

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. 2018050914

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on May 21, 2018, naming Antioch Unified School District as respondent. An order granting Student's request to amend the complaint was granted and the amended complaint deemed filed on August 8, 2018. A continuance was granted on September 19, 2018.

Administrative Law Judge Penelope Pahl heard this matter in Antioch California, on December 11, 12, 13, and 14, 2018.

Tania Whiteleather, Attorney at Law, represented Student. Father and Mother attended throughout the hearing. Student did not attend.

Matthew Tamel and Kasmirah Brough, Attorneys at Law, represented Antioch. Dr. Ruth Rubalcava, Antioch's Director of Special Education, attended each day of the hearing on Antioch's behalf.

The parties requested a continuance to file written closing briefs which was granted. The written closing briefs were timely filed on January 7, 2019, at which time the record was closed and the matter was submitted for decision.

ISSUES¹

1. Was the autism component of Antioch Unified School District's psycho-educational assessment conducted in May 2016 not legally compliant, such that Student is entitled to an independent evaluation at public expense?
2. Did Antioch Unified School District fail to convene an individualized education program team meeting to timely revise and review Student's Behavior Intervention Plan prior to removing him from the placement agreed to in the December 15, 2015 IEP?
3. Did Antioch allow the parents to participate in the determination of the 45-day interim alternative educational setting placement of Student when it unilaterally determined to remove Student to Sierra School on January 18, 2018?
4. Did Antioch deny Student a free appropriate public education by failing, in the following respects, to comply with the procedural requirements of the IDEA and California law by

¹ Issue 1 is re-worded to specify that the issue is limited to a review of the autism component of the psychoeducational assessment to comport with Student's amended complaint. Issue 3 and 4 were initially combined in the Order Following Prehearing Conference but were separated herein for clarity. Issue 4's typographical error dating the manifestation determination on January 8, 2018, rather than January 18, 2018, has been corrected. The ALJ has re-worded and clarified some issues as stated in Student's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made.

- a. giving notice of the January 18, 2018 manifestation determination less than 24 hours prior to the meeting; and
- b. holding the January 18, 2018 manifestation determination meeting over Parents' objections and without Parents' participation

SUMMARY OF DECISION

The autism assessment was thorough and complied with all legal requirements.

Antioch did not unilaterally change Student's placement. Parents stipulated to the temporary change of placement. Several meetings were convened to review and revise Student's behavior plan, but Parents either chose not to discuss the behavior plan, or chose not to attend the meetings. Parents did not prove that Antioch failed to timely convene meetings to discuss the behavior intervention plan.

Parents failed to prove that Antioch did not allow them to participate in the determination of the 45-day interim alternative educational placement. Antioch requested an expedited hearing to determine the appropriateness of placing Student in an interim alternative educational setting. Furthermore, although parental participation is not required in a decision regarding whether to file for an expedited hearing to remove student temporarily to an independent alternative educational setting, Parents participated when they stipulated to the placement at the time of the expedited hearing.

Finally, Student did not prove that Antioch failed to comply with the procedural requirements of the IDEA or California law by giving 24 hours' notice of a January 18, 2018 manifestation determination review meeting. In the circumstances of this case, 24 hours' notice was not unreasonable. Furthermore, the evidence did not establish that Student was denied a free, appropriate public education by virtue of a denial of meaningful participation by Parents in the January 18, 2018 manifestation determination review. Parents failed to prove they were deprived of the opportunity to participate.

Input from Parents was considered. Student's conduct was deemed a manifestation of his disability and Parents agreed with that conclusion. Proceeding without Parents was not a procedural violation under the facts presented.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 10 year-old boy who has resided within the geographical boundaries of Antioch Unified School District at all relevant times. While enrolled in Antioch Unified School District, Student qualified for special education under the category of other health impairment as a result of diagnosed attention deficit hyperactivity disorder. Student also suffers from substantial anxiety and obsessive compulsive behaviors and has been diagnosed with XYY Syndrome.

2. Student's last placement in the district was in a counseling enriched classroom at Carmen Dragon Elementary school. He was placed in that classroom in January of 2016 (at the beginning of the second semester of first grade) Student was enrolled in the California Virtual Academy on February 12, 2018.

3. Student's Parents are college-educated and hold professional jobs. They had participated in the IEP process on Student's behalf, including IEP team meetings, manifestation determination review meetings and due process hearings for at least five years by the time of the hearing in this case.

HISTORY OF AUTISM CONSIDERATION AND ASSESSMENTS

4. When Student was approximately two years old, he was referred to Dr. Russell Reiff, a developmental pediatrician at Kaiser San Francisco, because Parents were concerned that he had language delays. They consulted Dr. Reiff "a couple of times." Following observation of Student and interviews with Parents, Dr. Reiff concluded that Student was not autistic.

5. Student attended private school from preschool through the beginning of kindergarten.

Dr. Grandison's 2015 Assessment Of Student

6. Dr. Carina Grandison assessed Student in the spring of 2015, when he was finishing kindergarten in a general education class at Antioch's Jack London Elementary School. Dr. Grandison noted that Student had recently experienced three different school moves, all in the final trimester of his kindergarten year, describing the transitions as "painful."

7. Dr. Grandison's assessment included testing Student's attention and memory; evaluating ratings provided by Parent and a self-report from Student regarding Student's behavior; observing Student both at home and at school; and interviewing Parents and Student's Grandfather, who is a psychiatrist. Dr. Grandison concluded that Student had age appropriate and normal intelligence, which she noted was consistent with his prior assessment in 2014. She determined that Student's emotional regulation challenges were "palpable" and "quite state dependent" noting that when in a calm, regulated place, Student could be "sociable, playful and empathetic," but he lost control when his anxiety rose. She confirmed that Student was impulsive and inattentive, and met the criteria for attention deficit hyperactivity disorder, combined type.

8. Dr. Grandison's 2015 report states that Student was referred for "diagnostic clarification and assistance around school placement and services." Dr. Grandison did not diagnose Student with autism in 2015. She testified at hearing that "autism was not on the radar" because it was "not of concern." Rather, Student's distress and difficulty with education was the focus of the assessment. When asked about whether she should have considered other areas of assessment, Dr. Grandison stated that she was not bound by the "educational stuff," referring to a requirement to assess

in all areas of suspected disability. She was focused on Student's distress and "did not even think of autism."

9. Student attended Antioch Charter Academy, which is a Montessori school, in first grade. Student engaged in dysregulated behaviors and a functional behavior assessment was completed by Dr. Christine Mead in November of 2015.² A behavior plan was created based on the functional behavior assessment for use at the Antioch Charter Academy.

Transition To Counseling Enriched Classroom At Carmen Dragon

10. Student transitioned to the counseling enriched class at Carmen Dragon Elementary for the second semester of first grade, in January of 2016. Student continued to exhibit dysregulated behaviors at Carmen Dragon, beginning in February of 2016. The behaviors were similar to the concerns of his teachers in kindergarten and at Antioch Charter and included tantrums that could include screaming at staff and peers; throwing things, including chairs; scratching, hitting, and kicking. Sometimes these episodes would last for 30 minutes. Shortly thereafter Student began having tantrums at Carmen Dragon, Parents consented to Antioch conducting a psychoeducational assessment.

Dr. Lopes' Assessment

11. In March of 2016, Antioch hired Dr. Valerie Lopes to conduct Student's psychoeducational assessment.³ At the time, Dr. Lopes was the coordinator of

² Dr. Mead did not testify at the hearing and no evidence of her credentials was presented. Dr. Mead initially worked for Antioch as a Behavior consultant. The evidence was not clear when she began working for Parents as a consultant.

³ The undersigned is aware that Dr. Lopes testified regarding this assessment in a prior hearing involving these parties. The issues addressed in that hearing were not

Psychological and Social Work Services for the Oakland Unified School District. Part of her job for Oakland was training school psychologists in how to conduct assessments and write reports.

