavior problems, an inability to respond to teacher prompts, difficulty with transitions, or disruptive behaviors of any kind. Student clearly benefitted and progressed in his Cornerstone placement with typically developing peers, and Student would similarly benefit from a general education preschool placement with special education supports and services. The general education setting was the only setting that would provide

interaction with typical peers which the majority of his IEP goals required for Student to make meaningful educational progress.

Effects Of Student's Placement In A General Education Setting On Teacher And Peers

31. The preponderance of the evidence presented at hearing established that Student fit in well with typical peers in a general preschool setting. His behavior was age-appropriate, he was eager to learn and participate in the full range of preschool classroom activities. He transitioned from one activity to another with prompts and without inappropriate behavior. His teacher enjoyed having him in class. There was no disruption to the learning of other students from Student's presence in the classroom.

Cost Of General Education Placement

32. Antioch does not have general education preschools. If Student's special education needs resulting from his mild autism and social and expressive speech disabilities can be addressed in the general education environment, then special education classes, separate schooling, or other removal of Student from the regular educational environment is not permitted, even if the cost of such placement may be greater. (Ed. Code, § 56040.1, subd. (b).)

Harmful Effects On Student If Placed In A Special Day Class

33. The offered special day class contained students with more severe disabilities than Student, many of whom were nonverbal and just developing verbal speech. All of Student's early start providers emphasized to Parents that Student required his learning opportunities to include typical peers in integrated community settings so that he may be exposed to appropriate models for behavior, and social and expressive communication in order to progress on his goals. All of the witnesses who testified at hearing agreed that Student needs to be around typically developing peers

to develop and practice his communication skills. The special day class setting would not be appropriate, in comparison to a general education preschool setting, in terms of exposing Student to models for appropriate speech and social communication.

Furthermore, Student was at an advanced academic level compared to his same aged peers. There was no persuasive evidence presented at hearing indicating any benefit to Student that would result from his removal from a general education setting to a more restrictive setting with peers who all have disabilities. The only evidence Antioch offered to support this position was the testimony of Ms. Morales and Ms. Sundet, who assumed that Student could not get special education in the general education setting, thus leaving the special day class as the best option according to them. Their testimony was given little weight for that reason.

34. The overwhelming evidence presented at hearing established that from Student's third birthday on November 23, 2017, Antioch initially failed to discuss or consider the required factors in determining the least restrictive environment to implement services to address Student's unique disability needs at any of Student's four IEP meetings. This resulted in Antioch's refusal to offer Student a less restrictive placement than the special day class for 100 percent of his day and a delay of Student's services.

35. Considering the information available to the initial October 23, 2017 IEP team; the legal requirements for least restrictive environment, including for three to five year old students; and the *Rachel H.* factors, the appropriate least restrictive placement for Student was a general education setting with resource push-in services and related services of speech and language and ABA services. Antioch denied Student a FAPE from November 23, 2017, through March 6, 2018, by failing to offer an appropriate placement that met his needs in the least restrictive environment. The evidence further established that Antioch did not remedy this problem in its March 6, 2018, IEP offer because it left

the offered placement, "to be determined." Two days later, Antioch issued a prior written notice offering to implement related services at Cornerstone, Student's private preschool, but refused to pay for the placement stating it already offered an appropriate placement which it had not. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 34 C.F.R. § 300.17.) Accordingly, Antioch continued to deny Student a FAPE by failing to offer Student a *free* placement in the least restrictive environment through the remaining time at issue, August 9, 2018.

ISSUE 3: DID ANTIOCH DENY STUDENT A FAPE FROM HIS THIRD BIRTHDAY ON NOVEMBER 23, 2017 TO AUGUST 9, 2018, BY FAILING TO OFFER A CONTINUUM OF PLACEMENT OPTIONS FOR STUDENT?

