

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. 2015030589

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 13, 2015, naming Antioch Unified School District.¹ The matter was continued for good cause on April 24, 2015.

Administrative Law Judge Rebecca Freie heard this matter in Antioch, California, on August 25 and 26, 2015. The last day of hearing, August 31, 2015, was conducted telephonically.

Nicole Hodge Amey, Attorney at Law, represented Student. Mother attended the hearing on August 25 and 26, 2015. Certified Interpreter, Rosa Arce, interpreted for Mother. Lenore Silverman, Attorney at Law, represented Antioch. Maia Belus, executive assistant for the Director of Special Education, was Antioch's representative and attended the hearing on August 25 and 26, 2015.

A continuance was granted for the parties to file written closing arguments and the record remained open until September 17, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

¹ Antioch filed a complaint on February 5, 2015, OAH Case No. 2015020590, which was consolidated with this matter on March 23, 2015. At the beginning of the due process hearing Antioch dismissed its case without prejudice on the record.

ISSUES²

- 1) Did Antioch deny Student a free appropriate public education from June 2013 to March 13, 2015, by failing to assess her in all areas of suspected disability, specifically in relation to her diagnosis of Hashimoto's disease, and other frail health concerns?
- 2) Did Antioch deny Student a FAPE for the 2013-2014 school year by failing to offer her home/hospital instruction?

SUMMARY OF DECISION

Student did not establish that Antioch's failure to assess her health as a suspected disability from March 13, 2013, to October 2, 2014, denied her a FAPE. Antioch conducted a comprehensive triennial assessment in January 2012. In response to Mother's request for an independent educational evaluation, the Northern California Diagnostic Center conducted its own assessment in November 2012. The Diagnostic Center conducted a follow-up assessment in October 2013, which involved additional academic testing. Mother did not bring up health issues at individualized educational program team meetings during this time period. Student performed well in school, and did not display any signs that she had health problems, particularly health problems that interfered with her ability to access to the curriculum. Although Student was diagnosed with Hashimoto's disease, which causes hypothyroidism, in 2011, the evidence established that before October 2, 2014, Antioch had no reason to suspect that her Hashimoto's disease, or any other health condition, negatively impacted her access to her educational program. Student's history of poor attendance, was not attributable to Hashimoto's disease, nor any other lengthy acute or chronic illness or injury.

On October 2, 2014, Antioch presented Mother with an assessment plan asking her to consent to assessments in the areas of health, and speech and language, and asking that the speech and language therapist review records, interview Student's teacher, and observe Student in class. At this time Student was eligible for special education under the category of speech and language impairment, primarily due to articulation issues. Antioch's offer to assess Student in the area of her health on October 2, 2014, implies that Antioch saw this as a possible area of need, or suspected disability. But since Mother refused to sign consent for the assessment, it is not found that Student was denied a FAPE in this regard from October 2, 2014, to January 22, 2015.

² The issues have been rephrased 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.) Several other issues were contained in the complaint, but Student dismissed these without prejudice at the beginning of the hearing.

At an IEP team meeting on January 22, 2015, Mother presented the team with a letter asking for Student to be assessed. Although the letter was not specific as to the areas in which Mother was asking that Student be assessed, a letter from a medical professional was also provided to the team, clarifying that a health assessment was being sought. Antioch had an obligation to respond by either sending prior written notice refusing to assess, or by presenting an assessment plan for Mother's consent. Since it did neither, this procedural violation denied Student a FAPE, by significantly impeding Mother's ability to meaningfully participate in the IEP development process, and Antioch is ordered to conduct a health assessment of Student to determine if health issues impact her ability to access the curriculum and receive a FAPE.

Student failed to meet her burden of proof that Antioch denied her a FAPE because it did not provide her with home/hospital study for the 2013-2014 school year. Student did not provide Antioch with the required medical request for home/hospital instruction, and she showed no need for home/hospital instruction. Despite her frequent absences from school, Student almost always made up missed work, and her report card for the 2013-2014 school year showed that she was approaching grade level in all academic areas. The following school year her report cards showed that she was at grade level in all academic areas, despite her absences. Student offered no evidence that she ever required home/hospital instruction to receive educational benefit. Therefore, Antioch did not deny Student a FAPE by failing to offer home/hospital instruction in the 2013-2014 school year.