12. Dr. Lopes earned a doctorate in clinical psychology from Palo Alto University and a Master's of Clinical Child/School Psychology at California State University East Bay. At the time of the 2016 Psychoeducational Assessment, Dr. Lopes held a pupil personnel services credential and was licensed as a Licensed Educational Psychologist. She had performed hundreds of psychoeducational assessments by 2016.

13. At the time of the hearing, Dr. Lopes was employed as the Assistant Special Education Director for Antioch Unified School District. She still holds a pupil personnel services credential and also holds an administrative services credential.

14. As part of her psychoeducational assessment, Dr. Lopes established that she assessed Student for autism and considered whether he was eligible for special education under the category of autism. She ruled out autism and therefore determined he was not eligible on this basis. The legal sufficiency of the assessment itself and not the eligibility determination is at issue herein.

15. Neither party disputed that a legally sufficient assessment plan that included notice of the intention to investigate autism as a suspected disability was provided to Parents. Parents consented to the assessment plan.

16. In the course of conducting her assessment, Dr. Lopes reviewed records of services Student received previously. Her records review included Dr. Grandison's 2015 assessment of Student among others. During the 2015-2016 school year, Student also participated in a study at the National Institute of Health in Maryland which identified

identical to the issue presented here. The findings of this decision are limited to the evidence before the undersigned in this hearing.

him as having XYY syndrome. Mother informed Dr. Lopes that, in the course of the NIH evaluation, in addition to identifying XYY syndrome, Student was found to have high levels of anxiety and symptoms consistent with attention deficit hyperactivity disorder. Dr. Lopes requested, but did not receive a copy of, the report from the National Institute of Health. Mother informed Dr. Lopes that Student's cooperation with the evaluation was inconsistent.

17. As part of her assessment, Dr. Lopes conducted a nearly 90-minute interview with Mother regarding Student. Dr. Lopes considered Mother's report of Student's behavior characteristics to be candid and accurate. Dr. Lopes found Mother's comments throughout the conversation to be thoughtful; and to demonstrate a nuanced understanding of her son's behavior.

18. Mother reported that Student's interactions with his brother ranged from combative to empathetic. Sometimes they fought over mundane issues such as the correct name of a game; and sometimes Student showed tenderness to his sibling, such as offering a stuffed animal or a drink when his brother was upset. Mother stated that Student got along well with Parents but had become less communicative with her lately. She believed this was because he was sensitive to her stress about his school difficulties. She noted that Student had friendships in a playgroup that the family had interacted with since Student was very young.

19. Mother confirmed that Student was taking medications for asthma, and was prescribed extended release Ritalin plus Guanfacine, for his attention deficit disorder. At the time of Dr. Lopes' assessment, this medication was in the process of being titrated by Student's psychiatrist.

General Observations During Testing

20. Dr. Lopes' full psychoeducational assessment included using the Differential Abilities Scales, second edition; the Phonological Processing, Affect

Recognition, and Theory of Mind subtests of the NEPSY-2;⁴ the Behavior Assessment System for Children, third edition, completed by Mother and Student's Teacher, Kimberly Alford; and the Autism Spectrum Rating Scales, also completed by Mother and Teacher. Dr. Lopes also conducted a records review; interviewed Mother and Ms. Alford; conducted observations of Student's classroom and playground activities; and conducted a "time on task" assessment.

21. While some of the testing results were not directly intended to assess Student for autism, Student's conduct during all of the testing was observed by Dr. Lopes and those observations contributed to her overall evaluation of whether Student had autism. Only the components of the assessments that contributed Dr. Lopes' autism determination are discussed herein.

22. During testing, Dr. Lopes observed that Student's sustained attention was poor, and he sometimes failed to maintain eye contact with her. He was interactive when discussing topics of interest to him, such as video monsters; however, he was frustrated by Dr. Lopes difficulty in understanding him due to low speech volume, poor articulation, and a tendency to use atypical word order such as "I don't know what is this." While initially cooperative during the first testing session, his level of participation declined when presented with language-focused tasks.

23. Dr. Lopes noted that, on some days, Student refused tasks he decided were too hard; and then completed the same task accurately and completely on another testing day. Dr. Lopes saw Student respond impulsively but also saw Student self-correct mistakes. However, he required the nearly constant presence of his teacher and aide to provide frequent reinforcement with stickers, cat books and edibles; and required

⁴ There was no evidence as to the formal name of this test instrument.

frequent breaks between subtests and at times between individual test questions for the testing to be accomplished.

24. Dr. Lopes' observed that, as the challenges grew more difficult, Student's attention was hindered by his "negative affective flooding" in response to the perceived task difficulty and perceived failure. There was at least one test, the Differential Ability Scores Object Recall subtest, which Student declared Dr. Lopes was "making up" and refused to complete. An alternative memory test was administered instead. On another test, Student's performance, although ultimately in the high average range, was slowed down by his insistence on connecting squares embedded in circles rather than quickly striking through the circle containing the most squares as suggested by Dr. Lopes.

25. Student refused to complete the final testing session. Having been given a dinosaur sticker after each attempt at a test item, he protested that there were too many pages. When told that there was only one question left before he earned his stuffed cat, he declared Dr. Lopes was lying, started to leave the room and then came back and grabbed papers out of the filing cabinet strewing them on the floor. This conduct continued for 20 minutes before he was able to be redirected. He eventually expressed remorse for the conduct and helped pick up the papers.

Autism Spectrum Rating Scales

26. Mother and Ms. Alford, Student's first grade teacher, completed the Autism Spectrum Rating Scales. The autism rating scales measure behaviors of children that are associated with autism spectrum disorder. According to Ms. Alford's ratings, Student did not demonstrate problems with attention, motor or impulse control; he did not engage in stereotypical behaviors; and he was able to focus his attention. However, the teacher's responses indicated she viewed Student as having difficulty using appropriate verbal and nonverbal communication for social contact; tolerating changes in routine, activities, or behaviors; and regulating his response to sensory input, often

overreacting. He had difficulty relating to children and adults; and had difficulty providing appropriate emotional responses to people in social situations.

27. Mother's ratings showed Student used verbal and nonverbal communication for social contact at home and in the community. He did not engage in stereotypical behaviors and tolerated changes in routine well. Parents' ratings indicated that they saw Student demonstrating difficulty with inattention and focus of attention, motor and impulse control, and overreacting to sensory stimulation. Dr. Lopes concluded that Mother's ratings indicated Student demonstrated few of the behavioral characteristics of a child with autism.

28. Overall, Dr. Lopes concluded that the pattern of scores on the autism rating scales indicated some symptoms associated with autism. However, in considering the totality of the testing, she concluded that many of the symptoms were driven by anxiety rather than autism spectrum disorder. Dr. Lopes' report did note particularly, however, that Student was prone to sensory overstimulation.

Nepsy-2 Social Perception Cluster

29. Dr. Lopes attempted to administer the Social Perception cluster of subtests of the NEPSY-2 but was only partially successful. She was able to complete the affect recognition subtest, which required Student to distinguish facial expressions and match them across individuals. Student scored a scaled score of 7, placing him in the 16th percentile compared to children his age. This result suggested that Student had difficulty distinguishing facial expressions. Dr. Lopes noted such a difficulty could interfere with his ability to pick out and interpret facial cues in social contexts. However, during testing, Student informed Dr. Lopes that he had difficulty remembering the expressions, so he was choosing random items.

30. Dr. Lopes was unable to complete the Theory of Mind subtest due to Student's resistance to the testing and thus was unable to formally score it. However,

she reported that she did gain some information in her attempt to administer the instrument. Specifically, Dr. Lopes concluded that the qualitative aspects of Student's performance suggested that he struggled with the ability to understand that other people have thoughts, ideas, and perceptions that differ from his own. Dr. Lopes noted that, generally, children who have this problem have difficulty appreciating another person's perspective and found the ability to understand other people's motives, figurative speech, and subtle aspects of communication challenging. In making her findings, Dr. Lopes noted the Theory of Mind results from the testing completed by Dr. Carina Grandison in her 2015 assessment of Student, established that Student was able to identify the emotions of angry and scared.

31. Dr. Lopes noted at the outset of reporting on the social and adaptive rating scale results, that data from the rating scales could not be the sole basis for arriving at diagnostic conclusions. She stated that her evaluations of the rating scales results were combined with the results of her testing and observations.

Behavior Assessment System For Children

32. Mother and Ms. Alford also completed the rating scales for the Behavior Assessment System for Children, third edition. These ratings allowed Mother and teacher to provide their observations of Student in the areas of behavior, social and emotional functioning, and learning. Dr. Lopes noted that Ms. Alford's ratings overall demonstrated a negative view of Student's behavior while Mother's demonstrated neither an overly positive nor overly negative view. Dr. Lopes thought that Ms. Alford's ratings were likely the result of the severe level of behaviors Student exhibited in the classroom as opposed to invalid attitudes towards Student, as demonstrated by her responses to the elements of the rating scale that check for invalidly high negativity or positivity, called the "F-index." However, due to the discrepancy, her evaluation of the replies focused on the areas in which consistency was shown between the raters.

33. Dr. Lopes' report determined ratings from both Mother and Ms. Alford were in the "clinically significant" range in the areas of anxiety, depression and hyperactivity. Teacher also rated Student as clinically significant in the areas of mood, worry, and low self-esteem, while Mother rated Student as only moderately elevated in those areas. Mother and Ms. Alford both rated Student as elevated the area of hyperactivity. Student's social skills were rated as above average by Mother. Ms. Alford rated Student as in the impaired level in social functioning. Both Mother and teacher noted Student's difficulty adapting to changing circumstances, and that he took longer than other children his age to recover from difficult or stressful situations. Both raters also noted that Student's executive functioning was compromised by his poor self-control and regulation of his impulsive behaviors and emotions.

Adaptive Behavior Assessment System

34. The Adaptive Behavior Assessment System evaluates the development of independence skills, addressing the conceptual, social and practical domains of functioning. Conceptual ratings measure Student's abilities in the areas of communication, (both expressive and receptive language development); functional academics, that is, the ability to acquire every-day, rote information; and self-direction, which is the ability to engage in one's environment without excessive supervision. In the socialization domain, the rater considers the subject's ability to identify leisure activities of interest, to participate in fun activities, and to follow rules in games. Practical development ratings evaluate the subject's ability to understand and participate in their school and community; to care for living or classroom settings; and to engage safely in his environment, including responding to illness or injury. Mother and Ms. Alford saw Student's abilities in these areas very differently.

35. In the areas measured by the conceptual development ratings, (communication, functional academics and self-direction) Mother's overall rating of

Student was average; but some of his teacher's ratings fell below the average range. Student was rated as average by Mother in expressive and receptive language and in the low range by Ms. Alford. Dr. Lopes noted that people with expressive and/or receptive language deficits can be impaired in their ability to keep up with classroom work or interact with other people. Student was seen as average by Mother in his functional academic abilities, but as deficient by his teacher. Student was rated as borderline in the area of self-direction. Dr. Lopes opined that Mother's average rating of Student's conceptual abilities was more in line with his intellectual performance and that his teacher's ratings likely reflected Student's struggles to demonstrate his intellectual abilities in class due to his difficulty performing tasks without supervision and reinforcement. Dr. Lopes thought Ms. Alford's communication rating reflected the teacher's observations that Student does not always look at a person who is speaking to him, listen to instructions, pay attention, or start conversations of interest to others.

36. In the area of socialization, Student's leisure activities were rated as average by Mother and low by his teacher, who noted he often chose activities that did not engage others, such as using a computer or tablet; and seldom invited other children to play. With regard to practical development, Mother rated Student in the average range in his ability to understand and participate in school and the community, while Ms. Alford rated him as low. Both raters saw Student as having basic skills, such as the ability to throw trash into proper containers, pour liquid from a larger container into a smaller one, dress himself, and use the bathroom independently. His teacher's health and safety rating reflects her concerns regarding his safety in the classroom and his need for more supervision to remain safe.

Choice Not To Use Autism Diagnosis Observation Schedule

37. Dr. Lopes testified that she chose not to use the Autism Diagnosis Observation Schedule instrument, because she believed it resulted in too many false

positives in autism diagnoses. She believed the combination of instruments she chose, combined with the hours of observational data she compiled during the testing, resulted in a thorough assessment of whether Student was a child with autism, without the use of the Autism Diagnosis Observation Schedule.

Dr. Lopes' Finding Regarding Autism

38. Dr. Lopes concluded that Student did not consistently present with the communication or social interaction difficulties to be considered a Student with autism. She did not believe autism was impeding Student's educational performance. Dr. Lopes noted that Student had a normal capacity to learn as evidenced by intellectual skills which fell in the average to above-average range. Student demonstrated some rigidity of thinking and difficulty with remembering affects; but he did not consistently display these characteristics. She noted that he had some sensory reactivity and inconsistent understanding of motivation and perspective of others. She also observed that he typically relied on peers to initiate with him at school.

39. However, Dr. Lopes noted that Student demonstrated considerable reciprocal interaction: during testing, he used materials creatively in interactions with her; used gestures that were appropriate; he had minimal difficulty with eye contact which she attributed to the distraction of his attention deficit; and he engaged in joint referencing, pointing to things he was interested in (sea creatures) to engage Dr. Lopes. While Dr. Lopes noted some unusual intensity in Student's interests, for example, cats, she did not think Student met the threshold for a diagnosis of autism across the domains of language, non-verbal communications, and social interaction consistently. Dr. Lopes took into consideration Mother's report of Student's empathetic interactions with his brother and Student's recognition of Mother's recent stress. Further, Dr. Lopes determined that he had no developmental history that suggested evidence of autism before the age of three. Parents spoke of him using gestures and interactions as a

toddler. Parents noted some early anxiety and believed his anxiety had increased due to his experiences in multiple school settings. Dr. Lopes did not believe Student met the threshold for autism across all dimensions.

40. Dr. Lopes believed that while Student displayed some indicators of autism, the indicators were more symptomatic of dysregulation and anxiety than of autism. Student interacted with others, recognized their emotions and needs, and was able to appropriately respond to them. She attributed some of Student's difficulties at school to his attention deficit disorder, but more to the impact of his XYY syndrome on his ability to regulate his emotions. Given the totality of Student's history of tantrums and associated unsafe behavior in school, the information provided by Mother regarding his health, specifically the XYY syndrome diagnosis, and the history of attention deficit hyperactivity disorder, Dr. Lopes found his symptoms were more likely connected to his inability to regulate his emotions. In evaluating the relative impacts of his symptoms, Dr. Lopes concluded that the impact on Student's education was more likely to be the result of emotional disturbance, that is the emotional dysregulation, than due to being on the autism spectrum.

41. Dr. Lopes informed Parents of her opinion that Student did not meet eligibility requirements for special education as a student with autism during an IEP team meeting held on May 27, 2016. Parents acknowledged that her conclusion was in line with past assessors who had found Student not to be autistic. Parents did not express any disagreement with the autism assessment at the IEP team meeting, or at any other time in 2016.

Challenge To Dr. Lopes' Report⁵

42. Student argued that Dr. Lopes' assessment was flawed in two respects. First, that there were errors in the assessment report. Second, Dr. Grandison asserted it was flawed because Dr. Lopes failed to administer the ADOS. As found below, neither invalidated the assessment or rendered it non-legally compliant.

43. At hearing, Father testified that while Parents did not disagree with the assessment of 2016, and the conclusion that Student was not autistic, other assessors have now found Student to have autism. Student was ultimately diagnosed as being on the autism spectrum in 2017 by an assessor from the Regional Center of the East Bay; a diagnosis Dr. Grandison now endorses. As a result of the 2017 autism diagnosis, Parents recalled behaviors of Student that they now believe should have resulted in Student being identified as having autism in 2016. Mother also testified that she now sees behavior that she did not understand at the time as indicative of autism, including, "delayed language, rigidity and social issues."

44. Dr. Lopes' assessment report had errors in the tables presenting the scoring associated with the autism assessments and ratings.⁶ Father stated that he

⁵ Student argued for the first time in his closing brief, and in a motion to shift the burden of proof that was filed on the same day as the closing brief, that he was unable to prove his case regarding the legal compliance of Dr. Lopes' assessment pertaining to autism, because he was not provided with the assessment protocols from Dr. Lopes' testing. Antioch's failure to produce records was not an issue pled in the underlying complaint in this matter. An order denying Student's motion was issued on January 15, 2019.

⁶ There were a few errors, which Dr. Lopes testified were typographical errors, in tables related to assessments. The parties acknowledged during hearing that these

would have been more concerned about Student's Affect Recognition percentile score had the chart stated that it was in the 16th percentile rather than the 50th percentile because he knows that the 50th percentile is average. Immediately below the chart, the first sentence of the narrative concerning the Affect Recognition subtest score, stated, "On the Affect Recognition subtest, [Student's] performance is in the low range, suggesting he has difficulty distinguishing various facial expressions and matching them across individuals." No other evidence of Parents' specific concerns regarding the chart errors was presented by Student. The cumulative effect of the errors had a *de minimis* impact on the report as a whole and did not render the report unreliable or unduly confusing.

45. Next, Dr. Grandison testified the assessment was not legally compliant. She testified that she reviewed Dr. Lopes' assessment in conjunction with her November 2018 re-assessment of Student. In November 2018, Dr. Grandison determined that Student was autistic after consideration of a report completed in 2017 from the Regional Center of the East Bay, which found Student to have autism, as well as the report of Student's diagnosis of XYY syndrome. She also conducted additional testing including the Autism Diagnostic Observation Schedule. The cost of the reassessment was \$5,500. She testified that, in retrospect, her 2015 testing may have been incomplete.

46. Mother testified that one of the purposes of having Dr. Grandison re-assess Student in November of 2018 and issue a report was to develop evidence to present for this hearing.

47. Initially at hearing, Dr. Grandison testified she did not sufficiently recall the 2016 psychoeducational assessment to be able to comment about it. However, a short

errors were examined during the hearing related to OAH case Number 2017080513. They are not re-examined here.

break was taken to allow Dr. Grandison to re-read the report, and she then provided her critique. Dr. Grandison thought Dr. Lopes' 2016 psychoeducational assessment was incomplete. Dr. Grandison stated that a thorough assessment for autism would include observations in different environments, including the testing environment, school and home; a thorough history and autism diagnostic interview; gathering information from the teacher with rating scales, interviews or both; and interviewing Parents, as well as having Parents complete rating scales. Dr. Grandison also administers the Autism Diagnostic Observation System, second edition, to a child she suspects might be on the autism spectrum.

48. Dr. Grandison thought Dr. Lopes' autism assessment was not thorough and described it as being based solely on the responses to the Autism Spectrum Rating Scales. Dr. Grandison criticized Dr. Lopes for not administering the Autism Diagnosis Observation Schedule instrument. However, Dr. Grandison also acknowledged that results from the Autism Diagnosis Observation Schedule assessment would not dispositively establish whether a child was autistic. She acknowledged that no assessment can be relied on exclusively to determine autism. Dr. Grandison also noted that two assessors can have different opinions as to whether a child is autistic. She acknowledged that she did not diagnose Student with autism during her assessment in 2015 and did not administer the Autism Diagnosis Observation Schedule during that assessment. Dr. Grandison testified that, sometimes children with autism are identified later because they do not present in "classic autistic ways" such as rocking or acting "like Rain Man."

49. During her testimony Dr. Grandison evidenced confusion regarding the California Education Code requirements related to determining eligibility for special education and related services. Dr. Grandison believed a standard of "autistic-like" behavior was still applied in making special education eligibility determinations, despite

the change in applicable regulations that became effective in 2014. She also inaccurately articulated the standard for differentiating between autism spectrum disorder and emotional disturbance, identifying the applicable standard as an automatic elimination of a determination of autism spectrum disorder in the presence of co-existing emotional disturbance when the actual analysis is comparative. Dr. Grandison's opinions about Dr. Lopes' assessment lacked credibility due to her lack of understanding of the nuances regarding the application of special education eligibility standards to determine if a student qualifies for special education because he meets the autism eligibility criteria.

50. Dr. Grandison earned a doctorate from Boston University in developmental psychology and completed a postdoctoral fellowship in clinical neuropsychology at Children's Hospital in Boston. She is a California licensed clinical psychologist. She testified that she is a specialist in autism. Dr. Grandison is neither a school psychologist, nor a licensed educational psychologist.

51. Dr. Lopes' was a more credible witness than Dr. Grandison and more weight was accorded her testimony. The evidence established that Dr. Lopes conducted a thorough autism assessment. She was a qualified assessor who administered multiple assessment instruments in reaching her conclusion that Student was not on the autism spectrum. Despite minor errors in a few charted scores of test elements that were accurately explained in the report narrative, and ultimately did not change Dr. Lopes' conclusion, the evidence established Dr. Lopes administered the tests according to the manufactures instructions. The assessments were not racially or culturally biased. The assessments were conducted in English, Student's primary language.

REVIEW OF STUDENT'S BEHAVIOR AND REVISION OF THE BEHAVIOR INTERVENTION PLAN ⁷

52. The IEP team, including Parents, reviewed Student's behavior a number of times between November of 2016 and February 1, 2018, the date of the expedited hearing. Meetings during which Student's behavior was discussed were held on November 14, 2016, March 2, 2017, March 21, 2017, and October 3, 2017.

53. Following the March 2, 2017 meeting, with the agreement of the IEP team, including Father, Antioch's behaviorist, Erin Peterson, met separately with Parents' consulting behaviorist, Dr. Mead, to revise the behavior intervention plan. It had been difficult find a time when both could attend the same IEP team meeting.⁸ Therefore, the two collaborated in a short, in-person meeting and then shared drafts via email to develop a revised behavior intervention plan to present to the IEP team.

54. During the March 21, 2017 meeting, the revised behavior plan on which the two behaviorists had collaborated, was provided to Father. During this meeting, Ms.

⁷ Evidence was presented regarding the parties' opposing positions regarding the notice requirement for IEP team meetings. Parents asserted that a separate notice of IEP team meeting was always required. Antioch argued that, in instances when a Parent and Parents' education consultant were present and participated in the selection of the date and time for the next meeting at the preceding IEP team meeting, and received written confirmation of the agreed date and time; the notice of meeting requirement had been satisfied. The issue of whether failing to provide a separate notice of meeting under those facts violated the IDEA was not pled in this case and is not addressed in this decision.

⁸ Dr. Mead had been unavailable to attend a meeting since May 27, 2016 when the autism assessment was reviewed.

Peterson also presented detailed information regarding the behavior data that had been collected as part of Student's behavior intervention plan. While he participated in the discussion of the behavior data, Father chose not to proceed with a discussion of the behavior plan, because he had not had an opportunity to review the new plan prior to the meeting.

55. A discussion of Student's behavior occurred during the meeting to review the assistive technology assessment on October 3, 2017 and informed some decisions regarding introducing Student to assistive technology. Additional points were made during the October 3 meeting, regarding Student's behavior needs in preparation for Student's annual IEP, which was scheduled to be held on November 14, 2017. Meetings scheduled on November 14, 2017 and November 29, 2017, to finalize revisions to Student's behavior plan and next IEP were cancelled by Parents.

PARENTAL NOTICE AND APPROPRIATENESS OF MOVING FORWARD WITH JANUARY 18, 2018, MANIFESTATION DETERMINATION REVIEW MEETING WITHOUT PARENTS PRESENT

Manifestation Determination Meeting Of December 15, 2017

56. During fall 2017, Student's dysregulated behaviors again escalated. Behaviors included screaming tantrums, during which Student threw chairs other objects like staplers, overturned tables and desks, and tore up curriculum materials and other students' work. On at least one occasion he pushed over a small plastic file cabinet and once hit the principal with a keyboard that he had thrown. Student's teacher, instructional aide, and peers were also struck by flying objects during these incidents.

57. A manifestation determination review was scheduled for December 15, 2017. Student had been suspended for 8 days from November 2, 2017 to December 8, 2017. Parents attended the manifestation determination and were advised by their attorney, who appeared by telephone. Parents would not agree to have the two-hour

meeting be both a manifestation determination review and an annual IEP team meeting. The parties agreed to proceed with only the manifestation review. Student's conduct was determined to be a manifestation of his disability. Following the meeting, Parents were provided with an assessment plan for a Functional Behavior Assessment and another revised behavior intervention plan by mail.

58. On the Monday following the manifestation determination review meeting, December 18, 2017, Student engaged in behaviors that resulted in the classroom having to be evacuated. While the behaviors were similar to those previously seen, these were more intense and lasted much longer. It took three hours to deescalate him. He received a five-day out of school suspension for this incident. As the winter holidays were approaching, the suspension began the last three days of school before the holiday and continued through the first two days after Student's returned in January. Student returned to class on January 11, 2018.

The January 18, 2018 Manifestation Determination Review

59. Due to Student's suspension on December 18, 2017, as well as removals from the classroom on February 11, 2018, February 12, 2018, and February 16, 2018 (February 15, 2018 was a holiday), another manifestation determination review meeting was required. Antioch sent a notice of the manifestation determination meeting on January 17, 2018, by messenger to Parents' home. It arrived shortly after 2 p.m. and informed the Parents the meeting was scheduled for January 18, 2018 at 2:00 p.m.. The notice included notification that Antioch's legal counsel would attend the meeting. Father sent an email protesting the short notice for the meeting, asserting that it did not give Parents time to arrange their schedules to attend, or arrange for the attendance of their education consultant or attorney. He also protested the lack of adequate time to provide the required 24 hours' notice of his intention to record the meeting. He stated that Parents were not available to attend; and stated Parents "expressly do not give

consent for the meeting to be held on January 18" without them.

60. Antioch replied that it would waive the 24-hour notice of intent to record and asked if Parents could attend via telephone. Father replied that "less than 24 hours' notice" was not sufficient to allow Parents to reschedule work to participate either by phone or in person. He also noted that due to the fact they were "involved in on-going litigation, it would be inappropriate for us to participate in any meeting involving District Legal Counsel" without having Student's legal counsel participate, "and one days' notice is not sufficient to allow us to coordinate with his attorney or for his attorney to coordinate the meeting proposal with her schedule." At the time, two hearings between the parties were pending: an expedited hearing regarding the interim alternative educational setting placement and a hearing regarding the family's prior due process complaint. Father referred Antioch to Student's attorney to coordinate a mutually agreeable date and time for the meeting.

61. No evidence of any actual attempt by either Parent to arrange time from work to attend this meeting was submitted at the hearing. Nor was any evidence offered establishing the unavailability of Student's attorney or the family's education consultant for a meeting on January 18, 2017.

62. The meeting proceeded on January 18, 2018. Dr. Rubalcava testified that Antioch proceeded with the meeting due to safety concerns as well as concerns that it would not meet the statutory deadline for holding a meeting, given that Student had already exceeded the number of suspension days triggering a manifestation determination meeting. Parents did not attend, nor were they represented at the meeting. However, Antioch did receive the Parents' consent to the functional behavior assessment on the morning of January 18, 2018. The meeting was attended by Antioch's behavior specialist, the school psychologist, the principal of Carmen Dragon, the occupational therapist, the assistive technology specialist, program specialist, the special

education teacher, and Antioch's attorney. The Principal described the December 18, 2017 incident, which resulted in the evacuation of Student's classroom for the safety of the other people in the class and noted that it took three hours for staff to deescalate Student. Student's other suspensions, for similar, although shorter episodes of conduct like that exhibited on December 18, 2017, were also discussed.

63. The IEP team members present found that the conduct was a manifestation of Student's disability. Ms. Peterson discussed her proposed behavior plan and suggested strategies for managing Student in the classroom. It was noted that Antioch had received consent to the assessment plan for a new functional behavior assessment that morning. There was no discussion at this meeting of changing Student's placement. Following the meeting, the documentation from the meeting was sent to Parents.

PARENTAL PARTICIPATION IN DETERMINING 45-DAY INTERIM ALTERNATIVE EDUCATIONAL SETTING

64. Antioch filed a Request for Expedited Hearing seeking permission for a 45-day interim alternative placement of Student at Sierra School of Antioch. The hearing was scheduled to begin on February 1, 2018. Dr. Rubalcava testified that proceeding to an expedited hearing to enable this placement was a difficult decision to make; but one Antioch deemed necessary for safety reasons.

65. The issue in the expedited hearing articulated as, "May Antioch place Student in an appropriate interim alternative educational setting at Sierra School of Antioch for forty-five school days because it is substantially likely that the Student poses a danger to himself or others if he remains at the current placement."

66. At the time of the hearing, Parents stipulated that "Antioch Unified School District may move Student for 45 days to an interim alternative setting and that, as the School District has determined, that setting may be Sierra School." As a result of this

stipulation, Antioch withdrew the request for expedited hearing it had filed, (OAH Case number 2018010348), seeking a determination that the temporary placement of Student in Sierra School was appropriate.

67. Dr. Rubalcava credibly testified that Antioch would have considered alternatives to Sierra School proposed by Parents so long as the proposed placement could implement his behavior plan. Antioch would have preferred to avoid the expedited hearing. No evidence was introduced establishing that Parents had suggested alternatives.

68. Antioch did not unilaterally determine Student's proposed 45-day interim alternative educational setting placement. Parents had the opportunity to provide input regarding the placement during the hearing. Instead, Parents declined this opportunity and stipulated to the proposed placement. The stipulation constitutes participation in selecting Sierra School as Student's proposed IEAS placement.

69. No evidence was presented that Student's interim educational setting was requested due to conduct that was not a manifestation of his disability. Nor was evidence presented that Student ever possessed or used a weapon or drugs; or caused a serious injury.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁹

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code

⁹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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 higher education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In 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 that contains 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 nondisabled 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 re-enacting the IDEA in 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.) Recently, the U.S. Supreme Court elaborated on the *Rowley* standard declaring that, “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___, 137 S.Ct. 988, 999 [197 L.Ed.2d 335].)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. §

1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

5. The burden of proof in a hearing pursuant to the Individuals in Education Act falls on the party who files the request for due process. Here, Student filed the request for due process hearing seeking relief; so Student bears the burden of proof as to the issues raised in this case. (*Shaffer ex rel. Shaffer v. Weast* (2005) 546 U.S. 49, 62.)

ISSUE NUMBER 1: ADEQUACY OF MAY 2016 AUTISM ASSESSMENT:

6. Parents assert that Antioch failed to provide a thorough, legally compliant autism assessment. Their expert faulted the assessor for not administering the Autism Diagnostic Observation Schedule and relying only on the Autism Spectrum Rating Scales in reaching her conclusions. Parents also point out the errors in the report as being evidence of its failure to meet legal requirements. Antioch argues that the assessment was thorough and meets all legal requirements. Antioch asserts that the errors do not impact the reliability of the report.

REQUIREMENTS FOR APPROPRIATE ASSESSMENT

7. The purpose of an assessment is to explain to the IEP team what Student's present levels of performance and areas of strengths and weaknesses are; and to delineate what, if any, deficits exist that are impacting Student's ability to learn. Assessment tools and strategies that provide relevant information to assist the IEP team in determining the educational needs of the child are required. (34 C.F.R. § 300.304(c)(7).) Once those evaluations have been made, strategies can be developed to address any deficits impacting the student's ability to learn.

8. The assessment must be conducted in a way that: 1) uses a variety of

assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414 subds. (b)& (c)(5); Ed. Code § 56320, subds. (a) & (b).)

9. In pertinent parts, the Education Code defines autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Ed. Code § 56846.2)

10. California Code of Regulations, title 5, section 3030, subdivision (b)(1), describes the criteria for determining whether a child qualifies for special education under the category of autism:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely

affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

11. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3).) Tests of intellectual or emotional functioning must be administered by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code § 56324.) The evidence presented at hearing established that Dr. Lopes was qualified to conduct the psychoeducational assessment.

12. To obtain parental consent for an assessment, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3)(c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and related state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).)

13. There was no dispute as to the legal compliance of the assessment plan or notice of the 2016 psychoeducational assessment given to Parents. The plan included notice of a planned assessment of whether Student qualified for special education as a

student with autism.¹⁰ Provision of the assessment to Student in an appropriate language by a qualified assessor without bias were also not disputed.

Accuracy Of Report

14. To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code § 56327). The report must be furnished to a student without cost. Dr. Lopes presented a written report to Parents detailing the outcomes of the assessments and her reasoning of why Student was not eligible for special education as a Student with autism.

15. The law does not require a psychoeducational assessment report to be error-free in order to meet legal requirements. Dr. Lopes' report had some errors in score recording. However, the cumulative effect of the errors had a *de minimis* impact on the report as a whole and did not render the report unreliable or unduly confusing. This was supported by the fact that the only evidence of Parental concern involved the report of the affect recognition score. While Father testified that he would have been more concerned if the table reporting the affect recognition Score noted a percentile in the low range, the narrative immediately following the table described the score as being in the low range. Thus, Parents were provided with the correct information. No evidence was presented that the error in the table presenting the affect recognition score caused any confusion for the members of the IEP team at the time the report was discussed. Although during hearing Parents pointed out a few other mistakes where classifications were marked as "low average" instead of "average" or where a score was placed on the wrong line of a report, neither parent testified to any confusion resulting from those errors. Typographical errors in a report do not result in a report that has *per*

¹⁰ Only the autism assessment was at issue.

se failed to meet legal requirements. Each instrument was accurately discussed in the narrative and none of the errors impacted Dr. Lopes' conclusions.

Thoroughness Of Report As To The Autism Assessment

16. Parents criticize Dr. Lopes' autism assessment for not being thorough. Parent's expert witness, Dr. Grandison, asserted that Dr. Lopes used only the Autism Spectrum Rating Scales to evaluate whether Student had autism. Dr. Grandison also thought the assessment was not complete without the administration of the Autism Diagnostic Observation Schedule.

17. Dr. Lopes used a variety of assessment tools and strategies to assess Student in the area of autism. Dr. Lopes relied on responses provided to the Autism Spectrum Rating Scales by Mother and Ms. Alford, (Student's first grade teacher); ratings from the Behavior Assessment System for Children, also provided by Mother and Ms. Alford; results of the affect recognition subtest of the NEPSY-2 social perception cluster; results from the Adaptive Behavior Assessment System; interviews of Mother and Ms. Alford; and her own observations of Student in the classroom, on the playground, and during the hours she interacted with him in the testing environment. No single measure was relied on in making her determination that Student was not a child with autism. The testing was administered according to all manufacturer instructions.

18. Parents did not present evidence establishing that the results of the testing were unreliable. Student's amended complaint alleges "For reasons to be explained at hearing, Mother did not have a fair understanding of the typical behaviors or unusual characteristics and did not mark her questionnaire as she would do now, understanding more about what is 'typical'." Student failed to present evidence that she did not understand how to mark the questionnaires used in assessing Student in 2016.

19. Dr. Lopes articulation of her reasoning behind her ultimate conclusion that Student did not have autism was detailed, professional, and highly credible. Dr.

Lopes addressed the symptoms that might be considered indicators of autism and determined that, in her professional opinion, those symptoms were more likely to be the result of Student's emotional dysregulation. She found that Student's communication and social interaction difficulties were more pronounced in school than at home and concluded that the more structured environment of the school setting was stressful for Student. She noted some sensory reactivity and some difficulty distinguishing facial expressions. However, she also noted Parent ratings indicating Student had friendships at home; and that, as a very young child, he used gestures and interacted with Parents, demonstrating typically developing mutual enjoyment and engagement in social interactions. Student was empathetic with his brother and Mother, and showed remorse for pulling papers out of Dr. Lopes' files. He also engaged in reciprocal interaction during testing and sought out discussions on topics of interest to him. Finally, she found no evidence of early developmental deficits typical of autism.

20. Autism is a condition that generally manifests before a child is three years old. Parents agreed with Dr. Lopes' assessment that Student was not autistic at the time of the May 27, 2016 IEP meeting. They acknowledged that other professionals, who had evaluated Student, had not found him to be autistic. While at hearing Parents testified they could not recall how many assessments for autism Student had undergone prior to Dr. Lopes' assessment, Parents acknowledged there had been more than one, including Dr. Reiff's, the Kaiser developmental pediatrician, who evaluated Student as a toddler, and the assessment by Dr. Grandison. None of these evaluators reached the conclusion that Student had autism.

21. Dr. Lopes performed every step in her assessment of a suspicion of autism that Dr. Grandison testified was essential. The only instrument Dr. Lopes did not administer, that Dr. Grandison believed should have been administered, was the Autism Diagnostic Observation Schedule. Dr. Lopes explained that she did not use that

instrument because it was her professional opinion that it resulted in an unacceptably high number of false positives. This was a reasonable professional decision to make. The results of Dr. Lopes' testing and her observations of Student were remarkably similar to those of Dr. Grandison, and their conclusions in 2015 and 2016 were nearly identical. Dr. Lopes' testimony regarding why she stands by the conclusions she reached in 2016, based on the information available in 2016, was based on a detailed explanation of how she reached those conclusions, and was professional and persuasive.

22. Conversely, Dr. Grandison's explanation that she failed to find Student had autism at the time of her 2015 assessment because it was "not on her radar," lacked credibility. It is more likely that Dr. Grandison, who testified to specialist level knowledge regarding the diagnosis of autism, did not diagnose autism in 2015 because it was not apparent to her in 2015, just as it was not apparent to Dr. Lopes in 2016. Dr. Grandison's testimony established that her re-evaluation of Student in 2018 as having autism was influenced by reports from others who had later diagnosed Student with autism. That fact, in addition to the facts that Mother acknowledged Dr. Grandison's 2018 assessment was sought in part to create evidence to present at this hearing, and the fact that the 2015 assessment was conducted to "develop useful findings" as opposed to independently evaluate Student's condition, do not inspire confidence in the accuracy of Dr. Grandison's reconsidered diagnosis, or in her criticisms of Dr. Lopes' assessment.

Consideration Of Assessments Conducted After Dr. Lopes'

23. Parents appear to be asserting that, because a subsequent assessment by other professionals conducted in 2017 diagnosed Student as having autism, Dr. Lopes should have also reached the conclusion that Student qualified for special education as a child with autism in 2016. However, at the time of Dr. Lopes' assessment, none of those opinions were available. In her role as a school psychologist assessing Student's special education needs, and based on the information available to her at the time of

the assessment, her professional opinion that Student was not autistic was supported and reasonable. "The appropriateness of a student's eligibility should be assessed in terms of its appropriateness at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight." (*L.J. v. Pittsburg Unified School District* (9th Cir. 2017) 850 F. 3d 996, 1004.) Dr. Lopes' assessment must be evaluated in the context of the information available when it was completed. As Dr. Grandison noted, different professionals can come to different diagnostic conclusions with regard to autism.

24. The evidence established that despite some minor errors in the report, Antioch's autism assessment met all legal requirements governing assessments. Accordingly, Student is not entitled to an independent educational evaluation at public expense.

ISSUE NUMBER 2

Failure To Convene An IEP Team Meeting To Review And Revise The Behavior Plan:

25. Parents assert that Antioch failed to convene an IEP team meeting to timely review and revise Student's behavior intervention plan prior to Antioch removing Student from the counseling enriched program at Carmen Dragon in 2018. The evidence, however, established that Student's IEP team, including Father and Parents' education consultant, discussed the behaviors addressed in the behavior intervention plan during several IEP team meetings, including meetings on November 14, 2016, March 2, 2017, March 21, 2017 and October 3, 2017.

26. With agreement from Father at the March 2, 2017 IEP team meeting, Antioch's behaviorist, Ms. Peterson consulted with Parent's behaviorist, Dr. Mead, on a proposed revised plan separately from the rest of the team because scheduling both of them to attend the same IEP team meeting had proven difficult. The two behaviorists

completed a proposed, revised behavior intervention plan to present to the IEP team for discussion. At the beginning of the March 21, 2017 IEP team meeting, the proposed plan, collaborated on by the behaviorists, was provided to Father and his education consultant. During that meeting, the IEP team reviewed the data that had been collected as part of the existing behavior plan. The Antioch members of the team were present to begin discussions of the changes. Father declined to discuss the plan, stating that he needed time to review it before he could begin discussions.

27. The evidence established that Antioch reviewed and revised Student's behavior intervention plan on numerous occasions prior to Student's removal in January 2018.

ISSUE #3

Denial of Parent participation in Antioch's determination of the 45-day interim alternative educational setting at the January 18, 2018 meeting:

28. Student alleges that Antioch made a unilateral decision to change Student's placement at the time of the manifestation determination meeting of January 18, 2018. Antioch argues that the manifestation determination meeting did not result in any decision regarding Student's placement. It was convened to determine whether Student's recent conduct was a manifestation of his disability and the further steps to be taken if that were found. Furthermore, Parents were not entitled to "participate" in the decision regarding whether Antioch would request an expedited hearing to remove Student to an interim alternative educational setting. Despite that fact, Antioch points out that it engaged in settlement discussions at the time of the expedited hearing and entered into a stipulation with Parents whereby they agreed to placement of Student at Sierra School of Antioch. Parents assert their stipulation was not agreement to the placement.

29. An educational agency may seek permission to remove a child to an

interim alternative educational setting for up to 45 days, if the child is considered a danger to himself or others. The process for securing permission for this interim placement is a request for an expedited hearing. (20 U.S.C. 1415 (k)(3).)

30. The evidence established that the January 18, 2018 meeting was a manifestation determination meeting to consider the issue of whether Student's disruptive behaviors in the classroom and in other areas of the campus were a manifestation of Student's disability, not a meeting to discuss changing Student's placement. Parents did not attend that meeting.¹¹ Parents presented no evidence that discussion of changing Student's placement took place at the January 18, 2018 manifestation determination and no determination regarding a change of placement was made on January 18, 2018.

31. Antioch had been concerned for some time that Student's conduct constituted a danger to himself and to the other students and staff at the school. They had made several efforts to amend the behavior plan but Parents had not cooperated to complete that process. On January 11, 2018, Antioch filed a request for an expedited hearing that would grant them permission to remove Student to an interim alternative educational setting for up to 45 days, evidencing that they had no intention of unilaterally changing Student's placement. Parents were served with this hearing request on January 11, 2018.

32. Antioch intended to use the expedited hearing process to secure an order allowing them to remove Student to an interim alternative educational setting as Antioch staff were concerned that Student's conduct constitutes a danger to himself or his fellow students as provided for in the IDEA. (20 U.S.C. 1415(k)(3)(A).) Once a request

¹¹ The notice given parents and the fact that the meeting proceeded without them is discussed in Issue number four, below.

for expedited hearing has been filed, the Administrative Law Judge decides whether circumstances permit the temporary removal of the child and whether the placement is appropriate, although settlement prior to hearing is always an option.

33. At the February 1, 2018 expedited hearing, Parents' counsel acknowledged on the record that Antioch had the right to request the order changing placement. Parents stated that they did not oppose the placement and stipulated that, "Antioch Unified School District may move Student for 45 days to an interim alternative setting and that, as the School District has determined, that setting may be Sierra School." This stipulation constituted agreement that Student could be moved to Sierra School. The stipulation accepted Sierra School as an appropriate placement as acknowledged by the words "...and that, as the School District has determined, that setting may be Sierra School." Parents agreed to the selection of Sierra School as Student's interim alternative educational placement.

34. Parents cited no authority supporting their assertion that failed to establish that Antioch either unilaterally determined that Sierra School would be Student's interim individual educational placement or denied them the opportunity to participate in the decision regarding the interim placement. Parents participated in the selection of the placement by their stipulation.

ISSUE #4

Proceeding with the Manifestation Determination Review Meeting on 24-hours' notice, over Parents' objection and without Parents' participation:

35. Parents assert that 24 hours was inadequate notice of the January 18, 2018 Manifestation Determination review meeting, which resulted in Parents being unable to participate. Parents further assert that the District did not establish that they had made the necessary efforts to proceed with the meeting without them. Antioch argues that the

need to address safety concerns and meet statutory requirements for the determination, justified the expedited meeting.

MANIFESTATION DETERMINATION MEETING REQUIREMENTS

36. A manifestation determination review is not an IEP team meeting. The law provides that, if a student is to have a change of educational placement (including suspension) that would exceed 10 days in any school year, due to violations of the code of conduct of the school, the local educational agency, the parent and relevant members of the IEP team shall review all relevant information in the student's file within 10 days of the decision to change the placement, to determine whether the conduct in question was caused by or had a direct and substantial relationship to the child's disability; or the conduct in question was the result of a failure to implement the student's IEP. (20 U.S.C. 1415(k)(1)(E).) There could only be one of two outcomes for the meeting. Either, it would be found that Student's conduct was not a manifestation of his disability, in which case he would be subject to the discipline to which any other student would be subject; or, the conduct would be found to be a manifestation of his disability in which case he would be returned to his classroom, absent agreement among the parties to a different placement. (*Id.*)

37. Student argues that section 1415(k)(2) requires that the determination of an interim alternative educational setting be made in an IEP team meeting. All issues regarding failure to comply with the procedures of 1415(k) were resolved by the stipulation at the February 1, 2018. However, even if issue number 4 could be construed to encompass that argument, the code section cited is inapplicable because 1415(k)(2) refers only to interim alternative educational settings required pursuant to section 1415(k)(1)(C) and (G) which pertain to interim placements in the cases of children found to be exhibiting conduct that is not a manifestation of their disability or who are being removed due to "special circumstances," respectively. All parties agreed that special

circumstances as defined by section 1415(k)(1)(G), pertaining, to drug, weapons or infliction of serious bodily injury, did not apply in this case. At all times, Student's conduct has been found to be a manifestation of his disability.

Scheduling The Manifestation Determination Meeting With 24-Hours' Notice

38. Parents did not establish that, as a matter of law, 24 hours' notice is insufficient or a *per se* procedural violation of the IDEA. In this case, Student failed to establish 24-hours' notice was an unreasonable amount of time for scheduling a meeting in this case. Parents did not testify to any efforts made to attend the January 18, 2018 manifestation determination review meeting. No evidence was presented that a request for time off from work or for time at work to accommodate a telephone appearance, was made for either parent; or that such a request was refused. Nor was evidence submitted that Parents had specific discussions with their attorney, education consultant, or behavior consultant that established that any or all of these professionals were unavailable for a meeting on January 18, 2018. Parents chose to base their decision not to attend the meeting on their conclusion that 24-hours' notice of the meeting was insufficient *per se* instead of establishing that their opportunity to participate was denied due to the actual impact of the short notice.

39. Conversely, Antioch was worried about behaviors causing safety concerns and the increased frequency of Student's suspensions. Not only did Antioch need to meet the law's requirement that a meeting be held expeditiously, they needed to address concerns that Student was missing school. Parents did not establish that 24 hours' notice under these circumstances was unreasonable or violated the statute. However, as determined below, even if it were a procedural violation to have proceeded with the manifestation determination review meeting, doing so in this case did not result in a substantive denial of FAPE.

Proceeding With The Manifestation Determination Over Parents' Objection And Without Parents' Presence

40. Parents did not have the right to "object" to Antioch proceeding with the manifestation determination. That process is mandated by statute. Parents had the right to review all relevant information in the student's file, including the child's IEP; be informed of any teacher observations regarding Student's conduct and to provide input if they chose.

41. A manifestation determination review regarding identical conduct had been conducted on December 15, 2017 (due to winter holidays, just nine school days prior to the one scheduled for January 18, 2018). Parents had participated in that meeting to determine the manifestation of the conduct. At that meeting, documents had been reviewed and school staff had spoken about their concerns about Student. Student's conduct was found to be a manifestation of his disability.

42. Following the Friday, December 15, 2017 manifestation determination, Student was suspended again, due to tantrum conduct, on Monday December 18, 2017, that took Antioch staff three hours to deescalate. He was suspended for five days beginning December 19, 2017. His suspension lasted through January 10, 2018 (due to the winter holidays which began December 22, 2017 and did not end until January 9, 2018.) Student returned to school on January 11, 2018 and was removed from class on January 11, 2018, January 12, 2018 and January 16, 2018. (January 15, 2018 was a school holiday.) Student's dysregulated behavior was increasing in frequency and intensity.

43. Parents had informed Antioch they would not attend the January 18, 2018 meeting to discuss whether Student's conduct was a manifestation of his disability due to the provision of only 24-hours' notice. When asked if he could participate by telephone, Father replied that 24-hours' notice was insufficient to allow him to participate either in person or by telephone.

44. Parents had just reviewed documents in Student's file at the December 15,

2017 manifestation determination meeting. Parents submitted no evidence that they had not received documents explaining the reasons for Students' suspensions. Parents did not provide evidence of any additional input they would have wanted to be considered in making the manifestation determination. Parents submitted no evidence of information considered at the meeting with which they disagreed or about which they were unaware.

45. The conduct discussed at the January 18, 2018 meeting was identical to the conduct discussed on December 15, 2018. Antioch staff was concerned that the frequency and intensity of the conduct was increasing. Antioch was correct in their conclusion that proceeding with the manifestation determination immediately was important.

46. The team came to the same conclusion they reached in the prior manifestation determination: Student's conduct was a manifestation of his disability. Parents both testified that they agreed with the determination.

Student Failed To Prove That Proceeding With The Manifestation Determination Resulted In A Substantive Denial Of FAPE

47. The law required that Antioch proceed with a manifestation determination swiftly. Student had been removed from class for 9 days with the suspension on December 18, 2018. Three additional episodes, on January 11, 12, and 16, 2018, resulting in removal from the classroom had also occurred. Each suspension included the same attributes as those determined to be a manifestation of his disability on December 15, 2018. The incident on December 18, 2018 was particularly severe. The class had to be evacuated. It took three hours to deescalate Student. The January incidents also mirrored the conduct discussed in the manifestation determination on December 15, 2017 and included flipping over chairs, ripping items off the wall of the front office, when he had chosen to go for a break; pushing a desk into another student,

and then flipping the desk over; and tearing up another student's work.

48. Antioch was reasonable in concluding this was an urgent situation. The increased frequency of uncontrolled behavior cumulatively enhanced the need for expedited action. Here, Student was being removed from class and missing education repeatedly and recently, on a daily basis. A manifestation determination review needed to be conducted before Student was returned to class. Antioch made the decision to send notice the day following Student's last suspension, (January 17, 2018), of their intention to discuss the determination on January 18, 2018. Antioch made the particular effort of sending the notice by messenger to ensure its receipt. Father acknowledged he received it on January 17, 2018 at 2:09 p.m.. The meeting was scheduled for 2:00 p.m. the following day.

49. Father notified Antioch that 24-hours' notice was insufficient to allow Parents to attend. Antioch asked if he could arrange to attend via telephone. Father declined, stating that 24-hours' notice was insufficient for him to be able to make such arrangements. No evidence of an inquiry by either parent into whether they could be made available for a telephone call to participate in the manifestation review was submitted.

50. The 9th Circuit Court of Appeal has made it clear that parental participation in IEP team meetings is essential and has instructed that, if faced with a choice regarding missing a deadline to conducting a meeting or rescheduling to include Parents, a school district should reschedule as parental participation in the development of an IEP is critical. (*Doug C. v. Hawaii Dep't of Educ. supra*, 720 F.3d at p. 1046.) However, the Court was considering Parents' participation in an IEP team meeting; not a manifestation determination review. The court based that instruction on the premise that rescheduling the IEP team meeting would not cause Student harm because he would not be denied educational benefit. The court also acknowledged that there could

be circumstances in which accommodating a parent's schedule would do more harm to the student's interest than proceeding without the parent's presence. (*Id.*)

51. A manifestation determination review is not an IEP team meeting. Until a determination regarding the basis for Student's conduct was made, Student was removed from his class. That removal was resulting in a denial of educational services. Unlike in *Doug C.*, where Parent was ill and could not predict when he might be able to attend a meeting regarding his child's IEP, in this situation Parents provided no evidence that they could not attend or that they even investigated their ability to attend. Nor did Parents appear concerned about the urgency of the situation. They offered no alternative time or date to discuss the manifestation determination.

52. Antioch went forward with the manifestation determination so that Student could be returned to school. They had made an effort to consider Parents' input as required by statute. The consent to a Functional Behavior Assessment sent by Parents was considered. Parents failed to prove that they were denied the opportunity to review any documents or denied the opportunity to have information they would have contributed considered. Those present at the meeting agreed that Student's conduct, at all times, was a manifestation of his disability. At hearing, Parents both testified that they agreed with this outcome.

53. The purposes of the IDEA are to provide disabled students a free appropriate public education and to protect the educational rights of those students. (20 U.S.C. § 1400(d).) It is determined that in this case, no procedural violation occurred. However, even if proceeding without Parents was deemed a procedural violation, not all procedural inadequacies rise to the level of a substantive violation of the IDEA. Only those that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process result in the denial of a FAPE. (*Doug C., supra*, at p. 1046.) Here, proceeding with the consideration of the

manifestation of Student's conduct allowed his return to class and avoided further loss of educational opportunity on the part of Student. Parents' rights were not seriously infringed because they had the opportunity to participate and did not prove that they were unable to do. Furthermore, they contributed their consent to a Functional Behavior Assessment and agreed with the outcome of the meeting. Their lack of presence in the same room with Antioch staff when they considered the manifestation of Student's conduct did not deprive Parents of any meaningful opportunity to participate in the determination of the basis for Student's behavior. Antioch did not deny Student a FAPE under these circumstances, by proceeding with the determination of the manifestation of his behavior in Parents' absence.

ORDER

1. Student's 2016 Psychoeducational Assessment was thorough and met legal standards. Student is not entitled to an independent educational assessment at public expense.

2. Student failed to prove that Antioch denied Student a free, appropriate public education by failing to convene a IEP team meeting to timely review and revise Student's behavioral intervention plan.

3. Student failed to prove that Antioch denied Parents the opportunity to participate in the determination of the interim alternative educational placement.

4. Student failed to prove that Student was denied a FAPE because Antioch proceeded with the January 18, 2018 manifestation determination review.

5. As Student did not prevail on any issued decided herein, all requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. Antioch prevailed on all issues in this hearing.

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).)

DATE: February 6, 2019

/s/

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings