BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF

PARENT ON BEHALF OF STUDENT

v.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT

OAH CASE NUMBER 2019010819

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on January 22, 2019, naming William S. Hart Union School District. On February 1, 2019, William S. Hart served its written response to the complaint on Student. The Office of Administrative Hearings granted a continuance on February 19, 2019.

Administrative Law Judge Cole Dalton heard this matter in Santa Clarita, California, on April 30, 2019, and May 1, 2019.

Eric Menyuk and Bryan Winn, Attorneys at Law, represented Student. Mother attended each day of hearing. Father attended the first day of hearing.

Daniel Gonzalez, Attorney at Law, represented Hart. Director of Special Education, Sharon Amhrein, attended each day of hearing on behalf of Hart.

At the parties' request, the matter was continued until May 20, 2019, to permit the parties to file written closing arguments. Upon timely receipt of closing arguments on May 20, 2019, the record was closed and the matter submitted for decision.

ISSUE

Did William S. Hart deny Student a free appropriate public education by failing to make a clear written offer of a Free Appropriate Public Education, referred to as FAPE, for the 2018-2019 school year in individualized education programs, referred to as IEPs or an IEP, dated May 15, 2018; August 22, 2018; and October 24, 2018?

SUMMARY OF DECISION

Student did not prove William S. Hart failed to make a clear written offer of a free appropriate public education for the 2018-2019 school year in its May 15, 2018 individualized education program amendment. At the time, Student attended a nonpublic school, already agreed upon by the parties. She did not require a placement offer for the upcoming school year at that time.

Student proved Hart did not make a clear written offer of FAPE in its August 22, 2018 and October 24, 2018 Individualized Education Plans. The 2018-2019 school year had already begun at the time of the August IEP. Hart offered a myriad of placement options leading up to and during the August IEP. Hart offered two placement options in the October IEP. The October IEP document was internally inconsistent in that it offered a single placement in one location and two placements in another.

Hart denied Student a FAPE by failing to make a clear, written offer of placement in Student's August 22, 2018 amendment IEP and October 24, 2018 annual IEP. Hart's denial of FAPE entitled Student to a remedy for the 2018-2019 school year and extended school year.

FACTUAL FINDINGS

Student was a sixteen-year-old, ninth grader who resided with Parents within Hart's boundaries at all relevant times. Student qualified for special education and related services, initially under the eligibility category of specific learning disability, and later under autism.

During the 2016-2017 school year, Student began exhibiting maladaptive behaviors and emotional dysregulation, following an alleged assault at her public school placement. In spring 2017, she demonstrated suicidal ideation, resulting in hospitalization. Subsequently, she began attending Five Acres nonpublic school with related services in speech, 45 minutes per week of individual counseling, and behavior support. Five Acres provided a therapeutic environment in which Student's emotional state stabilized and improved.

Diagnostic Center, Southern California, assessed Student in March 2018, resulting in a report sent to Hart on May 11, 2018. Diagnostic Center recommended a change in eligibility to intellectual disability. Assessments demonstrated Student functioned at a seven-year-old level, with overall intellectual functioning falling within the extremely low range measured both verbally and non-verbally. Student's adaptive behavior fell within the low range. She required high levels of prompting to perform daily living skills.

Diagnostic Center recommended Student receive a functional skills curriculum with community-based instruction and supervision to address safety concerns. Student's reduced reasoning, language, and social skills put her at risk of being influenced to engage in unsafe behaviors to please others. Student learned in a rote fashion, working on discrete tasks and simplified requests. She benefitted from visual and manipulative supports such as pictures, videos, models, tangible objects, and graphic organizers. Diagnostic Center recommended school-based counseling and speech and language to "maximize [Student]'s potential."

MAY 15, 2018 IEP TEAM MEETING

Hart held an IEP team meeting on May 15, 2018, to review Diagnostic Center's report. Parents attended the meeting with advocate Lori Waldinger.

