

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021100357

PARENT ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT.

CORRECTED¹ DECISION

February 24, 2022

On October 13, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming the Pleasanton Unified School District, called Pleasanton, as respondent. On October 28, 2021, the matter was continued at the request of the parties. Administrative Law Judge Charles Marson heard the matter by videoconference on December 21, 22, 23, 28 and 29, 2021.

¹ This Corrected Decision is being issued to correct a typographical error in a heading identifying Issue 2.a.

Attorneys Kristin N. Springer and Betsy J. Brazy represented Student. Student's Parents and Grandfather attended all hearing days on Student's behalf. Student attended part of the last day of hearing. Attorneys Shawn Olson Brown and Elizabeth Schwartz represented Pleasanton. Dr. Kenneth Goeken, Senior Director of Special Education, attended all hearing days on Pleasanton's behalf.

At the parties' request the matter was continued to January 18, 2022 for written closing briefs. The record was closed, and the matter was submitted on January 18, 2022.

ISSUES

1. Did Pleasanton deny Student a free appropriate public education, called FAPE, by failing to file for due process to defend the April 29, 2020 individualized education program or IEP?
2. Did Pleasanton deny Student a FAPE for the 2020-2021 school year by:
 - a. Failing to have an IEP in place at the start of the school year;
 - b. Failing to materially implement writing and reading services pursuant to Student's operative IEP dated August 19, 2020;
 - c. Failing to provide prior written notice when it stopped providing reading services in March 2021;
 - d. Impeding Parent participation in the IEP process by:
 - i. refusing to consider Tanya Aungle's written report and input, Parent input, and Student math samples at the April 2021 IEP team meetings; and

- ii. during the May 2021 IEP team meetings, interrupting Parent and her attorney and blaming Parent for IEP document errors and for not signing the IEP document;
 - e. Failing to offer goals to address all areas of need in reading, spelling, executive functioning, and writing, and failing to offer measurable math and writing goals in the April 29, 2021 IEP;
 - f. Failing to offer adequate specialized academic instruction in the April 29, 2021 IEP, specifically, structured, sequential, multisensory interventions in reading, writing and math;
 - g. Failing to make a clear written offer of extended school year services; and
 - h. Failing to offer sufficient specialized academic instruction for the extended school year?
3. Did Pleasanton deny Student a FAPE during the 2021-2022 school year until October 13, 2021, by:
- a. Failing to implement intensive reading services, writing, and math services pursuant to Student's operative IEP dated August 19, 2020;
 - b. Impeding Parent participation in the IEP process by:
 - i. Refusing to provide a copy of what it believed was the last consented to and implemented IEP, or a copy of the IEP being implemented;
 - ii. Failing to provide a correct copy of Student's accommodations;
 - iii. Not responding to Parent's requests for information about the assessment plan for mental health services; and

- iv. Failing to consider independent evaluations by Tanya Aungle and Dr. Kathy Futterman presented at the September 10, 2021 IEP team meetings?
- c. Failing to offer goals to address all areas of need in reading, spelling, executive functioning, and writing, and failing to offer measurable math and writing goals; and
- d. Failing offer adequate specialized academic instruction, specifically, structured, sequential, multisensory interventions in reading, writing and math?

In the Order Following Prehearing Conference an additional issue was stated as Issue Number 2: "Did Pleasanton deny Student a FAPE by failing to make a clear written offer in the April 2020 IEP of extended school year services and instructional services in resource lab and the co-taught classroom?" Student withdrew that issue at the beginning of the hearing, and the other issues have been renumbered accordingly.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student initiated this matter and bore the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 12 years old and in the seventh grade at the time of hearing. She resided within Pleasanton's geographic boundaries at all relevant times. Student was eligible for special education under the category of specific learning disability. She had diagnoses of dyslexia, dysgraphia and dyscalculia, and attention deficit hyperactivity disorder.

ISSUE NO. 1: DID PLEASANTON DENY STUDENT A FAPE BY FAILING TO FILE FOR DUE PROCESS TO DEFEND THE APRIL 29, 2020 IEP?

Student contends that after Parents declined to agree to all but a small part of Pleasanton's April 29, 2020 IEP offer, Pleasanton was required by subdivision (f) of Education Code section 56346 to file for a due process hearing to obtain approval of the rest of the offer. Pleasanton contends that no such filing was required because Student was receiving a FAPE throughout the relevant period.

Education Code section 56346, subdivision (e), permits a parent to accept only part of an IEP offer, in which case the accepted part must be implemented. Subdivision (f) of the statute requires a school district to initiate a due process hearing if the district determines that a portion of an IEP to which a parent does not consent is necessary to provide a child with a FAPE.

In *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1165 (*I.R.*), an autistic student was placed in general education with a one-to-one aide, although the district believed she should be placed in a special day class. (*I.R., supra*, 805 F.3d at p. 1166.) In September 2010 the parent, believing that general education with an aide was the proper placement, declined an IEP proposing to move the student to a special day class. In November 2010 the district informed the parent that it believed the student should be moved to a special day class but recognized that the previous IEP governed, so the student remained in general education. (*Ibid.*)

From March 2011 to February 2012, the district in *I.R., supra*, 805 F.3d 1164, held a series of IEP team meetings during which it unsuccessfully attempted to persuade the parent to accept a special day class placement. Eventually, in May 2012, the parent filed

for a due process hearing. (*I.R., supra*, 805 F.3d at p. 1166.) The Ninth Circuit held that the district's delay, from the first disagreement in November 2010 to parents' filing for due process in May 2012, was too long; and that the district was therefore liable for the denial of FAPE "for that unreasonably prolonged period." (*Id.* at p. 1170.) It rejected the district's defense that it was justified in spending all that time attempting to change the parent's mind:

Once the school district determines that the [IEP] component is necessary, and that the parents will not agree to it, the district cannot opt to hold additional IEP meetings or continue the IEP process in lieu of initiating a due process hearing. Rather, the school district must initiate a due process hearing expeditiously. (*Id.* at p. 1169.)

The district must file for a due process hearing, the court continued, "when the school district and the parents reach an impasse." (*Ibid.*)

At the beginning of the two-year time period addressed in this Decision, October 13, 2019 to October 13, 2021, Student's program was governed by an IEP dated April 29, 2019. The April 29, 2019 IEP placed her in general education for most of the school day, with smaller classes to support her in reading, writing and math. Parents signed their agreement to that IEP on June 10, 2019 with additional comments but without rejecting any part of the IEP. The IEP was amended in minor ways in December 2019.

Starting on April 29, 2020, the parties met six times in an attempt to agree on a new annual IEP for Student. On June 2, 2020, following the sixth meeting, Pleasanton sent the resulting IEP document to Parents for signature. On June 15, 2020, Parents declined to agree to the offer, with the sole exception that they agreed to the provision

of 60 minutes a week of writing services during the extended school year. Parents explicitly rejected any other changes to the program in the April 2019 IEP. From that time to the filing of this request for due process hearing on October 13, 2021, the parties have not been able to agree on a full new IEP.

Pleasanton convened another IEP team meeting on August 29, 2020 in an attempt to amend the April 2020 offer to obtain Parents' consent. The parties agreed on most aspects of Student's program, but never finalized an IEP document, or obtained Parents' written consent to it.

I.R., supra, 805 F.3d 1164, does not support Student's argument. The obligation recognized in *I.R.* only arises if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a FAPE. (Ed. Code, § 56346, subd. (f).) Filing for due process is required only when "the school district determines" that the unconsented-to portion of the IEP is required to provide the student a FAPE. (*I.R., supra*, 805 F.3 at p. 1169; see also *Capistrano Unified Sch. Dist. v. S.W.* (9th Cir. 2021) 21 F. 4th 1125, 1136 (district's determination is "sole trigger" of obligation to file).) The school district made no such determination here, nor should it have. The consequence of Parents' nearly total rejection of the April 2020 IEP offer was that the April 2019 IEP remained in effect. Student does not argue that there was anything about the April 2019 IEP that failed to provide Student a FAPE.

Student contends that an email sent by Kenneth Goeken, Pleasanton's Senior Director of Special Education, in March 2021 amounted to the necessary determination that Student could not receive a FAPE without some element of the April 2020 IEP to which Parents did not consent. However, that email, sent almost a year after the April

2020 IEP was written, only stated that if Parents did not agree to a new 2021 annual IEP, which had not yet been written, then the District would file for due process. And the stated ground was not that Student could not obtain a FAPE without some rejected IEP provision; it was only that Student would have gone too long without an agreed-upon IEP. Goeken's March 2021 email referenced a future IEP not yet written; it did not address the April 2020 IEP at all.

In order to prevail on this claim, Student was obliged to show that there was some element of the largely rejected April 2020 IEP offer that was essential to delivering a FAPE to her. Neither at hearing nor in her closing brief did Student attempt to make that showing. Student's failure to identify anything in the April 2020 IEP that was rejected by Parents but was essential to a FAPE is fatal to her contention. Unless there was such an essential portion of the IEP to which Parents would not consent, Pleasanton had no duty under *I.R., supra*, 805 F.3d 1164, to seek relief in due process.

