

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF
PARENT ON BEHALF OF STUDENT

v.
ANTIOCH UNIFIED SCHOOL DISTRICT.
OAH CASE NUMBER 2019030244

DECISION

Antioch Unified School District, hereafter called Antioch, filed a request for due process hearing with the Office of Administrative Hearings, known as OAH, on February 20, 2019, naming Student. Parent filed a request for due process hearing on March 6, 2019, naming Antioch. OAH consolidated the cases on March 8, 2019, designating Student's case as primary. On April 19, 2019, OAH granted a continuance of the hearing dates. Antioch withdrew its case on June 21, 2019.

Administrative Law Judge Cynthia Fritz heard the matter in Antioch, California, on June 25 and 26, 2019.

Martha M. Watson, Attorney at Law, represented Student, who was not present. Student's Father attended the first hearing day and authorized Ms. Watson to proceed on the second hearing day without him. Mother did not participate in the hearing.

Sally J. Dutcher, Attorney at Law, represented Antioch. Dr. Ruth Rubalcava, Senior Director of Special Education, appeared for Antioch.

On June 26, 2019, at the parties' request, OAH continued the matter to July 15, 2019, for closing briefs. The parties filed closing briefs, the record closed, and the matter was submitted for decision on July 15, 2019.

ISSUES

1. Did Antioch deny Student a free appropriate public education, known as a

FAPE, during the 2018-2019 school year, by failing to implement his individualized education program, known as an IEP, by not providing him specialized academic instruction after November 30, 2018?

2. Did Antioch deny Student a FAPE by failing to offer him an appropriate placement at the January 9, 2019 IEP team meeting, and instead offering to place him in a transitional kindergarten class even though he will not become five years old during the 2018-2019 school year?

3. Did Antioch deny Student a FAPE during the 2018-2019 school year by failing to offer him an education at no expense to his Parents?

SUMMARY OF DECISION

This Decision finds that Antioch failed to materially implement Student's specialized academic instruction from December 8, 2018, through February 28, 2019. This failure denied Student a FAPE.

Student failed to prove by a preponderance of the evidence that the January 9, 2019 IEP offer of placement in a transitional kindergarten denied him a FAPE based on his age. Lastly, Student did not prove that Antioch failed to offer him an education at no expense to his Parents in January and February 2019.

FACTUAL FINDINGS

JURISDICTION

Student is a four-year-old boy who resided with Parents within the jurisdictional boundaries of Antioch Unified School District, hereafter called Antioch, until February 28, 2019. Parents withdrew Student from Antioch on March 1, 2019.

On October 23, 2017, Antioch found Student eligible for special education and related services under the categories of autism and speech and language impairment, and offered Student placement in a special day class with related services. Throughout

the 2017 – 2018 school year, Parents disputed Student's placement and services.

2018-2019 SCHOOL YEAR

On August 13, 2018, Parents enrolled Student in a private preschool called Child Day Schools for the 2018-2019 school year. The morning preschool program is from 8:30 a.m. to 12:00 p.m., five days a week. The full-time preschool program is in the morning and afternoon, five days per week. Student attended the full-time preschool program, four days a week. Parents paid \$1170 monthly tuition to Child Day Schools.

On September 19, 2018, Antioch convened an IEP team meeting to amend the October 23, 2017 IEP offer, hereafter called September 2018 IEP. The September 2018 IEP offered Student a private preschool placement with 60 minutes weekly of group speech and language services, 120 minutes weekly of group specialized academic instruction, and 60 minutes weekly of behavioral consultation. Student would receive all services at the private preschool. Antioch also offered to pay retroactive tuition at Child Days Schools for up to three hours a day, Monday through Friday, beginning August 13, 2018, and continuing through November 6, 2018, the date of Student's next annual IEP team meeting. All IEP services would be provided during the funded three-hour period. Parents consented to the speech and language services and all goals, but did not agree to the specialized academic instruction, behavior consultation services, or tuition funding.