FACTUAL FINDINGS

Jurisdiction

1. Student resides with Mother within Antioch's boundaries. She is 11 years old. Student attended Antioch schools from kindergarten through fifth grade, the 2014-2015 school year. She enrolled in a charter school for the 2015-2016 school year that is chartered by another school district.

2. Student qualified for special education at the age of three due to speech and language impairment, including language development and articulation issues. She is bilingual in English and Spanish. Since at least the 2011-2012 school year, when Student was in second grade, she was placed in a general education classroom, and she only received speech and language services as part of her IEP. She successfully accessed the curriculum and did not require any other special education services, including resource support services.

*2011-2012 School Year*³

3. Student was in second grade and attending Nmo Grant Elementary School for the 2011-2012 school year. In 2011, Student was diagnosed with Hashimoto's disease, which causes hypothyroidism. It is treated by medication. Symptoms may include trouble swallowing, intolerance to cold, possible weight gain, fatigue, constipation, dry skin, or hair loss. Student's physician's office sent a letter to Antioch in September 2011, with an information sheet describing the symptoms and treatment of the condition. During the time period at issue in this case, Student did not display any of these symptoms in the school setting.⁴

ANTIOCH'S 2012 ASSESSMENTS

4. In January 2012, Antioch school psychologist Ramzi Nashashibi conducted psychological testing. Special education teacher Lauren Resides conducted academic testing during the same time period. Student did not offer evidence that suggested that any of the assessments failed to meet all legal requirements.

5. Academic testing showed that Student was performing at grade level in most areas. Mr. Nashashibi assessed her cognitive abilities, and found them to be average. He also found that Student had some weaknesses in the areas of auditory processing and memory. However, because of her generally good grades and academic achievement test scores, he concluded the auditory processing and memory weaknesses did not rise to such a level that she would require special education intervention. Mr. Nashashibi noted that the Regional Center had assessed Student for attention deficit hyperactivity disorder in 2008, and it was found that she did not meet the diagnostic criteria. As part of his evaluation, Mr. Nashashibi sought information from several sources including interviews with Mother and Student's teacher. Student was performing very close to grade level, with average to better than average grades. Her attendance was not an issue in the 2011-2012 school year. Mr. Nashashibi found that Student did not meet the criteria for a specific learning disability. At the time of the January 2012 testing, Student did not have educational deficits requiring special education, beyond the speech and language therapy she was already receiving.

³ The time period at issue in this case is March 14, 2013, to March 13, 2015. However, events before this time are relevant to the issue of whether Antioch assessed Student in all areas of suspected disability.

⁴ There was testimony about Student falling asleep in class on two occasions during the time period at issue, but the evidence established that this did not occur because of Hashimoto's disease or any other health issue.

6. Mr. Nashashibi specifically addressed whether Student's diagnosis of Hashimoto's disease affected her educationally. He did not find any evidence that the medical condition impacted access to her educational program. Antioch had no reason to suspect that she had any other disabilities that required further assessment. Student continued to receive speech and language services, because she met the criteria for speech and language impairment. Student did not show that at the time of this assessment she had any educational needs which flowed from the Hashimoto's or any other medical condition.

7. Following the Antioch assessments, Student's case manager made multiple attempts to arrange an IEP team meeting to discuss the two assessments. Mother finally agreed to an IEP team meeting on March 27, 2012, but she did not appear for the meeting. At some point Mother told Antioch personnel that she did not agree with Antioch's assessment and, in May 2012, Mother asked that Student be assessed by the Diagnostic Center in Fremont.

2012-2013 School Year

8. Student transferred from Grant to Fremont Elementary School for the 2012-2013 school year. In the fall of 2012, Mother consented to a speech and language assessment to be conducted by Barbara Cringle, Student's speech and language therapist and case manager at Fremont. The report was completed in October 2012. The speech and language assessment showed that Student's language development was in the average range for her age, but she qualified for speech and language services due to articulation issues.

9. On or about November 1, 2012, Antioch convened an IEP team meeting, but Mother refused to attend. However, Antioch developed an IEP offer at that meeting and Mother received a copy of that IEP offer.