The team discussed Diagnostic Center's recommendations. Hart offered a change from diploma track to certificate of completion so that Student could focus on a functional skills program.

The team discussed a change in placement because Five Acres was closing after the 2018 extended school year. Hart offered nonpublic school placement with transportation, speech and language therapy, and school-based counseling. Hart did not offer a specific school site placement. Instead, Hart offered to collaborate with Parents to locate schools for the family to visit. Hart agreed to hold an IEP team meeting before the end of the extended school year to offer a FAPE for the 2018-2019 school year. Parents signed consent to the IEP amendment.

POTENTIAL PLACEMENT VISITS

Hart's program specialist William Hester exchanged several emails with Mother between May 17, 2018, and May 23, 2018, identifying nonpublic school placements to visit. He recommended placement at Casa Pacifica, Bridgeport at the Help Group, and a special day class at Hart's Golden Valley High School.

Mother responded to Mr. Hester that she previously visited Help Group programs at Village Glen twice and Bridgeport once. She expressed concern to Mr. Hester over placing Student at Golden Valley's comprehensive high school campus, given Student's safety issues. Mr. Hester responded that Bridgeport would be best suited for Student and that communication and program fidelity had increased over the past school year.

During the process of observing potential school placements, Parents learned about a local Christian school, Trinity Classical Academy, which included an academic program for special education students called Imago Dei School. On May 22, 2018, in the midst of email exchanges between Mother and Mr. Hester, Student underwent academic screening at Trinity. Student had not enrolled in Trinity at that time.

On June 26, 2018, Ms. Waldinger sent correspondence on Parents' behalf to special education director Sharon Amrhein. Ms. Amrhein held a bachelor of arts in interdisciplinary studies and a master of science in special education. She held clear credentials in education specialist instruction and administrative services. She worked at Hart as a special education teacher four years, a program specialist five years, and director of special education for over six years. Ms. Amrhein demonstrated specific knowledge of Student's needs, Hart's programs, and nonpublic school options for children like Student. She testified succinctly, directly, and consistently with documentary evidence. For these reasons, her testimony was found credible.

Ms. Waldinger, in her June letter, requested informal dispute resolution. The letter acknowledged that Parents considered placement options offered by Hart and visited "Casa Pacifica, The HELP Group, Westmoreland, etc." Parents determined that Trinity, a local private religious school, provided a program to students with needs similar to Student's and they sought a meeting to resolve Student's educational placement.

On July 6, 2018, Hart's attorney Mr. Gonzalez responded to Ms. Waldinger's letter about Trinity. Referring to California Constitution, Article IX, section 8, Mr. Gonzalez asked Ms. Waldinger to provide a legal basis that supported Hart using public funds to pay tuition at a religious school.

On August 6, 2018, Parents wrote to Ms. Amrhein indicating they had not been offered an appropriate placement for Student. The letter provided written notice of Parents' intent to place Student at Trinity for the 2018-2019 school year and seek reimbursement for tuition, fees, and related services.

On August 14, 2018, Ms. Amrhein sent Parents prior written notice declining their request for Hart to fund Student's private religious school placement. Ms. Amrhein expressed Hart's willingness to work with Parents to identify a mutually agreeable nonpublic or non-parochial private school placement. The letter did not offer a specific placement. Ms. Amrhein attached parent rights and an IEP team meeting notice for August 22, 2018. Hart's 2018-2019 school year began August 16, 2018.

AUGUST 22, 2018 IEP TEAM MEETING

On August 22, 2018, Hart held an IEP team meeting to discuss Student's placement and Parents' request for reimbursement of Student's attendance at Trinity. Ms. Amrhein and Mr. Hester attended on Hart's behalf. Parents and Ms. Waldinger attended on Student's behalf.

Parents reported touring Help Group programs several times, including Bridgeport, Westmoreland, and Village Glen. Mother toured Casa Pacifica and looked into Westmark private school.