36. Parents contend that their preferred placement for Student, as consistently communicated to Antioch throughout the IEP process, was a general education preschool setting with special education supports and services. Parents assert that the only placement offered by Antioch at the IEP team meetings was the special day class and that no other reasonable, less restrictive, options were available or offered to Student. Antioch contends that initially, consideration was given to Parents' request for a general education setting but Antioch maintained that the nature and severity of Student's disability necessitated his placement in a special day class. Following Student's March 6, 2018 addendum IEP team meeting, Antioch contended that because Student's disability needs no longer required a special day class placement, and because there were no general education placements in Antioch, the only option was to push special education services into Student's Christian preschool which Antioch claims was unilaterally chosen by Parents, was the school Student would attend if Student did not have disabilities, and which Parents were thus obligated to fund.

Legal Provisions Regarding The Continuum Of Placement Options

37. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (Daniel R.R., *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

38. Student presented no legal authority requiring that Antioch offer Student a continuum of placements. Such a proposition would undermine the IDEA's specific requirement that an IEP contain a clear offer, including the location of the offered services. (20 U.S.C. § 1414(d)(1)(A)(VII).). Antioch was not required to offer Student a continuum of placements but instead to determine the least restrictive placement in light of the continuum of placements. Student's assertion that a continuum of placements was required to be offered to Student is without merit.

ISSUE 4: DID ANTIOCH DENY STUDENT A FAPE FROM HIS THIRD BIRTHDAY ON NOVEMBER 23, 2017 TO AUGUST 9, 2018, BY FAILING TO OFFER OR PROVIDE STUDENT WITH APPROPRIATE TRANSPORTATION TO AND FROM SCHOOL?

39. Parents contend that transportation was required for Student to receive a FAPE, was offered at his initial IEP, and accepted before Student's third birthday. Parents contend the responsibility to provide transportation was not relieved by Antioch's failure to offer Student appropriate services and a placement in the least restrictive environment. Antioch contends that Student was not entitled to transportation to and

from Cornerstone. Antioch also contends that Student no longer requires special education transportation; and that transportation is not required for Student to receive a FAPE.

Legal Provisions Regarding Transportation

40. School districts must provide transportation to disabled students, if: (1) the school district provides transportation to the general student population to and from school, or, (2) the IEP team determines Student requires transportation to benefit from special education. (Questions and Answers on Serving Children with Disabilities Eligible for Transportation, 53 IDELR 268 (OSERS 2009); Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46576 (Aug. 14, 2006))

41. The offer of transportation is made on a case-by-case basis. (In re: Student with a Disability (N.Y. SEA 2012) 59 IDELR 180 (SEA NY 2012) [noting a student's mobility, behavior, communication skills, physical and health needs, age, ability to function without special transportation, ability to follow directions, distance student will have to travel, the nature of the area, and the availability of private or public assistance as relevant considerations when determining the need for transportation services]; *Student v. Los Angeles Unified Sch. Dist.* (Cal. SEA 2008) 50 IDELR 114 [considering student's safety and the safety of other pupils riding on the bus in determining appropriate transportation services]; *Student v. Modesto City Elementary School Dist.* (Cal. SEA 2002) 38 IDELR 88 [finding district's offer of general education bus transportation appropriate to meet needs of a student with specific learning disability with the cognitive ability to learn and remember the bus route, speech and language skills to be understood and communicate his needs, and no physical impairments that would prevent him from traveling to the bus stop].)

42. Student's October 23, 2017 initial IEP expressly offered special education transportation. Parents accepted this offer of transportation on November 7, 2017. The

offer was made because Antioch concluded that Student needed special education transportation because Student was not attending his home school, and because his disability needs required it. Student therefore required transportation to receive a FAPE. Because Student's disability needs did not change since his initial IEP in any way that would relate to his need for transportation, Antioch's proposed removal of transportation as a related service on March 8, 2018 was inappropriate and failed to meet Student's needs.

43. The preponderance of the evidence presented at hearing established that Antioch denied Student a FAPE by failing to offer transportation services to him from his third birthday on November 23, 2017, through the 2017-2018 extended school year.

ISSUE 5: DID ANTIOCH DENY STUDENT A FAPE FROM STUDENT'S THIRD BIRTHDAY ON NOVEMBER 23, 2017 TO AUGUST 9, 2018 BY FAILING TO OFFER HIM AN EDUCATIONAL PLACEMENT AT NO COST TO PARENTS?

44. Parents assert that from Student's third birthday to March 8, 2018, Antioch offered Student a placement in the special day class at no cost to Parents. However, Parents maintain that the least restrictive placement for Student has always been a general education classroom with supports and services since his initial IEP. Parents assert that the entire special education placement, including special education services and supports and the general education setting, must be provided at no cost to Parents. Antioch asserts that it offered Student a placement at no cost to Parents from Student's initial IEP meeting in October 2017, up until the date of his addendum IEP in March 2018, which Parents declined. Antioch then asserts that, at the March 6, IEP team meeting, the IEP team determined that Student made so much progress that he no longer required a special day class, and his least restrictive environment became the general education private preschool with supports and services. Antioch contends that these services did not include a general education placement, but only the special

education services listed in the IEP, and therefore Parents must fund the cost, if any, for the general education preschool in which the services are implemented.

45. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 34 C.F.R. § 300.17.) In California, "a specific educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one or a combination of public, private, home and hospital, or residential settings." (Cal. Code Regs., tit.5, § 3042.)

46. As set forth above, if a preschool child requires special education and related services in order to receive a FAPE, school districts must offer the child an appropriate program. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56345, subd. (a)(1)(B).) If a district determines that placement in a private preschool program is necessary for a child to receive a FAPE, the district must make that program available at no cost to the parent. (Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education and Ryan B (7th Cir. 1999) 184 F. 3d 912, 917.)

47. The evidence established that, although not deemed appropriate, from November 23, 2017, through March 6, 2018, Antioch offered Student a placement at no cost to Parents. From March 6, 2018, through August 9, 2018, the evidence established that Antioch was required and failed to offer Student placement at no cost to Parent. For two days it offered placement at a location, "to be determined," and at Cornerstone thereafter but expected parents to bear the cost. This constituted a denial of FAPE.

ISSUE 6: DID ANTIOCH DENY STUDENT A FAPE FROM HIS THIRD BIRTHDAY ON NOVEMBER 23, 2018, TO MARCH 6, 2018, BY FAILING TO PROVIDE STUDENT ANY SPEECH AND LANGUAGE SERVICES?

48. The parties are in agreement that Antioch was required to provide Student with speech and language therapy from his third birthday.

Legal Provisions Relating To IEP Implementation

49. As soon as possible following the development of an IEP, special education and related services shall be made available to a student with exceptional needs in accordance with his or her individualized IEP. (Ed. Code, § 56344, subd. (b).) If a parent consents in writing to the receipt of special education and related services, but does not consent to all of the components of the IEP, those components to which a parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).)

50. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (Van Duyn v. Baker School Dist. (9th Cir. 2007) 502 F.3d 811, 815, 822 (Van Duyn).) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (Ibid.) The Van Duyn court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (Ibid.)

51. The evidence established, and Antioch does not dispute, that Antioch was required and failed to provide 30 minutes, two days a week, of speech therapy services from November 23, 2018, Student's third birthday, until March 6, 2018, pursuant to Student's October 23, 2018 IEP. Antioch did not begin to implement those services or

compensate Student for missed services until March 12, 2018. Antioch also agrees that Antioch still owes Student nine hours of compensatory speech services and agreed to so provide them. The failure to provide Student with these services denied him a FAPE because he was unable to access and receive educational benefit from the offered and agreed to speech and language services. Student's remedies will be discussed below.

ISSUE 7: DID ANTIOCH DENY STUDENT A FAPE FROM FEBRUARY 6, 2018, TO MARCH 6, 2018, BY FAILING TO INDICATE THE LOCATION OF HIS SPECIAL EDUCATION SERVICES IN HIS IEP?

52. From February 6, to March 6, 2018, Antioch offered Student placement in a special day class at Turner Elementary School. Accordingly, Student failed to establish a denial of FAPE based on Antioch's failure to identify a location for services for the time asserted.

REMEDIES

1. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia*, (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and 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.*)

2. Student prevailed on Issues 1, 2, 4, 5, in part, and 6. As a result of Antioch's failures, Student was deprived of nine hours of speech and language services; three hours, five days a week of specialized academic instruction by a special education teacher from Student's third birthday through the 2017-2018 extended school year. Had Antioch offered Student an appropriate placement from his third birthday, he would have required ABA services three hours a day, five days a week in a general education preschool classroom during the regular school year as well as extended school year, and at no cost to Parents. Lastly, Antioch was obligated to provide special education transportation for Student to access special education services to receive a FAPE.

3. Parents requested remedy includes reimbursement of all out of pocket expenses they incurred in sending Student to Cornerstone from November 2017, through August 2018, including tuition, ABA services and mileage for two round trips per day that they transported Student to and from Cornerstone. Additionally, Parents request that Antioch provide or compensate them for the mutually agreed upon amount of missed and unreimbursed speech therapy services for Student. Lastly, Parents request prospective placement at Child's Day School for the full time, five day a week program for the 2018-2019 school year as part of his compensatory services. Antioch, in its closing brief, concedes that once Student's offer of FAPE was changed to provide services in Cornerstone, Antioch was obligated to fund tuition from Student's third birthday on November 23, 2017 to the end of the regular school year on June 7, 2018. However, Antioch asserts that the tuition amount it is obligated to pay should be limited to the time needed to implement the March 6, 2018 offer of FAPE if Parents had accepted the offer. As discussed below, Parents make the more persuasive argument, with the exception of their request for the cost of prospective placement for Student as part of Student's compensatory education services and two round trip mileage reimbursements per day that they transported Student to Cornerstone.

4. To compensate Student for the remaining speech and language therapy owed for missed speech and language sessions between Student's third birthday and March 12, 2018, Antioch shall provide the remaining nine hours of compensatory group speech and language therapy for Student as already agreed to by the parties.

5. To compensate Student for Antioch's failure to offer appropriate specialized academic instruction five days a week, three hours a day, by a special education teacher, and the failure to offer placement in the least restrictive environment from November 23, 2017, through the 2017-2018 extended school year, Antioch shall reimburse Parents for all out of pocket expenses for Cornerstone tuition for Student's attendance in the two day a week program from Student's third birthday through July 31, 2018. Parent's request for additional compensatory services in the form of prospective tuition at Child Day School is rejected as unreasonable.

6. To compensate Student for Antioch's failure to provide Student with ABA services for five days a week, three hours a day, in the least restrictive environment of a general education preschool, Antioch shall reimburse Parents for all out of pocket costs for Milestone's ABA services between Student's third birthday and August 9, 2018.

7. To compensate Student for failure to provide transportation to and from Student's placement in the least restrictive environment, Antioch shall reimburse Parents for one 7.2 mile round trip, per day that he attended Cornerstone preschool between Student's third birthday and July 31, 2018.

ORDER

1. Antioch shall provide nine hours of speech and language therapy to Student at an agreeable location or shall reimburse Parents for the cost of the therapy by a nonpublic agency at \$80.00 per hour by December 31, 2018.

2. Antioch shall reimburse Parents \$4,199.32 for their out of pocket Cornerstone tuition expenses from Student's third birthday to July 31, 2018.

3. Antioch shall reimburse Parents \$1,500.00 for their out of pocket expenses for Milestone ABA services from Student's third birthday to August 9, 2018.

4. Antioch shall reimburse Parents for their mileage in transporting Student to and from Cornerstone on all days of his attendance from Student's third birthday to July 31, 2018, which is 79 days. Antioch shall pay a total mileage reimbursement to Parents of \$310.00, calculated at 79 days, 7.2 miles a day, times the federal reimbursement rate of \$.545 a mile.

5. Antioch shall reimburse Parents within 45 days of the date of this Decision. Parents are not required to submit any additional receipts prior to being reimbursed.

6. Student's other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 1, 2, 4, 5, in part, and 6. Antioch prevailed on Issue 3, 5, in part, and 7.

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: October 1, 2018

/s/

RITA DEFILIPPIS

Administrative Law Judge

Office of Administrative Hearings