10. As Student's case manager, Ms. Cringle had many discussions with Mother during the 2012-2013 school year. Mother never brought up health issues. Although sometimes Student would say she did not feel well at the beginning of the twice-weekly speech and language therapy sessions, Ms. Cringle would then tell Student that maybe they could not do the session if she was unwell. Student liked her speech and language therapy sessions, so she would say she could still participate, and the session proceeded. Student never showed any symptoms of illness during those sessions.

DIAGNOSTIC CENTER ASSESSMENT 2012

11. Antioch made a referral to the Diagnostic Center for an independent evaluation following Mother's request in the fall of 2012. Mother and Antioch personnel completed forms for the Diagnostic Center referral. In the forms Mother completed for the Diagnostic Center, she mentioned that Student had low thyroid, but in the section where she

was asked to list her concerns, she concentrated on Student's communication skills. Neither Mother, nor Antioch, asked the Diagnostic Center to assess whether Student's Hashimoto's disease, or any other medical issues, were affecting Student's ability to access the curriculum.

12. The Diagnostic Center assessed Student in November 2012. Testing was completed and a report was issued. Antioch provided Mother with a translated copy of the report in early February 2013. The Diagnostic Center found that Student had average intelligence, although some disparity existed among the scores of various subtests. Like Mr. Nashashibi, the Diagnostic Center also found that Student had some weakness in the area of auditory processing and auditory memory. However, unlike Ms. Cringle, who opined that Student's only speech and language deficit was articulation, the Diagnostic Center concluded that Student had a language disorder.

13. The IEP team meeting was convened on March 13, 2013. At the meeting, Student's third grade teacher reported that Student

has lost instruction time due to being absent from school due to a broken arm; Independent Study, doctor appts. etc., which is not helpful for her. She also has many ailments, i.e. neck aches, fingernail hurts, loose tooth kept her from doing any work all day.

Student offered no evidence that any of these ailments were related or part of a medical condition such as Hashimoto's disease. The team reviewed the Diagnostic Center's report, and its recommendations were incorporated into Student's November 1, 2012 IEP. Mother consented to the November 1, 2012 IEP, as amended on March 13, 2013. She has not consented to any later IEP offers. In the 2012-2013 school year, Antioch did not have any reason to suspect that Student had any additional educational needs stemming from health issues which would have required assessment in any additional areas, including health.

2013-2014 School Year

DIAGNOSTIC CENTER ASSESSMENT 2013

14. Student continued her enrollment at Fremont in the fall of 2013 and the Diagnostic Center agreed to do a follow up on the previous year's assessment of Student. The Diagnostic Center tested Student in the area of academics. Student's test results generally fell in the average range for her age and grade level. Antioch held an IEP team meeting on October 15, 2013, to review the recent Diagnostic Center assessment. Mother attended and claimed that Student was forgetful, worked slowly, and did not seem to understand her homework when she did it at home. However, the same behavior was not

happening at school. Mother did not say anything about Student's Hashimoto's disease, or any other health condition. Student had friends, actively participated in class, was accessing the curriculum, and was making educational progress.

DECEMBER 16, 2013 IEP TEAM MEETING

15. Antioch held another IEP team meeting on December 16, 2013. Mother claimed that Student could not be understood in English or Spanish. Ms. Cringle disagreed, and told Mother Student could be understood in English at school by her teacher, peers, and others. Mother wanted Ms. Cringle to address alleged speech deficits she claimed Student had when speaking Spanish, but Ms. Cringle told her that the speech and language therapy was in English only. The evidence established that teachers and peers understood Student in the school setting. Student offered no credible evidence that health issues were discussed by the IEP team at this meeting, or that anyone on the team had concerns that Student's health impacted her access to her educational program.

16. At the December 2013 IEP team meeting, Mother asked if Student could be home-schooled, and Antioch told her that this was an option. However, as will be discussed below, Student offered no evidence that Mother ever requested home/hospital instruction. Mother did not say anything at this meeting about Student having health issues, or any other issues that would have caused Antioch personnel to suspect Student had another disability, besides speech and language impairment, that was causing her to suffer educationally and which needed to be assessed. Student offered no evidence that, at the time of this meeting, Student required home/hospital study due to health issues. Nor was there any note from a medical professional recommending such.

ATTENDANCE ISSUES

17. Student began the 2013-2014 school year at Fremont. Between the beginning of the school year and winter break, she accumulated 12 absences, purportedly due to illness. Of the 12 absences for illness, she was absent four successive days in November and three successive days in December. Fremont's records did not record a reason for the absence other than just illness.

18. Student was involved in a disciplinary incident on December 18, 2013, in which Student uncharacteristically scuffled with other students. Student had an unexcused absence on December 19, 2013. Following the end of winter break, Student was absent from school due to "illness" for nine successive school days. However, Mother could not explain, when she testified, what the illness caused this lengthy absence.

19. Student returned to Grant on January 17, 2014, pursuant to an intra-district transfer. After Student began attending Grant, she had only two days of absence for illness for the rest of the 2013-2014 school year, one in April and another in May 2014. However,

she was absent from school for five days from March 28, 2014, through April 4, 2014, when Mother was attending a Parent Teacher Association conference in Anaheim and took Student with her, and then she had three more days of absence beginning April 7, 2014, due to the death of her maternal grandfather.

20. When she testified, Mother could not provide a reason why Hashimoto's disease might be the cause of Student's absences during the 2013-2014 school year. When she was confronted with the fact that Student's older teenage sister was often absent on the same days as Student, she tried to explain that since both children had Hashimoto's disease, they often got sick at the same time. This testimony was not credible, because the evidence which described Hashimoto's disease did not contain any information suggesting that people with the disease were more susceptible to other illnesses. At no time during the 2013-2014 school year, did Mother communicate to Antioch that Student was missing school due to illnesses that were caused by or complicated by any particular condition. Further, there was no evidence that Student's absences, while concerning, gave rise to the need to assess Student further. Educationally, Student's needs were being addressed and met.

21. Student was tardy at least 11 times during the 2013-2014 school year, almost all of which were unexcused. Mother also removed her from school early on at least 12 occasions, after she began attending Grant, purportedly for medical and dental appointments. Antioch was concerned enough about the number of absences, tardies, and early departures, that it sent truancy and excessive excused absence letters to Mother on January 28, 2014.

22. Student offered no evidence that Student ever submitted a doctor's letter to either Fremont or Grant during the 2013-2014 school year asking that Student be placed on home/hospital study. Student offered no evidence that Mother ever told anyone at either Fremont or Grant that Student had a health issue that might require home/hospital study, nor did Student demonstrate any need for this through any other evidence. At the end of the school year Student was approaching grade level standards in all areas.

IEP TEAM MEETING JUNE 3, 2014

23. Student continued to receive speech and language therapy at Grant. Antioch held an IEP team meeting on June 3, 2014. At that meeting, Mother complained that Student had problems retaining information and completing homework. Although Student sometimes worked slowly at school, her teacher felt she was a capable student. She could be understood by peers and teachers. Although Student had some very minor articulation issues, these were due to a lateral lisp, air escaping from the side of her mouth when she spoke, which was due to malocclusion. This is a dental issue that is not something the school could treat. The IEP developed at this meeting called for Student to continue receiving speech and language services. The evidence did not show that there was any reason to suspect that Student had any additional education needs at this time which warranted further assessment or inclusion on Student's IEP.

PRESENTATION OF AN ASSESSMENT PLAN

24. On October 2, 2014, Antioch's Special Education Director, Karen Mates, and Mr. Nashashibi met with Mother. They presented her with an assessment plan and asked that she consent to a speech and language assessment. The assessment plan also called for the speech and language therapist to assess Student's health issues, review files, interview her teacher, and observe her in class.⁵ No other assessments were suggested, nor did Mother request any. Mother refused to sign the assessment plan.

25. Despite the lack of a signed assessment plan, Susan Schlagle, Student's speech and language therapist and case manager for the 2014-2015 school year, conducted several informal observations in both the classroom environment and during unstructured time. She described this as a screening. She kept data on the number of times Student demonstrated a lisp, based on her knowledge of Student articulation issues, and found that Student demonstrated no articulation issues for 87-95% of the time. Ms. Schlagle produced a written summary of her findings.

26. Antioch scheduled an IEP team meeting for January 22, 2015. Antioch sent an IEP notice to Mother stating that the purpose of the meeting was to exit Student from special education. On January 21, 2015, Mother sent an email to the principal at Grant. The school secretary translated the email on the same date, and sent the translation to the principal, as well as Ms. Mates and others. The email is not easy to understand, and some of it was discussed by Mother at the IEP team meeting the following day. The email stated that Mother wanted changes in Student's IEP, and also wanted Antioch to have a Section 504 coordinator in attendance at the meeting. She also stated that Student's doctor wanted her to be assessed, and this was important because Student was "Social Security disabled." Mother also asked that Mr. Nashishibi not attend. Mother claimed that the school secretary had told Mr. Nashishibi that that student was "having important health problems," yet Mr. Nashashibi had done nothing. However, Mr. Nashashibi claimed at hearing that he had never received information that Student had health issues that had an effect on her access to education, and Student offered no evidence, including Mother's email, that credibly contradicted his testimony.

IEP TEAM MEETING OF JANUARY 22, 2015

27. The IEP team meeting had many people in attendance, including Mother, her significant other, Ms. Mates, Ms. Schlagle, Student's teacher, and Mr. Nashashibi. Mother began speaking shortly after the meeting began, and was not silent, except during the portion

⁵ No finding is made as to the propriety of the speech and language therapist assessing Student's needs in the area of health.

of the meeting when Ms. Schlagle's written summary was translated to her. Mother spoke loudly, and rambled, wanting the team to address, for example, an IEP or incident from 2009. She did not understand why Student's report card did not show grades in every preprinted area of the form, although Student's teacher, Heather Owens-Werkheiser, tried to explain that these were areas that had not yet been taught, so they were not graded, and this was noted on the report card. Two interpreters were present, and they struggled to interpret everything Mother had to say. Mother constantly interrupted others who were attempting to respond to the matters she brought up, and she did not show any willingness to listen to what others had to say.

28. At the end of the meeting, which lasted slightly more than one hour, Mother presented a letter from a physician's assistant that had been written a few days before. The letter asked for further assessment of Student, claiming that health issues might be affecting her educationally. However, up to the time of this IEP meeting, Student had never demonstrated any symptoms of Hashimoto's disease, or any other health issues, in the school setting. At the end of the meeting Mother left without signing consent for Student to be exited from special education.

29. At the end of the meeting Mother also gave Ms. Mates a letter she had written which was translated. Mother described Student as not completing homework, forgetting things, and taking a long time to do things. Mother also claimed that Student "makes mistakes, and has accidents, falls, throws things and breaks them." She claimed Student had safety issues, and

only wants to be with me or her sister or her pets or dolls, it's like she gets lost in that world of games, does not want to do anything and at times only wants to be laying down, has headaches and backaches, leg pains. She wants me to carry her like if she were a baby.

Mother had never described this type of behavior before, nor had it ever been observed by any Antioch personnel.

30. In the letter, Mother described Student as having many problems doing and completing homework, which Mother claimed caused Student "stress and anxiety." Mother complained that Student's teacher was not sympathetic, and that Student had difficulty understanding the teacher. She complained Student was not fully assessed in 2009. Attached to the letter were 40 pages printed out from one or more special education websites. At the end of the letter Mother asked that an assessment plan be sent to her in 15 days. Neither party offered any evidence that Antioch responded to this letter, other than by filing its own complaint on February 5, 2015, requesting a finding that Antioch could exit Student from special education.

31. Other than the claim that Student had difficulty completing homework, Mother had never voiced the other concerns in the letter to anyone at Antioch. Student offered no evidence that Mother ever told anyone at the Diagnostic Center of the concerns expressed in her January 2015 letter when it conducted its assessments.

32. Although Mother complained in her letter, and at one or more IEP team meeting, that Student had behavioral issues at home centered around homework, teachers reported that Student was a sweet, well-behaved child at school, who had friends, worked hard, and was either approaching or meeting grade level standards (the latter in the 2014-2015 school year), which was significant in light of her poor attendance. Student generally appeared to Antioch's staff to be in good health at school; she actively participated in class, made academic progress, and played with others during recess.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA⁶

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)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. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services

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.

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 Dist. 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. 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).) 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); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student bore the burden of persuasion.