In addition, after rejecting the April 2020 offer, Parents presented their disagreements with the offer to Ed Diolazo, Pleasanton's Assistant Superintendent of Student Support Services. Their disagreements were primarily that the offer did not provide for one-to-one instruction in math using the Making Math Real program, or provide for one-to-one instruction in reading using the Wilson Reading System. Diolazo encouraged the special education staff to arrange another IEP team meeting to see if Parents' concerns could be met. In the meantime, Diolazo committed the District to reimbursing Parents for their expenses in hiring outside providers to teach Student math and reading in a one-to-one setting using Making Math Real and the Wilson Reading System. This reimbursement was to continue until the dispute was resolved. Pleasanton's support of private providers using Parents' preferred programs provided Student a reasonable approximation of the Specialized Academic Instruction her 2019

IEP required. That IEP required Specialized Academic Instruction in math, reading, and writing, though not delivered in a one-to-one setting. Under Diolazo's decision, Student enjoyed the rough equivalent of those requirements although she received it in a one-to-one setting with private providers. If anything, her instruction in math and reading was more intensive than the Specialized Academic Instruction her IEP required.

That fact makes this case nothing like *I.R., supra*, 805 F.3d 1164, in which the student "remained in an inappropriate program for a much longer period of time than should have been the case." (*Id.* at p. 1170.) She spent more than a year in a general education program that did not adequately serve her or provide her a FAPE. This, the Ninth Circuit held, "directly resulted in a clear injury." (*Ibid.*) Here there was no such clear injury. Student enjoyed the rough equivalent of the special education required by her governing IEP while Parents and the District continued to attempt to agree on her program. Pleasanton even adjusted Student's schedule so that her private providers could work with her during the regular school day, and since then, Student has generally spent the morning of school days on a Pleasanton campus and the afternoon with her one-to-one instructor.

Student therefore failed to prove that Pleasanton denied her a FAPE by not filing for a due process hearing to defend the April 2020 IEP offer.

ISSUE NO. 2: DID PLEASANTON DENY STUDENT A FAPE FOR THE 2020-2021 SCHOOL YEAR BY FAILING TO HAVE AN IEP IN PLACE AT THE START OF THE SCHOOL YEAR?

Student argues that Pleasanton had no IEP in place at the beginning of the school year. Somewhat inconsistently, she also argues that the August 29, 2020 IEP was

complete, was the last agreed-to and implemented IEP, and should be the basis for awarding substantial relief. Pleasanton acknowledges it did not have an IEP for Student in place at the beginning of the 2020-2021 school year. It argues that it should be excused from liability for violating this requirement because Parents' rigid insistence on particular IEP language caused any delay.

At the beginning of each school year, each public agency must have an IEP in effect for each child with a disability within its jurisdiction (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a)(2006); Ed. Code, § 56344, subd. (c).)

The IDEA defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with §§ 300.320 through 300.324." (34 C.F.R. § 300.22 (2006).) Parental consent to an IEP must also be "in writing." (34 C.F.R. § 300.9(b)(2008).)

The requirement that an IEP be written is not just a technicality; it is critical to implementation of a student's program. An IEP must be in writing to be enforceable. "[A] discussion does not amount to an offer. [Student] could force the District to provide only those services and devices listed in the IEP, not those discussed at the IEP meeting but left out of the IEP document." (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199 [citation omitted].) The Court added:

Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. When parent is unaware of the services offered to student - and, therefore, can't monitor how these services are provided - a FAPE has been denied, whether or not parent had ample opportunity to participate in formulation of the IEP. (*Id.* at p. 1198.)

In a closely related context, the Ninth Circuit has held that compliance with the requirement that a district make a clear written offer is essential to enforcement of a student's program. It noted that "[t]he requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered ..." (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) It also observed that "a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." (*Ibid.* [citation omitted].)

The IEP that must be in place at the beginning of the school year is an IEP that is fully compliant with the IDEA. (34 C.F.R. § 300.22 (2006).) The proposed IEP from the August meeting was neither complete nor consented to in compliance with the IDEA, and it therefore did not satisfy the statutory requirement that an IEP be in place at the beginning of the school year.

Pleasanton argues that this matter is similar to *MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523. In *MM*, the district held unsuccessful IEP team meetings in May and August 1996 and arranged a third meeting but parents cancelled it. The district's proposed IEP for the school year 1996-1997 was incomplete. The Fourth Circuit held that this was a violation of the requirement that an IEP be in place at the beginning of the school year, but also held, for two reasons, that the violation was harmless and therefore FAPE was not denied. (*MM, supra*, 303 F.3d at pp. 529, 534-535.)

First, after cancelling the third scheduled IEP team meeting, parents became wholly uncooperative with the district. The district asked for dates on which another meeting could be held but parents would not supply any. The district then asked for

notification when parents were ready to meet again, but parents declined to give it. Though the district informed parents it would hold a spot open for the student during the 1996-1997 school year, parents unilaterally enrolled the student in kindergarten at a local church. (*MM, supra*, 303 F.3d at pp. 534-535.)

Second, the *MM* court also found it significant that there was no evidence parents would have signed any IEP that did not include reimbursement for the Lovaas program they preferred. (*MM, supra*, 303 F.3d at p. 535.)

The facts of this case are quite different. Parents did not refuse to attend or cancel any IEP team meetings; in fact, they helped cause the August 29, 2020 meeting by complaining to Diolazo. They and Pleasanton worked hard on August 29 to reach agreement and came close to doing so. The record does not show that these Parents would not have signed any IEP unless it included the one-to-one math and reading programs they were seeking. And while parents of special education students may sometimes be insistent or obstinate, the Ninth Circuit has consistently warned against blaming parents for breakdowns in the IEP process. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1045; *Anchorage Sch. Dist. v. M.P., supra*, 689 F.3d at p. 1055; *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485.) *MM*, therefore, does not aid the district here.

Pleasanton did not have a complete written IEP in place for Student at the beginning of the school year 2020-2021. The written August 2020 offer was never completed and was never agreed to by Parents in writing. Pleasanton's failure to have an IEP in place at the beginning of the school year was a procedural violation of the IDEA.

A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subds. (f)(2), (j).)

Pleasanton's violation produced a series of results damaging to Parents' participatory rights. After a lengthy discussion at the August 29, 2020 IEP team meeting, the parties were close to agreement, but a few matters remained open. Mother was unwilling to sign anything until what she perceived as errors in the document were resolved. The team agreed that Mother and Joyelle McCarthy, the District program specialist managing Student's program, would complete the document after the meeting.

However, Mother and McCarthy were not successful in that effort. Parents did not receive a written version of the August 29 offer until September 9, 2020. The version sent to Parents did not contain the meeting notes, which included most of the details of the proposed program. The draft left open a disputed description of writing services in the hope that McCarthy and Mother would be able to agree on one.

The effort by Mother and McCarthy to complete the document not only failed; it made the ambiguities in Student's program worse. McCarthy sent Mother a draft on September 9 and Mother responded with a lengthy list of omissions, criticisms, and desired changes. The parties negotiated periodically throughout the fall but did not reach agreement.

In January 2021, McCarthy sent Mother a document that she described as Student's "complete and current offer of FAPE." The document she sent, however, was an amendment to the April 2019 IEP, not the offer that the August 29, 2020 IEP team had intended to convey.

On February 3, 2021, McCarthy sent another document to Mother, again describing it as the complete and current IEP. The accompanying email stated that McCarthy had used a new approach to completing the IEP draft, which involved picking and choosing parts from the April 2019 IEP and the April 2020 offer. Mother believed that the proposed February 3, 2021 amendment confirmed and completed the August 19, 2020 offer. Student's closing brief characterizes the amendment as "further memorialization" of the August 29, 2020 IEP team's agreement. However, the document itself did not mention the August 2020 offer. The February 2021 amendment instead amended the April 2020 IEP offer. It made "changes to the IEP dated 4/15/2020." The document required Mother to check a box by the words "I agree to the contents of the amendment to the IEP dated 4/15/20."

Parents did not accept the February 3, 2021 amendment right away. Instead, Mother wrote to Goeken and Diolazo that she was still trying to get a clean IEP but the IEP was "still a mess." She set forth numerous changes she believed the IEP still needed and that she believed should be made at an IEP team meeting. On March 2, 2021, Goeken responded by stating that there would be no more meetings to correct the April 20, 2020 IEP. As noted, he informed Mother that if Parents declined to sign the new annual IEP offer that would be produced at the upcoming annual IEP team meeting in April 2021, the district would file for a due process hearing.

Student's annual IEP team meeting in April and May 2021 only added to the confusion. Six sessions of the meeting were held between April 29 and May 24, 2021, but never produced an IEP that Parents would sign. On May 12, 2021, in between parts three and four of the annual meeting, Mother sent the District a document consenting to the February 3, 2021 amendment.

By this time the details of Student's program were obscure. The District was implementing the August 2020 IEP without a completed document or parental agreement. It obtained an amendment to an earlier IEP that Mother thought amended the August document. There was still no agreement about describing the writing program. Mother wanted further amendments, but Pleasanton would not hold an IEP team meeting to consider them.

In the meantime, the staff actually administering Student's program were left wondering what program to follow. Five of them testified at hearing that they were not certain what IEP document governed her program or which set of annual goals to use.

The confusion surrounding Student's program then impeded Parents' ability to seek a resolution in due process. Student filed a request for due process hearing in June 2021 and demanded that Pleasanton comply with the stay put rule. (20 U.S.C. § 1415(j).) Goeken responded that Student would have to spell out what she believed was Student's stay put program in a motion for a stay put order so Pleasanton would know which program she meant. No such motion was filed.

On September 2, 2021, Parents further complicated matters by sending Pleasanton written consent to a different set of goals and accommodations, those in the April 2021 offer. Later in September, Goeken responded to Parents' earlier purported acceptance of the April 2020 goals and accommodations. He stated that the April 2020

offer had expired before Parents accepted parts of it, implying that the District would not recognize or act on Parents' consent. No one knew where that left the parties. On September 28, 2021, Goeken accurately wrote to Parents: "We do not have an agreed to IEP."

Because of the negative consequences above, Pleasanton's failure to complete a written IEP from the August 2020 meeting in time for the beginning of the school year substantially impeded Parents' right to participate in the decision-making process regarding the provision of a FAPE to Student. (See 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subds. (f)(2), (j).) Those failures led to months of confusion about Student's program, involved Parents in a lengthy but futile effort to clarify that program, brought about the implementation of an IEP that did not have lawful parental agreement, confused District staff, and eventually restricted Parents' ability to invoke the IDEA's stay put provision.

Pleasanton's failure to have an IEP in place at the beginning of the school year 2020-2021 therefore substantially impeded Parents' right to participate in the IEP process, and therefore constituted the denial of a FAPE.

ISSUE NO. 2.a: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR UNTIL OCTOBER 13, 2021, BY REFUSING TO PROVIDE A COPY OF WHAT IT BELIEVED WAS THE LAST CONSENTED TO AND IMPLEMENTED IEP, OR A COPY OF THE IEP BEING IMPLEMENTED?

On September 23, 2021, Mother wrote to Elizabeth Zaine, Student's new program specialist and case manager, requesting a copy of the governing IEP, apparently in order

to force the District to commit to a particular program for Student. Director Goeken declined to provide one, asking instead for exact dates of the IEP's requested and stating that Parents had been given full access to Student's files.

A federal regulation requires a district to respond affirmatively to such a request. "The public agency must give the parent a copy of the child's IEP at no cost to the parent." (34 C.F.R. § 300.322(f)(2006).) Pleasanton's refusal to give Mother a copy of the governing IEP at her request violated that provision. It also substantially impeded Parents' participatory rights because it perpetuated the confusion about Student's program, and because it deprived Parents of an IEP document that could be used for enforcement as the 2021-2022 school year proceeded. The violation therefore denied Student a FAPE.

ISSUE 2.b: DID PLEASANTON DENY STUDENT A FAPE FOR THE 2020-2021 SCHOOL YEAR BY FAILING TO IMPLEMENT INTENSIVE READING SERVICES, WRITING, AND MATH SERVICES PURSUANT TO STUDENT'S OPERATIVE IEP DATED AUGUST 19, 2020?

ISSUE 3.a: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR UNTIL OCTOBER 13, 2021, BY FAILING TO IMPLEMENT INTENSIVE READING SERVICES, WRITING, AND MATH SERVICES PURSUANT TO STUDENT'S OPERATIVE IEP DATED AUGUST 19, 2020?

As explained, the IEP offer of August 19, 2020 was never Student's operative IEP because it was incomplete and not agreed to in writing. Student therefore had no legal entitlement to the implementation of any of its provisions, including its provisions for

reading, writing, and math services. Student therefore did not prove that she was denied a FAPE by Pleasanton's failure to implement the reading, writing, and math services in the August 2020 IEP offer in either of the 2020-2021 and 2021-2022 school years.

ISSUE 2.c: DID PLEASANTON DENY STUDENT A FAPE FOR THE 2020-2021 SCHOOL YEAR BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE WHEN IT STOPPED PROVIDING READING SERVICES IN MARCH 2021?

ISSUE 2.d: DID PLEASANTON DENY STUDENT A FAPE FOR THE 2020-2021 SCHOOL YEAR BY REFUSING TO CONSIDER TANYA AUNGLE'S WRITTEN REPORT AND INPUT, PARENT INPUT, AND STUDENT MATH SAMPLES AT THE APRIL 2021 IEP TEAM MEETINGS; AND DURING THE MAY 2021 IEP TEAM MEETINGS, INTERRUPTING PARENT AND HER ATTORNEY AND BLAMING PARENT FOR IEP DOCUMENT ERRORS AND FOR NOT SIGNING THE IEP DOCUMENT?

ISSUE 2.g: DID PLEASANTON DENY STUDENT A FAPE FOR THE 2020-2021 SCHOOL YEAR BY FAILING TO MAKE A CLEAR WRITTEN OFFER OF EXTENDED SCHOOL YEAR SERVICES?

ISSUES 3.c ii, iii, AND iv: DID PLEASANTON DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR UNTIL OCTOBER 13, 2021, BY IMPEDING PARENT PARTICIPATION IN THE IEP PROCESS BY FAILING TO PROVIDE A CORRECT COPY OF STUDENT'S ACCOMMODATIONS; NOT RESPONDING TO PARENT'S REQUESTS FOR INFORMATION ABOUT THE ASSESSMENT PLAN FOR MENTAL HEALTH SERVICES; AND FAILING TO CONSIDER INDEPENDENT EVALUATIONS BY TANYA AUNGLE AND DR. KATHY FUTTERMAN PRESENTED AT THE SEPTEMBER 10, 2021 IEP TEAM MEETINGS?

Student makes a number of additional procedural arguments that need not be analyzed separately. The facts underlying the claims in Issues 2c, 2d, 2g, and 3b ii, iii, and iv. all occurred after the August 29, 2020 IEP team meeting, when Pleasanton's interference with Parents' participatory rights began. They all concern alleged additional interference with parental procedural rights, not interference with Student's education. Full relief from Pleasanton's substantial interference with Parents' participatory rights is provided in the Order. That relief would be no different whether or not Student could establish that Pleasanton committed these additional procedural errors denying Parents' participatory rights after August. 29, 2020.

In her closing brief, Student makes several additional claims against Pleasanton, but those claims are not issues in this matter and will not be addressed. They include claims that certain teachers lacked adequate training; that Pleasanton did not monitor Student's progress or provide progress reports; that it never implemented the goals in the April 2021 IEP; that it failed to conduct assessments before changing Student's

program; that it failed to provide a transition plan back to small group instruction on campus; that it failed to have all appropriate personnel at the September 10, 2021 IEP team meeting; and that it failed to train its staff to conform to the best practices recommended by the California Dyslexia Guidelines issued by the California Department of Education.

ISSUES NO. 2.e AND 3.c: DID PLEASANTON DENY STUDENT A FAPE FOR THE 2020-2021 SCHOOL YEAR BY: FAILING TO OFFER GOALS TO ADDRESS ALL AREAS OF NEED IN READING, SPELLING, EXECUTIVE FUNCTIONING, AND WRITING, AND FAILING TO OFFER MEASURABLE MATH AND WRITING GOALS IN THE APRIL 29, 2021 IEP?

ISSUES NO. 3.d AND 2.h: DID PLEASANTON DENY STUDENT A FAPE IN THE APRIL 2021 ANNUAL IEP BY FAILING TO OFFER ADEQUATE SPECIALIZED ACADEMIC INSTRUCTION, SPECIFICALLY, STRUCTURED, SEQUENTIAL, MULTISENSORY INTERVENTIONS IN READING, WRITING AND MATH?

Student contends that the annual goals in the April 2021 IEP offer were inadequate because they did not address all of her needs and because some were not measurable.

Student also contends that she can only obtain a FAPE by being instructed in a one-to-one setting by a qualified teacher using the programs: Making Math Real, the Wilson Reading System, and a writing program called Self-Regulated Strategy

Development. Pleasanton contends that Student has successfully accessed the curriculum without the use of those programs and could continue to do so.

At hearing, educational therapist Aungle and educational doctor Futterman both testified to Student's "need" for these teaching methods. The implication of Aungle's testimony, at least, was that Student could not obtain a FAPE using any other method of teaching math, reading, and writing.

Whether these contentions are right or wrong does not matter to the outcome of this case. By the time Pleasanton made its April 2021 written offer of FAPE, it was May 28, 2021, the last day of the academic year 2020-2021. Parents had not accepted the extended school year and soon unilaterally placed Student with Aungle for that time instead.

This decision awards Parents full reimbursement for their expenditures in providing Student with math, reading, and writing instruction by placing her with Aungle. If the claimed substantive denial of FAPE occurred, the relief given would be precisely the same, and would not begin until approximately the same time Parents unilaterally withdrew Student from academic subjects at Pleasanton. It is therefore not necessary to decide this issue. (See *Anchorage School Dist. v. M.P.*, *supra*, 689 F.3d at pp. 1054-1055 ("It is unnecessary to address [the substantive adequacy of an IEP] if we identify 'procedural inadequacies that ... seriously infringe the parents' opportunity to participate in the IEP formulation process ..."; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, *supra*, 960 F.2d at p. 1485.)

CONCLUSIONS AND PREVAILING PARTY

As required by 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. This issue was not decided because Student prevailed on her principal procedural claims during this time.

ISSUE NO. 1:

Pleasanton did not deny Student a FAPE by failing to file for due process to defend the April 29, 2020 IEP.

Pleasanton prevailed on this issue.

ISSUE NO. 2.a:

Pleasanton denied Student a FAPE for the 2020-2021 school year by failing to have an IEP in place at the start of the school year.

Student prevailed on this issue.

ISSUE NO. 2.b:

Pleasanton did not deny Student a FAPE by failing to materially implement writing and reading services pursuant to Student's operative IEP dated August 19, 2020.

Pleasanton prevailed on this issue.

ISSUE NO. 2.c:

Did Pleasanton fail to provide prior written notice when it stopped providing reading services in March 2021?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 2.d:

Did Pleasanton impede parent participation in the IEP process by: (i) refusing to consider Tanya Aungle's written report and input, Parent input, and Student math samples at the April 2021 IEP team meetings; or (ii) during the May 2021 IEP team meetings, interrupting Parent and her attorney and blaming Parent for IEP document errors and for not signing the IEP document?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 2.e:

Pleasanton failed to offer goals to address all areas of need in reading, spelling, executive functioning, and writing, and failed to offer measurable math and writing goals in the April 29, 2021 IEP.

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 2.f:

Did Pleasanton fail to offer adequate specialized academic instruction in the April 29, 2021 IEP, specifically, structured, sequential, multisensory interventions in reading, writing and math?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 2.g:

Did Pleasanton fail in the 2020-2021 school year to make a clear written offer of extended school year services?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 2.h:

Did Pleasanton fail in the 2020-2021 school year to offer sufficient specialized academic instruction for the extended school year?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 3.a:

Pleasanton did not deny Student a FAPE during the 2021-2022 school year until October 13, 2021, by failing to implement intensive reading services, writing, and math services pursuant to Student's operative IEP dated August 19, 2020.

Pleasanton prevailed on this issue.

ISSUE NO. 3.b.i:

Pleasanton impeded Parents' participation in the IEP process during the 2020-2021 school year, to August 13, 2021, by refusing to provide a copy of what it believed was the last consented to and implemented IEP, or a copy of the IEP being implemented.

Student prevailed on this issue.

ISSUE NO. 3.b.ii:

Did Pleasanton impede Parents' participation in the IEP process during the 2020-2021 school year, to August 13, 2021, by failing to provide a correct copy of Student's accommodations?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 3.b.iii:

Did Pleasanton impede Parents' participation in the IEP process during the 2020-2021 school year, to August 13, 2021, by not responding to Parent's requests for information about the assessment plan for mental health services?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 3.b.iv:

Did Pleasanton impede Parents' participation in the IEP process during the 2020-2021 school year, to August 13, 2021, by failing to consider independent evaluations by Tanya Aungle and Dr. Kathy Futterman presented at the September 10, 2021 IEP team meetings?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 3.c:

Pleasanton denied Student a FAPE during the 2020-2021 school year, to August 13, 2021, by failing to offer goals to address all areas of need in reading, spelling, executive functioning, and writing, and failing to offer measurable math and writing goals.

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

ISSUE NO. 3.d:

Did Pleasanton deny student a FAPE ailing offer adequate specialized academic instruction, specifically, structured, sequential, multisensory interventions in reading, writing and math?

This issue was not decided because Student prevailed on her principal procedural claims concerning this time.

REMEDIES

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*).) The award must 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." (*Reid, supra*, 401 F.3d at p. 524.)

This dispute almost entirely concerns infringements upon Parents' participatory rights, which were substantial. The remedies set forth below are intended to ensure that Student and Parents are made whole from those violations. Staff training is ordered because it is apparent that Pleasanton staff have sometimes departed significantly from the procedural requirements of the IDEA. In an appropriate case, training of district staff may be ordered. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 444 F.3d 1149, 1156-1157.)

Fortunately, as the dispute among adults continued, Student's education was not significantly damaged. Despite the lack of an IEP, Student had the program Parents wanted for her because she went to school in the morning and spent the afternoon with her one-to-one providers. She was able to access the curriculum, received almost entirely A and B grades, advanced from grade to grade, and made educational progress.

Student contends that there were two instances of educational loss. First, Student claims that she lost 1,170 minutes of writing services between August 11 and November 10, 2020, after Dialozo agreed to fund private providers but before a writing provider could be found. However, the District states it has already made up for the shortfall in writing services with compensatory education. The weight of evidence supports the District. Mother acknowledged that the compensatory services had been provided in a March 16, 2021 email to a Pleasanton program specialist. The evidence established that Student eventually received the writing services. And even if it did not, Student was owed the writing services because of the discretionary promise of the Assistant Superintendent, not by virtue of any IEP provision.

Second, the evidence showed that in the 2020-2021 school year, Jennifer Nikols, an outside teacher hired by the District, instructed Student in reading using the Wilson

Reading System. That system has 12 steps. On March 8, 2021, Nikols decided that Student had completed the 12 steps of the Wilson program and stopped Student's reading instruction. Nothing in the record shows that Student received any reading instruction between March 8, 2021 and the end of the academic year on May 29, 2021.

Student now claims a right to the restoration of 2,760 lost minutes of reading instruction from March 8, 2021 to the end of the school year. However, that measurement is calculated according to the program set forth in the IEP team meeting notes of August 29, 2020. Since that IEP was not completed or signed, it did not entitle Student to reading instruction. Student's entitlement to one-to-one reading instruction using the Wilson Reading System depended upon the discretionary promise of the Assistant Superintendent, not any provision of a binding IEP.

Parents are entitled to significant reimbursement for their expenses in ensuring that Student's education continued. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c)(2006); see also *School Committee of Town of Burlington, Mass., supra*, 471 U.S. at pp. 369-370.)

Student proved at hearing that Pleasanton did not make a FAPE available to her during the 2020-2021 and 2021-2022 school years because of the procedural violations of the IDEA discussed above. Procedural violations that significantly impede parental participation in the IEP process constitute denials of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subds. (f)(2), (j).)

The private placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c)(2006); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] Nor must a unilateral placement address all of a disabled student's needs. It is enough that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159-1160.)

Tanya Aungle was not a credentialed teacher or a non-public agency provider. However, she had extensive experience in teaching with the methodologies: Making Math Real, the Wilson Reading System, and Self-Regulated Strategy Development. Aungle had taught Student using Making Math Real since 2017. She had a master's degree in educational therapy and was certified as a structured literacy dyslexia specialist and a level two instructor in the Wilson Reading System. Pleasanton does not question her qualifications. For someone of her training and experience, her hourly fee of \$150 was reasonable. Parents will therefore be reimbursed for the educational services they purchased from Aungle when they decided, correctly, that Pleasanton had not provided Student a FAPE.

Aungle began teaching Student reading and English Language Arts in addition to math, on July 8, 2021. Her bill for that month was \$4,800. For August 2021 it was \$5,850. For September it was \$6,675, which included charges for preparing for and presenting her assessment at the September 10, 2021 IEP team meeting. For those three months, Aungle's bills totaled \$17,325. Parents will be reimbursed for those expenditures.

Much of the reimbursement ordered above may already have been made. The parties agree that Pleasanton has been reimbursing Parents for Aungle's instruction since approximately August 2020, but the record does not clearly show how much they have been reimbursed, or for what particular periods of time. It appeared at hearing that the parties were still discussing further reimbursement. Thus, Pleasanton may subtract any amounts it has already reimbursed Parents for Aungle's services from the total amount it must reimburse.

Aungle conducted an assessment of Student's reading skills at Parents' request and billed them \$1,350. Parents also obtained an assessment from Dr. Kathy Futterman, a Doctor of Education who specializes in training teachers and administrators in supporting children with dyslexia, dysgraphia, and dyscalculia, and was a member of the California Department of Education's Dyslexia Program Guidelines Work Group. She charged \$2,500 for her assessment, which was reasonable for a person of her training and experience. Both assessments were directed at determining Student's present levels of performance and future educational needs, which the parties had been disputing. In the absence of any District assessments, it was reasonable for Parents to commission their own, and they will be reimbursed for those costs, which total \$3,850.

ORDER

1. Pleasanton shall reimburse Parents \$17,325 for Tanya Aungle's July, August, and September 2021 services. Pleasanton may deduct reimbursement payments already made for Aungle's services during that period.

2. Pleasanton shall reimburse Parents for Aungle's October 1 to October 13, 2021, services upon proof of payment. Pleasanton may deduct reimbursement payments already made to Parents for those services.
3. Pleasanton shall also reimburse Parents for Aungle's and Futterman's assessments, in the total amount of \$3,850.
4. All ordered reimbursement must be made to Parents within 45 days of receipt of appropriate documentation.
5. Within 30 days of the date of this decision, Pleasanton shall convene an IEP team meeting for Student. At that meeting, Pleasanton shall attempt to reach agreement with Parents on a new IEP for Student. If the parties agree on a new IEP, the entire agreement shall promptly be reduced to writing in an IEP offer, leaving nothing for future resolution, investigation or discussion, and leaving no part of the agreement unwritten. The new offer, if any, shall not amend any previous IEP but shall be a new and complete statement of the educational program Pleasanton offers Student. Pleasanton shall ensure that Student's entire program is set forth in the new IEP offer, without cross-references to existing documents. The new offer shall not be presented to Parents for signature until all its provisions are complete. Pleasanton shall encourage Parents to approve the IEP in writing without exceptions. If Parents decide to approve the new IEP with exceptions, Pleasanton shall attempt to clearly identify any portion or portions of the offer to which they do not agree and which they do not desire to be implemented. If Parents have any comments on the document, Pleasanton shall encourage them to state those comments

separately. Pleasanton shall not distribute the new IEP, or any portion of it, to staff for implementation until all of the preceding requirements have been fulfilled.

6. Within 90 days of the date of this decision, Pleasanton shall provide at least 10 hours of training to its staff in the writing, processing and recording of IEP's and the legal requirements surrounding the completion and presentation of IEP's. The training shall be presented to the IEP decisionmakers in Pleasanton's special education department, including the Senior Director, any other directors, program specialists and Student's present and potential case managers. The training shall be presented by special education attorneys or experienced administrators, but not by Pleasanton's attorneys or employees.
7. All of Student's other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Charles Marson

Administrative Law Judge

Office of Administrative Hearings