On October 18, 2018, Antioch sent Parents a Prior Written Notice reiterating the September 2018 IEP offer, and identifying Child Day Schools as the designated location for all services. Parents agreed in writing to Antioch's offer as specified in its Prior Written Notice, and their correspondence was incorporated into the September 2018 IEP. Parents then consented to the September 2018 IEP on October 23, 2018. The September 2018 IEP, as consented to on October 23, 2018, is the last agreed upon IEP between the parties.

After Parents provided IEP consent, Antioch began implementing Student's services, including his specialized academic instruction, and observing him at Child Day Schools. This gave Antioch providers an opportunity to identify Student's then present levels of performance before his upcoming annual IEP team meeting.

On November 6, 2018, the annual IEP team meeting commenced. Antioch staff did not see any deficit area warranting a goal, and could not recommend goals without further assessment. Further, Antioch service providers agreed that Student displayed typically developing skills and behavior for a 4-year-old.

In light of these observations, Antioch proposed to assess Student and provided a proposed assessment plan to Parents. It also offered to continue with his placement and services, until January 31, 2019, pending completion of the assessments. Parents did not consent to this IEP offer or the proposed assessment plan at the November 6, 2018 IEP team meeting.

On November 30, 2018, Child Day Schools informed Parents that aside from the speech and language pathologists, it would no longer allow Antioch staff further entry into the school. The preschool was concerned with the number of Antioch staff on the campus which interrupted the daily routine of all students and was disruptive to Student. Child Day Schools notified Antioch of this decision on December 7, 2018. Because of the school's restriction on Antioch providers, it did not implement Student's specialized academic instruction at Child Day Schools after December 7, 2018.

On December 10, 2018, Antioch sent an IEP team meeting notice to Parents for December 20, 2018. Parents were unavailable to attend the meeting. Subsequently, the parties agreed to meet for an IEP team meeting on January 9, 2019, over one month after Antioch stopped implementing Student's specialized academic instruction.

On December 14, 2019, Parents agreed to Antioch's proposed assessment plan but did not consent to the assessments taking place at the Child Day Schools because

the school would not allow it. Parents instead requested that Antioch coordinate dates on which Parents could bring Student to Antioch for the assessments. Parents, however, did not agree to any dates proposed by Antioch.

On December 21, 2018, Antioch sent a letter to Parents proposing a new school for Student in an Antioch transitional kindergarten program, where it could implement Student's IEP services and complete his assessments. Student could begin at the transitional kindergarten beginning January 8, 2019, the first school day in January, after the Antioch winter break. Antioch failed to offer Student any other alternatives to ensure his specialized academic instruction services as stated in his agreed upon IEP were provided, except through changing schools.

Through December 2018, Antioch continued to pay the cost of Student's private school tuition for three hours a day, four days per week. Antioch stopped paying as of January 2019 because of Child Day Schools' decision to disallow its service providers and assessors access to the school.

On January 9, 2019, Antioch held an IEP team meeting. Antioch offered a public school placement in a transitional kindergarten, and also offered all of Student's last agreed upon IEP services. The transitional kindergarten program consisted of class five days a week from 8:00 a.m. to 11:20 a.m. Antioch service providers would be able to implement all of Student's IEP services, including the 120 minutes per week of specialized academic instruction, and also be able to complete the consented-to assessments. The program included four and five-year-olds. It was at no cost to Parents. Parents did not consent to a tour of the program, and to the transitional kindergarten IEP offer.

Father testified at hearing as Student's only witness. He asserted that the January 9, 2019 IEP offer was inappropriate because Student was too young to be legally admitted into the transitional kindergarten program. Student's birthday is November 23,

2014, and he will not turn five until the 2019-2020 school year. Father also believed that the transitional kindergarten curriculum was appropriate for older students and different from Student's current preschool curriculum. He raised no other concerns. Father's testimony was not persuasive because he had little understanding of Antioch's transitional kindergarten program curriculum. Further, he had no personal knowledge of the transitional kindergarten class and had never visited it.

After the January 9, 2019 IEP team meeting, Child Day Schools allowed limited access for assessments to take place at its school site, beginning the last week of January. Antioch began assessments at that time. Parents, however, revoked their consent to the assessments on February 15, 2019, and Antioch was unable to complete them. Subsequently, Parents and Student moved out of Antioch's jurisdictional area. Student withdrew from Antioch on March 1, 2019.

PARENTS' OUT-OF-POCKET EXPENSES

Student requests January and February full-time tuition at \$1170 per month for a total of \$2340. Father testified that Antioch pays \$535 a month of Child Day Schools tuition for three hours a day, four days a week, but was unsure if this amount was correct. Parents chose to have Student stay home on Wednesdays. Student failed to present any evidence to support reimbursement for his full-day, four-day a week preschool program, and no testimony was solicited regarding the necessity for Student to attend preschool for more than three hours a day.

COMPENSATORY EDUCATION

Father contends that Student missed 20 hours of specialized academic instruction from December 8, 2018, through February 28, 2019. This includes specialized academic instruction two hours a week for 10 weeks, and excluding the winter break. He requested 20 hours of compensatory education in the form of a one on one tutor, or a

one on one applied behavior analysis aide at home. Father, however, presented no evidence of group specialized academic instruction options, the costs for specialized academic instruction, or if a tutor or applied behavior analysis aide had the proper credentials to provide such services.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. Further, all references in this discussion to the Code of Federal Regulations are to the 2006 version.

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 Individuals with Disabilities Education Act is often referred to as the "IDEA." The main purposes of the IDEA are:

1. To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
2. To ensure that the rights of children with disabilities and their parents are protected.

(20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a

disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel. This statement describes the child’s needs, academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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], 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.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000; 197 L.Ed.2d 335] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that

"[t]his standard is markedly more demanding than the 'merely more than de minimis' test [¶] . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was "[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided." (*Id.* at p. 1001.) Further, the Court declined "to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in [the *Rowley*] case." (*Ibid.*) The Court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified Sch. Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 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].) Student requested the hearing in this matter, and therefore, Student had the burden of proof on the issues.

ISSUE NO. 1. ANTIOCH DENIED STUDENT A FAPE BY FAILING TO PROVIDE
SPECIALIZED ACADEMIC INSTRUCTION AFTER DECEMBER 7, 2018.

Student contends that Antioch denied him a FAPE by failing to implement the specialized academic instruction as agreed. He asserts that while Child Day Schools impeded Antioch's ability to provide the services, Parents did not. Thus, Student argues that Antioch had a continuing duty to provide the services.

Antioch concedes that it did not provide the services after December 7, 2018, but argues it was prevented from delivering the services due to the Child Day Schools' and Parents' obstructive behavior. Antioch argues Parents were complicit in the obstruction as they received notice of the school's exclusion of Antioch service providers a week before Antioch was informed. Antioch also alleges that Parents' delay in consenting to the assessment plan and revocation of consent further impeded the process. Further, Student should not receive compensation for the missed services as it offered an alternative, the Antioch transitional kindergarten program, which included the specialized academic instruction. And, the specialized academic instruction would not provide an educational benefit to Student, because it was unneeded. Thus, Student should not receive compensation for the missed services.

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. (34 C.F.R. §300.323(c)(2); Ed. Code, § 56344, subd. (b).) Once a student's IEP includes a service, system, or device, then the district is obligated to provide that component. (Ed. Code, § 56345, subd. (c).)

It is undisputed that Antioch failed to implement Student's specialized academic instruction after December 7, 2018, through February 28, 2019, in conformance with his September 2018 IEP, as agreed to on October 23, 2019. 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*)). "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*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.*)

Here, the September 2018 IEP as agreed to on October 23, 2018, is the last agreed upon IEP. The relevant portion of the IEP calls for Student to receive 120 minutes per week of group specialized academic instruction. Antioch concedes that it failed to provide 120 weekly minutes of specialized academic instruction after December 7, 2018, through February 28, 2019. This amount totals 10 weeks, excluding winter break, at two hours per week, for a total of 20 hours. As such, Antioch failed to provide Student with a total of 20 hours of specialized academic instruction.

Child Day Schools' decision to deny access to Antioch service providers is no fault of Parents. The one-week delay between the notification to Parents and Antioch is of no consequence. The delay did not change Child Day Schools' decision to refuse Antioch staff admittance, and Student received the services through December 7, 2018. Further, Parent's delay in signing the proposed assessment plan and later revoking consent is unconnected to Antioch's failure to provide the specialized academic instruction.

The lack of specialized academic instruction, however, disadvantaged Student as his IEP team determined this was a necessary service for him to receive educational benefit. Despite the private preschool's restrictions, Antioch was obligated to continue

to implement Student's IEP services until Parents consented to a new IEP or OAH rendered a decision regarding the dispute. Antioch's failure to implement Student's specialized academic instruction, was a material failure to implement his last agreed upon IEP.

Antioch's attempt to mitigate the situation by offering a new school was deficient, because it failed to offer any other alternatives for the delivery of his instructional services pending agreement on a new IEP placement or an order authorizing implementation of a new IEP. Student's placement at Child Day Schools continued, while his specialized academic instruction did not. So it was unnecessary for Antioch to offer a school change and an entire alternative program under these circumstances.

Antioch could have offered stand-alone specialized academic instruction through a non-public agency, an Antioch program, or compensatory education to implement Student's group specialized academic instruction. Student did not attend school on Wednesdays. Antioch could have offered services at that time. Instead, it's only offer was an entirely new school, when the dispute was the implementation of the specialized academic instruction, not placement. Parents rejection of this offer, as a take it or leave it scenario, is not by itself unreasonable. Parents are within their rights to reject placement offers.

Further, the issue of whether the specialized academic instruction continued to be appropriate is not at issue in this case. Antioch offered it in the last agreed upon IEP, and continued to offer the services at a subsequent IEP team meeting. Antioch could have convened an IEP team meeting and offered an alternative location, an alternate location, until the parties reached an agreement, or OAH rendered a determination on the issue. Additionally, Student need not show harm to prove a material failure to implement an IEP service. "[T]he materiality standard does not require that the child

suffer demonstrable educational harm in order to prevail.” (*Van Duyn* at 822.)

Thus, Student proved by a preponderance of the evidence that the failure of Antioch to provide specialized academic instruction after December 7, 2018, through February 28, 2019, was a material failure to implement his IEP. This constituted a FAPE denial based on the material failure to implement his IEP from December 8, 2018, through February 28, 2019.

ISSUE NO. 2: TRANSITIONAL KINDERGARTEN PROGRAM AT THE JANUARY 9, 2019, IEP TEAM MEETING.

Student contends that Antioch’s January 9, 2019 IEP offer of a transitional kindergarten is inappropriate because it violates Education Code section 48000 and is invalid as a matter of law, due to his age. Antioch disputes Student’s assertions and argues that the transitional kindergarten offer was appropriate.

IEP Purpose

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, and describes:

- the child’s needs;
- academic and functional goals related to those needs;
- the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals;
- the progress in the general education curriculum; and
- participation 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 is the “centerpiece of the [IDEA’s] education delivery system for disabled

children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (34 C.F.R. § 300.343, Ed. Code, § 56340.)

An IEP is developed by an IEP team. (20 U.S.C. § 1414(d)(1)(B); 34 C.C.R. § 300.321(a); Ed. Code, § 56341, subd. (a).) In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

Education Code Section 48000

California statutes generally require initial placement of a child in transitional kindergarten depending on the child’s age. A child is eligible for transitional kindergarten if the child will have his or her fifth birthday between September 2 and December 2. (Ed. Code, § 48000, subd. (c)(3)(A).)

However, a school district may, at any time during the school year, admit a child to the transitional kindergarten program who will have his or her fifth birthday after December 2 but during the same school year, with:

- the approval of the parent or guardian;
- if it is in the best interests of the child: and
- the parent or guardian is given information regarding the advantages and disadvantages about the effect of early admittance. (Ed. Code, § 48000, subd. (c)(B)(i).)

Additionally, a school district may place a four-year-old child enrolled in a

California state preschool program into a transitional kindergarten program. (Ed Code, § 48000, subd. (h).) A state preschool program means part-day and full-day programs for low-income or otherwise disadvantaged three- and four-year-old children. (Ed. Code, § 8208, subd. (ad).)

Here, Student does not meet the criteria under Education Code section 48000 for admission into the transitional kindergarten. Student turns 5-years-old on November 23, 2019. Further, the parties presented no evidence that Student is low-income or disadvantaged. Because he does not meet any of the transitional kindergarten admission criteria under the Education Code, Student argues that the program is inappropriate as a matter of law, and thus denied him a FAPE. Student fails to prove this.

The statutes regarding the age criteria for transitional kindergarten relate to general education students. Here, Student was determined to meet special education eligibility on October 23, 2017, and qualified continuously through the January 9, 2019, IEP team meeting. Thus, Student was not a general education Student during the applicable period and accordingly does not fall under the general education statutes related to the age requirements for transitional kindergarten.

Further, Student provided no evidence or law to support his contention that the California education statutes related to transitional kindergarten are exclusionary and supersede federal and state special education statutes. If true, these statutes alone and not Student's IEP team would determine placement. Student presented no legal authority that the general education statutes usurp Student's IEP team regarding placement decisions. Thus, Student failed to prove that his age alone made Antioch's January 9, 2018 IEP offer legally invalid.

Father asserted that the transitional kindergarten curriculum was different than the preschool curriculum and not appropriate because it was designed for older children. Father was not familiar with the transitional kindergarten curriculum and had

no basis for his opinion. To the extent he argues the transitional kindergarten curriculum was not appropriate either as a matter of law or because it did not meet Student's educational needs, neither contention was pled nor at issue in this case. Accordingly, no determination is reached herein regarding either assertion.

ISSUE NO. 3: STUDENT FAILED TO PROVE THAT ANTIOCH DENIED HIM A FAPE DURING THE 2018-2019 SCHOOL YEAR BY FAILING TO OFFER HIM AN EDUCATION AT NO EXPENSE TO HIS PARENTS?

Student asserts that Antioch failed to offer placement at no cost to Parents in January and February 2019, because Antioch failed to pay Student's tuition for school attendance full-time, four days a week, in the monthly amount of \$1170. Antioch contends that it offered Student placement at no cost to Parents because it offered the transitional kindergarten program to them.

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 determining whether a student has received a FAPE in compliance with the IDEA, the IEP is evaluated to determine whether the IEP (or lack thereof) was reasonably calculated to enable the child to receive educational benefit. (*L.J. by and through Hudson v. Pittsburg Unified School Dist.* (9th Cir., 2017) 850 F. 3d 996, 1003.)

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.)

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.)

Here, Antioch offered a private preschool to Parents in its last agreed upon IEP. It agreed to pay Child Day Schools' tuition from August 13, 2018, through November 6, 2018, for five days a week, three hours a day, which Parents agreed to on October 23, 2018. Student, however, only attended preschool four days per week, so Antioch only paid for three hours a day, four days a week that Student attended preschool. According to Father, Antioch paid \$535 a month for Student's tuition.

Antioch offered to continue placement and services through January 31, 2019, while assessments were conducted, and it continued to pay Student's November and December 2018 tuition, for three hours a day, four days a week. It stopped tuition payments in 2019 due to Child Day Schools' decision to discontinue access to Antioch staff.

On December 21, 2018, Antioch proposed the transitional kindergarten program and services to Student, beginning January 8, 2019, after its winter break, thus offering an alternative placement also at no cost to Parents. At the January 9, 2019 IEP team meeting, Antioch offered Student placement at its transitional kindergarten program, five days a week, from 8:00 a.m. through 11:20 a.m., which included implementing all previously agreed upon services there. This offer was at no cost to Parents, which they declined. Parents, however, maintain that the transitional kindergarten offer was inappropriate for Student. As stated above, Student failed to prove this based solely on the allegations adjudicated herein. Thus, the evidence established, that Antioch offered

Student a placement at no cost to Parents in January and February 2019.

While Parents assert that Antioch failed to pay January and February 2019 tuition, that is not an issue in this case. The issue before OAH is if Antioch offered Student placement at no cost to Parents, not if it failed to implement Student's IEP by failing to pay tuition. Accordingly, Student was unable to meet his burden of proof that Antioch failed to offer a placement at no cost to Parents, from January 2019 through February 2019.

Antioch makes an argument in its closing brief that it offered an appropriate placement, the transitional kindergarten program, and this cuts off its liability on Student's issues. Antioch, however, dismissed its complaint that requested a determination regarding the appropriateness of the transitional kindergarten offer. Here, the appropriateness of Antioch's January 9, 2019 IEP offer of placement as related to Student's age only is before OAH, not the legal appropriateness of the entire offer. Since no determination is made in this Decision regarding the legal compliance of the entire transitional kindergarten placement IEP offer, Antioch's argument fails.

REMEDIES

Student prevailed on issue one. As a result of Antioch's failures, Student was deprived of 20 hours of group specialized academic instruction. In Student's closing brief, he requests 10 hours of specialized academic instruction as compensatory education.

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 "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.*)

At hearing, Father requested compensatory education for specialized academic instruction either through a tutoring service or through an applied behavior analysis aide at home. Student presented no evidence regarding Student's need for either service. Nor was evidence presented of the cost for group specialized academic instruction or if a tutor or applied behavior analysis aide is qualified to give this instruction. Thus, the request for compensatory education is denied.

Parents also requested reimbursement for full-time Child Day Schools' tuition in January and February 2019, for \$2340. At no time did Antioch agree to pay Student's tuition for a full-day program at Child Day Schools, and Student offered no evidence that Student needed educational instruction longer than three hours a day, in a preschool program.

Antioch funded three hours per day, four days per week, and provided all IEP related services during the funded three hours per day. Student failed to establish and presented no evidence that more time was necessary for Antioch to meet Student's unique needs and for him to gain educational benefit. Thus, Parents' request for reimbursement for the full-time tuition is denied.

Student did not establish that the type of compensatory education sought was appropriate. The undersigned ALJ carefully considered all available remedies to compensate for Student's lost educational services. Relying on the ALJ's ability to craft equitable remedies, it is determined Student is entitled to reimbursement. To

compensate Student for the 20 hours of group specialized academic instruction lost after December 7, 2019, through February 28, 2019, Antioch shall reimburse Parents \$1070. This amount represents two months, January and February 2019, at \$535, of Child Day Schools' tuition. All other requests were carefully considered and rejected.

ORDER

1. Antioch shall reimburse Parents \$1070 for out-of-pocket expenses for Child Day Schools' tuition.
2. Antioch shall reimburse Parents within 45 days of the date of this Decision. Parent are not required to submit any additional receipts before being reimbursed.
3. 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. Student prevailed on issue one. Antioch prevailed on issue two and issue three.

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: August 12, 2019

/s/

CYNTHIA FRITZ

Administrative Law Judge

Office of Administrative Hearings