Parents explained, at the meeting, why they did not believe any of the programs they saw would meet Student's needs. First, Bridgeport was not the least restrictive environment because no typically developing children attended. Second, children at Bridgeport were lower functioning than Student. Third, Village Glen did not take students on track for a certificate of completion, like Student. Fourth, Westmark served students with specific learning disabilities, while Casa Pacifica served students with emotional disturbance. Finally, Hart's functional skills special day class at Golden Valley was housed on a campus too large and unsafe. Mother informed the team that she would never accept placement at Golden Valley.

Parents advised Hart that Student would begin attending Trinity on August 23, 2018 and they requested reimbursement for the 2018-2019 school year. Hart again explained its inability to use public funds to reimburse Student's attendance at a private religious school.

Hart discussed nonpublic schools it could fund at the Help Group and Casa Pacifica. Ms. Amrhein opined that both placements were appropriate for Student but that Bridgeport was the most appropriate. She described Bridgeport's use of visual

schedules, visual mapping, functional math, money math, and other functional academics, which addressed Diagnostic Center's recommendations.

Ms. Amrhein presented Hart's offer for a nonpublic school placement. She informed Parents that Hart was willing to help Parents looks at other nonpublic and private schools. She expressed concern that it seemed to her that Parents decided to choose a school and not consider nonpublic school options. Throughout the IEP team meeting discussions, Hart offered both Casa Pacifica and Bridgeport as the most appropriate nonpublic school placement options for Student.

Ms. Waldinger asked Hart to provide a written offer of FAPE to which Parents could respond. The written IEP document offered nonpublic school placement with transportation and speech and language. Parents requested reimbursement for Trinity and related services. At this point, Parents had declined all offers of public and nonpublic school placement made by Hart. Hart did not offer a specific placement.

OCTOBER 24, 2018 IEP TEAM MEETING

Hart held Student's annual IEP team meeting on October 24, 2018. Mother attended with Ms. Waldinger. Imago Dei School principal Megan Howell attended telephonically. Ms. Howell held a bachelor of science in management. She worked at Trinity for 10 years, beginning as a licensed educational therapist. She helped open Imago Dei School at Trinity in 2011.

Ms. Howell observed that Student seemed reserved and nervous when she began attending Trinity. By the time of the October IEP team meeting, Student made some friends and developed a meaningful friendship with her peer mentor. Ms. Howell attributed part of this progress to social thinking and emotional regulation taught throughout the school.

Trinity did not implement Student's IEP. Mother reported to the IEP team that Parents provided Student with private speech and counseling services. Ms. Howell observed that Student made her wants and needs known but continued to work on communication with peers in unstructured settings.

Hart offered nonpublic school placement, "specifically, Bridgeport or Casa Pacifica, assuming they accept [Student] for enrollment." Hart identified supports and services that could be implemented at either school.

Mother declined Hart's FAPE offer and requested reimbursement for costs, transportation, individual and family counseling associated with Student's 2018-2019 school year at Trinity. Mother declined Hart's offer of an individual services plan to provide speech and counseling services at a district school location. At hearing, Mother explained that she did not think she could be reimbursed for placement and services at Trinity if she accepted an individual services plan.

The IEP document identified Bridgeport as the offered placement on the services page. The services page stated that specialized academic instruction would be received at Bridgeport in a program leading to a certificate of completion. At hearing, Mother testified that she did not understand this to mean that Bridgeport was Hart's sole offer of placement. She referred to the notes section of the IEP, which stated that Hart's offer of FAPE continued to be a nonpublic school, "specifically, Bridgeport or Casa Pacifica, assuming they accept her for enrollment."

On November 4, 2018, Mother provided limited consent to the annual IEP. She agreed with eligibility. She disagreed with Hart's offer of FAPE, because Hart did not provide a single offer of placement. She also believed Hart did not offer appropriate goals, services, and placement.

Ms. Amrhein credibly explained at hearing that Hart offered nonpublic school placement since before June 2018. Parents and Ms. Waldinger knew there was an offer of FAPE and refused to place Student at Bridgeport or Casa Pacifica. She had no further contact with Parents after the October 24, 2018 IEP team meeting.

REQUEST FOR REIMBURSEMENT

Student attended Trinity throughout the 2018-2019 school year. Parents preferred the Imago Dei School program at Trinity over placements offered by Hart because it provided a small, structured setting on a small campus, with opportunities for Student for social interaction with typically developing peers.

During the 2018-2019 school year, Trinity educated 565 students in first through twelfth grade. Sixty students had special needs in areas including autism, Down syndrome, attention deficit hyperactivity disorder, sensory processing disorder, and intellectual disability. Student attended fitness, theater, and educational technology with typically developing peers at Trinity. She attended life skills, functional math, English, social studies, and bible class at Imago Dei School with one to three other students.

Parents believed Trinity provided the best educational opportunities for Student. Student earned A's and B's on a modified curriculum, which included community based instruction and job training working in the on-campus coffee shop.

Parents paid a $300.00 non-refundable tuition deposit and $2,425.00 per month for tuition for the 2018-2019 school year. Student's IEP's for the 2017-2018 and 2018-2019 school year offered extended school year to prevent regression. Trinity offered academic services for eleven months per year. Charges from August 2018 through July 2019 totaled $29,100.

Student received individual counseling through Dynamic Interventions, averaging two sessions per month, costing $150.00 per session. Parents paid $2,550.00 for counseling from September 2018 through June 2019.

LEGAL CONCLUSIONS

Introduction – Legal Framework Under the Individuals with Disabilities Education Act

Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. This hearing was held under the Individuals with Disabilities Education Act, referred to as the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006), et seq. (All subsequent references to the Code of Federal Regulations are to the 2006 version.); 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 (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for 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).) A FAPE means special education and related services that are available to an eligible child at no charge to the Parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20

U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].)

In *Board of Education of the Hendrick Hudson Central Sch. 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 United States Supreme Court clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'…" (*Endrew F. v. Douglas Sch. Dist. RE-1* (2017) 137 S.Ct. 988, 1000). The Supreme Court in *Endrew* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.) The IDEA affords Parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student had the burden of proof on the sole issue raised in her complaint.

Clear Written Offers Regarding May, August, and October 2018 IEPs

Student contends Hart denied Parents' participation in the development of her May, August, and October 2018 IEPs and denied Student a FAPE because it did not make a clear written offer identifying a single placement, which she could accept or reject. Hart contends that offering a nonpublic school placement was enough and that it was not obligated to identify a specific school. Hart further contends it offered Bridgeport in its October 24, 2018 IEP, making that offer clear.

Each local educational agency shall have an IEP in effect for each individual with exceptional needs within its jurisdiction at the beginning of the school year. (Ed. Code, § 56344, subd. (c); 34 C.F.R. § 300.323(a).)

In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and 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).)

The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program and that parents can understand. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*); *J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 459-460.)

A formal written offer provides parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. Even if a district is convinced that a parent will not agree to the district's proposed IEP, the district must still hold the meeting, give the parent the opportunity to discuss the placement and services, and make the offer. A school district cannot escape its obligation to make a formal placement offer on the basis that the parents had previously "expressed unwillingness to accept that placement." (*Union*, *supra*, at p. 1526.)

Union involved a district's failure to produce any formal written offer. However, numerous judicial decisions have invalidated IEPs that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City Sch. Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City Sch. Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine Sch. Dist. v. K.H.*, No. 04-1468, 2005

WL 1587241, at p. 10 (D. Ore., June 2, 2005); *Glendale Unified Sch. Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108 (*Glendale*); see also *Marcus I. v. Dept. of Ed.* (9th Cir. 2014) 583 Fed.Appx. 753, pp. 755-756 (*Marcus*.)

In *Glendale*, the court considered a school district's contention that an offer of four potential placements was procedurally proper, so long as it presented the choices in a coherent written offer. (*Glendale*, *supra*, at p. 1107.) The *Glendale* court found that *Union* required a district formally offer of a single, specific program, reasoning that, "[o]ffering a variety of placements puts an undue burden on a parent to eliminate potentially inappropriate placements, and makes it more difficult for a parent to decide whether to accept or challenge the school district's offer." (*Ibid*.)

Failure to make a clear written offer of FAPE is a procedural violation. A procedural violation only constitutes a denial of FAPE 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 child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural errors may be held harmless. (*M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

MAY 15, 2018 IEP

The May 15, 2018 IEP team meeting was held to discuss Student's progress and Diagnostic Center results. The team also discussed closure of Five Acres at the end of the 2018 extended school year.

At the time of the May 15, 2018 IEP team meeting, Student attended nonpublic school placement at Five Acres. Student's IEP offered continued placement at Five Acres through the 2018 extended school year. Parents expressed their intent for Student to attend Five Acres through the extended school year.

Hart was not required to name a specific school placement for the 2018-2019 school year at the time of the May IEP. Student already had a placement through the end of the extended school year and did not require a new placement until the beginning of the new school year.

During the May 15, 2018 IEP team meeting, Hart offered collaboration with Parents in visiting potential placements and offered to hold an IEP team meeting to discuss FAPE for the 2018-2019 school year by the end of the extended school year. Two days later, Hart offered Student several placement options to visit. Parents had sufficient time to review the options, collaborate with Hart, and notify Hart of their placement preference before the start of the 2018-2019 school year.

Student had a specific nonpublic school placement at Five Acres at the time of the May 15, 2018 IEP. Hart was not required to have an IEP in effect for the 2018-2019 school year until the beginning of the school year. Accordingly, Hart's continued offer of nonpublic school placement in the May 15, 2018 IEP did not deny Student a FAPE. Student did not prevail on her sole issue as it relates to the May 15, 2018 IEP.

AUGUST AND OCTOBER 2018 IEPS

Hart made multiple placement offers beginning May 17, 2018. Hart believed the placements it offered were appropriate to address Student's needs as identified in the Diagnostic Center assessment report.

Parents toured public and nonpublic school placements offered by Hart. Parents observed other placements, including nonpublic schools and private schools. Mother expressed concern over placing Student on a comprehensive public high school campus as early as May 2018, in response to Mr. Hester's emails.

As part of their placement search, Parents toured Trinity's Imago Dei School. Parents concluded placement at Trinity addressed their concerns over Student's safety and could provide an appropriate education for her. On June 26, 2018, Ms. Waldinger notified Hart of Parents' intention to place Student at Trinity. Through July and August 2018, the parties sent letters back and forth regarding the Student's proposed placement. Parents provided written notice of their intent to place Student at Trinity and seek reimbursement. Hart provided prior written notice of its inability to use public funds to pay for private religious school placement.

Despite knowing that Parents rejected every placement option offered, Hart did not formally make an offer of a single, specific program before the start of the 2018-2019 school year on August 16, 2018. Hart held another IEP team meeting on August 22, 2018, again not offering a single, specific program. Hart continued to offer nonpublic school placement, identifying Bridgeport and Casa Pacifica as two possible options, which Parents previously declined. Hart offered no assurance at the August 22, 2018 meeting that either program would accept Student. Student began attending Trinity the following day.

The parties met again on October 24, 2018, to develop Student's annual IEP. The October IEP document made internally inconsistent offers of Bridgeport on one page and of Bridgeport and Casa Pacifica on another. Hart did not make a single, specific offer. Moreover, the weight of the evidence showed that Bridgeport served intellectually disabled students while Casa Pacifica provided a more therapeutic program designed to

address, primarily, the needs of students with emotional disturbance. Ultimately, the evidence demonstrated that Hart offered two different programs, making the IEP unclear.

Hart specified that both placements were contingent on either of the nonpublic schools' enrollment of Student. Hart did not determine whether either school had space for Student or would accept Student, which made the placement offers illusory at the time Hart made them.

Parents declined Hart's offers of placement on numerous occasions between May and October 2018. Hart never responded to Parents' rejection of its offers by making a clear written offer of a single placement, which Parents could officially accept or reject.

The IDEA's structure relies upon parental participation to ensure substantive success in providing quality education to disabled students. (*Rowley*, *supra*, at pp. 205-206.) Parents were very involved in the process of locating an appropriate placement for their child. They attended IEP team meetings with an advocate, voiced their concerns and preferences. Nothing in the IDEA precluded Hart from discussing a range of possible placements during IEP meetings. However, Hart placed an undue burden on Parents to eliminate potentially inappropriate placements. Although Hart used its expertise to identify a variety of placement options, it failed to take that final step of identifying a single appropriate placement that Parents could accept or reject.

School districts cannot abdicate their responsibility to make a specific offer allowing a parent to choose from among several programs presented as "formal offers." Instead, after discussing the advantages and disadvantages of various programs that

might serve the needs of a particular child, the school district must clearly identify an appropriate placement from the range of possibilities. (*Glendale*, *supra*, at p. 1107; *Alexandria*, *supra*, at p. 681.)

In its closing brief, Hart relies on several factually distinguishable authorities for its position that it made a legally sufficient FAPE offer. Hart cites an Office of Administrative Hearings case, which relied on *Marcus*, *supra*, at pp. 755-756. Hart misconstrues *Marcus*. In *Marcus*, the Ninth Circuit found that a district's failure to name a specific public school placement in prior written notice procedurally violated the IDEA, but resulted in harmless error. The Ninth Circuit relied on the hearing officer's factual findings that district providers from the proposed placement attended the IEP placement meeting and explained how the IEP could be implemented at the proposed placement. The district confirmed that funds were available to provide all related services identified in student's IEP at that placement. For these reasons, the district did not impede parental participation in the development of student's IEP.

Similarly, Hart cites *A.V. ex rel. Vaz Atunes v. Lemon Grove Sch. Dist.*, Case No. 3:16-CV-0803-CAB-(BLM), 2017 W.L. 733424 (S.D. Cal. Feb. 24, 2017) (*Lemon Grove*) to support its position that it did not have to identify a specific nonpublic school in its IEPs to offer a FAPE. In *Lemon Grove*, student attended school under the terms of a settlement agreement, which expired December 2014. The district did not offer placement prior to expiration of the agreement. The district offered nonpublic school placement during a January 2015 IEP team meeting. During the meeting, the parties did not agree on a particular nonpublic school and the district agreed to investigate placement options. In an April 2015 letter to parents, the district offered immediate placement at Sierra nonpublic school, once parents provided consent.

California's Southern District upheld the Administrative Law Judge's decision, finding, in part, that the district denied student a FAPE between December 2014 and April 2015, when it failed to make an appropriate, specific offer of placement. The denial of FAPE was not cured until the district finally identified a specific nonpublic school, which had an opening for student.

Neither *Marcus* nor *Lemon Grove* are similar to the facts here. Hart did not make a single specific offer of FAPE. Hart did not offer immediate placement in any nonpublic school. During the August 2018 IEP, Hart offered to continue working with Parents to locate a mutually agreeable nonpublic or private placement. Hart never offered fewer than two placements, from which Parents were either required to choose or identify additional nonpublic or private placements. The law does not require parents to find a school for their special needs children. The law requires school districts to offer an appropriate placement choice, which parents can then accept or reject. Hart did not provide Student with a clear written offer of placement.

Hart's failure to identify a specific placement in light of Parents' rejection of the panoply of placement options denied meaningful parental participation in the development of Student's IEP. Moreover, the failure to make a clear written offer, which Parents could accept or reject, denied Student a FAPE for the 2018-2019 school year and extended school year. Accordingly, Student prevailed on her sole issue, as it relates to the August 22, 2018 and October 24, 2018 IEPs.

REMEDIES

Student proved William S. Hart Union High School District's August 22, 2018 and October 24, 2018 IEPs failed to offer a FAPE because the IEPs did not constitute a clear written offer of placement. Neither IEP identified a specific nonpublic school placement for Student, the programs offered at the two schools were not the same, and Parents made it clear they rejected each of Hart's proposed placements.

Parents may be entitled to reimbursement for the costs of placement or services procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA. (20 U.S.C. § 1412(a)(10)(C); *Sch. Committee of the Town of Burlington, Mass. v. Dept. of Educ.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996] (*Burlington*).)

When a school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Burlington*, *supra*, at pp. 369-370; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496; 20 U.S.C. § 1415(i)(2)(C)(3).)

The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements

of the IDEA, such as the requirement that the placement address the child's needs and provide them educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361].)

Parents may receive reimbursement for appropriate unilateral placements. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter*, *supra*, 510 U.S. 7, at pp. 15-16 [114 S.Ct. 361].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show the private placement furnishes every special education service necessary to maximize their child's potential. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.)

Reimbursement may be reduced or denied in a variety of circumstances, including whether parents acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

Student requests reimbursement for placement at Trinity as a remedy for Hart's denial of FAPE for the 2018-2019 school year and extended school year. Parents did not deny all placements offered by Hart simply as a means to obtain reimbursement for Trinity. Parents observed each nonpublic school and public school placement offered by Hart. Parents observed additional nonpublic school and private placements in an effort to find one they felt appropriate for their daughter. Their placement search was complicated by concern for their daughter's safety in light of past experience. Hart was willing to fund a nonpublic school and even private placement for Student, but could not use public funds for placement at a private religious school.

On June 26, 2018, Parents provided Hart with written notice of their intent to place Student at Trinity and seek reimbursement. Hart, in its closing brief, argues that Student provided notice after enrolling Student at Trinity in May 2018. Hart conflates pre-admission activities with actual enrollment. The evidence demonstrated that Student continued her enrollment and attendance at Five Acres nonpublic school, through the end of the 2017-2018 school year and a portion of the 2018 extended school year. Moreover, Student did not begin attending Trinity until August 23, 2018. Hart had two months after Student's written notice of the intent to enroll in Trinity and seek reimbursement to respond by making a single, clear written offer of placement.

Student's placement in small structured academic classes at Trinity's Imago Dei School addressed her need for a functional academic curriculum. Participation in community based outings and on campus job training addressed her need for life skills training. Inclusion in Trinity classes and activities with typically developing peers addressed her needs in socialization and social communication. She obtained educational benefit, as demonstrated by her progress in all components of her educational program. Equity favors reimbursement of Student's private placement at Trinity because Hart failed to make a clear and single offer of placement for the 2018-2019 school year, which Parents could accept or reject.

Hart argues the Office of Administrative Hearings cannot order reimbursement of Student's costs for attendance at a private religious school for constitutional reasons. Hart cites no legal authority which limits an Administrative Law Judge's broad latitude to fashion equitable remedies in this manner. Such authority does not exist. The Ninth Circuit upholds the Office of Administrative Hearing's authority to order reimbursement

for private religious school tuition where the school district denies student a FAPE and the placement is appropriate. (*S.L. ex rel. Loof v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1160.)

In *Zobrest v. Catalina Foothills Sch. Dist.* (1993) 509 S.Ct. 1 [113 S.Ct. 2462], parents of a deaf child brought suit after the school district refused to provide a sign-language interpreter for the child's attendance at a Catholic high school. The school district argued the interpreter would act as a conduit for religious training and the Constitution barred it from providing government funds for the child's religious development.

The *Zobrest* Court reasoned that if the Establishment Clause barred religious groups from receiving any general government benefits, absurd results would follow, including that a "church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. (Citations omitted)." (*Id.*, at p. 8 [113 S.Ct. 2462, 2468].) Application of the Establishment Clause under California's constitution does not yield a different result. (U.S. Const. art. VI, § sec. 2.)The *Zobrest* Court reasoned that if the Establishment Clause barred religious groups from receiving any general government benefits, absurd results would follow, including that a "church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. (Citations omitted)." (*Id.*, at p. 8 [113 S.Ct. 2462, 2468].) Application of the Establishment Clause under California's constitution does not yield a different result. (U.S. Const. art. VI, § sec. 2.)

In *Zobrest*, as here, a contrary rule would lead to absurd results. A school district could deny any student a FAPE and not be tasked with reimbursement for an appropriate placement, so long as that placement was a private religious school.

Nothing in the IDEA, state, or federal law, requires such a result. The IDEA does not limit such reimbursement to nonpublic or non-religious private schools.

Reimbursement for an appropriate placement after a denial of FAPE is part of the general government program of benefits available to students under the IDEA. Parents, here, had no financial incentive to choose Trinity over a different school. They paid tuition out-of-pocket on a monthly basis. Therefore, reimbursement for placement at Trinity constitutes a neutrally provided benefit. Further, Hart is not being ordered to fund private religious activities, make direct payments, or provide prospective placement at Trinity. Reimbursement is incidental to Hart's denial of a FAPE, does not result in public funds being used to provide direct aid, or a cash subsidy for religious teaching at Trinity.

Moreover, Hart did not demonstrate whether Student had religious instruction during her school day such that tuition reimbursement must be reduced. Though Ms. Howell described a bible class that met weekly for a de minimis amount of time, she did not say whether the class met during Student's regular school day. Student's class schedule did not include bible class.

Hart shall reimburse Parents for costs associated with Student's education during the 2018-2019 school year, including tuition and fees. Student raised, for the first time, a request for mileage reimbursement in her closing brief. Student offered no evidence to support the request for mileage reimbursement and none is awarded here. Mother's undisputed testimony demonstrated that Parents incurred and paid a $300.00 non-refundable tuition deposit and $2,425.00 per month for tuition for 10 months from August 23, 2018, through June 2018, in the total amount of $24,550.00.

Student's IEPs for the 2017-2018 and 2018-2019 school year offered extended school year to prevent regression. Trinity offered academic services for eleven months per year. Ordering reimbursement for Student's attendance at Trinity's summer program is an appropriate remedy for Hart's denial of FAPE for the 2019 extended school year.

Student required related services in individual counseling, as demonstrated in by Diagnostic Center's assessment report and Hart's offer of 45 minutes per week of individual counseling in Student's annual IEPs. Hart argues that Parents could have consented to an individual services plan to obtain counseling through district providers. But no legal authority required Parents to do so. Hart shall reimburse Parents for the cost of individual counseling through Dynamic Interventions in the amount of $2,550.00.

ORDER

William S. Hart Union High School District shall reimburse Parents, within 45 days of the date of this Decision, for fees and tuition associated with Student's attendance at Trinity Classical Academy, Imago Dei School from August 23, 2018, through June 23 2019, for 10 months, in the total amount of $24,550. No further proof of payment by Parents is required.

Hart shall reimburse Parents for the cost of Trinity's 2019 summer or extended school year session upon proof of attendance by Student and proof of payment by Parents. Parents shall have 45 days from the date of this Decision to provide such proof to Hart. If Parents timely provide Hart with such proof, Hart shall have 90 days from the date of this Decision to reimburse Parents.

Hart shall reimburse Parents for the cost of individual counseling through Dynamic Interventions in the amount of $2,550.00, within 45 days of the date of this Decision. No further proof of payment by Parents is required.

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. William S. Hart Union High School District prevailed as to the May 15, 2018 individualized education program. Student prevailed as to the August 22, 2018 and October 24, 2018 IEPs.

RIGHT TO APPEAL

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

DATED: July 2, 2019

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings