

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 No. 2017061061

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on June 21, 2017, naming Antioch Unified School District. The matter was continued for good cause on August 2, 2017.

Administrative Law Judge Tiffany Gilmartin heard this matter in Antioch, California, on October 24, 25, 26, and November 1, 2, and 28, 2017¹.

William N. Pohl, Attorney at Law, represented Student. Student's Mother attended all dates of the hearing. Father attended on November 2, 2017. Student did not attend.

Kidd P. Crawford, Attorney at Law, represented District. Ruth Rubalcava, Director of Special Education attended the hearing on behalf of District.

On November 28, 2017, the last day of hearing, the matter was continued to

¹ Division Presiding Administrative Law Judge Margaret Gibson was present for the morning of October 24, 2017.

January 2, 2018, to allow parties to submit written closing arguments. Upon timely submission of closing arguments, the record was closed.

ISSUES²

1. Did Antioch deny Student a free and appropriate public education (FAPE) during 2015-2016 school year by:

- a. failing to fulfill its child find responsibility;
- b. refusing to perform a functional behavior assessment and implement a behavior intervention plan?

2. Did Antioch deny Student a FAPE during the 2016-2017 school year by:

- a. failing to assess in all areas of suspected disability;
- b. failing to provide Student with a FAPE in the least restrictive environment;
- c. failing to provide services as per the last agreed upon placement for Student;³
- d. failing to provide Student with a placement offer;
- e. failing to provide goals for the Student in all areas of need; and
- f. failing to implement the individualized education program (IEP)?

3. Did Antioch deny Student a FAPE during the 2017-2018 school year by failing to have an IEP in place for the beginning of the 2017-2018 school year?

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

³ Student Counsel clarified the last agreed upon placement was home hospital instruction in Spring 2016.

SUMMARY OF DECISION

This Decision finds that although Antioch failed to meet its child find obligation to Student during part of the 2015-2016 school year, Student failed to establish he was eligible for special education and related services prior to January 6, 2016, when Antioch found him eligible. Therefore, he did not meet his burden establishing this violation constituted a denial of FAPE. This Decision finds Antioch denied Student a FAPE by failing to complete a functional behavior assessment during the 2015-2016 and 2016-2017 school years, and a mental health assessment beginning in April 2016.

Further, this Decision finds Student was denied a FAPE during the 2016-2017 school year due to Antioch's failure to provide Student goals in specific areas of need, and to provide Student with a clear placement offer. As a result Student is entitled to compensatory education, reimbursement, and an independent functional behavior assessment at public expense.

This Decision finds Antioch did not deny Student a FAPE for the 2017-2018 school year for failing to have an IEP in place at the beginning of the school year.

FACTUAL FINDINGS

BACKGROUND

1. Student is a 13-year-old boy who at all times resided within the boundaries of Antioch. He is an active boy who likes rough-and-tumble activities and is known as a hard-worker. He attended an Antioch charter school from third grade until sixth grade. Student attended middle school during the time period at issue. At all times, Student struggled academically and behaviorally at home and school.

2. Student also struggled relating to his school peers. He often felt singled out and he believed others did not like him. He struggled with self-control and responding appropriately to the behavior of other children. Mother called him a "bait

taker." As a result, he has been suspended numerous times for behavior issues. As a third grader, Student was diagnosed with attention deficit hyperactivity disorder, combined type and anxiety.

FOURTH GRADE SCHOOL YEAR 2013-2014

3. While enrolled at the charter school, Student was on a trimester schedule with report cards issued three times per year. Rather than traditional grades, student performance was described by numerical or symbolic ratings. If a student received a "1" or "Δ" it was identified the student needed "additional support/change," or "needs developing" in that area of academic study. Student received numerous "1" or "Δ" marks in his fourth grade year including in areas of focus and direction following.

4. In November 2013, Parents requested and Student received a written Section 504 plan.⁴ The plan was developed to help him with work completion and focus. His accommodations included the option to stand during classes, to sit near older students, preferential class seating, clear expectations, class jobs, daily feedback on his work, and a weekly behavior report for Parents. Mother signed his initial Section 504 plan in November 2013.

5. After the implementation of his Section 504 plan, his grades did not improve. His "lifelong guidelines/life skills," "writing," "mathematics," and "math unit average" marks declined in the second trimester. By the third trimester, Student's writing grade remained "1," his mathematics unit average declined to 23 from a 57 in his first

⁴ A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

semester. He still demonstrated weakness in learning skills such as "takes responsibility for own learning," "respects learning atmosphere," and "organizes for learning."

6. The charter school also kept logs for students who had negative contact with a teacher or staff member. If an adult witnessed the negative behavior and gave a student a "rec," the student would have a conversation with the adult about the behavior. Student received eight "rec" entries from teachers at the charter school that year. He also received eight referrals home. Three incidents were food-related where he took another student's food or threw food at another student. Five incidents were physical involving hitting or throwing things at other students. He was given an out of school suspension on April 15, 2014, for shoving another student during recess. He was suspended again on May 8, 2014, for disrupting a testing situation, defiance to a teacher, and not following the teacher's instructions.

FIFTH GRADE SCHOOL YEAR 2014-2015

7. Now a full year into his Section 504 plan, Student's academics still were not improving. In fifth grade, Student continued to have three teachers. Two teachers carried over into the fifth grade year.⁵ Student had one new teacher that year, Marianne Dubitsky. Ms. Dubitsky, who testified at the hearing in this matter, was the charter school's licensed school psychologist, and also a member of the Student Study Team who developed Student's two Section 504 accommodation plans. Ms. Dubitsky knew of Student's attention deficit hyperactivity disorder diagnosis.

8. He continued to receive "1" or "Δ" in "life guidelines/life skills," "positive attitude in P.E.," "completes classwork on time," "mathematics," "algebraic thinking," "operations," "fractions," "math work completion," and "math facts." Student's second

⁵ Student had five teachers while at the charter school, only Ms. Dubitsky was called to testify.

Section 504 accommodation plan was signed by Father on October 3, 2014.

9. In terms of behavior, Student continued to act out. During fifth grade he received 24 negative behavior entries and two suspensions. Thirteen times he was counseled by a teacher or staff member for failing to follow directions, for engaging in aggressive physical contact with another student, and disrupting class. He received six referrals. He was also suspended two times for a total of four days for intentionally tripping another student and disrupting a testing situation.

10. Ms. Dubitsky believed Student did not demonstrate maladaptive behaviors indicating the need for a special education referral as she considered his behavior, "comparable to other students." Her perception was belied by Student's disciplinary record. The evidence established Student's negative behaviors escalated in fifth grade. Student was suspended twice in fifth grade, for a total of five days. Both incidents involved maladaptive behaviors that impeded his and other students' opportunities to learn.

11. The evidence established that by the end of the 2014-2015 school year, the charter school had knowledge of, or reason to suspect, Student may have had a disability and reason to suspect that special education services may be needed to address that disability. Specifically in this case, the evidence established that Student displayed symptoms possibly consistent with a specific learning disability due to his academic challenges and general education interventions had not stopped his academic decline. He also demonstrated symptoms possibly consistent with other health impairment due to his behavioral concerns and attention challenges.

12. The charter school and Antioch executed a memorandum of understanding specifying that the charter school would "assume primary responsibility, and fully cooperate with the District, in identifying any student with special needs." Antioch retained all responsibility for all other "IDEAIA obligations and responsibilities

not assigned to the Charter School.” In this case, Antioch failed to refer Student for a special education assessment by at least end of 2014-2015 school year which was an essential component of meeting its child find obligation.

SIXTH GRADE SCHOOL YEAR 2015-2016

13. Student started sixth grade at the charter school. Student was in Ms. Dubitsky’s class again. As his fifth grade teacher, Ms. Dubitsky was aware he struggled with writing, mathematics, focus, and work completion. Student’s academic struggles continued into his sixth grade year.

Special Education Referral and Assessment

14. On October 15, 2015, Mother consented to assess Student. Mother agreed to have Student assessed in the following areas: academic achievement, intellectual development, motor development, social/emotional, adaptive behavior, and other observations, interviews, and file review.

15. On October 22, 2015, Debbie Johnsen, education specialist at Antioch administered the Woodcock-Johnson IV Tests of Achievement and the Wide Range of Achievement Test, Revision 3.

16. School psychologist, Leslie Allen, administered: the Weschler Intelligence Scale for Children—Fourth Edition; the Test of Auditory Processing Skills, Third Edition; the Test of Visual Perceptual Skills—Third Edition; and the Behavior Assessment System for Children—Second Edition.

January 6, 2016 IEP meeting

17. An IEP team meeting to review the test results was held on January 6, 2016. At this team meeting, Student’s IEP team determined he was eligible for special education and related services. It was not established by a preponderance of the

evidence that Student was eligible for special education and related services prior to the date Antioch found him eligible.

18. The team identified his areas of need as math and behavior. To this end, the team drafted five goals for Student. One goal addressed math computation, one addressed English language arts, and three goals addressed behavior. Two of the behavior goals addressed task completion and one addressed on-task behavior and completing assignments.

19. The Antioch members of Student's IEP team offered placement outside of the general education environment for six percent of the time because he would receive specialized academic instruction for 120 minutes per week. He was offered "push in" support from a special education staff member who provided him assistance in his reading and writing.

20. At the conclusion of the meeting, Parents did not consent to the IEP. Mother asked for further revisions to the goals. She sent specific feedback to Ms. Johnsen. Mother asked for goals to help Student address his belief he is singled out for his behavior. She also asked for support to neutralize his "bait taking" behaviors that got him into trouble. Following feedback from Mother, Ms. Johnsen provided Parents a revised goal for math and task completion on January 13, 2016. On January 26, 2016, Mother consented to Student's eligibility finding while reserving consent on goals and services provided.

21. Mother informed Antioch that her refusal to consent was due, in part, to the inadequacy of the goals and the lack of a functional behavior assessment. Antioch provided Mother with an assessment plan for a functional behavior assessment on February 15, 2016. She consented to the assessment the same day and signed the document.

TRANSFER TO PARK MIDDLE SCHOOL AND MARCH 4, 2016 IEP

22. At the end of February 2016, fearing that the escalation of his behaviors would result in expulsion, Parents withdrew Student from the charter school and enrolled him at Park Middle School. Park Middle School is one of four comprehensive middle schools within Antioch.

23. Park Middle School convened an IEP team addendum meeting on March 4, 2016. The purpose of the meeting was to discuss Student's transition to Park Middle School and accommodation needs. Teachers reported Student had conflicts with other students at lunch time; was not completing his assignments; appeared unfocused, especially in the afternoon; and often misinterpreted social cues from peers.

24. In preparation for the IEP team meeting, Zane Anderson, the school psychologist at Park Middle School began reviewing records on March 2, 2016. Mr. Anderson, who testified at the hearing in this matter, had concerns with Student's behaviors, specifically his difficulty with peers and the verbal altercations with them.

25. At the meeting, Student's special education teacher, Kirsten Rocheleau reported Student often needed to sit at a table for ten minutes before he is able to focus on his academic tasks. Student especially struggled in regaining focus after lunch. The school psychologist, Mr. Anderson observed Student once in class and found him unfocused. Stacey Saadiq, Student's general education teacher, reported he was not completing his homework. Student was failing science due to incomplete assignments. Principal John Jimno reported Student was having issues with other students due to his inability to recognize social cues from others.

26. At the end of the IEP team meeting, Antioch offered Student 30 minutes of counseling weekly and 43 minutes per day of specialized academic instruction in a pull out/push, small group setting. Parents consented to receiving these services. Antioch, also, presented Parents with a new assessment plan to "establish [Student's] current

academic levels." The plan covered academic achievement, motor development, social/emotional, executive functioning, specifically, on attention and concentration concerns. Mother consented to this assessment plan on March 4, 2016. The team scheduled an additional IEP team meeting for May 6, 2016, to finalize Student's goals and agreed to submit them to Parents in advance.

27. Antioch also gave Student a battery of psychological tests. Student was given the Developmental Neuropsychological Assessment, Second Edition on April 26, 2016. On May 6, 2016, Father, Student, and four of Student's teachers completed the Behavior Assessment System for Children—Second Edition. That same day, the Conners Rating Scales, Third Edition was also completed. Finally, he was administered the Wechsler Individual Achievement Test-Third Edition, where he completed this assessment on May 12, and May 17, 2016.

28. Spring Break for Antioch was March 25-April 4, 2016. Thus, accounting for the holiday, the functional behavior assessment, which Parents consented to on February 15, 2016, should have been completed by April 26, 2016. Mr. Anderson submitted the assessment summary on May 20, 2016, at the IEP team meeting. This meeting was untimely and Antioch presented no evidence why the meeting was held beyond the applicable statutory period.

STUDENT'S BEHAVIOR ISSUES AT PARK MIDDLE SCHOOL

29. On March 23, 2016, Student engaged in a "slap game" with another student. When Student slapped the other student, the other student confronted Student, and a fight broke out. Student was suspended from school for a day.

30. He was suspended again for another fight on April 8, 2016. Father witnessed the fight while waiting in his vehicle for Student after school. He saw another student approach Student, where they engaged in a verbal altercation. Student attempted to withdraw from the altercation by sitting down. The other student re-

engaged Student and then Student pushed the other student away. By this time, Father left his vehicle and approached the skirmish. School security and an assistant principal also intervened. Student was detained by school personnel until Father demanded Student be released to him and they left the campus.

31. The fight triggered anxiety in Student. His parents took him to Kaiser on April 13, 2016, for a mental health evaluation. The treating physician ordered a mental health exam and recommended Student be home-schooled until a safer school environment was determined. Student did not return to Park Middle School.

32. There was inconsistent testimony regarding whether Mother informed members of Student's IEP team that he suffered suicidal ideations following the fight. It was established, however, that Mother did inform Antioch about Student's treatment and evaluation by Kaiser for mental health concerns and that he was suffering from anxiety.

HOME HOSPITAL INSTRUCTION

33. For a student eligible for special education to be placed by the IEP team on home\hospital instruction, the student must provide a note, signed by a physician stating the diagnosed condition, and certifying the condition prevents the student from attending a lesser restrictive placement, and a projected calendar date for the student's return to school.

34. Parents provided a note on April 13, 2016, from Student's physician stating he needed to be home-schooled as a result of being a victim of bullying. The physician recommended he be home-schooled for the remainder of the 2015-2016 school year.

35. An addendum IEP team meeting was convened on April 19, 2016. Parents told Antioch a comprehensive middle school was not working for Student. At that point, Parents refused to return Student to Park Middle School. They requested Student be placed and on home\hospital status for the remainder of the school year. Antioch, in

their IEP amendment notes, stated Antioch team members “believed current placement was FAPE.” However, Antioch agreed to place Student in a home\hospital status through the “end of the school year.” Antioch also offered five 60-minute sessions of instruction, 60 minutes of counseling, and an extra 30 minutes of counseling per week while he was enrolled in home\hospital. Parents consented to the April 19, 2016 IEP, wherein Antioch retained Student’s prior goals. By April 19, 2016, Antioch was on notice that mental health was now a suspected area of need for Student. Antioch was required to but did not offer to assess Student’s mental health needs at that time. Student formally withdrew from Park Middle School on April 29, 2016.

PRIOR WRITTEN NOTICE OF MAY 4, 2016

36. Student’s functional behavior assessment was not completed. Antioch contended the assessment could not be completed due to Student’s absence from school. Kai Montgomery, special education coordinator, sent Parents a prior written notice on May 4, 2016, informing them Antioch would complete the functional behavior assessment when Student returned to school as Antioch personnel were unable to collect data about the Student in a natural environment with Student’s enrollment in home\hospital instruction.

37. There was no evidence that Antioch made any attempt to timely complete the assessment. By this time, Antioch placed Student in a home\hospital setting through an IEP. No evidence was presented at hearing establishing why the functional behavior assessment was no longer required under the law or why it could not have been done in the Student’s then placement. Alternatively, no requests were made to arrange for an alternative setting so that the assessment could have been completed in a school setting. The evidence established in this case that Antioch was not relieved of its obligation to conduct a functional behavior assessment once it transitioned Student to a home\hospital placement.

MAY 20, 2016 IEP MEETING

38. The District convened an IEP team addendum meeting on May 20, 2016 to review Student's assessment results, goals, and present Parents with an IEP offer. The IEP did not draft or present goals to Parents.

39. Antioch's offer of placement was at a "comprehensive middle school with counseling support, [occupational therapy] OT consult, behavioral goals and BIP [behavior intervention plan], to support the transition back into a comprehensive middle school, the team agrees to include an incremental schedule for [Student] to return to full day by the 3rd quarter of the 16-17 school year as part of the BIP."

40. The team also recommended changing Student's eligibility from specific learning disability to other health impairment to better capture the impact his attention-deficit hyperactivity disorder has on his learning.

41. The placement offer was insufficiently clear to permit parents to meaningfully consider the offer. There were four "comprehensive middle schools" within the District. The offer stated intent to transition Student back to a comprehensive middle school but lacked any specifics regarding how this transition was to be achieved. For example, would Student attend part days and ultimately transition to a full day, or receive counseling support between classes. There are countless ways to transition a student back from home\hospital to a comprehensive school. Without any of those specifics, Parents could not meaningfully consider the offer.

SEPTEMBER 7, 2016 IEP TEAM MEETING ADDENDUM

42. Antioch convened an IEP team meeting on September 7, 2017. Multiple meeting notices scheduling IEP team meetings for different days and locations had been sent to parents, including the one Antioch actually convened on September 7, 2016. As a result of the confusion, neither the Parents nor Student were present. The meeting

went forward in their absence.

43. At the time this meeting was held, Student's IEP team was aware he had academic, behavioral, and social emotional needs, and potentially mental health needs. Specifically, he had needs in the area of math, English language arts, anxiety, transitioning from one activity to another, and peer relations. The Antioch members of Student's IEP team drafted five goals addressing math, English language arts, and behavior. No proposed goals addressed his anxiety, peer relations, or transitioning between activities. Antioch reiterated its offer of FAPE as "Placement at comprehensive school setting, specialized academic instruction in a resource program, counseling and guidance, and mentoring."

44. The proposed IEP amendment was mailed to Parents. The document consisting of team meeting notes, signature page, multiple meeting notices, and goals drafted in March 2016 made it impossible for Parents to seriously consider Antioch's offer. The IEP amendment document failed to detail the location of the placement, and no specifics to the configuration of the counseling, guidance, and mentoring (for example group or individual counseling), or the time that would be allocated to Student for special education and related services. These deficiencies rendered it impossible for Parents to consider the IEP and meaningfully participate in the IEP process.

PRIOR WRITTEN NOTICE SEPTEMBER 14, 2016

45. Antioch then sent a prior written notice to Parents on September 14, 2016. This prior written notice proposed Student had "Special education eligibility under Specific Learning Disability. Districts offer of FAPE is placement in a comprehensive middle school, specialized academic instruction, counseling and guidance." As before, the placement offer made for the Parents to consider was insufficiently clear and lacked specifics.

PRIOR WRITTEN NOTICE NOVEMBER 18, 2016

46. Antioch mailed Parents a prior written notice on November 18, 2016, notifying parents of initiating the school attendance review team and school attendance review board process for Student. Within this prior written notice, Antioch informed Parents "AUSD is ready, willing and able to provide Free and Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE), Individual/Group Counseling, and transportation. District offer of FAPE will be delivered at Dallas Ranch Middle School (DRMS)."

47. While this placement offer was specific, no other deficiencies were corrected from the offer of September 7, 2016, specifically, the amount and time configurations of special education and the related services of transition, counseling, guidance, and mentoring.

48. This was the first time Dallas Ranch Middle School was offered by the Student's IEP team. Parents did not consent to the offer. Thereafter, Parents requested an independent educational evaluation be conducted. Antioch agreed and Sara Rice Schiff, Ph.D. was the agreed-upon assessor.

INDEPENDENT EDUCATIONAL EVALUATION

49. Dr. Sara Rice Schiff, an independent clinical psychologist met with Student in her office on multiple occasions, starting in January 2017. Dr. Schiff holds a doctorate of philosophy in clinical psychology from Brigham Young University. She is licensed to practice in Utah and California. Dr. Schiff testified at the hearing in this matter.

50. Dr. Schiff reviewed Student's prior assessments conducted by Antioch. She also interviewed Student and his Parents. Student also completed the Weschler Intelligence Scale—Fifth Edition; Woodcock-Johnsen IV Tests of Achievement; the Delis Kaplan Executive Functioning System Verbal Fluency; the Children's Memory Scale; the

California Verbal Learning Test—Children’s Version; the Rey-Osterreith Complex Figure Test; Children’s Depression Inventory Test; the Wisconsin Card Sorting Test; the Revised Children’s Manifest Anxiety Scale; and the Berry Buktenica Visual Motor Integration Test. Dr. Schiff assessed Student’s mental health needs but her assessment did not constitute a functional behavioral assessment.

51. Based on Student’s assessments and interviews with his Parents, Dr. Schiff determined Student met the criteria for DSM-V diagnoses of adjustment disorder with depressed mood, other specified neurodevelopmental disorder (executive functioning deficits), and attention deficit hyperactivity disorder, combined type. She determined his executive functioning deficits impacted his ability to plan and organize. She noted he had difficulty in creating a strategy to copy a complex figure and to remember a lengthy list of words.

52. She also determined Student was suffering from post-traumatic stress from the fight at school and he exhibited signs of depression. She articulated Student continued to display pronounced reactions from the fight at school. So heightened, she opined, he likely met the criteria for acute stress disorder.

53. Dr. Schiff recommended Student receive intensive intervention in mathematics to remediate his deficiencies. She also recommended he be placed in a small, academically intensive educational setting, where discipline is applied consistently. She recommended he receive educationally related mental health services, specifically individual weekly therapy to address his depression.

JANUARY 30, 2017 IEP TEAM MEETING

54. Antioch convened an IEP team meeting on January 30, 2017. The team discussed the findings of the independent educational evaluation. Dr. Schiff participated telephonically during the IEP team meeting where she gave her report. Antioch recommended changing Student’s primary disability to other health impairment. His

areas of need were identified as math, writing, and behavior. On his functional skills assessment his struggle with organizing his thoughts and the motor skills necessary for writing were noted. His continued struggle with complex mathematics equations was also documented.

55. Antioch re-offered the goals originally drafted in March 2016. New goals in math, English language arts, and three behavior goals were included. The new goals addressed multi-step mathematics problems, task completion, behavior self-management, and the writing process. Absent, still, were any goals to address his anxiety, poor peer relations, and his on-going struggle with transitioning from one task and beginning a new task.

56. The IEP team discussed placement options. Antioch offered Student specialized academic instruction in a small group setting to take place in the counseling enriched class at Dallas Ranch Middle School, a comprehensive site. Student was offered this placement due to the small class size, the ability for individualized instruction, the opportunity to interact with neuro-typical peers, and embedded counseling available. In sum, Antioch offered Student 1,256 minutes weekly of group specialized academic instruction. He was also offered 30 minutes of counseling weekly. The IEP team offered Student curb-to-curb transportation services. This offer was extended from January 30, 2017 to January 29, 2018. At the meeting, Parents declined the offer and requested Student be placed at Halstrom Academy.

57. Dr. Schiff had not observed Dallas Ranch's counseling enriched program, but after hearing the program description, she concluded it was not appropriate for Student. She said she reported what was put forth by Mother. Two weeks prior to the October hearing, she initiated contact with Antioch in an attempt to view the counseling enriched classroom at Dallas Ranch. At the time of her testimony she had still not

observed a counseling enriched classroom at Dallas Ranch Middle School.

58. Dr. Schiff's objections to Dallas Ranch were not persuasive. They were based almost exclusively on Parents' request. Despite that, the IEP was fatally flawed. It indicated that Student would only be outside of a general education classroom six percent of the time. The offer also indicated he would receive specialized academic instruction for 1,256 minutes daily. The evidence at hearing did not reconcile this inconsistency. The offer also failed to indicate whether the 30 minutes of counseling was part of the "embedded" program or separate, and if, separate whether it was one-on-one or small group, or some other configuration. Therefore, the offer was not clear and Parents were not able to meaningfully consider the offer.

HALSTROM ACADEMY

59. In September 2017, Student enrolled at Halstrom Academy, where Student took a seventh grade math and a supported seventh grade English class. Antioch and Parents entered into an interim agreement on August 2, 2016, where Antioch agreed to provide Student with "60 minutes of direct, individual instruction at Student's home address per school day by a duly credentialed teacher." This agreement also allowed Parents to contract with a third party and seek "reimbursement from the District for an hourly rate of up to but no more than \$110.00 per hour." Parents elected to contract with Halstrom Academy as the third party.

60. Carol Ruppe, Halstrom Academy's Walnut Creek Center Director, who testified at the hearing, observed Student's behavior and academic progress at Halstrom. Halstrom, with approximately 29 full time students, has classes that run for 50 minutes. Most students at Halstrom are males. While students with attention deficit hyperactivity disorder are not a focus of the school, many students have the diagnosis, and the mostly one-to-one instruction is beneficial for them. Almost 40 percent of the student population is on a Section 504 plan or IEP. It is Western Association of Schools

and Colleges accredited. The evidence did not establish that Halstrom is a non-public school certified by the Department of Education.

61. Student made academic and behavioral progress at Halstrom Academy. He improved his peer relations. Student's anxiety is better controlled at Halstrom Academy than in his prior placements.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

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

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

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

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island*

School Dist. (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.] Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn.10.)

4. In *Andrew F. ex rel., Joseph F. v. Douglas County School Dist.* (2017) 580 U.S. ____, 137 S.Ct. 988, 996, the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast*

(2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, Student had the burden of proof on the issues decided.

ISSUE 1A: CHILD FIND 2015-2016 SCHOOL YEAR

6. School districts have an affirmative and ongoing obligation to identify, locate, and evaluate children with suspected disabilities. The IDEA requires each state to have procedures in place to identify children in need of special education services (20 U.S.C. § 1412(a)(3).) The district must “actively and systematically,” search out individuals with exceptional needs. (Ed. Code § 56300.) Districts can utilize referrals from teachers, parents, agencies, appropriate professional persons, and members of the public. (Ed. Code § 56302.)

7. A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*); *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (*Cari Rae S.*)). That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Timothy O., supra*, 822 F.3d at 1119-1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].(*Hellgate*)).

8. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R. § 300.301; Ed. Code, § 56302.1.) If the child is referred for

assessment to determine if they are an individual with exceptional needs, the determination shall occur within 60 days of parental consent. (Ed Code, 56302.1.) The threshold for suspecting a child has a disability is low. (*Department of Education v. Cari Rae S.* (D. Hawaii. 2001.) 185 F.Supp. 2d 1190, 1195.) The district's appropriate inquiry is to determine whether a child should be referred, not whether the child actually qualifies. (*Ibid.*)

9. A student shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

10. Student had significant academic and behavioral challenges in fourth and fifth grade. The charter school implemented a Section 504 plan for Student to address those concerns during the 2013-2014 school year when Student was in fourth grade. The 504 plan, a general education intervention, was designed to address Student's academic and behavioral needs. Despite general education intervention, Student's behavior and academic needs persisted. The evidence established that Student's academic deficits and maladaptive behaviors actually increased in fifth grade during the 2014-2015 school year. The evidence established that by the end of Student's fifth grade year, the charter school through its memorandum of understanding with Antioch, was obligated to refer Student for a special education assessment. The failure to do so constituted a violation of Antioch's child find duty.

11. A child find violation does not constitute a denial of FAPE unless the child would have otherwise been eligible for special education and related services. (*R.B. v Napa Valley Unified School District* (9th Cir. 2007) 496 F. 3d 932, 942.) Mother formally requested Student be evaluated for special education and related services when he entered sixth grade in 2015. Antioch presented parents an assessment plan on October 15, 2015. Student's initial IEP team meeting was held on January 6, 2016, during which

he was found eligible for special education and related services. Student failed to meet his burden to establish that he was eligible for special education and related services prior to January 6, 2016. Therefore, even though Antioch failed to meet its child find obligation regarding Student from June 2015 this failure did not constitute a denial of FAPE.

ISSUE 1B: FUNCTIONAL BEHAVIOR ASSESSMENT AND BEHAVIOR INTERVENTION PLAN⁸

12. Mother consented in writing to the functional behavior assessment on February 15, 2016. Parents removed Student from his placement on April 29, 2016. Antioch offered Student home\hospital placement through an IEP until the end of the 2015-2016 school year, to which Parents consented on April 19, 2016.

13. "Once a child has been referred for an initial assessment to determine whether the child is an individual with exceptional needs and to determine the educational needs of the child, these determinations shall be made, and an individualized education program team meeting shall occur within 60 days of receiving parental consent for the assessment." (Ed. Code § 56043 subd.(c).)

14. The 60-day period for completing the functional behavior assessment began on February 16, 2016. Spring break that year was from March 25, 2016 to April 4, 2016. This was a break of ten days. Antioch was obligated to complete the functional behavior assessment by April 26, 2016, and convene an IEP team meeting within the statutorily allotted time. Antioch failed to meet that deadline.

⁸ Student also raised for the first time in his closing argument an issue related to bullying, home\hospital placement as it related to stay put and whether stay put could be limited by time. Antioch was unable to put on a defense to these allegations. These issues will not be addressed as they were not part of Student's original pleading.

15. Antioch asserts it was absolved of its responsibility to conduct the assessment because Parent's removal disrupted its ability to assess Student. That argument is unpersuasive in this case. Antioch presented no legal authority that it was relieved of its obligation to complete the assessment. Additionally, while Parents initially removed Student, Student's placement became home\hospital through an IEP on April 19, 2016. Antioch could have conducted observations of Student when he received home\hospital instruction outside of the school setting, and that information would also have informed Antioch whether Student indeed exhibited maladaptive behaviors in the instructional setting that needed to be addressed by developing a behavior plan. The delay is a failure on Antioch's part.

16. Mother signed an additional assessment plan on March 4, 2016, that did not impact the functional behavior assessment then pending. That consent did not alter the 60-day timeline for the functional behavior assessment.

17. The failure to conduct a timely assessment is a procedural violation of the IDEA. (*Park, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d, 1025, pp.1032-1033 (*Park*); *Timothy O., supra*, 822 F.3d at pp.1120-22.) A procedural violation 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; 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 (*Target Range*).

18. Student's behavior challenges became severe enough that his IEP team placed him on home\hospital instruction. The procedural violation in this case, namely the failure to conduct a timely functional behavior assessment and develop a behavior intervention plan impeded Student's right to a FAPE. Therefore, the procedural violation

constitutes a denial of FAPE from April 27, 2016, through the end of the 2015-2016 school year.

ISSUE 2A: FAILING TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY DURING THE 2016-2017 SCHOOL YEAR

19. Student contends that Antioch failed to assess Student in all areas of suspected disability by not completing the agreed-upon functional behavior assessment to which Mother provided consent on February 15, 2016. Student further contends Antioch failed to assess his mental health needs during the 2016-2017 school year despite being on notice it was an area of suspected disability.

20. After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. 300.303(a); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (34 C.F.R. 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

21. Antioch failed to complete all assessments consented to, specifically, the functional behavior assessment during the 2015-2016 school year and this failure to assess carried over to the 2016-2017 school year. Additionally, Student's mental health became a suspected area of need in April 2016 when Student's physician recommended home\hospital placement to, in part, address his deteriorating mental health.

22. The failure to complete a functional behavioral assessment and assess Student's mental health needs constituted procedural violations of the IDEA. The failure to assess Student's mental health needs following his home\hospital placement was also a violation of the IDEA. For the reasons discussed above regarding how this procedural violation impacted Student, these failures deprived Student of educational benefit which constitutes a denial of FAPE during the 2016-2017 school year.

23. Parents requested and Antioch granted Student an IEE. The IEE conducted by Dr. Schiff assessed Student's mental health needs in January 2017.

ISSUE 2B, D, AND E: FAILURES TO PROVIDE A FAPE IN THE LRE, A PLACEMENT OFFER, AND GOALS IN ALL AREAS OF NEED

24. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: (i) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); (ii) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); (iii) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and (iv) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

25. The procedural requirement of a formal, written 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.*) A formal, specific offer from a school district

(1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (*Ibid.*) An offered IEP may still be invalidated under *Union's* rigorous approach if it is "insufficiently clear and specific to permit parents to make an intelligent decision." (See e.g. *A.K. v. Alexandria City School Bd.*, 484 F.3d 672, 681 (4th Cir. 2007); *Knable v. Bexley School Dist.*, 238 F.3d 755, 769 (6th Cir. 2001); *Bend LaPine School Dist. v K.H.*, No. 04-1468, 2005 WL 1587241 (D. Ore. June 2, 2005); *Glendale Unified School Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1108 (C.D. Cal. 2000); *Mill Valley Elem. School Dist. v. Eastin*, No. 98-03812, 32 IDELR 140, 32 LPR 6046 (N.D. Cal., Oct. 1, 1999); *Marcus I. v. Dept. of Educ.*, No. 10-00381, 2011 WL 1833207 (D. Hawai'i, May 9, 2011)). A school district may not dispense with this procedural requirement as an empty gesture if parents indicate that they will not accept the offer. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra*, 15 F.3d at p. 1526.) The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. (See *Anchorage School District v. M.P.* (2012) 689 F.3d 1047, 1055.)

26. Parents received a myriad of offers from Antioch between March 4, 2016 and January 30, 2017. During the 2016-2017 school year, Antioch offered Student a home\hospital placement, but only until the end of that school year. On May 20, 2016, Antioch offered, "placement in a comprehensive middle school with counseling support, [occupational therapy] OT consult, behavioral goals, and BIP [behavior intervention plan] to support the transition into a comprehensive middle school, the team agrees to include an incremental schedule for return to the full day by the third quarter of the

2016-2017 school year as part of the BIP." Antioch had four comprehensive middle schools and none were identified in this offer.

27. The IDEA mandates that the "location" of services be identified in an educational placement. (20 U.S.C. § 1414(d)(1)(A)(i)(VII).) California's implementing regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs." (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A school district "must ensure that.[t]he child's placement...[i]s as close as possible to the child's home." (34 C.F.R. § 300.116(b)(3).) The school district "must ensure that...[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." (34 C.F.R. § 300.116(c).) Accordingly, a "comprehensive middle school," does not constitute a "location," for his educational placement.

28. Antioch's offer was insufficiently clear and specific to other services offered. Specifically, no length of time or configuration (small group, one-to-one) was specified for the specialized academic instruction and all other services offered. This offer does not contain the specificity required under the IDEA and *Union* and its progeny. Further, the lack of specificity deprived Parents of the information necessary to alert them to consider the appropriateness of the placement, and to help them determine whether to accept or reject the offer and services. The May 20, 2016 IEP offer, did not comport with the requirements of the IDEA or *Union*. The offer was incomprehensible, which resulted in a substantive denial of FAPE.

29. Antioch failed to remediate the deficiencies cited above in subsequent offers for the remainder of the 2016-2017 school year. The September 7, 2016 IEP offer again contained a placement offer at an unspecified comprehensive middle school. It did not include lengths or configurations for special education and related services. On

November 18, 2016, Antioch sent a prior written notice that included Dallas Ranch as the specific placement. This did not sufficiently remedy the other defects, in that it did not provide details regarding the length of time or configuration for special education and other related services, including counseling, guidance, and mentoring. Accordingly, the *Union* violation continued.

30. On January 30, 2017, another IEP team meeting was held. The offer at that meeting was for placement at Dallas Ranch with the following specifics, "specialized academic instruction for 1,265 minutes weekly, counseling and guidance for 30 minutes weekly, curb-to-curb transportation." The IEP further specified that Student would be outside of a general education setting for six percent of the time. However, 1,265 minutes is 22 hours, which far exceeds six percent of Student's total time in school. These were irreconcilable inconsistencies. Additionally, the configuration for the counseling was not specified. Therefore, the *Union* violation continued throughout the remainder of the 2016-2017 school year.

31. When all evidence is considered, these errors were so significant that Student was substantively deprived a FAPE throughout the school year because his Parents were never provided an offer that was sufficiently clear to allow them to make an intelligent decision to agree or disagree on the substance of the offer, thus it deprived them of the ability to meaningfully participate in the IEP process.

Goals

32. The IEP is considered the centerpiece of the IDEA's educational delivery system for disabled children. The procedures required to prepare a child's IEP emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. Adherence to the mandated process is designed to result in special education and related services that are tailored to the unique needs of a particular child. (*Endrew F., supra*, 137 S. Ct. 988, 994.) An IEP must contain annual goals,

including academic and functional goals, that are measurable, meet the unique needs of the individual that result from the disability, and enable the pupil to be involved in and make progress in the general education curriculum; and meet each of the other educational needs of the pupil that result from the disability. (Ed.Code § 56345, subds. (a)(2)(A) and (a)(2)(B).) “The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided.” (Cal.Code Regs., tit. 5, § 3040, subd. (b).) The Supreme Court, in *Andrew F.* declared that the IDEA required a fact-intensive exercise to develop an IEP that is reasonable, based on the information available regarding the child’s circumstances, including expertise of school officials and parents. The court emphasized that the instruction must be specially designed and meet a child’s unique needs through an individualized education program. (*Id.* at p. 999, emphasis in original).

33. The purpose of goals is to permit the IEP team to evaluate whether a student is making progress in an area of need. (Ed. Code § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation (or most recent evaluation) of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. §1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child’s present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code § 56345.)

34. The evidence established that during the 2016-2017 school year, Student had needs in the area of anxiety reduction, transition between activities, and peer relations, in addition to math, behavior, and English language arts. None of the IEP’s offered during the 2016-2017 school year contained goals addressing anxiety reduction,

transition between activities, and peer relations. The evidence established that the failure of the IEP team to develop goals to enable Student to be involved in and make progress in the general education curriculum is a denial of FAPE.

35. The damage to Student's education and Parent's participatory rights is evident because Parents were never given a clear, understandable offer of a FAPE by Antioch. Parents received five different offers from Antioch with varying levels of service, different providers, and on two of them there was no clear indication of where Student would attend school or the specific educational supports he would receive. Thus, they never received the benefit of a "specific educational placement" offer. Instead, they received cobbled together offers that never comprehensively addressed Student's unique needs. Due to these serious consequences, Antioch denied Student a FAPE for the 2016-2017 school year.

ISSUE 2C AND F: FAILURE TO PROVIDE SERVICES PER THE LAST AGREED UPON PLACEMENT FOR STUDENT AND FAILURE TO IMPLEMENT IEP

36. Only material failures to implement an IEP constitute violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 822.) "A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP. Minor discrepancies between the services provided and the services called for by the IEP do not give rise to an IDEA

" (*Id.* at p. 822.) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Id.* at p. 822.) "We also emphasize that nothing in this opinion weakens schools' obligation to provide services "in conformity with" children's IEPs." (*Id.* at p. 822.)

37. Student argued that the failure to implement the last agreed upon placement was his home\hospital placement. In this case, Antioch offered home\hospital placement only through the end of the 2015-2016 school year. Student

failed to meet his burden to establish that Antioch failed to implement his home\hospital placement during the 2016-2017 school year, because he did not establish that he was entitled to such during that year.

38. Regarding the failure to implement "the IEP," Student did not assert which IEP or components of an IEP (other than home\hospital) were not implemented. Accordingly, Student failed to meet his burden that Antioch failed to implement Student's IEP during the 2016-2017 school year.

ISSUE 3: FAILURE TO HAVE AN IEP FOR 2017-2018 SCHOOL YEAR⁹

39. Student contends Student was denied a FAPE because the January 30, 2017 IEP was incomplete.¹⁰ The evidence does not support Student's contention.

40. Student contends he was denied a FAPE because the January 30, 2017 IEP was incomplete.

41. A school district must have an IEP in effect for each child with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. §

⁹ Student additionally raises in his closing argument for the first time, an issue that Antioch failed to carry over the home\hospital placement from 2016-2017 school year and Antioch needed to initiate due process against the parents. These issues are raised for the first time in Student's closing arguments, thereby denying Antioch an opportunity of notice and to respond. Thus, these issues will not be addressed in this Decision.

¹⁰ Student raises the issue of the incomplete "January 30, 3017 [sic] IEP" for the first time in closing argument. At the beginning of Student's closing brief, Student identified the issue as "District denied Student a FAPE during the 2017-2018 school year by failing to have an IEP in place for the beginning of the 2017-2018 school year."

300.323(a)(2006); Ed. Code, § 56344, subd. (b).)

42. Antioch convened an IEP meeting on January 30, 2017. The IEP that was developed offered Student an educational program from January 2017 through January 2018. Student did not challenge the sufficiency of the offer specifically during the 2017-2018 school year. Therefore, Student failed to meet his burden that Antioch had no IEP offer in place at the beginning of the 2017-2018 school year.

REMEDIES

1. Student prevailed on Issues 1 b and 2a, b, d, and e. As a remedy, Student requests he be authorized to matriculate at Halstrom Academy full-time.¹¹

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

3. 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 and be

¹¹ District requests any relief be offset by the educational services Antioch is already funding as part of an interim agreement entered into by Parents and the District on August 1, 2017. OAH does not enforce settlement agreements between parties; therefore, the impact of this clause, if any, is not considered by the ALJ.

“reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

4. A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).) However, the District Court for the Northern District of California upheld an ALJ’s authority to reimburse, as compensatory education, a pupil’s ongoing placement at a noncertified school. (*Ravenswood City School Dist. v. J.S.*, (N.D. Cal. 2012) 870 F. Supp. 2d 780. 787-788.)

5. Antioch denied Student a FAPE during school year 2016-2017 because it failed to assess him in all areas of need, provide goals, and failed to provide legally compliant IEP offers. To compensate Student for the lost educational opportunity, Student will be provided as compensatory education, reimbursement of full-time tuition at Halstrom Academy until the end of school year 2017-2018 consistent with the holding in *Ravenswood*.

6. Student is currently enrolled part-time at Halstrom Academy where he has taken an English and math class there since September 2017. No evidence was submitted that Student required less than a full-time day schedule to receive FAPE. Since Student is already enrolled at Halstrom Academy, Student will be allowed as compensatory education to enroll full time for the remainder of the 2017-2018. Antioch will reimburse Parents for academic expenses they have or will incur out-of-pocket as a result of his enrollment at Halstrom Academy. Those expenses include tuition, mandatory school fees, mandatory supplies, and any other school mandated costs associated with his attendance at Halstrom Academy for the 2017-2018 school year.

7. Antioch funded an independent educational evaluation by Dr. Schiff that

assessed Student's mental health needs. Accordingly, no further assessment in this area is necessary to compensate Student for that denial of FAPE.

8. Antioch will fund an independent functional behavior assessment for Student. Parents shall select the evaluator, who shall meet Antioch's criteria for an independent educational assessment. Antioch will pay for the evaluation and for the assessor/s to be present at the IEP team meeting that will be convened to discuss the results. Within ten days of this order, Antioch will provide Parents their criteria for an independent assessment. Parents will notify Antioch as to the name and contact information for the assessor within 15 days of receiving the criteria from Antioch. The independent assessor shall observe Student at Halstrom Academy and shall observe Antioch's proposed placement for Student for the 2018-2019 school year. An IEP team meeting will be scheduled to convene within 30 days after the IEE is completed.

ORDER

1. Student will receive compensatory education reimbursement that will allow him to matriculate as a full-time student at Halstrom Academy for the remainder of school year 2017-2018. These expenses include tuition, mandatory school fees, mandatory supplies, and any other school mandated costs associated with his attendance at Halstrom for the 2017-2018 school year.

2. Antioch will fund an independent functional behavior assessment evaluation of Student, and Antioch shall also fund assessor's attendance at the IEP team meeting to review the results.

3. Within 10 business days of this Decision, Antioch will provide Parent with its criteria for independent evaluations. Parents shall select an assessor who meets the specified criteria and provide Antioch with the contact information within 15 business days of receipt of Antioch's criteria.

4. Within 10 business days of receipt of the contact information for the

chosen qualified assessor, Antioch shall send the assessor a contract to perform the independent assessment. Antioch shall cooperate with all reasonable requests of the assessor.

5. The independent assessor shall provide the assessment report directly to Parents and Antioch. Antioch shall convene an IEP team meeting no later than 30 days after receipt of the independent report. Antioch shall fund the attendance of the assessor at an IEP team meeting to review the assessment results.

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 was the prevailing party on issues 1b and 2a, b, d, and e. District prevailed on issues 1a, 2c, f, and 3.

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: January 26, 2018

/s/

ALJ TIFFANY GILMARTIN
Administrative Law Judge

Office of Administrative Hearings