Issue One: Failure to Assess in All Areas of Suspected Disability

5. Student contends that Antioch failed to assess her in all areas of suspected disability for the two year period beginning March 4, 2013, specifically in the area of health. Student argues that Student's attendance records should have put Antioch on notice that health issues were affecting her educationally, and that she might be eligible for special education as a student with other health impairment. Further, Student claims Mother brought up health concerns at every IEP team meeting. Antioch contends that Student's only disability was in the area of speech and language, and it did not have information that caused it to suspect that she needed further assessment in the area of health after the January 2012 evaluation by Mr. Nashashibi and Ms. Resides, as well as the Diagnostic Center evaluations in 2012 and 2013.

ASSESSMENTS FOR SUSPECTED DISABILITIES

6. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivisions (a) and (b). In the instant case, Student claims Antioch should have assessed her for a disability other than the one that previously made her eligible for special education. This is analogous to a "child find" situation, and therefore this issue will be analyzed in accordance with the "child find" standards.

7. A school district's child find duty extends to all children "suspected" of having a qualifying disability and a need for special education. (34 C.F.R. § 300.311 (c)(1); *N.G. v. Dist. of Columbia* (D.D.C. 2008) 556 F. Supp.2d 11, 26 .) Pursuant to this standard, the appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Department of Educ., State of Hawaii v. Cari Rae S.*, (D. Hawaii 2001) 158 F.Supp.2d 1190, 1195 (*Cari Rae*)). "[A] child should not have to fail a course or be retained in a grade in order to be considered for special education and related services." (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46580 (Aug. 14, 2006).) That a student made adequate educational progress is not a valid reason not to assess if there is reason to believe that student may qualify for and require special education. (34 C.F.R. § 300.111(c)(1); *Cari Rae, supra* 158 F.Supp.2d 1190, 1196-1197.) A district's child find duty is not dependent on any request by the parent for special education testing. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301; *Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518 .)

TESTS FOR DETERMINING FAILURE TO ASSESS FOR SUSPECTED DISABILITIES

8. The Ninth Circuit Court of Appeals has not yet articulated a test for determining when a district should assess a child for a suspected disability. In a recent unpublished opinion, the Ninth Circuit advised that the oft-cited test espoused by the federal district court of Hawaii has not been adopted by two sister circuits. (*G.M. v. Saddleback Valley Unified School Dist.*, (9th Cir. July 18, 2014, No. 12-56627) 583 Fed.Appx. 702, 703, fn. 1.) In 2001, the Hawaii federal district court held, “[T]he child-find duty is triggered when the [district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.” (*Cari Rae*, supra, 158 F.Supp.2d 1190, 1194 [citations omitted].) The *Cari Rae* court cited the Third Circuit’s holding that child find requires districts to identify and evaluate children “within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.” (*Ibid.*, citing *W.B. v. Matula* (3rd Cir. 1995) 67 F.3d 484, 501, abrogated on other grounds by *A.W. v. Jersey City Public Schools* (3rd Cir. 2007) 486 F.3d 791.)

9. The Sixth and Third Circuits have since promulgated child find tests that differ significantly from the *Cari Rae* standard. The Third Circuit, while continuing to allow districts that are on notice of a student’s potential eligibility a “reasonable period of time” to identify and evaluate, adopted a higher threshold noting that child find does not require “a formal evaluation of every struggling student.” (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 249 (*D.K.*)) The *D.K.* test does not require districts to “rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.” (*Id.* at 252.) The Sixth Circuit established a more stringent test, holding that the individual claiming a child find violation must demonstrate “that school officials overlooked clear signs of disability and were negligent in failing to order testing or that there was no rational justification for not deciding to evaluate.” (*Board of Educ. of Fayette County, Ky. v. L.M.* (6th Cir. 2007) 478 F.3d 307, 313 (*L.M.*) [citation omitted].)

10. In analyzing a child find violation, the actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

11. 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. (20 U.S.C. § 1414(a)(1); 34 C.F.R § 300.301; Ed. Code, § 56302.1; (*N.G. v. Dist. of Columbia*, supra, 556 F.Supp. 2d 11, 26-27.)) In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code, § 56302.5.)

PROCEDURAL VIOLATIONS

12. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (Cari Rae, *supra*, 158 F.Supp. 2d 1190, 1196; *D.K.*, *supra*, 696 F.3d 233, 249-250; *L.M.*, *supra*, 478 F.3d 307, 313 (L.M.); *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025 F.3d 1025, 1031.)

13. A procedural violation denies a child a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939].) Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award].)

ASSESSMENT PLANS

14. If a district agrees to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a) ; 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

PRIOR WRITTEN NOTICE

15. Prior written notice must be given by the public agency to the parents of an individual with exceptional needs "upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child." (Ed. Code, § 56500.4, subd. (a); see also, 20 U.S.C. 1415(b)(3) and (4) and (c)(1); 34 C.F.R. 300.503.) Failing to take action in response to a recommendation or request for assessment is tantamount to refusing to assess. (See, *Compton Unified School Dist. v. Addison, et al.* (9th Cir. 2010) 598 F.3d 1181.)

16. A prior written notice must contain: (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).) The procedures relating to prior written notice “are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions.” (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.)

FAILURE TO ASSESS REGARDING HEALTH CONCERNS

JUNE 2013 THROUGH OCTOBER 2014

17. Antioch was on notice when it conducted its psychoeducational assessment in January 2012 that Student had been diagnosed with Hashimoto’s disease, and Mr. Nashashibi addressed that in his assessment, finding that the condition did not affect Student educationally. She was making progress in the general education curriculum, with academic testing results showing, for the most part, that she was at grade level. There was no indication that Student had any separate educational needs stemming from a health condition.

18. When Student was assessed by the Diagnostic Center in November 2012, Mother did not state in her portion of the referral packet that she had concerns that Student had health issues that were affecting her academically. Instead she focused on speech and language needs. Nor did Antioch, in its part of the referral packet, indicate that health issues were of concern. This confirms Antioch’s position that at this time, it did not have any reason to suspect health issues were impacting her educationally.

19. At the IEP team meeting in March 2013, Student’s teacher expressed concern about Student’s absences, and noted minor classroom complaints by Student of neck aches, a broken arm, nail pain and a loose tooth. None of these symptoms are noted on the information sheet admitted into evidence concerning Hashimoto’s disease. Rather, they seem to be minor childhood complaints. Mother did not bring up health concerns at this meeting, nor at any other IEP team meeting except the January 22, 2014 IEP team meeting.

20. At IEP team meetings in October 2013 and December 2013 at Fremont, Mother did not attribute her complaints that Student had difficulty with homework at home, or needed homeschooling because she had health issues, specifically those related to Hashimoto’s disease, or another medical condition. Nor was there evidence that Mother informed Antioch at the IEP team meeting in June 2014, that Student had health issues that were affecting her educationally.

21. Using the *Cari Rae* standard, Student did not establish that Antioch should have suspected that Student had a disability in the area of health and needed special education to address her deficits. Student had no deficits that affected her ability to access the curriculum in her general education class; she was performing quite well in the classroom setting, and was receiving educational benefit.

22. The *D.K.* standard has an even higher threshold than the *Cari Rae* standard. It does not require every “struggling” student be assessed. There was no credible evidence that Student was struggling in school. The *L.M.* standard requires a student to demonstrate that there were “clear signs of disability,” and that the school district was negligent in deciding not to evaluate, and had no “rational justification” for this decision. Student did not meet that standard, since there were no “clear signs” that she was disabled in the area of health.

OCTOBER 2, 2014, THROUGH JANUARY 22, 2015

23. When Antioch asked Mother for consent to assess Student in October 2014, she would not consent to the assessments Antioch wanted the speech and language therapist to conduct, including one in the area of health. There was no explanation as to why Antioch added this part to the assessment plan. The addition of this component raises an inference that Antioch had some suspicion that Student’s health might be an area of need. However, Mother did not consent to the assessment. Therefore, the record establishes that Antioch believed Student’s health might be an area of need that required assessment, and was willing to assess her. However, Mother’s refusal to consent to the assessment plan establishes that Antioch did not deny Student a FAPE in this regard from October 2, 2014, to January 22, 2015.

JANUARY 22, 2015, THROUGH MARCH 12, 2015

24. Mother’s email to Antioch on January 21, 2015, the letter from a medical provider she presented to Ms. Mates at the IEP team meeting of January 22, 2015, and her own letter with the same date specifically asking for an assessment gave Antioch notice of a possible need to assess Student, specifically in the area of health. Antioch should have produced an assessment plan for Mother to sign no later than February 6, 2015, or it should have provided Mother with prior written notice concerning its refusal to assess. It did neither. This was a procedural violation that significantly impeded Mother’s right to meaningfully participate in the IEP development process. Therefore, it must be found that due to this procedural violation, Antioch denied Student a FAPE by failing to assess her in all areas of suspected disability, specifically in the area of health, from February 6, 2015, through March 12, 2015. Student is entitled to relief in this regard.

Issue Two: Failure to Provide Home/Hospital Study

25. Student contends that her history of excessive absences should have put Antioch on notice that she required home/hospital services. Antioch contends that Student did not establish that her pattern of excessive absences were due to a real health issue, she never went through the proper process to apply for home/hospital services, and she did not show a need for such services.

EDUCATIONAL PLACEMENT

26. A specific educational placement means that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042.) The continuum of placements includes specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; special instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

HOME/HOSPITAL PLACEMENT

27. Title 5, California Code of Regulations, section 3050.4 describes the circumstances under which a child should be offered home/hospital instruction by a school district. Generally, home/hospital instruction is limited to pupils with exceptional needs resulting from a medical condition related to surgery, accidents, short-term illness, or medical treatment required for a chronic illness.

28. The IEP team must have a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report must include a projected calendar date for the pupil's return to school. The IEP team must meet to reconsider the IEP prior to the projected calendar date for the pupil's return to school. (Cal. Code Regs., tit. 5, § 3050.4 (d).)

29. Student has only requested relief for Antioch's failure to provide home/hospital instruction for the 2013-2014 school year. Student provided no evidence of a medical report from an attending physician or surgeon, or the report of a psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevented Student from attending school, and required home/hospital study. Therefore the criteria required for the IEP team to even consider home/hospital instruction was not met and Antioch had no obligation to place Student on home/hospital instruction. Student did not meet her burden of proof that she was denied a FAPE because she was not provided with home/hospital study.

REMEDIES

1. Student partially prevailed on Issue 1, in that Antioch failed to provide Mother with an assessment plan, or prior written notice of its refusal to assess Student, after Mother requested an assessment on January 22, 2015. In her closing argument Student requests an independent health evaluation. She also requests six hours of speech and language therapy sessions that she claims were missed when she was absent from school, and 56 hours of compensatory education for days she was absent from school for health reasons.

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.) 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, supra*, 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

3. Mother was given an assessment plan on October 2, 2015, which asked for consent for Antioch to assess Student in the area of health. Mother refused to consent to the assessment. Antioch’s duty to either present Mother with a new assessment plan, or prior written notice of its refusal to assess Student, arose on February 6, 2015, 15 days after Mother asked that Student be assessed on January 22, 2015, and ended when Student filed her complaint on March 13, 2015. Due to Mother’s refusal to allow a health assessment of Student in October 2014, it is found that she is not entitled to an independent health assessment. However, Student is entitled to a health assessment by Antioch due to Antioch’s procedural violation of failing to provide Mother with either an assessment plan, or prior written notice of its refusal to assess after Mother requested assessment in January 2015.

4. A school nurse can conduct an assessment of a student’s health needs as related to the development of an appropriate plan to ensure the education of a child. (Ed. Code § 49426, subd. (b).) Since the purpose of this assessment is to determine whether Student has health needs that should be addressed in the context of special education, the health assessment should be conducted by a school nurse in collaboration with a credentialed special education teacher. The report shall address whether Student has health issues that impact her ability to access education, and if she does, what special education and related services she requires to address this deficit.

5. Student's request for six hours of speech and language services is denied; failure to implement Student's IEP was not an issue that was litigated. Similarly, in regards to the request for compensatory education, this is not an appropriate remedy for failure to conduct a health assessment, and Student presented no evidence at all of any need for compensatory education for any reason.

ORDER

1. Within 30 days of the issuance of this Decision, Antioch shall conduct a health evaluation of Student, utilizing a school nurse and credentialed special education teacher. A written report shall be prepared, and provided to Mother. A translated copy of the report shall be provided to Mother within 45 days of the issuance of this Decision.

2. Student's remaining claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student partially prevailed on the first issue, and Antioch prevailed on the second issue.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: October 19, 2015

_____/s/_____
REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings