



LAW UPDATE SPECIAL EDUCATION

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September 2019

*PARENT ON BEHALF OF STUDENT V.
WILLIAM S. HART UNION HIGH SCHOOL DISTRICT*
OAH CASE No.: 2019010819

TWO IS ONE TOO MANY—ALWAYS MAKE ONE DEFINITE OFFER OF FAPE

Administrative Law Judge Cole Dalton (“ALJ”) recently addressed the issue of what constitutes a specific offer of free appropriate public education (“FAPE”) in the context of a nonpublic school (“NPS”) placement. This case also illustrates what can go wrong when a district is faced with responding to a 10-day written notice to unilaterally place a student.

In this case the Office of Administrative Hearings found that William S. Hart Union High School District (“District”) did not make a clear written offer of FAPE in its August 22, 2018 and October 24, 2018 Individualized Education Programs (“IEPs”) because District offered several placement options leading up to and during the August IEP, and offered two placement options in the October IEP. Additionally, the October IEP was internally inconsistent in that it offered a single placement in one location and two placements in another.

The facts leading up to this case illustrate the possible pitfalls when a student’s placement is discussed over multiple meetings.

Student was a ninth grader placed in Five Acres, a therapeutic NPS, for the 2017-2018 school year. At an IEP held on May 15, 2018, the team reviewed Student’s current assessments and agreed that Student continued to need NPS placement. The team (including parents) agreed that the placement at Five Acres was FAPE; however, Five Acres was closing at the end of the 2018 extended school year (“ESY”). The May 15, 2018 IEP offered a generic NPS placement with transportation, speech and language therapy, and school-based counseling. District did not offer a specific school site placement. Instead, District offered to collaborate with parents to locate schools for the family to visit. District agreed to hold an IEP meeting before the end of the ESY to offer FAPE for the 2018-2019 school year. Parents signed consent to the May 15, 2018 IEP.

After the May IEP, district staff identified three programs for parents to visit as potential placements, Casa Pacifica, Bridgeport at the Help Group (“Bridgeport”), and a special day class at District’s Golden Valley High School. Parents began visiting the programs but did not believe any of the potential programs were appropriate. During the process of observing potential placements, parents learned of a local private Christian school, Trinity Classical Academy (“Trinity”), which

included an academic program for special education students. Parents initiated the process of having Student enrolled for the upcoming 2018-2019 school year.

On June 26, 2018, parents' advocate sent a letter to District and requested informal dispute resolution. The letter stated that parents had visited the potential placements, determined that Trinity had an appropriate program for Student, and sought a meeting to resolve Student's educational placement. District's response stated that the California Constitution prevented the use of public school funds for religious school tuition. District did not offer to hold a meeting at that time.

On August 6, 2018, parents sent a letter indicating they had not been offered an appropriate placement for Student and provided notice under 20 U.S.C. §1412(a)(10)(C)(ii) of their intent to place Student at Trinity for the 2018-2019 school year and seek reimbursement for tuition, fees, and related services.

AUGUST 22, 2018 IEP

In response to parents' notice, an IEP meeting convened on August 22, 2018.¹ At the meeting, parents reported to the team that they had toured the potential placements and did not believe they were appropriate. Parents advised District that Student would begin attending Trinity on August 23, 2018 and requested reimbursement for the 2018-2019 school year.

District discussed the NPS placements it could fund at Bridgeport and Casa Pacifica. District staff opined that both placements were appropriate for Student but that Bridgeport was the most appropriate.

District staff again presented an offer for an unspecified NPS. District indicated that it was willing to help parents look at other nonpublic and private schools. Throughout the IEP meeting, District offered **both** Casa Pacifica and Bridgeport as the most appropriate NPS placement options for Student.

Parents' advocate requested a written offer of FAPE to which parents could respond. The written IEP document offered NPS placement with transportation, and speech and language; however, District did not offer a specific NPS placement.

OCTOBER 24, 2018 IEP

At Student's annual IEP meeting on October 24, 2018, District offered the following, "specifically, Bridgeport or Casa Pacifica, assuming they accept [Student] for enrollment." District identified supports and services that could be implemented at either school. However, the IEP identified Bridgeport as the offered placement on the services page, in direct conflict with the notes page.

Mother declined District's FAPE offer and requested reimbursement for costs, transportation, and individual and family counseling associated with Student's 2018-2019 school

¹ District's 2018-2019 school year began August 16, 2018.

year at Trinity. Mother also declined District's offer of an individual services plan to provide speech and counseling services at a district school location.

THE AFTERMATH

Student filed for due process alleging that District denied FAPE by failing to make a clear written offer in the May 15, 2018, August 22, 2018, and October 24, 2018 IEPs.

The ALJ found that District did not deny FAPE at the May 15 meeting because Student was already attending an NPC agreed upon by the parties and Student did not require a new placement offer at that time.

However, the ALJ did find that District did not make a clear written offer of FAPE in the August 22, 2018 and October 24, 2018 IEPs. At hearing, Mother testified that she did not understand this to mean that Bridgeport was District's sole offer of placement. This testimony was substantiated by the notes section of the IEP, which provided for potential placement at either NPS.

The ALJ found that despite knowing parents rejected every placement option offered, the District did not formally make an offer of a single, specific program before the start of the 2018-2019 school year. Ultimately, the evidence demonstrated that District offered two different programs, making the IEP offer unclear.

Finally, the ALJ also found that District specified that both placements were contingent on either of the NPS's enrollment of Student. Given that District did not determine whether either school had space for Student or would accept Student, the ALJ found District's placement offers to be illusory at the time they were made.

The ALJ held, "Although District 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."

In arriving at her decision, the ALJ relied on *Glendale Unified Sch. Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093. In *Glendale*, the court found that the precedent in the Ninth Circuit requires a district to formally offer 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."

As such, school districts cannot abdicate their responsibility to make a specific offer by allowing a parent to choose 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 district must clearly identify an appropriate placement from the range of possibilities. (*Glendale v. Almasi, supra* 122 F.Supp.2d at p. 1107.)

Because the offer of FAPE was unclear, Student prevailed, even though the evidence established that placement at either NPS would have met Student's needs and the ALJ still ordered that District reimburse parents for Student's costs of attending Trinity.

The takeaways from this case are quite clear. When continuing an IEP in order to allow parents an opportunity to review proposed placement options, keep in mind the following:

1. There is nothing wrong with continuing the meeting to have parents review potential placements. Parents are members of the team and should be informed. However, be sure that the IEP notes are very clear in reflecting that the meeting is being continued. Specifically state in the IEP notes page the arranged date for the team to reconvene and finalize the IEP.
2. During the break, have a district staff member familiar with the student observe the potential placements and get information as to which placement can accept the student. This is especially important if the meeting is in response to a 10-day notice of unilateral placement made under 20 USC §1412(a)(10)(C)(ii).
3. If the parents reject all proposed NPS placements at the meeting, the district should not leave it to the parents to choose between two or more options. The District should make a formal, full, and final offer of FAPE that lists only one NPS.
4. Always double-check the paperwork and be sure the provider on the services page matches the provider specified in the offer.
5. Finally, if parents request an informal dispute resolution you should respond by attempting to arrange a dispute resolution meeting as soon as possible.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

~ Darren J. Bogié

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