

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 2019030818

DECISION

Parent, on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, often referred to as OAH, on March 20, 2019, naming Antioch Unified School District as respondent. OAH continued the matter for good cause on May 2, 2019.

Administrative Law Judge Penelope Pahl heard this matter in Antioch, California, on May 21, 22, 23, 28, 29 and 30, 2019.

Attorney Jamie Yust represented Student. Student's Mother attended the hearing each day on behalf of Student. Student did not attend the hearing. Attorney Kidd Crawford represented Antioch Unified School District. Dr. Ruth Rubalcava, Antioch's Special Education Director, attended the hearing each day on behalf of Antioch Unified School District.

At the request of the parties, OAH granted a continuance to June 24, 2019 at 3:00 PM to file written closing briefs. Antioch filed a timely written closing brief. On June 24, 2019, Student requested and was granted an extension of time to file his brief. Antioch did not object to the extension. Student filed his closing brief by the new deadline of noon on June 25, 2019. On June 25, 2019, the record was closed and the matter was submitted for decision.

## ISSUES

1. Did Antioch deny Student a free appropriate public education, also known as a FAPE, from March 20, 2017 to March 20, 2019, by:

- a) failing to assess him in all areas of suspected disability, namely:
  - 1) hearing and vision;
  - 2) psychoeducational status;
  - 3) neuropsychological status;
  - 4) speech and language;
  - 5) intellectual functioning;
  - 6) cognitive processing (including visual processing, visual motor integration, auditory processing and working memory);
  - 7) academic achievement;
  - 8) functional behavior;
  - 9) social-emotional status;
  - 10) mental health;
  - 11) occupational therapy; and
  - 12) health;
- b) failing to provide Parent prior written notice of the reasons why the above assessments were not conducted; and
- c) failing to respond to Parent's request for an independent educational assessment?

2. Did Antioch deny Student a FAPE from March 20, 2017 to March 20, 2019, by failing adequately to address Student's:

- a) dyslexia, and his need for a goal concerning dyslexia;
- b) behavioral needs;
- c) social-emotional functioning, social skills and pragmatic language; and

d) inability to achieve annual goals and need for revised goals in light of his academic failures?

3. Did Antioch deny Student a FAPE from March 20, 2017 to March 20, 2019, by:

a) providing an individualized education program, or IEP, amendment from the August 25, 2017 IEP team meeting that could not be read or understood;

b) failing to have required personnel at the August 25, 2017 IEP team meeting; and

c) failing until November 13, 2018, to classify Student as having a secondary disability of specific learning disability?

4. Did Antioch deny Student a FAPE from March 20, 2017 to the filing of the complaint by failing to provide Parent material information required by the IDEA to be provided and necessary to her informed consent to IEP's; namely, sufficient information from appropriate assessments to allow her to participate meaningfully in the IEP process?

## SUMMARY OF DECISION

This Decision holds that Student proved that Antioch failed to provide a speech and language assessment it promised in the September 25, 2018 assessment plan. It also holds that Antioch should have deemed a functional behavior assessment warranted as of the March 16, 2018 when it became clear to Antioch that other approaches to Student's school avoidance issues were not working. The decision holds that a mental health assessment was warranted as of November 13, 2018, following receipt of the information regarding Student's mental health revealed by Antioch's psychoeducational assessment.

This decision also holds that Antioch should have conducted an occupational therapy assessment when, during the September 26, 2017 IEP team meeting, at which

time the team had information that Student was demonstrating sensory needs. Antioch has already provided an occupational therapy assessment; and no additional remedy was proven; therefore, no additional assessment in the area of occupational therapy is required. Student failed to prove that Antioch was obligated to provide any other assessment.

Student failed to prove that Antioch was obligated to provide a prior written notice regarding any assessment. Neither did evidence establish that Antioch failed to provide an independent educational evaluation requested by Mother.

Student proved that Antioch failed to adequately address Student's behavior needs beginning March 16, 2018 to March 20, 2019 when it decided to reduce Student's school day rather than explore an assessment to find successful means of addressing Student's school avoidance. Student proved that Student missed school during that period resulting in missed instruction, particularly in reading resulting in a denial of FAPE.

Student failed to prove that Antioch denied Student a free, appropriate public education by failing to adequately address Student's dyslexia; his social emotional, social skills or pragmatic language needs; or his inability to achieve goals. Student did not prove that Student needed goals that were not offered in light of his academic performance.

Student failed to prove that the August 25, 2017 IEP amendment was unclear or that Antioch failed to convene an IEP team meeting with all necessary parties on August 25, 2017. Student did not produce evidence establishing that he was denied a FAPE due to the fact that the secondary eligibility category of specific learning disability was not added to his IEP until November 13, 2018.

Student did not provide legal authority for the proposition that Mother was denied the opportunity to participate meaningfully in IEP team meetings, due to a

failure to provide assessment reports to Mother. This allegation was duplicative of Student's assertions that Antioch failed to provide FAPE by failing to assess student which denied Mother meaningful participation in the IEP process. No separate denial of FAPE was proven.

Student is entitled to independent educational evaluations in the areas of speech and language, behavior and mental health. The behavior assessment is to be conducted by a Board Certified Behavior Analyst and shall include elements of a functional behavior assessment at the assessor's discretion. The mental health assessment will evaluate Student's mental health, its impact, if any, on his ability to access his education and services necessary to address any educationally related mental health impact identified. Additionally, Antioch is ordered to fund the assessors chosen by Mother to attend the IEP team meeting to explain their findings and recommendations so that Mother is able to ask questions. This remedy will address both the failure to assess Student and the failure to provide meaningful participation in the IEP development process by Mother.

Student is awarded 120 hours of compensatory education as an equitable remedy for failing to address his behavior needs from March 16, 2018 to March 20, 2019.

## FACTUAL FINDINGS

### BACKGROUND

Student was 11 years old at the time of the hearing, resided with Mother within Antioch Unified School District boundaries, and was eligible for special education under the primary category of Emotional Disturbance at all times relevant to this decision.

### ASSESSMENTS PRIOR TO ATTENDANCE IN ANTIOCH

Triennial assessments of Student's special education needs were conducted by Pittsburgh Unified School District in 2015, the district in which Student attended school prior to moving to Antioch.

## Independent Psychoeducational Assessment by Lisa Pippin L.E.A.

Pittsburgh provided an independent educational evaluation, at Mother's request, which was conducted by Lisa Pippin, Licensed Educational Psychologist, in February 2016. The primary purpose of the assessment was to evaluate concerns with self-regulation, aggression and difficulties with academics, particularly reading; and to assess whether, in Ms. Pippin's opinion, special education eligibility under the categories of emotional disturbance and/or specific learning disability should be recommended.

Ms. Pippin's February 21, 2016 psychoeducational assessment was based on a record review, observation, and several interviews of Student's therapists, Mother, Teacher, and Student himself. Ms. Pippin also administered testing batteries to evaluate memory and learning ability, language processing, executive function, social-emotional function and behavior. She found that his learning profile was complicated by his competing behavioral and academic needs as well as medical diagnoses.

Student has lived through a series of devastating traumas over the course of his lifetime including multiple experiences of homelessness, domestic violence, and an incarcerated parent. Student has been diagnosed with attention deficit, hyperactivity-combined type; post-traumatic stress disorder, oppositional defiance disorder and disruptive mood dysregulation disorder. Ms. Pippin concluded that Student's difficulties managing his emotions were not purely environmental. She believed they were related to his medical diagnoses of Disruptive Mood Dysregulation Disorder and to a lesser extent, Attention Deficit Hyperactivity Disorder, combined type.

According to Ms. Pippin's report, the Diagnostic and Statistical Manual, fifth edition, describes disruptive mood dysregulation disorder as resulting in:

"chronic, severe irritability associated with marked disruption in a child's family and peer relationships as well as in school performance. Children with this disorder have extremely low

frustration tolerance and generally have difficulty succeeding in school. They are often unable to participate in the activities enjoyed by age-related peers. Their family lives are severely disrupted by their outbursts and irritability and they have trouble initiating and sustaining friendships. Similar to pediatric bipolar disorder, the presence of dangerous behavior, suicidal ideation or attempts or severe aggression and psychiatric hospitalization are common. Far beyond temper tantrums, disruptive mood dysregulation disorder is characterized by severe and recurrent temper outbursts that are grossly out of proportion in intensity or duration to the situation.”

Student has a history of aggressive and impulsive behaviors both at school and in the home environment. Student was first denied special education eligibility because his conduct was attributed to social maladjustment as opposed to emotional disturbance. He was then made eligible under the category of emotional disturbance in Kindergarten and placed in a counseling enriched classroom. However, extreme behaviors resulted in suspensions and ultimately a shortened day in first grade when Student’s conduct included urinating on staff; eloping from the campus; assaulting staff (punching them in the face or throwing things); or exposing himself. Ms. Pippin noted that the concerns had previously been addressed using breaks; sensory breaks; short work periods; use of manipulatives; tangible incentives, including preferred foods; first, then scheduling; and coaching, check-ins, and reflecting with an adult. Ms. Pippin found that all of these interventions resulted in a positive response from Student.

As of Ms. Pippin’s observation in February 2016, Student was exhibiting extreme behaviors with no apparent antecedent. Ms. Pippin recommended a functional

behavioral assessment as a prelude to the development of a behavior intervention plan.

### Functional Behavior Assessment by Eva Portley Dangerfield

Eva Portley Dangerfield, a behavior intervention specialist with Seneca Agencies, conducted a functional behavioral assessment of Student and issued her report on September 29, 2016. After observing Student Ms. Dangerfield identified four target behaviors, specifically, non-compliance, disruptive behavior, elopement, and aggression. She found that these target behaviors were all triggered by being asked to comply with instructions, or a limit previously set, especially if instructed by a female staff member. Additional triggers included being asked to complete an academic task; inability to perform an academic task; denial of access to preferred items, activities or areas; transitions; an environment that is too loud; when he feels attention is called to his behavior or academic performance in front of peers; or when seeking social contact in front of others. Ms. Dangerfield determined that his need for a behavior intervention plan fell in the "serious" range, the second most urgent category of the four options available.

Ms. Portley Dangerfield prepared a behavior intervention plan on September 29, 2016, recommending

- Academic modifications including individual instructions; simplified problems; covering all items on a page except the current problem; use of a larger font; less words and numbers on a page; and use of an individual white board for practicing math, reading sight words and writing; as well as use of flashcards matching and word-association with items in the environment.
- Environmental modifications including options of work locations and choices of 3-5 math problems at a time.
- Functional communication prompting for use of phrases like, "I'm stuck," "this is hard," or "I don't understand."

- Creation of a “do later” folder for work from which he needed a break, accompanied by choices of how much work he completed during a specific amount of time while using praise for approximations, attempts and successful transitions to other tasks.
- Use of a token or point system whereby Student could access rewards such as breaks, accompanied by praise for proper transitions.
- “First, Then” scheduling with a visual board showing non-preferred tasks to be followed by preferred structured activities.
- Use of a visual schedule that allowed him to cross off items completed, combined with the use of an auditory or visual timer, like an hourglass.
- Structured breaks built into Student’s schedule to allow movement or sensory activities.
- Use of hands-on learning opportunities that included technology and kinesthetic forms of learning throughout the day.
- Use of non-contingent reinforcement including direct praise for all appropriate behavior and talents displayed beginning with frequent reinforcement that fades over time. This was particularly intended to address appropriate use of language, social interactions, breaks and attaining attention in appropriate ways.
- Encouraged use of an emotional rating scale using characters from the film “Inside Out” or other familiar characters that allowed Student to identify and rate the intensity of his feelings.
- Strategies to address different emotional challenges, such as counting to 10, taking deep breaths or practicing mindfulness.
- Identification of appropriate replacement methods to deal with the feeling of a need to escape, protest or express anger.

- A check-in, check-out system with a consistent staff member, and Parent when possible, providing tokens or points for success, with a review of successes.
- Social skills development starting by having Student identify one or two peers that he could develop positive interactions with, and helping Student identify common interests and opportunities to interact.
- Teaching Student social story development to help him draw, dictate or write a story to support him in areas that challenge him.
- Communication with Parent via a communication log emphasizing Student's accomplishments.

The behavior intervention plan was incorporated into Student's IEP from Pittsburg.

#### PLACEMENT AT CATALYST ACADEMY

Pittsburg Unified School District placed Student at Catalyst Academy, a non-public school in El Sobrante, which is focused on helping students with significant behavior challenges. Mother testified that she liked Catalyst Academy and thought Student was doing very well there. She particularly liked the school environment, as it was housed in an old school building with nice grounds and a separate science room.

When Student began the summer extended school year program at Catalyst, he had a very limited attention span and was able to attend to a lesson for only 5-10 minutes. He would get up and leave a lesson early every day. However, by December his teacher was able to encourage him to work for 15 to 20 minutes at a time.

Student was quite far behind in reading skills when he started at Catalyst. He was unable to decode words and knew approximately five sight words. He loved the math and science room, which had a turtle that he was very fond of, and being outdoors.

Catalyst taught their students in small groups using a system in which students

rotated from working with the teacher, teacher's aides, on the computer and at their desk. This system allowed the teacher to work with two-three students at a time on reading, writing and math. Rotations lasted 10-15 minutes depending on the activity. Catalyst used a point and level system for positive behavior reinforcement. A point sheet was maintained to record each student's achievements, cooperation and positive interactions with peers and staff during the day, as well as the points they earned for good conduct and completing academic work. Earning enough points would allow a student to advance to a higher level of standing in the class. Student generally responded positively to the rewards and incentives utilized to encourage on-task behavior; however, he did have some serious behavior incidents. The behavior intervention plan developed by Ms. Portley Dangerfield was implemented beginning in late September 2016.

Student's attendance was quite bad at the beginning of his time at Catalyst and, combined with a lot of running away from class, or "elopement" as they called it, resulted in missed instruction. Student's attendance improved for a time, and he was in class four days in a week. However, towards the end of his enrollment, Student attended only two to three times per week. Student had behavior issues on the long bus ride to and from El Sobrante which also discouraged him from wanting to attend school.

During his time at Catalyst, Student demonstrated many serious maladaptive behaviors. In addition to the elopement, Catalyst incident reports established that Student assaulted staff and peers by punching, spitting, and once using a chain. A behavior intervention plan had been put in place on September 29, 2016. However, Student only had the benefit of the behavior plan for about 3 months before he moved to Antioch.

#### STUDENT'S MOVE TO ANTIOCH

Mother relocated, so she enrolled Student in Antioch on January 10, 2017, at the

beginning of the second semester of his third grade year. This case alleges issues during the time period of March 20, 2017 to March 20, 2019.

## PLACEMENTS IN ANTIOCH UNIFIED SCHOOL DISTRICT

### Sierra Schools of Antioch-Kimball

When Student moved to the Antioch district, he was initially placed at Sierra Schools of Antioch's Kimball campus, which was near Student's residence. Sierra Schools of Antioch has different sites including one at the Kimball Elementary School campus and one at the Diablo Vista Elementary School campus. Sierra Schools are state-certified, non-public schools, that focus on providing an educational environment with intensive behavioral support.

### March 9, 2017 IEP Team Meeting

An IEP team meeting to review Student's progress in his new school was held on March 9, 2017. During the meeting, Student's January 27, 2016 IEP was amended; however, the IEP continued the same goals which were:

- A social emotional/behavior goal stating that Student would identify and appropriately express his anger and ask to take a break (outdoors or drawing) in the school setting 70 percent of the time as measured by teacher observations and data collection.
- A social emotional/behavior goal stating that Student would develop and utilize self-regulation skills to remain physically and emotionally regulated 50 percent of his school day as measured by school staff observation and report.
- A social emotional/behavior goal stating that Student would utilize pro-social skills, including full body listening and effective communication skills such as speaking with appropriate responses and phrases to decrease engagement in the inappropriate behaviors and increase healthy connections with others in

- the classroom and general milieu in 6 out of 10 periods per day.
- A decoding goal stating that Student would decode multi-syllable words as measured with 80 percent accuracy in 4 out of 5 trials by Student work samples/teacher charted records.
  - A writing goal stating that Student would introduce the topic or text they are writing about, state an opinion and create an organizational structure that lists 3 reasons as measured by Student work samples/teacher charted records on 4 of 5 trials with 80 percent accuracy.
  - A mathematics goal stating that Student would be able to use place value understanding to round whole numbers to the nearest 10 or 100, given three prompts, with at least 80 percent accuracy in 4 of 5 trials as measured by student work samples and teacher records.
  - A social emotional/behavior goal stating that Student would respect the belongings of others when prompted, as a means to manage impulses, 5 out of 10 opportunities per day.

Student had made little progress on any of the September 26, 2017 IEP goals by the time of the March 9, 2017 IEP. However, as of March 9, 2017, Student had not been observed failing to respect others' property. Student had made some progress in using pro-social skills to demonstrate attention to classmates which he did about 10 percent of the time; and he was successful at self-regulation in 1 of 10 opportunities.

Antioch's March 9, 2017 IEP amendment provided a full day of specialized academic instruction at a local non-public day school as well as 30 minutes of group and 30 minutes of individual counseling weekly. Student was also offered extended school year services for summer school, also at a local non-public day school with individual and group counseling for 30 minutes each weekly.

Student finished his third grade year and attended extended school year at

Kimball. Mother had some difficulty getting Student to school and Student exhibited work avoidance, eloping, and aggression. Mother stated that he was not as difficult to get to school during the summer school program; but Student informed her they were not required to work in the summer program.

#### Mother's Request for a Different Placement

Mother was not pleased with the environment of the Kimball campus. She disliked the fact that there was airport-type security in place to enter. She felt it made the school feel like juvenile detention. She also thought the student population as a whole was rough and aggressive. She worried about Student. Mother believed Student continued to have the same behavior problems as in his prior district.

#### August 25, 2017 IEP Amendment

Due to Mother's negative impression of the Kimball campus, Mother called Antioch special education program specialist Christie DeBerardino on August 25, 2017, to request that Student be moved to a different location. During the telephone conference, it was agreed that Student would be moved to the Sierra Diablo Vista campus despite concerns with the length of travel necessary to get there. Mother agreed to provide transportation to the new location pending the completion of arrangements for Student to ride the bus.

Following the telephone conversation, Mother was sent documents to sign via mail consenting to the IEP amendment as well as a team member excusal form. When Ms. DeBerardino prepared, signed and dated the forms she erroneously dated her signature "8-25-18". The form excusing all other members from an August 25, 2017 IEP team meeting, referencing the August 25, 2017 IEP Amendment, shows Mother's signature with a date of "8-25-18." Mother copied Ms. DeBerardino's erroneous date when she executed the excusal form. She did not make that mistake on the amendment

form.

Much emphasis was placed on the mismatched dates during hearing. However, the preponderance of the evidence establishes that it was a simple error. There was no evidence that the date error caused Mother any confusion about the amendment.

#### Student's Move to Sierra Schools Diablo Vista

Student began attending Sierra Schools of Antioch Diablo Vista in August of 2018 for the 2018-2019 school year. Diablo Vista was further from Student's home than Kimball. The bus ride to school took more than an hour each way because many students were picked up on Student's route to and from school. Student frequently missed the bus due to his desire to avoid attending school. When that happened, Mother sometimes drove him.

Student's fourth grade teacher was TraReese Walker. School started at 8:00 AM and ended at 2:30 PM. The class had a combination of first through fifth grade students. Most students were at the first grade level academically with only a few exceptions. The day started with an English Language Arts rotation from 8:15 to 9:35 AM. Student usually missed this class because he arrived after 10:00 AM most days. Ms. Walker modified Student's schedule to provide his reading instruction when he arrived in the morning; however, sometimes that resulted in Student missing recess.

Ms. Walker taught using small group rotations, supported by her teaching assistants. The class was divided into small groups of two to three students per group. One group would meet with Ms. Walker to receive instruction while another group worked with a teaching assistant receiving supplemental instruction on the topic. At the same time, a third group worked at their desk doing worksheets, and another worked at the computers. All of the work was similar and reinforced the lesson. This rotation system was used for English language arts and math. Ms. Walker also taught social studies, world readiness, and science to the whole class at once. Students also had

physical education.

All of the Sierra campuses employed the same method of addressing the need for behavior modification, that is, use of a color-coded level and reward system. The system applied to Student was modified to make additional incentives available to Student for attendance and to allow for shortened work periods prior to earning a preferred activity break.

Student's assertion in her closing brief that Ms. Walker was not qualified to teach Student was not an issue pled in the complaint. This issue will not be addressed in this decision.

#### The Sierra Schools Color-Coded Behavior Incentive System

The Sierra schools work with children with significant behavior control needs. Each of the sites use the same approach in working to change a child's behavior in challenging situations. A color-coded level and point system, which they call the "level system" provides children with incentives to stay on task, conduct themselves appropriately in the classroom and interact positively with peers and school staff. Children can earn a variety of rewards by earning enough points, as well as move to a higher color level. Children earn treats, toys, extra time for preferred activities and other rewards for moving to a higher color level. Ultimately, the ability to maintain a high enough level is an indication that the student is ready to be transferred out of the Sierra schools program and would result in the consideration of a new placement by a child's IEP team. Each child's level is visible in the classroom so that peers are aware of where each student stands.

The color levels are, from low to high, red, yellow, green, blue and gold. Students start on green when they enter the class. Students were allocated points for appropriate behaviors such as following directions, remaining on task, staying in their assigned area and showing respect to others. Students earned different numbers of points for

behavior and for academic work to meet the requirement to advance in the color system. The system used was essentially the same system used by Catalyst Academy.

The number of points required to advance increased as the student advanced through the color levels; as the expectations regarding their conduct, and thus the points they need to earn, increased. For instance, a student needed 18 points to move up in red, 19 in yellow and 26 in blue. After 45 days on blue level, students advanced to the gold level. Teachers kept individual point sheets for each student on which seven student behaviors were tracked in 15-20 minute intervals throughout the day. Each day Students also set a personal goal. Teachers also tracked any time out of class and recorded bonus points students earned on these sheets. The sheet included a space for the teacher to log students' schoolwork accomplishments throughout the day. These sheets were also used as a basis for tracking attendance.

Generally, students had to achieve the required points three days in a row to move up a color level. Students earned 2 points for each interval. If students were not following directions, they got three warnings. After 2 warnings, the student received a minus. After 2 minuses, Students dropped a point. This system was nearly identical to the system used when Student attended Catalyst.

There were exceptions to the rules about how points could be earned and teachers also had discretion to move a student more quickly. For instance, if a student was on red but made blue level points, the student could skip a day of required red level. Teachers also had discretion to "level up" a student based on their conduct and work, so a student could advance from red, day three, to yellow, day three, with only a single day's worth of points. Teachers also randomly held "level sales" where earning a single day's worth of points advanced students to the next color. These occurred every couple of months.

Student's point requirements were modified because he often arrived to school

around 10:30 AM. Ultimately, he was put on a half-day schedule and allocated a 10-point goal for red, 12 for yellow, 14 for green and 20 for blue.

Students were chosen to be Student of the Week, which was class specific, and resulted in a treat from the teacher; or Student of the Month, which was a school-wide honor, entitling the chosen student to special treats and special places to sit. This recognition was generally reserved for students on blue level.

Student was most often on "red" level due to his struggles to regulate his emotions. However, at least once, in January of 2019, he made it to blue and was chosen for recognition. Testimony was unclear as to whether he was designated Student of the Week or Student of the Month. Testimony was also unclear as to how long Student was recognized. He later assaulted a peer and was dropped from blue to red because of the incident. Student was extremely disappointed when his recognition period ended and his attendance was negatively affected by his disappointment.

Conflicting evidence was presented regarding how the incentive and level system affected Student. Mother was adamant that incentives did not work for Student. Mother stated that Student was crushed when he was no longer the recognized student. He refused to continue to go to school. However, Mother acknowledged using incentives at home to encourage Student to conduct himself properly. Student did modify his behavior at times to earn offered rewards.

Student's therapist, David Jaskolski, also stated that Student responded to incentives, as did Kimberly Rodgers, the family partner assigned to assist the family by Contra Costa County. Ms. Rodgers acknowledged that Mother regularly talked about the need to use rewards and incentives to get Student to attend school and to encourage other positive behaviors. As a result, Ms. Rodgers instituted a number of incentives with Student. The most effective was one-to-one attention from her or from his Mother. Mother acknowledged that Student's favorite incentive was her attention.

Mother acknowledged that Student was proud of achieving the higher color levels when that occurred. However, several witnesses confirmed that Student was usually on red level.

#### SEPTEMBER 26, 2017 IEP TEAM MEETING

Shortly after Student started 4th grade at Diablo Vista, on September 26, 2017, Student's annual IEP team meeting was convened. Student's goal progress was reviewed and new goals were developed.

#### Goal Progress

In the eight months Student had been attending Sierra Schools of Antioch he made some progress on his previous year's goals. He was able to ask to take a break when feeling angry approximately 50 percent of the time he was in school. He could self-regulate and remain physically and emotionally regulated approximately 30 percent of the time. Student was able to respect the belongings of others in approximately 60 percent of opportunities. However, Student did not meet his goal to use pro-social skills for communication. The progress note stated Student was having difficulty meeting this goal due to his poor attendance.

Student did not make progress on his decoding goal. Instead of working towards listing three reasons supporting an opinion about a topic or text they were working on in class, he was working on independently writing a sentence. He did meet his math goal of using place value understanding to round numbers with 80 percent accuracy.

#### New Goals

Student's new goals were:

- A behavior goal stating that, by September 2018, Student would identify and appropriately express his anger and ask to take a break (outdoors or drawing)

in the school setting 80 percent of the time as measured by teacher observation and data collection.

- A reading goal stating that, by September 2018, Student would recognize and read 50 priority sight words as measured with 80 percent accuracy in 4 of 5 trials by student work samples and teacher charted records. Priority sight words were defined as the first 50 to 92 sight words required to fluently read text.
- A writing goal stating that, by September 2018, Student would, when given a writing prompt at his instructional level, be able to write a 1 to 2 sentence paragraph with 80 percent accuracy in 4 of 5 trials as measured by student work samples.
- A mathematics goal stating that, by September 2018, Student would add and subtract within 1000 using concrete models or drawings and strategies based on place value, properties of operations and/or the relationship between addition and subtraction and relate the strategy to a written method with at least 80 percent accuracy in 4 of 5 trials as measured by student work samples or teacher records.
- A behavior goal stating that, by September 2018, Student would, when given an academic task, demonstrate the ability to stay on task for 20 minutes and complete the task with 80 percent accuracy in 4 of 5 trials.
- A pro-social skills in group goal stating that, by September 2018, Student would ask peers in a social activity to join him appropriately by asking the peer to come and play with him or asking his peer if he could join the peer on 4 of 5 occasions with two or fewer adult prompts.

#### Changing Student's Goal from Decoding to Sight Words

Andrea Nunn was Student's third grade teacher. By May of 2019, when she

testified at hearing, her name had changed to Ms. Pons. As Ms. Nunn is the name shown in Student's records, we will refer to her as Ms. Nunn throughout this decision. Ms. Nunn recommended that a new reading goal focused on sight word recognition be included in the September 26, 2017 IEP, despite the fact that Student had not met the decoding goal. The team agreed Student's instruction needed a new approach and decided that placing emphasis on mastering more sight words would result in reading itself being less of a struggle for Student. Student's goal was amended to emphasize sight word recognition.

#### Antioch's 2017 Occupational Therapy Assessment Offer

During the September 26, 2017 IEP, Ms. Nunn informed the IEP team that Student tended to chew on his shirt. Mother was offered an occupational therapy assessment at to determine if Student had sensory needs. The IEP notes stated that Mother declined it. Mother disputed that at hearing. However, Mother's recollections were not deemed reliable due to her spotty memory throughout her testimony and her tendency to lack recollection only of details that were contrary to her position in the hearing. After Mother declined the assessment, the IEP team offered "chewys" and a sensory cushion to meet Student's sensory needs which Mother stated had been helpful to him in the past. The evidence established that Student received these supports. No evidence was presented that Mother was ever presented with an assessment plan describing the assessment proposed and seeking her consent or that Antioch ever pursued the assessment by any other means, such as filing for a due process to seek permission to assess.

#### Student's School Attendance Difficulties

Student had a history of poor school attendance and behavior problems on school buses in his prior district and he continued to have bus issues in Antioch.

Discipline for bad behavior and negative interactions with peers on the bus combined with the long ride discouraged Student from wanting to attend school. While enrolled in the Sierra Schools, Student also often arrived at school very late because he either missed the bus or refused to get on the bus. It was not uncommon for Student to arrive to school after 10:00 AM, which resulted in missed reading and writing instruction and often missed counseling sessions as well. Student's absences did not follow a pattern.

Mother did her best to get Student to go to school but Student is big for his age. At the time of the hearing he was described as a 170 pound, fifth grader. Mother was not a large woman. She described frequent instances of Student curling up in a ball on the floor and refusing to move. Student had several notices of bad behavior on the bus.

Beginning in December 2017, Mother had in-home assistance from Contra Costa County which assigned Mother a "Family Partner," Kimberly Rodgers. Mother was referred to Ms. Rodgers by Contra Costa County Children's Mental Health Clinical Specialist, David Jaskolski who worked with the family since 2013. Ms. Rodgers provided family services that included linking the family to needed assistance and providing support when requested by Mother. No evidence was presented as to why Ms. Rodgers was initially assigned to assist the family. Student's school attendance became an issue a few months after Ms. Rodgers started working with the family.

Ms. Rodgers came into the home several times to try to help get Student to school, but she did not recall specifically when or how often. She attempted to work with Student to improve his attendance. To do that, she suggested alternative strategies over several months, including getting him up earlier so he would not feel rushed or pressured, and getting him up later so he had more sleep. She purchased a new backpack and school supplies for him as incentives.

She had witnessed him curling up into a ball and refusing to attend school. She had overheard physical altercations when she was speaking to Mother on the telephone

trying to help her through difficult mornings.

Mr. Jaskolski was also concerned about Student's attendance. He recalled recommending that Mother play with Student prior to the time he needed to leave for school. However, this advice resulted in Student being less willing to go to school as Student was required to transition from having his Mother's attention to the less preferred activity of going to school which he often refused to do.

Mr. Jaskolski recalled attending IEP team meetings and asking for additional help getting Student to school. He also recalled having conversations with Student about school. However, he could not recall any specifics about his conversations with anyone. Overall, Mr. Jaskolski's recollections of his interactions with Student and with the Antioch IEP team were vague. His testimony was given less weight because he was not sure who he spoke with, when conversations occurred or the details of what was discussed. However, the fact that he worked with Mother and the IEP team to encourage Student's school attendance was deemed credible.

#### Antioch's Knowledge of Attendance Issues

Mother reported some of her struggles getting Student to school to Antioch. Mr. Jaskolski and Ms. Rodgers also attended IEP team meetings to support Mother in seeking assistance from the district regarding Student's attendance. Antioch tried many approaches to meet Student's needs on the bus. He was encouraged to choose a different seat or speak to one of the aides on the bus if another Student was bothering him. The transport company representative told the IEP team it was open to considering any suggestions to resolve bus behavioral issues. Additional incentives were put in place at school that were based solely on successfully arriving for school and for good behavior on the bus.

When Mother decided to try to drive him, Antioch offered to pay her for mileage. However, Student was difficult to control, and when Mother tried to force him to go to

school, he could be violent. Mother testified that, on one occasion, Student kicked the windshield out of the car, however, no evidence of when this occurred was presented at hearing. Student also grabbed at Mother and sometimes hit her while she was driving. On at least one occasion, Mother estimated in January or February of 2019, Mother had to call the Contra Costa County Mobile Response team to deescalate Student because he was angry about having to go to school. Student presented no evidence that the incidents involving kicking the windshield out of the car or having to call for emergency assistance related to school attendance were communicated to Antioch. However, Antioch was aware of the frequency of Student's absences resulting in missed instruction.

During the IEP team meeting of March 16, 2018, Student was offered a shortened day so the bus ride would be shorted. None of the alternatives tried resulted in Student's attendance improving. No member of the IEP team ever proposed assessment of Student's behavior issues as an avenue towards understanding why he was so negative about school, despite the team's acknowledgment that Student's attendance was impacting his ability to access his education.

#### Sierra Schools Attendance Records

Attendance records indicate that Student had 44 days of unexcused absences during the 2017-2018 school year, his 4th grade year at Diablo Vista. In addition to the absences, Student was more than 45 minutes tardy on 11 days and was often well over an hour late. The school day started at 8:00 AM and ended at 2:30 PM.

Student was absent 56 days in the 2018-2019 school year, his fifth grade year, through March 20, 2019, the period applicable to this case. Additionally, in that timeframe he was more than an hour late on five occasions. It is notable that Student was absent every day but two from January 22, 2019, to February 15, 2019; and every day but two from February 25, 2019 to March 20, 2019.

Sierra's attendance records were not 100 percent accurate. Student established four dates on which Student's attendance was incorrectly marked in the records: one day when Student was marked as present when he had not yet started at Diablo Vista and two other days that he was marked as absent when he was actually only tardy. On another date, Student was marked tardy when his schedule had been changed to allow for the shortened bus trip. However, all witnesses testified to difficulties caused by Student's regular lack of attendance at school, including Mother. Antioch witnesses, as well as Student's therapist, described Student's lack of attendance as one of the primary impediments to Student's ability to make academic progress.

## ASSESSMENTS CONDUCTED BY ANTIOCH

### Assessment Plans

Antioch prepared an assessment plan for triennial assessments in the areas of academic performance, health, social emotional/behavior and adaptive behavior. Mother consented to these assessments on August 27, 2018. Mother requested additional assessments in a note to Antioch on September 6, 2018. On September 7, 2018 a second assessment plan was issued for assessments in the areas of speech and language, occupational therapy and assistive technology. Mother consented to this plan on September 25, 2018.

### Hearing and Vision

Neither the August 27, 2018, nor the September 25, 2018 assessment plans signed by Mother specifically included vision or hearing assessments. Student presented no evidence that an assessment of Student's hearing or vision was requested at any time and not included in an assessment plan. Nor was evidence submitted establishing that Student had a vision or hearing need that should have been suspected by Antioch.

No evidence was presented establishing the last date on which Student's hearing

and vision were screened. Student's 2017 and 2018 IEPs stated that Student was referred to the nurse to complete routine hearing and vision screenings. Antioch staff testified that a referral could have been made for a number of reasons. Student did not present evidence regarding why the referral was made. Nor did Student present evidence that the screenings were not completed.

### Psychoeducational Assessment

Prior to the recent triennial assessments, Student's last full psychoeducational assessment was completed in November of 2015 by Pittsburgh Unified School District. An independent educational evaluation was completed on February 21, 2016 by Lisa Pippin. That assessment evaluated Student's self-regulation, aggression and difficulties with academics, particularly reading. During the period from March 20, 2017 to September 5, 2017, when Antioch's triennial assessments began, Student presented no evidence of a suspected need or noted change that would have warranted an additional psychoeducational assessment. Neither Mother nor a teacher requested a psychoeducational assessment prior to Mother consenting to Student's triennial assessment plan.

From September 2018 to November 2018, School Psychologist, Reena Shah, used multiple standardized instruments to assess Student in the areas of intellectual functioning, cognitive processing, functional behavior, social emotional function, and behavior. The tests included:

- The Wechsler Intelligence Scale for Children, 5th edition;
- The Beery Buktenica Test of Motor Integration, 6th edition;
- The Comprehensive Test of Phonological Processing, 2nd edition;
- The Behavior Assessment System for Children, 3 rating scales given to Mother, Student's teacher and Student;
- The Scales for Assessing Emotional Disturbance 2 which is a rating scale that

- was given to Mother; and
- Adaptive Behavior Assessment System, 2, which is also a rating scale completed by Mother.

The school psychologist administered 10 subtests of a cognitive measure. However, the school psychologist noted that during testing, Student was uncooperative a significant portion of the time. He acted “silly” and lacked attention. Student was observed to guess at answers and demonstrated a lack of motivation to do his best on the assessments. Ms. Shah believed his conduct impacted his processing speed scores and visual motor integration results as well as his overall cognitive ability score. Ms. Shah testified at hearing that Antioch was appropriately emphasizing helping Student to regulate his emotions as without those skills Student was unable to focus on his academic work.

Antioch did not fail conduct a psychoeducational assessment of Student.

#### Neuropsychological Assessment

No evidence was presented that student needed a neuropsychological assessment at any time from March 20, 2017 to March 20, 2019. No evidence established that Student ever had a neuropsychological assessment in the past, resulting in a need to provide a triennial review of a neurological assessment. No evidence was presented of any testing usually included only in a neuropsychological assessment was necessary to explore a suspected disability. Antioch did not fail to provide a neurological assessment.

#### Speech and Language Assessment

No evidence was presented that Student demonstrated a need for a speech and language assessment prior to Mother’s request on September 6, 2019. However, Mother did request a speech and language assessment and Antioch agreed there was a need,

including it in the assessment plan signed by Mother on September 25, 2018.

That speech and language assessment was never completed. The speech pathologist previously working for Antioch left in December of 2018 and had not assessed Student prior to her departure. Ms. Oliveri was assigned to the Sierra Diablo Vista site and attempted to assess Student three times between January 15, 2019 when she received the assessment assignment from Antioch, and the February 6, 2019 IEP team meeting.

Student was not at school on the days Ms. Oliveri attempted to assess and she was told the prior speech pathologist had similar difficulties arranging an assessment. No effort was made to arrange a specific date and time with Mother to conduct the assessment or to enlist the assistance of Sierra administration or Antioch special education administration to arrange a time or alternate place to assess Student.

At the February 6, 2019 IEP team meeting, when the decision was made to return Student to the Kimball campus, Ms. Oliveri informed the team that, she would no longer be the assigned speech pathologist, so arrangements would need to be made to have the speech pathologist assigned to Kimball assess Student. As of the last date of the hearing, May 30, 2019, the speech and language assessment had not been completed. Antioch failed to provide a speech and language assessment that was needed.

#### Intellectual Functional Assessment

Student's intellectual function was tested as part of the psychoeducational assessment completed on November 11, 2018. Prior to that, it had been assessed as part of the psychoeducational assessment completed in 2015.

Student presented no evidence establishing that evaluation of his intellectual functionality was warranted due to a suspected need or a noted change from March 20, 2017 to September 5, 2018 when the triennial assessment was started. Antioch did not fail to conduct a needed assessment of Student's Intellectual Function.

## Cognitive Processing Including Visual Processing, Visual Motor Integration, Auditory Processing and Working Memory

Student's cognitive processing was assessed by Lisa Pippin in February of 2016. At which time she found Student to be dyslexic. Student presented no evidence of a suspected need or a noted change that would have warranted additional cognitive processing assessments between the dates of March 20, 2017 and September 6, 2018 when triennial assessments began.

Antioch conducted cognitive processing assessments between September of 2018 and February of 2019. Mother requested that Student's dyslexia be assessed during an IEP team meeting at the September 17, 2018 IEP team meeting. Ms. Shah stated she would include processing testing in her psychoeducational assessment. No evidence was presented establishing that Ms. Shah did not complete the promised testing.

On September 12, 2018, Ms. Shah administered the Beery Buktenica Test of Motor Integration, 6th edition. This instrument assessed Student's visual and motor abilities, usually referred to as "hand-eye coordination." She also administered the Comprehensive Test of Phonological Processing, 2nd edition, which had subtests that assessed Student's phonological memory, that is his ability to encode phonological information for temporary storage and retrieval in short-term memory; and rapid naming which tests Student's ability to scan an array of visual symbols and encode a phonological response in long-term memory. Ms. Shah reported that Student struggled with auditory tasks; however, Student's lack of attention, lack of cooperation; failure to exert his best efforts and silly behavior during the testing impacted his results overall.

On November 9, 2018 and February 6, 2019, Ms. Gagne Jackson administered the Bruininks-Oseretsky Test of Motor Proficiency which, in part, evaluates visual-motor integration skills.

Student submitted no evidence of areas of cognitive processing that should have

been tested, that were not. Student failed to meet her burden of proving that Antioch did not conduct all necessary cognitive processing assessments.

### Academic Achievement

Student presented no evidence establishing a need for academic achievement testing between March 20, 2017 and September 5, 2018 when Antioch began its triennial academic performance evaluation. Student produced no evidence of a new academic need requiring assessment or of a change to Student's needs that should have resulted in Antioch determining that additional academic achievement assessments were warranted.

The triennial academic achievement testing was administered by TraReese Walker, Student's fourth grade teacher, in September of 2018. Student scored in the lowest one percent of 10 year-old children nationally. Ms. Walker noted that Student appeared tense or worried during the testing, responded too quickly at times and gave up easily when a difficult task was attempted. He was not able to apply phoneme-grapheme relationships and appeared to have limited understanding of grade or age appropriate math application tasks. His spelling was laborious, he read slowly and with difficulty, mispronouncing words, omitting words, inserting or substituting words that were not there. The sentences he wrote were inadequate for his age, were incomplete, awkward and had limited content.

Student failed to establish that there was any academic achievement testing that should have been completed by Antioch, that was not.

### Functional Behavior

Lisa Pippin completed behavior assessments in February 21, 2016 and recommended that a functional behavior assessment be conducted. The functional behavior assessment was completed on September 29, 2016 and a behavior intervention

plan was developed based on that assessment.

Student had continuous and increasing difficulty with school avoidance from the time he moved to Sierra, Diablo Vista, involving both refusal to attend school and refusal to take the bus or cooperate with Mother so he would arrive on time when she drove him to school. This resulted in substantial amounts of missed instruction. Although several different approaches were attempted to address the increasing tardiness and absence issue, none worked.

Antioch was aware of Student's school avoidance. However, even after several different approaches failed to result in improved attendance, Antioch did not arrange for additional behavior testing. The preponderance of the evidence established that Antioch should have determined that behavior assessments were warranted when the IEP team began considering reducing Student's instruction time to reduce the length of Student's bus ride. Antioch never proposed that a behavior assessment be completed to explore the cause of Student's school avoidance prior to shortening Student's school day, as the IEP team decided was necessary on March 16, 2018. The prior behavior assessments did not address school avoidance and Student was much younger when his behavior was last assessed.

#### Social-Emotional Status

Student had social emotional assessments completed as a part of Pittsburg's triennial assessments in 2015, and by Lisa Pippin in February of 2016. No evidence was presented of social emotional needs or significant changes in Student's social emotional state. Nor was evidence presented of needs that were not being addressed that would have warranted additional social emotional assessments between the dates of March 20, 2017 and September 6, 2017 when Antioch began its triennial social emotional assessments.

Antioch's 2018 triennial psychoeducational assessment, which included an

evaluation of Student's social emotional behaviors, revealed concern from Mother, Ms. Walker and from Student himself in a number of areas. Student saw himself in the "clinically significant" range, suggesting a high level of maladaptation, in the areas of: attitude to school, attitude to teachers, atypicality, social stress, anxiety, depression, sense of inadequacy, attention problems, hyperactivity, interpersonal relation, self-esteem and self-reliance. He saw himself as "at risk," or not yet requiring clinical treatment but bearing monitoring, in the area of locus of control; and as average in his relations with his parents.

Although the score reliability index indicated Student's self-assessment should be viewed with caution due to its exceeding negativity, Ms. Shah noted that, as a self-assessment is reflective of how a person feels about himself, Student's responses might well be a reliable perception of his own situation. In the course of completing his self-assessment, Student informed Ms. Shah that he was afraid to be alone at night because he heard voices and people laughing who were not there. He also told her that he saw people who were not there at night and during the day. Student also informed Ms. Shah that he had considered suicide on multiple occasions, although he did not have a plan to commit suicide.

Mother and Ms. Walker's ratings of behavior showed both considered him in the "clinically significant" range in the areas of: hyperactivity, aggression, conduct problems, depression, atypicality, adaptability, and social skills. Ms. Walker also saw Student as in the clinically significant range in the areas of somatization, anxiety, attention problems and functional communication. Mother rated Student as "at risk" in the area of anxiety, somatization, attention problems and functional communication. Mother rated Student as average in the area of leadership while Ms. Walker saw him as "at risk." Ms. Walker's ratings in the areas of study skills and learning problems were both "clinically significant." The parent scale does not rate these areas, however, Mother saw Student as

“at risk” in the area of activities of daily living which is an area not rated by teachers.

On scales for assessing emotional disturbance, Mother rated Student as having behaviors indicative of emotional disturbance in all areas, including inability to learn, relationship problems, inappropriate behavior, unhappiness or depression and physical symptoms of fears. On an adaptive behavior scale, completed by Mother, Student was in the well below average range on all areas of adaptive behavior except practical measures, in which area Student was below average. His composite adaptive behavior score was well below average.

Antioch did not fail to conduct a needed social emotional assessment.

### Mental Health

Student failed to prove that a mental health assessment was required prior to the November 13, 2018 IEP team meeting when Ms. Shah’s psychoeducational report was shared. No evidence that Student’s behavioral issues rose to the level of a mental health need was established. Student presented no evidence that Student was exhibiting mental health needs that were not being addressed by the Sierra School intensive behavior and counseling system.

However, the November 13, 2018 psychoeducational report raised concerns that warranted proceeding with a more comprehensive mental health assessment. The results of Ms. Walker and Mother’s rating scales were troubling in that they both rated Student as clinically significant range in the area of depression. In the area of anxiety, Mother rated Student as “at risk” and Ms. Walker rated him as clinically significant. Withdrawal was rated by both as “at risk.” Atypicality was rated by both as clinically significant. Student’s report should have raised a red flag, however, because it resulted in self-ratings of “clinically significant” in all areas except two. More of an indication that a mental health assessment was needed should have been the information Student gave Ms. Shah when they were completing the self-assessment. Student was only 10 years

old when he informed Ms. Shah of his suicidal ideation; that he was hearing voices at night and during the day; and that he believed he saw people who were not there. This was information that should have raised a suspicion of a disability for Antioch's IEP team resulting in a proposed assessment.

### Occupational Therapy

Student failed to produce evidence that Student had an occupational therapy need that should have been suspected by Antioch prior to September 26, 2017. Antioch was aware that Student was assessed for occupational therapy needs in Pittsburgh. However, the assessment reports result in a recommendation that Student's needs be discussed at the next IEP team meeting to be conducted in Pittsburgh. No evidence of the outcome of that discussion was submitted at hearing. Nor was evidence submitted that Student's IEP included occupational therapy services when he arrived at Antioch that would have resulted in a suspected disability.

However, Student proved by a preponderance of the evidence that Antioch failed to conduct a needed occupational therapy assessment as of the September 26, 2017 IEP team meeting. At that meeting, Ms. Nunn reported that Student chewed on his shirt. While Antioch offered an occupational therapy assessment that was declined by Mother; Antioch was then informed by Mother that Student had previously received "chewys" and other sensory devices in other placements. Antioch failed to proceed with the development of an assessment plan to pursue the needed assessment. Antioch did provide sensory items for Students use in class.

In November of 2018 and February of 2019, Antioch assessed Student's occupational therapy needs. Beth Jackson Gagne conducted Student's triennial occupational therapy assessments in two different sessions. Ms. Gagne Jackson had not attended the September 26, 2017 IEP team meeting. In the first assessment, Ms. Jackson Gagne completed a standardized measure of motor proficiency, classroom observations

and a teacher interview prior to the November 13, 2018 IEP team meeting where she shared the results of her assessment. She recalled that during her interview of the teacher during the first assessment, something was said that led Ms. Jackson Gagne to conduct a sensory assessment as well. As a result, Ms. Jackson Gagne conducted more observations of Student and asked Ms. Walker to complete the Sensory Profile 2, questionnaire which rates Student's responses to stimuli in the classroom and sensory processing during daily routines at school.

Ms. Jackson Gagne reported on the second phase of the occupational therapy assessment during the February 6, 2019 IEP team meeting. Mother attended both meetings at which time she had the opportunity to hear from Ms. Jackson Gagne and ask questions about her conclusions and recommendations.

#### Health

Student failed to submit any evidence that Student needed a health assessment at any time prior to the triennial assessment. Health was a listed area of assessment on the August 27, 2018 assessment plan. However, Student failed to submit evidence to establish whether or not a health assessment was completed.

#### Assistive Technology

Christine Kusaba conducted Antioch's assistive technology assessment which was discussed at the February 6, 2019 IEP team meeting. Ms. Kusaba reviewed the educational approaches being employed and thought that the educational materials were appropriate. She noted that current worksheets were "ideal" because they had "minimal writing with lots of visuals." She found the science and health curriculum incorporated clear themes, key vocabulary and strong visuals. She noted that reading and language lessons required more writing which was a challenge for Student, but approved of the individual small group instruction and visual supports. She saw her job

as a review of Student's environment, identification of tasks and tools to enhance his strengths and help compensate for relative weaknesses, and evaluation of alternative access to materials or alternative means of completing tasks, to reduce the impact of Student's learning difficulties and to support or enhance instructional methods. Ms. Kusaba noted Student's amazing comprehension when he saw a video of things he enjoyed. When video was combined with spoken words, such as speech to text, he was able to answer more questions.

To improve Student's reading, Ms. Kusaba thought it would be useful to try visual-audio books, visual reading, text to speech, and graphic novels. She emphasized that she was not recommending just an auditory program because she believed Student would benefit from the combination of seeing and hearing in combination. Ms. Kusaba also suggested that Student begin a visual dictionary based on categories, using digital and paper formats, to engage multisensorially in organization of material. To improve Student's composition writing, Ms. Kusaba recommended trying speech to text, adding art to his written work. She also recommended having Student engage in kinesthetic writing, focusing on thoughts and ideas versus spelling and writing. She emphasized that all of the suggestions would be trials. Many of the suggested approaches were already being employed in the Sierra classrooms.

#### Independent Educational Evaluations

No evidence was presented that Mother or anyone else requested any independent educational evaluations on Student's behalf from Antioch.

#### SEPTEMBER 17, 2018 IEP TEAM MEETING

Student's annual IEP for 2018 was conducted in three parts and included meetings on September 17, 2018, November 13, 2018 and February 6, 2018. The three meetings were held to allow for completion and discussion by the IEP team of all of the

assessments.

At the September 17, 2018 IEP team meeting, Mother requested additional assessment in the area of dyslexia. In response to this request, the school psychologist added assessments of processing disorders to the pending psychoeducational evaluation. During that meeting, Student's present levels of performance were reviewed as were Student's accommodations and goal progress.

### Goal Progress

Overall, Student made progress on his goals in 2017, despite his frequent absences and emotional dysregulation challenges. Student made some progress on his September 2017 behavior goals. By September 17, 2018, Student could appropriately express his anger and ask for a break 65 percent of the time. The other 35 percent of the time, he destroyed property and cried under his desk.

Student did not hit the mark of being able to recognize and read 50 priority sight words as measured with 80 percent accuracy in 4 of 5 trials. However, by September 17, 2018, Student was able to read and recognize sight words at 65 percent accuracy.

Student was not able to write a 1 to 2 sentence paragraph pursuant to a grade appropriate prompt with 80 percent accuracy. Student ended the year being able to write one sentence at 55 percent accuracy.

By September of 2018, Student was not able to add and subtract within 1000 with 80 percent accuracy but he was able add within 1000 at 95 percent accuracy and subtract at 50 percent accuracy.

Student was able to stay on task for 20 minutes and complete a task with 80 percent accuracy about 50 percent of the time. His original goal was to do so 80 percent of the time.

Ms. Walker noted in Student's IEP progress report that had made "really good progress" on asking peers to join him in a social activity or asking if he could join theirs;

but was not able to do so on 4 of 5 occasions with two or fewer adult prompts. No quantification of his progress was included in her report.

#### NOVEMBER 13, 2019 IEP TEAM MEETING

During the November 13, 2018 IEP team meeting the psychoeducational, academic and occupational therapy assessments were reviewed. A secondary eligibility category of specific learning disability was added and Student was found eligible for occupational therapy services. Student's sensory avoidance was particularly noted. Ms. Jackson's report included school avoidance in this category as well as use of headphones and retreating into a corner.

#### Adding a Secondary Eligibility Category

Student was eligible for special education under the category of emotional disturbance. Pursuant to Ms. Shah's psychoeducational assessment, Student was found to have a processing disorder and specific learning disability was added as a secondary category on November 13, 2018.

Although Ms. Pippin had diagnosed dyslexia in 2016, a secondary eligibility category had not been added to Student's IEP prior to November 13, 2018. Ms. Nunn, who taught Student during the 2017-2018 school year, used the information in the February 2016 independent psychoeducational evaluation, indicating that Student was dyslexic, to determine how to differentiate instruction for Student. No evidence was presented that Student required additional services to address his dyslexia. No evidence was presented that adding a secondary eligibility category sooner than November 13, 2018 would have resulted in additional services or a different curriculum to instruct Student in reading.

February 6, 2019 - Part III of Student's September 17, 2018 IEP Team Meeting

The February 6, 2018 IEP team meeting included review of the assistive technology assessment and additional sensory processing assessments conducted by the occupational therapist.

New Goals for the 2018-2019 School Year

Following consideration of the various assessment reports, new goals were created for Student. They were not all developed at the same meeting. Student's new goals were:

- A self-regulation goal stating that, by November 2019, given sensory tools and a support program, (such as ALERT or Zones of regulation) Student would decrease crying and improve in seat behavior by at least 80 percent of the day, as measured by data collection.
- A handwriting goal stating that, by November 2019, given a slant board and pencil grip as needed, Student would write two sentences with correct letter formation, use of upper and lower case letters and orientation of letters 80 percent of the time as evidenced by work samples.
- A reading goal stating that, by September 2019, Student would recognize and read long and short vowels in one-syllable words as measured with 80 percent accuracy in 3 of 5 trials by Student work samples.
- A writing goal stating that, by September 2019, with the support of a graphic organizer, when given a writing prompt at his instructional level, Student would write a 2 to 3 sentences paragraph with 70 percent accuracy in 4 of 5 trial as measured by Student work samples.
- A mathematics goal stating that, by September 2019, Student would use repetitive addition to demonstrate multiplication on one digit times one digit for 3 of 5 trials with 80% accuracy as measured by Student work samples and

teachers' data.

- A behavior goal stating that, by September 2019, Student would follow verbal directions and complete required academic tasks in a timely manner and with cooperation with 80 percent accuracy in 4 of 5 trials as measured by teacher and staff.
- A behavior goal stating that, by September 2019, Student would, when given a frustrating situation, (i.e. undesired task, demand, and/or undesired peer behavior) with one prompt Student will utilize coping strategies (i.e. take a break, deep breaths, draw, etc.) with 80 percent accuracy in 4 of 5 trials as measured by teacher and staff observation.
- A pro social manners goal stating that, by September 2019, Student would continue to join counseling and learn to remain on topic and stay focused during the session by asking to be moved if he is feeling distracted or asking for a break if he is irritated with his peers on 4 of 5 occasions with two or fewer adult prompts.

By the February 6, 2018 IEP team meeting, progress was reported on some of the earlier developed goals. By January 14, 2019, Student was noted to have made little progress on his reading goal as he often missed English Language Arts rotation due to his absences and when he did attend, he refused to sound out words of more than four letters. Limited progress on the writing goal also resulted from frequently missed English Language Arts instruction, and Student's tendency to quickly give up on writing sentences even on preferred assignments when he was at school. Student was making progress on learning multiplication using a multiplication chart to multiply single digit numbers. He could do that with a 50 percent success rate. Student was showing the ability to follow directions 50 percent of the time.

The IEP team did not include any goals related to attendance, despite the fact

that Student's attendance was a noted concern.

Antioch offered Student 1620 minutes a week of specialized academic instruction at a local nonpublic day school, occupational therapy 30 minutes per week and individual and group counseling sessions of 30 minutes each per week. Student was also offered extended school year services that included 1200 minutes per week of specialized academic instruction in a local nonpublic day school and individual and group counseling sessions of 30 minutes each per week. Student's need for intensive behavior support and small group instruction in order to access the curriculum was noted as the rationale for removing him from a general education setting. Student's behavior intervention plan was updated but it did not address Student's attendance or tardiness issues.

A number of accommodations were also included to assist Student with his instruction, including use of a graphic organizer, reduction of background noise, extended time to complete work, use of articulation devices, visual and auditory presentation of instruction, when needed, and provision of notes, outlines and instructions. Student's assignments would also be shortened, the content of assignments would be graded separately from spelling and instructions would be shortened to aid comprehension. Student and/or his teachers were to receive 8 hours of direct and indirect consultation with the assistive technology specialist over the school year regarding the use and usefulness of the technology Student would try in the classroom.

#### STUDENT'S RETURN TO SIERRA KIMBALL

Due to Student's attendance issues and difficulties on the bus, Student returned to the Kimball campus on March 9, 2019 which was closer to his home. However, despite the change to the new location, Student was marked absent for every day of school from March 11, 2019 through March 20, 2019. Student may have attended a few

more days than he received credit for in the attendance records as Mr. Meador, Student's fifth grade teacher at Kimball, recalls him being in class once every nine or 10 days.

#### READING INSTRUCTION

Student's reading instruction from Sierra, between March 20, 2017 and March 20, 2019, included phonemic awareness instruction with his teachers one-on-one and use of the iReady program, which is a research based curriculum, that is accessed on the computer, for use with children who have dyslexia. This program assesses a Student's current academic level and provides appropriate material in audio-visual format for a Student to work on individually. Student was also provided with worksheets and additional individual instruction.

No evidence was presented regarding Student's initial instruction at Kimball. Beginning in August of 2017, when Student moved to Sierra, Diablo Vista, Ms. Nunn worked one-on-one with Student to help him learn consonant-vowel-consonant words such as cat and bag. Ms. Nunn testified that Student knew about 10 sight words when he arrived in her third grade class. Beginning in August of 2018, Ms. Walker worked with Student one-on-one for about 15 minutes per day on sight words in fourth grade. Beginning in March of 2019, Galen Meador was Student's fifth grade teacher at Kimball. He provided approximately 45 minutes per day of one-on-one instruction, when Student was in class, which included phonemic awareness and additional one-on-one reading in the Spectrum curriculum. However, Student only attended class once every nine or 10 days while in Mr. Meador's classroom which impeded his ability to progress. Mr. Meador stated Student knew approximately 50 sight words at the time of the hearing.

Student submitted no evidence of additional measures that should have been taken to improve Student's reading skills. Nor did Student provide evidence that any

alternative curriculum or approach would have been superior to the one in use by Sierra Schools.

## SOCIAL SKILLS

Student's Sierra classrooms employed one-on-one discussion of, and support for, social interactions and social emotional difficulties when Student interactions became contentious. Student was counseled by teachers and administrators when he and other Students disagreed and staff helped Students talk through problems. Sierra staff also promoted self-control, and assisted Student with identifying self-soothing methods such as taking breaks and identifying activities he enjoyed in an effort to improve his emotional regulation and by extension his social interactions.

However, Student struggled with social skills and tended to play alone. Student often grabbed other children's papers and tore them up, and used profanity in the classroom, on the playground and in counseling. He also kicked peers occasionally. Reena Shah, the school psychologist who assessed Student, saw Student play on his cell phone rather than go outside to play. Ms. Shah believed the cell phone caused problems with transitions, as Student had difficulty giving the phone up when it was time to work. In the psychoeducational report, she recommended that Student not have a cell phone at school.

Student was involved in a group counseling session once per week and was working on his social skills. He had difficulties staying on task in the group sessions and most of his peer interactions were not positive. He often left the counseling sessions after a few minutes when he did attend. The reason for leaving the group was mood dysregulation, that is, he could not actively sit and use words to express his feelings or emotions. Bowra Faiez, Student's counselor for fourth and fifth grades, at both the Diablo Vista and Kimball school sites, was working on these skills, as well as positive peer interactions, in Student's counseling sessions. Ms. Faiez testified that Student's

inability to regulate his emotions should be a primary focus of Sierra staff as he would not be able to sit and concentrate on his academic work if he was unable to regulate his emotions.

Student often missed both group and individual counseling because of absences or tardy arrival. Counseling sessions were scheduled between 8:00 AM and 10:00 AM. Ms. Faiez spoke with Mother on multiple occasions about the fact that Student's poor attendance, including arrivals after 10:00 AM, was interfering in his ability to progress with his counseling. Ms. Faiez believed Mother was making an effort to get Student to school but was unable to do so despite a variety of attempts by Mother, her Contra Costa County Children's Mental Health Counselor, the IEP team, and the transport company.

Student provided no evidence regarding additional measures that should have been taken to meet Student's social skills needs, and no evidence was submitted of any remedy that should be required of Antioch due to any failure to meet Student's social skills needs.

### Pragmatic Speech

Pragmatic language was defined by Antioch staff members as an ability to understand and communicate information and ask for help. Student failed to provide any evidence that this was not an accurate or complete definition.

Ms. Faiez never saw pragmatic speech, which she defined as Student's ability to express his ideas and ask questions; as well as understand the ideas of others, as a concern. Student understood what was being said and was able to address topics with Ms. Faiez and with his peers. Both Ms. Pons and Trareese Walker, Student's fourth grade teacher, echoed Ms. Faiez' opinion regarding Student's pragmatic speech, which they did not see as a weakness. Ms. Faiez testified that Student had difficulties interacting with his peers in group counseling. However, she attributed that to his emotional

dysregulation, stemming from his disruptive mood dysregulation disorder, as opposed to a pragmatic language deficiency. They worked on social interactions in group counseling and she also addressed issues she observed with Student in her individual counseling sessions.

None of the other witnesses testified that they believed Student had needs in the area of pragmatic language nor was evidence presented establishing an unmet pragmatic language need. Student failed to submit evidence that a need in the area of pragmatic language was not met or that additional services that should have been provided to meet a pragmatic language deficit. Nor did Student submit evidence regarding any remedy that should be provided to meet a pragmatic language need for Student.

#### ANTIOCH'S 2018-2019 WINTER BREAK

Official Notice is taken of Antioch's academic calendar for the 2018-2019 school year which is posted on the Antioch School Website at:  
<https://www.antiochschools.net/cms/lib/CA02209771/Centricity/domain/58/school-calendars/2018-19%20School%20Calendar%20final.pdf>. Antioch schools were closed for winter break from December 24, 2018 through and including January 2, 2019. School resumed on January 3, 2019.

#### LEGAL CONCLUSIONS

##### INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. All references in this discussion to the Code of Federal Regulations are to the 2006 version.

## LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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 (2006) 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, first, 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 second, 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 Individualized Education Program, commonly called an 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 or 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 using the IDEA's procedures, with the participation of parents and school personnel. The IEP describes the child's present levels of performance, needs, and 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 work towards the stated 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] (*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.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*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.) 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].) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*. The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to

change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Andrew F. (E.F. v. Newport Mesa Unified School 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).) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing.

A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, Student requested the hearing in this matter, and therefore Student has the burden of proof on the issues.

#### ISSUE 1A: FAILURE TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

Student asserts that Antioch failed to conduct psychoeducational and neuropsychological assessments and also failed to assess him in the areas of hearing

and vision; speech and language; intellectual functioning; cognitive processing, including visual processing, visual motor integration, auditory processing and working memory; academic achievement; functional behavior; social-emotional status; mental health; occupational therapy; and health. Antioch argues that all required assessments were completed except in the case of the speech and language assessment which it attempted to conduct but was unable to do so due to Student's poor attendance.

### Reevaluation Requirements

A school district must ensure that reevaluations of a child's needs are conducted if the district determines that the educational or related services needs of a child with special needs, including improved academic achievement and functional performance, warrant a reevaluation; or if the parent or teacher request a reevaluation. Reevaluations of a child's special education must be conducted in accordance with the procedural requirements required by the IDEA. (20 U.S.C. 1414 (a)(2)(A).) Reevaluations must be conducted at least every three years and may not be performed more frequently than once a year unless both the district and the parents agree. (20 U.S.C. §1414 (a)(2)(B).)

The failure to conduct a reevaluation to ensure that a Student has been assessed in all areas of suspected disability can constitute a denial of FAPE. (*Dept. of Education of Hawaii v. Leo W. by and through his Parent Veronica W.*, (D. Hawaii, 2016) 226 F. Supp. 3d 1081, 1099.) However, not all procedural violations result in a denial of FAPE. Only procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE. (*Shapiro ex rel. Shapiro v. Paradise Valley Unified School District*, (9<sup>th</sup> Cir. 2003) 317 F. 3d 1072, 1079.) The question in this case is whether Antioch should have determined that additional assessments were warranted.

A failure to progress does not always indicate a need to conduct further assessments. Absent evidence that reassessment beyond the triennial assessments was

necessary due to a need for additional information, Antioch had no duty under 20 U.S.C section 1414 (a)(2) to conduct a reevaluation of Student more frequently than every three years. (*M.S. by and through Sartin v. Lake Elsinore* (9<sup>th</sup> Cir. 2017) 678 Fed. Appx. 543, 544.)

#### Issue 1(a)(1) - Hearing and Vision

Student's issue asserts that Antioch failed to assess Student in the areas of hearing and vision. However, she argues in her closing brief that Student's hearing and vision screenings were not completed. Student is conflating two different types of testing. Assessments are required by the IDEA when there is a suspected disability that needs to be evaluated so that it can be determined whether an offer of specialized academic instruction or related services is required. (20 U.S.C. 1414(b)(3)(B) and 1414 (b)(4).) Student failed to produce any evidence establishing that he had a vision or hearing need requiring assessment for special education or related services. Student failed to meet his burden of proving Antioch failed to provide a vision and hearing assessment due to a suspected disability in this area.

Student asserts that his hearing and vision screenings were not completed. However, Student did not raise the failure to conduct hearing and vision screening in his issues for hearing. He asserted a failure to assess vision and hearing for special education and related services. Furthermore, Student failed to produce any evidence establishing that vision and hearing screening did not occur. Student did not meet his burden of proving that Antioch failed to assess in the area of vision and hearing.

#### Issue 1(a)(2) - Psychoeducational Assessment

Several of Student's separately identified assessments are usually included in a psychoeducational assessment. For ease of reference, each assessment Student has asserted was not provided, will be separately addressed.

Student asserts Antioch did not provide a psychoeducational assessment when Student failed to make academic progress. A failure to progress does not always indicate a need to conduct further assessments. Evidence of a suspected need or disability is required in order to trigger an obligation to assess beyond the triennial assessments required by the IDEA. (*M.S. by and through Sartin v. Lake Elsinore* (9<sup>th</sup> Cir. 2017) 678 Fed. Appx. 543, 544.)

Student had a complete psychoeducational assessment in 2015 when he attended school in Pittsburgh. He had an independent educational evaluation, which was completed in February of 2016, that assessed his self-regulation, aggression and difficulties with academics. Student failed to establish that his needs had changed or that a new need was suspected would have warranted a full psychoeducational assessment during the period from March 20, 2017, to the date Student's triennial assessments began on September 6, 2018. Nor was there evidence that a psychoeducational assessment was requested during this time, triggering Antioch's obligation to assess. (20 U.S.C. 1414(a)(2)(A)(ii).)

Beginning September 6, 2018, Antioch conducted a psychoeducational assessment. Student failed to prove that at any time between the dates of March 20, 2017 and March 20, 2019, Antioch failed to conduct a needed psychoeducational assessment.

In his closing brief, Student raises the issues of whether the November 13, 2018 psychoeducational assessment was timely. Student also asserts it was "insufficient." Student did not raise the issue of the timeliness of assessment in his issues for hearing. Nor did Student challenge the adequacy of any assessment. Neither of those issues will be addressed in this decision.

#### Issue 1(a)(3) - Neuropsychological Assessment

Student failed to produce any evidence that Student had needs warranting a

neuropsychological assessment. Without demonstration of a suspected need, Antioch had no obligation to assess unless Mother or a teacher requested an assessment. Student produced no evidence of such a request. (20 U.S.C. 1414(b)(3)(B) and 1414 (b)(4).)

No expert testified during the hearing that Student required any kind of testing usually included only in a neuropsychological assessment and no other evidence established that Student had needs that could only be evaluated with this specialized assessment either. Antioch did not fail to provide a neuropsychological assessment.

#### Issue 1(a)(4) - Speech and Language Assessment

Student asserts that Student should have been provided with a speech and language assessment between March 20, 2017 and March 20, 2019. Student failed to meet his burden of proving that he had speech and language needs at any time prior to Mother's request for a speech and language assessment on September 6, 2018.

Antioch did agree that a speech and language assessment was warranted when it provided the assessment plan including speech and language that Mother signed on September 25, 2018. Antioch then failed to provide the assessment. Antioch's assertion that they were unable to assess Student because of his attendance problem is not persuasive. Antioch's speech pathologist failed to try to coordinate an assessment date with Mother directly, failed to enlist the assistance of Antioch's special education administrators to find a solution to the difficulty with scheduling and failed to explore assessing Student at a location other than school.

The law does not state that Antioch must try to assess Student; the IDEA requires that an assessment be conducted within 60 days of Parent providing consent. (20 U.S.C. §1414(1)(C).) "Participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Similarly, making only a referral for an assessment

does not meet a district's obligation to ensure a Student is assessed. (*Id* at p. 1055-1056.) Antioch had a duty to ensure that the assessment that was consented to by Mother was conducted. It could only have prevailed on the argument that Student was not made available for testing if it exhausted all reasonable attempts to assess which it did not.

Failing to conduct the consented to speech and language assessment was a procedural error that denied Student a FAPE because failing to provide assessment results denied Mother an opportunity to meaningfully participate in her son's IEP development process. Mother asked for the assessment because she questioned whether Student had needs in the area of speech and language. She was entitled to an answer to her question in order to be certain that all suspected needs were being addressed. Student is entitled to an independent speech and language assessment as an equitable remedy.

#### Issue 1(a)(5) - Intellectual Function Assessment

Student failed to establish that Student should have received intellectual functioning testing at any time from March 20, 2017 to the time of Antioch's triennial assessment. Student produced no evidence of a suspected intellectual function disability that warranted an assessment outside the triennial assessment period. Absent a suspected intellectual function disability, Antioch had no obligation to assess Student's intellectual functioning until the triennial assessment was due. (20 U.S.C. 1414(b)(3)(B) and 1414 (b)(4).)

Antioch included assessment of Student's intellectual functioning in the psychoeducational assessment completed on November 13, 2018. Student did not meet his burden of proving that Antioch failed to provide a needed intellectual functioning assessment.

Issue 1(a)(6) - Cognitive Processing Including Visual Processing, Visual Motor Integration, Auditory Processing and Working Memory

Student asserts that Antioch failed to assess his cognitive processing abilities during the period from March 20, 2017 to March 20, 2019. Student's cognitive processing was assessed in 2015 and 2016 in testing completed when he attended school in Pittsburgh. Student was found to be dyslexic in Ms. Pippin's report of February 21, 2016. Student presented no evidence of the development of an additional suspected cognitive processing disability between the dates of March 20, 2017 and September 6, 2018 when Antioch began assessing Student's cognitive processing in its triennial assessments. Nor did Student establish by a preponderance of the evidence, any change to his cognitive processing that would have warranted an assessment prior to the triennial assessments.

Mother requested that Student's dyslexia be assessed during the September 17, 2018 IEP team meeting and Ms. Shah stated that processing testing would be included in the psychoeducational assessment. It was included. Ms. Shah described testing of visual motor integration, visual processing, auditory processing and working memory in her November 13, 2018 psychoeducational report. Additionally, Ms. Gagne Jackson also tested Student's visual motor integration skills when conducting Student's occupational therapy assessment. Student offered no expert testimony or other evidence establishing that Mother's requested dyslexia testing had not been completed. Student's claim that the cognitive processing assessments were insufficient was not an issue raised at hearing and, thus, is not before this tribunal. 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.) Student failed to prove that Antioch failed to provide any needed cognitive processing assessments.

### Issue 1(a)(7) - Academic Achievement

Student asserts that Antioch failed to assess his academic achievement during the period from March 20, 2017 to March 20, 2019 and his academic performance should have resulted in Antioch's belief that an additional academic achievement assessment was warranted. Student failed to prove that he had needs warranting an academic achievement assessment in addition to the triennial assessments conducted during the triennial assessment cycle.

Student failed to provide that his academic needs had changed. Student was quite far behind in reading and had been for several years. However, this did not necessarily indicate a need for an additional academic achievement assessment. (*M.S. by and through Sartin v. Lake Elsinore* (9<sup>th</sup> Cir. 2017) 678 Fed. Appx. 543, 544.) Student did not establish that additional exploration of Student's academic abilities was necessary to address his academic needs or that any particular assessment would have provided information to the IEP team that they did not already have.

Student's academic abilities were assessed by Ms. Walker in September of 2018 as part of Student's triennial assessments. Student did not produce any evidence establishing that he would have benefited from being assessed earlier or that the testing was not complete. Student failed to establish by a preponderance of the evidence that Antioch should have conducted any additional academic achievement testing.

### Issue 1(a)(8) - Functional Behavior

Student asserts that he should have been provided with a functional behavior assessment due to his school avoidance. Antioch argues that it was utilizing appropriate positive behavior methods and took all reasonable steps to address Student's absenteeism. Antioch's argument is not persuasive.

Antioch did take measures to address Student's attendance and bus behavior issues. However, when those proved unsuccessful, they stopped trying to determine the

cause of a problem that all witnesses admitted was interfering in Student's ability to access his education. Antioch should have determined that further assessment was warranted given all of the approaches that had been tried by Antioch in concert with Contra Costa County's Children's Mental Health employees and Mother, that had failed. Arranging for a behavior assessment to evaluate what might be causing the intense school avoidance Student was demonstrating was clearly warranted based on the needs being demonstrated by Student. (20 U.S.C. 1414 (a)(2)(A)(i).) This should have occurred prior to making a decision to reduce Student's school day without any assessment data to support a conclusion that this would help with Student's school avoidance issues, and further limiting his instructional time. That decision was made in the March 16, 2018 IEP team meeting.

Student's last behavior assessments were in 2016. At that time, Student was seven years old and in the second grade. Now, at 10 years old and in the fifth grade, it was reasonable to suspect that his motivations for avoiding school and acting out at school resulting in missed instruction might be different than they were when he was seven. Choosing to reduce Student's already limited school attendance instead of delving into the problem of why he was refusing to go to school was not a reasonable alternative to arranging for additional assessments in an effort to gather information from specialists that could lead to alternative paths for Student to attend school more consistently.

Antioch's failure to provide the behavior assessment was a procedural violation that impeded Student's ability to access his education and interfered with Mother's ability to meaningfully participate in the development of Student's IEP. It therefore rose to the level of a substantive denial of FAPE. Student will be provided with an independent behavior assessment as an equitable remedy.

#### Issue 1(a)(9) - Social-Emotional Status

Student argues that Antioch should have assessed his social emotional status during the period from March 20, 2017 to March 20, 2019, specifically arguing that the November 13, 2018 psychoeducational assessment in this area was inappropriate due to its minimal observation of Student.

Student's social emotional condition was assessed in 2015 and in 2016. Student failed to prove that Student demonstrated social emotional needs different from those presented in Student's 2016 behavior assessments or that there were any new developments in Student's social emotional state that would have warranted social emotional assessments prior to the triennial assessments conducted in November of 2018. Student failed to present evidence that earlier social emotional assessments were warranted.

Antioch conducted social emotional assessments in the psychoeducational assessment completed in November of 2018. The adequacy of assessments was not raised in this hearing and so will not be addressed here. Student failed to prove that Antioch was obligated to conduct additional social emotional assessments.

#### Issue 1(a)(10) - Mental Health

Student asserts Antioch failed to provide needed mental health assessments from March 20, 2017 to March 20, 2019. Antioch argues that it provided an abundance of counseling services and positive role-models at school. Student received group and individual counseling weekly.

Student failed to prove that Antioch should have suspected a mental health disability at any time prior to the November 13, 2018 psychoeducational assessment. Student offered no testimony or other evidence that Student was demonstrating a mental health need or new behavior that would have led Antioch to suspect that an educationally related mental health assessment was necessary. Absent a suspected

disability, Antioch had no reason to pursue and assessment. (*See*, (20 U.S.C. 1414 (a)(2)(A)(i).)

However, when Ms. Shah presented the results of her behavior assessments and the disturbing comments made by Student during his self-assessment at the November 13, 2018 IEP team meeting, Antioch should have suspected that Student needed an assessment to determine whether a more serious mental health issue was impeding his ability to access his education. Student's comments, combined with both Mother and Teacher's clinically significant anxiety and depression ratings, among others; Student's personal history; and his prior psychiatric diagnoses; should have led Antioch determine a mental health assessment was warranted in light if Student's extremely negative views regarding attending school.

Student is entitled to an independent educational evaluation in the area of mental health as an equitable remedy.

#### Issue 1(a)(11) - Occupational Therapy

Student asserts that Antioch failed to provide needed occupational therapy assessments from March 20, 2017 to March 20, 2019. Antioch argues that it provided an occupational therapy assessment as part of Student's triennial assessment. Antioch's argument does not persuasively dispense with the need to assess Student when they suspected his disability in September of 2017.

During the September 26, 2017 IEP team meeting, Ms. Nunn reported that Student chewed on his shirt. Antioch offered Mother an occupational therapy assessment to explore whether Student had sensory needs. Mother declined but informed Antioch that chewy necklaces had been useful to Student in the past. Instead of working towards proceeding with the assessment Antioch chose to provide sensory items without an assessment to determine what he needed. Mother's refusal of the assessment should not have been dispositive of the question. "Under the IDEA, the

school district must conduct a 'full and individual initial evaluation,' one which ensures that the child is assessed in 'all areas of suspected disability,' before providing that child with any special education services." (*Timothy O. v. Paso Robles Unified School District*, 822 F.3d 1105, 1119 (quoting 20 U.S.C. §§ 1414(a)(1)(A), 1414(b)(3)(B)). 20 U.S.C. 1414 (a)(2)(A)(i).)

Antioch did complete an occupational therapy assessment in November 2018 and February 2019. Student submitted no evidence that the assessment was not completed or needed to be redone for any reason. The adequacy of the assessment is not at issue in this case. Ultimately Antioch provided the assessment. Therefore, although they committed a procedural violation, it was remedied with the completion of the occupational therapy assessment. Student failed to prove that another remedy was necessary.

#### Issue 1(a)(12) – Health

Student failed to put on any evidence regarding his allegations that Antioch failed to provide a health assessment. While Mother testified to vision and hearing screenings that she suspected were not completed, these routine screenings were not assessments for purposes of determining eligibility for special education or related services. (Ed. Code 56321 (f).) No testimony or other evidence was offered to establish that Student's health assessment was not completed. Student also failed to provide any evidence of a health need that was unassessed. Student did not meet his burden to prove that Antioch failed to conduct a health assessment.

#### ISSUE 1B: FAILURE TO PROVIDE PARENT PRIOR WRITTEN NOTICE OF WHY THE ASSESSMENTS LISTED IN 1A WERE NOT COMPLETED

Mother asserts that Antioch failed to provide prior written notice pertaining to its failure to assess Student.

A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The purpose of the prior written notice requirement is to ensure that parents receive sufficient information about the proposed placement change or change in services to reach an informed conclusion about whether it will provide an appropriate education. (*Smith v. Squillacote* (D.D.C. 1992) 800 F.Supp. 993, 998.)

Student failed to prove that Antioch refused to conduct any assessment. Thus, he failed to provide he was entitled to a prior written notice of the refusal to assess. Although the speech and language assessment was not completed, it was not due to a refusal to assess, but Ms. Oliveri's inability to arrange, and lack of follow-through in scheduling, a time for assessment when Student was present at school. Antioch was not obligated to issue a prior written notice regarding any assessment identified in Student's issue number 1A in this case.

#### ISSUE 1C: FAILURE TO RESPOND TO PARENT'S REQUEST FOR AN INDEPENDENT EDUCATIONAL EVALUATION

Under certain conditions, a Student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) ,incorporating 34 C.F.R. § 300.502 by reference; Ed. Code, § 56506, subd. (c)[parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) To obtain an IEE, the Student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1).)

When a Student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is

appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2).)

Student produced no evidence at hearing that Mother ever requested an independent educational evaluation from Antioch. Therefore, Student is not entitled to any independent educational evaluations other than those ordered as equitable remedies due to Antioch's failure to assess.

**ISSUE 2A: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING TO ADEQUATELY ADDRESS STUDENT'S DYSLEXIA AND HIS NEED FOR A GOAL CONCERNING DYSLEXIA:**

Student asserts Antioch failed to address Student's needs pertaining to his dyslexia and failed to provide adequate goals. Antioch argues that the goals in the IEPs from March 20, 2017 through March 20, 2019, and the instructional methods employed by Sierra schools, met Student's needs for educational approaches that would address Student's dyslexia.

A state or local educational agency satisfies the "educational benefit" standard for a free and appropriate public education (FAPE) within the meaning of the IDEA by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. (Anchorage School Dist., *supra*, 689 F.3d at p. 1057.)

Student failed to prove that Antioch should have employed additional measures to address Student's needs in the area of dyslexia. Student asserts that Antioch should have offered Student a research based reading program such as "Orton-Gillingham or some other research based method that addressed specific needs of Students with dyslexia." However, Student failed to establish why the iReady program being offered to Student at Sierra, which Mr. Meador testified is a research-based method for addressing the needs of Students with dyslexia, was inappropriate. The iReady curriculum was

supplemented with one-on-one instruction in decoding and sight word recognition, and additional one-on-one reading in the Spectrum curriculum.

Student asserts that inadequate reading progress was being made. However, Student was making progress. Catalyst records indicated Student had about five sight words at the beginning of third grade. Student's third grade teacher at Antioch, Ms. Nunn testified that Student came into the second half of third grade knowing approximately 10 consonant-vowel-consonant words such as cat. Student's fifth grade teacher, Mr. Meador, testified that, as of the date of the hearing, Student could identify approximately 50 sight words. The evidence established that Student was making progress in reading, which would benefit him in all academic areas and, ultimately, also in the area of behavior as one of Student's recorded behavior triggers was his reading frustration. While the progress was slow, it was significant, especially in light of the fact that the reinforcement and improvement of Student's reading skills was impeded by his frequent absences from school.

Student failed to establish how much progress Student should have been making in his academics while also dealing with his emotional dysregulation, ADHD, and insecure housing; as well as the fact that he had been substantially behind in reading since before he entered Antioch. Nor was any testimony or other evidence offered to establish why the reading program offered by Antioch was inadequate. Student did not offer any evidence establishing the attributes of a program that Student believed would have been adequate; or establishing why another program would have been superior to the instruction methods being used. Student failed to prove Antioch was inadequately addressing Student's dyslexia.

Student also failed to prove that the goals in Student's IEPs were inadequate to address his dyslexia. No testimony was offered regarding goals that should have been included to address Student's dyslexia, but were not. No evidence established that the

goals that were included in the IEPs failed to address his needs. In his September 2017 IEP, Student moved from a decoding goal to a reading goal in an effort to change approaches to improve Student's reading fluency. By the time of the next annual IEP, September 17, 2018, Student was noted to be reading sight words with 65 percent accuracy. By May of 2019, Student could read approximately 50 sight words. This progress was made despite the fact that he was attending school only one of every nine or 10 days.

An IEP must include a statement of measurable goals, including academic and functional goals, designed to (i) meet the child's needs resulting from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and to (ii) meet the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2); 34 C.F.R. § 300.320(a)(2)(i).

Student failed to prove that additional annual goals were necessary to address Student's dyslexia. Student failed to establish that any additional services should have been offered and implemented to address his dyslexia. No evidence was offered that an approach that differed from the one employed by Sierra schools in accordance with Student's IEPs was required to provide Student a FAPE.

**ISSUE 2B: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING TO ADEQUATELY ADDRESS STUDENT'S BEHAVIORAL NEEDS:**

A behavior assessment was completed by Lisa Pippin on February 21, 2016. A functional behavior assessment was completed by Student's prior school district on September 29, 2016. Student enrolled in Antioch on January 10, 2017, just a few months later. Antioch developed three behavior intervention plans for student dated March 17, 2017, September 13, 2017, and September 17, 2018.

The evidence established that Student's classroom behaviors were improving. Antioch placed Student in the Sierra schools, a program offering intensive behavior support, to address his behavior through a level and rewards system specifically designed to assist Student in identifying his own frustrations and using socially acceptable means of addressing them. Sierra's embedded behavior modification system was supplemented by Student's behavior intervention plans. Student continued to demonstrate behavioral challenges, but he also showed progress in the area of behavior.

Compared to the behaviors described by Ms. Pippin in 2016, Student's conduct markedly improved while attending Antioch. His anger was focused most often on ripping up papers and running out of the classroom as opposed to more violent outbursts and assaults on staff and peers. When assaults occurred, they were of a considerably less dangerous type. While one would never condone kicking, it is much less dangerous than assaulting someone with a chain or punching them in the face as occurred at Catalyst.

However, Student established by a preponderance of the evidence that Antioch did not take adequate measures to address Student's behaviors on the bus and his school avoidance. Antioch was required to assess a disability that it suspected was impeding Student's ability to access his education. (20 U.S.C. 1414(b)(3)(B).) Antioch was then obligated to consider services to address the impediment to Student's access to education.

Antioch's staff and Sierra faculty acknowledged in hearing that they knew Student's absenteeism and tardiness was impeding Student's ability to progress academically. This was also documented in school records. Yet they did not assess in order to determine whether additional services or specialized academic instruction was necessary to improve Student's ability to successfully take the bus, or to address his

school avoidance. As a result, Student missed instruction which impeded his ability to make academic progress, especially in reading. Antioch denied Student a FAPE by failing to adequately address this clear impediment to Student's education.

Student failed to provide evidence of the dates during which Student was impacted by Antioch's failure to adequately address Student's behavior needs; or exactly how failing to address his attendance and tardiness impacted Student's access to education. Nor did he provide evidence as to the type of compensatory education that should be provided to remedy the denial of FAPE.

No evidence established that Student's behavior needs were inadequately addressed from March 20, 2017 to the date the IEP team decided to reduce his school day in an effort to improve his attendance without benefit of an assessment. Absent evidence that Student was impacted during a different time frame, this decision concludes that, from March 16, 2018, the date the IEP team made the decision to reduce his school day, Student was denied a FAPE by Antioch for failing to adequately address his behavior.

Student submitted evidence of Student's attendance records, indicating how often Student was absent or tardy. Although the records were not 100 percent accurate, the preponderance of the evidence established that the errors were few and the records were substantially reliable. Mother, and all of Student's teachers testified that Student's greatest struggle was in reading. Student's late arrivals primarily impacted his ability to access his reading instruction. All of these factors will be combined to determine an appropriate remedy for the denial of FAPE for failure to adequately address Student's behavior needs from March 16, 2018 to March 20, 2019.

ISSUE 2C: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING TO ADEQUATELY ADDRESS STUDENT'S SOCIAL-EMOTIONAL FUNCTIONING, SOCIAL SKILLS AND PRAGMATIC LANGUAGE

Student failed to prove by a preponderance of the evidence that Antioch inadequately addressed Student's social emotional, social skills or pragmatic language needs from March 20, 2017 to March 20, 2019. Student produced no evidence that Student had social emotional needs that were not being addressed by Student's IEP.

Student failed to prove that Student had social-emotional needs that were not being met by his IEPs. Student was placed in an intensively behavior-focused non-public day school program that provided embedded services of group and individual counseling. Additionally, the school employed one-on-one discussion of, and support for, social interactions and social emotional difficulties from staff, faculty and administrators. In addition to promoting self-control, the staff assisted Students with identifying self-soothing methods such as taking breaks and identifying activities they enjoyed.

Student was provided with weekly group and individual counseling. In group counseling he worked on social skills and Ms. Faiez also addressed social skills occasionally in his individual counseling sessions. She believed, however, that his deficits in the area of social skills were a result of his inability to regulate his emotions which was mostly attributable to his disruptive mood dysregulation disorder. Student failed to prove that he had a pragmatic language need.

No evidence was presented that the Sierra program was inadequate to meet Student's social-emotional functioning, social skills or pragmatic language needs. Student's social emotional needs were adequately assessed.

Student failed to provide evidence of any additional social emotional services that Student needed that were not already being provided. Student's outside counselor made no recommendations as to what other services should have been provided, and

did not give an opinion on whether the services offered to address Student's social skills, social emotional functioning or pragmatic language were appropriate. Nor did Student prove that there were other approaches Antioch should have taken to address Student's social emotional well-being or social skills that were not being taken.

Student failed to meet his burden of proving that Antioch denied him a FAPE during the period from March 20, 2017 to March 20, 2018 for failing to adequately address his social emotional, social skills or pragmatic language.

ISSUE 2D: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING TO ADEQUATELY ADDRESS STUDENT'S INABILITY TO ACHIEVE ANNUAL GOALS AND NEED FOR REVISED GOALS DUE TO HIS ACADEMIC FAILURES:

Student failed to prove that he was demonstrating a general inability to achieve annual goals. The evidence established that Student was making progress on most of his goals despite the fact that he frequently missed school. A Student may derive educational benefit that meets the requirements of the IDEA even if some of her goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A Student derives benefit when he improves in some areas even though he fails to improve in others. (See Fort Zumwalt Sch. Dist. v. Clynes (8th Cir. 1997) 119 F.3d 607, 613; Carlisle Area School v. Scott P. (3rd Cir. 1995) 62 F.3d 520, at 530.) A Student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the Student is making progress commensurate with his abilities. (Walczak v. Florida Union Free School District (2d Cir. 1998) 142 F.3d 119, 131; E.S. v. Independent School District, No. 196 (8th Cir. 1998) 135 F.3d 566, 569.)

There is no one test for measuring the adequacy of educational benefit conferred under an IEP. (Board of Education of Hendrick Hudson Central School District

*v. Rowley* (1982) 458 U.S. 176, 201, 202; 102 S.Ct. 3034; 73 L.Ed.2d 690 (Rowley). Here, Student was making slow progress in his reading but he was progressing. His math progress was more impressive and, while not at grade level, his progress reports show a steady improvement from March 20, 2017 to March 20, 2019.

Student made progress despite his challenges. Student's behavior and absences, warranting his placement in a non-public school that emphasized behavior and mental health attention, interfered with his ability to make progress. Student argues that Antioch placed too much emphasis on addressing his behavior needs and not enough on academics. However, Ms. Faiez and Ms. Shah both opined that placing an emphasis on Student's behavior, as the program at Sierra did, was necessary in order to help Student achieve the ability to focus more consistently on academic subjects. Without his ability to regulate his emotions, he was unable to regulate the frustration that interfered in his ability to progress more rapidly.

Ms. Pippin's report also emphasized that Student's medical diagnosis interfered with his ability to progress and described in detail how Student's medical diagnosis of disruptive mood dysregulation disorder impacted Student's self-control. The evidence showed Student's behaviors improved in class compared to information available regarding his conduct from second grade forward despite his significant challenges. The approach was working, albeit slowly.

Student failed to provide evidence of the progress that should have been achieved or that was achievable given Student's circumstances. However, Student did prove that Antioch should have explored adding a goal that addressed attendance, given Student's struggles with absenteeism, tardiness and school avoidance. A student's IEP must include goals to address the needs of the individual that result from their disabilities, to enable the student to be involved in, and make progress, in the general education curriculum. (Ed. Code §56345(A)(2)(A).)

Student failed to prove the date on which it should have been determined that a goal to address his school avoidance was necessary; therefore, the alleged violation cannot be measured. While Student proved Antioch should have provided a goal, Student failed to prove exactly what the goal should have addressed, the nature of the educational benefit denial that resulted from the failure to provide the goal; or the appropriate remedy for the failure to institute an attendance goal. Therefore, while failing to provide the goal was a procedural error, Student failed to prove that it rose to the level of a substantive denial of FAPE that required a remedy.

**ISSUE 3A: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY PROVIDING AN UNCLEAR IEP AMENDMENT FROM THE AUGUST 25, 2017 IEP TEAM MEETING?**

The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)). A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*)

After the completion of a child's annual IEP, the parent and the educational agency may agree not to convene an IEP team meeting for purposes of making changes to the IEP and instead may develop a written document to amend or modify the child's current IEP. (34 C.F.R 300.324(a)(4).)

Student failed to prove that the August 25, 2017 IEP amendment was unclear. The only error Student identified was confusion regarding signature dates on the IEP Amendment. Both Mother and Antioch's program specialist mistakenly dated the amendment in one place with a 2018 date instead of a 2017 date. However, there was no testimony from Mother that those errors resulted in any confusion on Mother's part or that Mother did not understand the August 25, 2017 amendment which changed

Student's school from Kimball to Diablo Vista. In fact, Mother testified that she requested that specific IEP amendment and Antioch provided the change she requested.

No evidence was presented that Mother lacked an understanding of the need to seriously consider the change of placement due to a lack of clarity in the August 25, 2017 IEP amendment. Nor was there any evidence presented that the obvious error in the date accompanying a signature rendered the August 25, 2017 IEP insufficiently clear and specific to permit Mother to make an intelligent decision as to whether to agree or disagree with Antioch's August 25, 2017 FAPE offer, which, ultimately, simply documented Mother's requested change to Student's IEP. Student did not prove Antioch denied a FAPE for failure to provide an unclear August 25, 2017 IEP Amendment.

### ISSUE 3B: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING TO HAVE REQUIRED PERSONNEL AT THE AUGUST 25, 2017 IEP TEAM MEETING?

A formal IEP team meeting is not required in order to amend an IEP that has been previously completed. (34 C.F.R 300.324(a)(4).)

On August 25, 2017, Mother and Ms. DeBerardino, an Antioch program specialist, discussed changing Student's placement over the telephone. Ms. DeBerardino agreed to Mother's request to move Student to the Diablo Vista campus due to Mother's concerns about the Kimball campus. Mother agreed to provide transportation until Ms. DeBerardino could arrange for the bus to pick Student up. The evidence established that Diablo Vista's program is identical to Kimball's program. Ms. DeBerardino and Mother agreed to execute an IEP amendment to memorialize this change to Student's IEP.

Documents to accomplish this change were sent to Mother in the mail including a copy of her procedural safeguards, the IEP amendment form, and a form confirming that she had excused all other members of the IEP team from the discussion during her

telephone conversation with Ms. DeBerardino. The excusal form was not required for an IEP amendment discussion. However, Mother did not know that; and pursuant to Ms. DeBerardino's request, Mother signed consent to the absence of the other IEP team members when she signed the IEP amendment.

Mother and Antioch agreed that no meeting would be convened to modify Student's IEP. There was no denial of FAPE for failure to convene a complete IEP team for purposes of discussing and executing the August 25, 2017 IEP amendment.

ISSUE 3C: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING, UNTIL NOVEMBER 13, 2018, TO CLASSIFY STUDENT AS HAVING A SECONDARY DISABILITY OF SPECIFIC LEARNING DISABILITY?

Student asserts that Antioch's failure to classify him as having a secondary disability from March 20, 2017 to November 13, 2018 denied him a FAPE because, had Antioch acknowledged Student's learning disabilities, Antioch would have developed appropriate goals and provided related services to help him meet the goals. Antioch argues that the goals in place combined with teaching methodologies employed by Sierra schools addressed all of Student's needs.

The IDEA does not give a Student a legal right to a particular disability classification or even to a proper disability classification so long as each child is designated as having disability listed in 20 United States Code section 1401. (20 U.S. §1412(a)(3)(B); *Weissburg v. Lancaster* (9th Cir. 2010) 591 F. 3d 1255, 1259.) Student was classified as eligible for special education as a Student with an emotional disturbance. Eligibility pursuant to specific learning disability was added as a secondary eligibility category on November 13, 2018.

Antioch acknowledged Student's need for special education and related services, and had an IEP in place, at all times during Student's enrollment in Antioch. Antioch provided a research based reading program intended for use by Students with dyslexia.

Student failed to prove that it was inadequate. Ms. Kusabe, the Assistive Technology Assessor, noted that the Antioch was already using several approaches she was recommending as a result of her assessment. Student failed to prove that, had Student been classified as eligible as a student with a specific learning disability earlier, he would have received different levels or types of services than already offered by the IEPs in place. Nor did he provide evidence that he should have received different services than Antioch offered. The IDEA is not concerned with labels. What is important is whether a student is receiving a FAPE. (*E.M. ex rel. E.M. v. Pajaro Valley Unified School District*, (9<sup>th</sup> Cir. 2014) 758 F. 3d. 1162, 1173.) Student failed to prove he was denied a FAPE by not having the secondary specific learning disability category added earlier.

**ISSUE 4: DID ANTIOCH DENY STUDENT A FAPE FROM MARCH 20, 2017 TO MARCH 20, 2019 BY FAILING TO PROVIDE PARENT MATERIAL INFORMATION REQUIRED BY THE IDEA AND NECESSARY TO HER INFORMED CONSENT TO IEPs, NAMELY, SUFFICIENT INFORMATION FROM APPROPRIATE ASSESSMENTS TO ALLOW HER TO PARTICIPATE MEANINGFULLY IN THE IEP PROCESS?**

Student's Issue No. 4 is duplicative of Issue No. 1 in that no additional denial of FAPE is proven. Student asserts that an additional denial of her right to meaningfully participate in the IEP process arises from the failure to provide her with the reports that would result from the assessments she has proven Antioch failed to provide. Student provides no legal authority to support the argument that Mother is denied an opportunity to meaningfully participate in the IEP development process twice by virtue of being denied the same assessment reports.

A substantive denial of FAPE has already been determined for failure to provide the assessments; and assessments have been ordered. Additionally, Antioch is ordered to pay for assessors to participate in IEP team meetings to allow Mother the opportunity to meaningfully participate in the process. Student has failed to provide any evidence

that she has been denied two separate types of meaningful participation due to a single failure to assess. Antioch did not separately deny Student a FAPE by failing to provide Mother with the assessment reports earlier.

## REMEDIES

ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). In remedying a FAPE denial, the Student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). The purpose of the IDEA is to provide Students with disabilities “a free appropriate public education which emphasizes special education and related services to meet their unique needs.” (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means “relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d. at p. 1497.)

School districts may be ordered to provide compensatory education or additional services to a Student who has been denied a FAPE. (*Id.* at p. 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11;129 S.Ct. 2484.) These are also equitable remedies that courts and hearing officers may employ to craft “appropriate relief” for a party. (*Puyallup, supra*, at p. 1496.)

An award of compensatory education need not provide “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual Student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (*Ibid.*) Hour-for-hour relief for a denial of FAPE is not required by law. *Puyallup,*

*supra*, at p.1497.) Neither is it prohibited, and at a minimum it can form a beginning basis for calculating relief, in the absence of a better measure.

## ASSESSMENTS

### Speech and Language

Student proved that Antioch's failure to conduct a timely speech and language assessment denied him a FAPE in that it denied Mother the opportunity to meaningfully participate in the development of his IEP. An appropriate remedy for the failure to provide the timely speech and language assessment is for Antioch to fund an independent speech and language evaluation by the assessor of Mother's choice and fund the appearance of the assessor at the IEP team meeting convened to discuss the assessment. This will allow Mother the opportunity to ask any questions she has, thereby providing the opportunity for meaningful participation in the IEP development process and the development of a program that provides appropriate education pursuant to the mandates of the IDEA. (See *Puyallup, supra*, 31 F.3d. at p. 1497.)

Antioch shall directly contract with the assessor of Mother's choice and fund an assessment in an amount up to \$1,500 which is a commonly charged fee for speech and language assessments in the San Francisco Bay Area.

### Behavior

Student proved that Antioch failed to conduct a behavior assessment that was warranted due to Student's continued school avoidance issues did not abate after several different approaches were attempted. Prior to instituting a reduction of Student's school day in order to shorten his bus ride, thereby diminishing his instructional time, Antioch should have pursued a behavior assessment. That decision was made on March 16, 2018.

An appropriate remedy for the failure to provide the behavior assessment is for

Antioch to fund an independent comprehensive behavior evaluation by the assessor of Mother's choice. The chosen assessor shall have the discretion to include elements of a functional behavior assessment should the assessor deem it useful in determining the cause of Student's school avoidance. Antioch shall also fund the appearance of the assessor at the IEP team meeting convened to discuss the assessment, allowing Mother the opportunity to ask any questions she has, so she is provided the opportunity for meaningful participation in the IEP development process and the development of an appropriate IEP to meet Student's needs. (Id.) Antioch shall directly contract with and fund a behavior assessment in an amount up to \$6,000 as this sum represents fees previously ordered by OAH for thorough behavior assessments in the San Francisco bay area.

#### Mental Health

Student proved that Antioch failed to conduct a mental health assessment that was warranted after completion of Ms. Shah's report to the IEP team regarding the outcome of the behavior rating scales by Student, Mother and Ms. Walker; and Mother's ratings of Student on scales of emotional disturbance and adaptive behavior. The outcomes of these assessments in combination with Student's psychiatric history and his violent school avoidance should have resulted in Antioch determining that a full mental health assessment of Student was warranted, particularly in light of Student's worrying self-assessment results and comments to Ms. Shah during the self-assessment process.

The appropriate remedy for the failure to initiate a mental health assessment is for Antioch to fund an independent, comprehensive mental health evaluation by a qualified assessor of Mother's choice who shall have, at minimum the ability to diagnose psychiatric disorders, evaluate their impacts in an educational setting, and recommend appropriate services if necessary. The selected assessor shall assess Student's current mental health and whether it is interfering with Student's ability to access his education.

Antioch shall directly contract with and fund an assessment not to exceed \$7,000 as this sum represents commonly charged fees for comprehensive mental health assessments conducted by assessors with the designated credentials in the San Francisco Bay Area.

Antioch shall also fund the participation of the assessor at an IEP team meeting convened for the purpose of reviewing the results and recommendations in the assessment report. This shall allow Mother the opportunity to ask questions and meaningfully participate in a discussion regarding the development of an appropriate educational plan as mandated by the IDEA and California special education laws.

### Occupational Therapy

Student proved that Antioch failed to provide an occupational therapy assessment following the September 26, 2017 IEP team meeting in which it was revealed Student chewed on his shirt during class. Although Mother declined the assessment, Antioch had an obligation to assess in all areas of suspected disability. Antioch's provision of sensory items despite having the assessment done is evidence that they suspected Student had sensory needs. Student should have been assessed in approximately 75 days, taking into account the time Parents have to consider the assessment plan and the time Antioch would have had to provide the assessments. (20 U.S.C. 1414(a)(1)(C); 20 U.S.C. 1414(b)(1); Ed. Code §56321.) That did not occur and resulted in a procedural violation of the IDEA. However, Antioch has completed the assessment. Student submitted no evidence that any remedy other than an assessment was necessary.

### COMPENSATORY EDUCATION

Student failed to prove the timeframe for which any compensatory education was due. Nor did Student prove the types of compensatory education that Student required. However, compensatory education is an equitable remedy. Student has established that

Antioch denied him a FAPE by failing to address his behavioral needs.

On March 16, 2018, Antioch decided it would need to reduce Student's school day to improve his attendance, a decision made without the benefit of assessment or any data indicating this would successfully address Student's needs. Absent any evidence of another date from which compensatory education should be provided, Antioch is found to have denied Student a FAPE for failure to adequately address his behavior needs as of March 16, 2018, through the end of the period at issue here which is March 20, 2019.

Student failed to provide evidence of the compensatory education that should be due to Student. However, Student did provide evidence that Student was denied FAPE, that the FAPE denial resulted from the failure to address his attendance issues and that the failure to address his attendance issues resulted in a loss of instructional time, especially in reading instruction which was provided in the mornings prior to Student's frequent late arrivals. While Ms. Walker did state that she provided some make-up English Language Arts instruction when Student arrived late, no evidence of how much makeup provided was detailed.

According to Sierra's attendance records for the period from March 15, 2018 to March 20, 2019, Student missed school 69 days and was tardy more than 90 minutes on 10 occasions. Due to Student's substantial remediation needs, and the fact that his absences became more frequent toward the end of the time period, resulting in a lack of reinforcement of the instruction he was receiving, Student is allocated 120 hours of compensatory education with the private academic instruction provider of Mother's choice. The total represents approximately 1.5 hours per day that Student was absent or significantly tardy. 80 percent of these hours must be devoted to instruction provided by a reputable research-based, reading, spelling and writing program that meets Student's needs and was developed to address the needs of children with Dyslexia. The

program shall provide one-on-one, in person instruction. The balance of the hours may be devoted to academic remediation in any other subject deemed most important by Mother, which could be additional reading instruction or could address Student's other needs. These hours of compensatory education will be available to Student through the end of the 2020-2021 school year and shall remain available to him regardless of whether the family lives in the Antioch district, as they compensate for past services not received.

Antioch shall directly contract with the academic instruction providers of Mother's choice. The cost of the instruction shall not exceed \$120 per hour for the academic instruction. This amount is based on rates usually charged in the Bay Area by organizations providing individual dyslexia focused remediation.

Student failed to prove that Student was entitled to any other compensatory education.

## ORDER

1. Antioch shall provide Student with an independent assessment in the area of speech and language with the assessor of Mother's choice in an amount not to exceed \$1,500.
2. Antioch shall provide Student with an independent assessment in the area of behavior and shall fund an assessment provided by a person who is a Board Certified Behavior Analyst. The assessor shall have the discretion to include elements of a functional behavior assessment in the evaluation of Student's school avoidance at their discretion. Antioch shall directly contract with the assessor of Mother's choice in an amount not to exceed \$6,000.
3. Antioch shall provide Student with an independent assessment in the area of mental health and shall fund an independent, comprehensive mental health evaluation by a qualified assessor of Mother's choice who shall have, at

minimum, the ability to diagnose psychiatric disorders, evaluate their impacts in an educational setting, and recommend appropriate services if necessary. The selected assessor shall assess Student's current mental health and whether it is interfering with Student's ability to access his education. Antioch shall directly contract with the assessor of Mother's choice in an amount not to exceed \$7,000.

4. Within 10 business days of the date of this order, Antioch shall:
  - a. Provide Mother with instructions for providing information to Antioch to allow it to contract with Mother's selected assessors.
  - b. Present Mother with a list of qualified independent speech and language, mental health, and Board Certified Behavior Analysts. Mother is free to choose an assessor who is not listed so long as the fees do not exceed the limits ordered above.
5. Any contract entered into by Antioch shall also include the necessary additional sum required to have the assessors join an IEP team meeting, to discuss the findings of the assessment and recommendations, if any.
6. Antioch shall make all necessary efforts to expedite the arrangements for contracting so that the assessments can be finished as quickly as possible given the available schedules of Mother's chosen assessors.
7. Antioch shall also provide 120 hours of compensatory academic tutoring with 80 percent of the 120 hours devoted to reading instruction using a the reputable, research-based reading, spelling and writing instruction method of Mother's choice in an amount not to exceed \$120 per hour.

## 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(a)(4), 1(a)(8) and 1(a)(10) and on issue 2(b). Antioch prevailed on all other issues presented.

## 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: July 22, 2019

*/s/*

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings