

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of STUDENT, ¹)	
)	Date Issued: April 6, 2017
Petitioner,)	
)	Hearing Officer: Peter B. Vaden
v.)	
)	Case No: 2017-0025
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Date: March 23, 2017
Respondent.)	
)	Office of Dispute Resolution, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Petitioner, the adult student’s mother and attorney-in-fact, alleges that Respondent District of Columbia Public Schools (DCPS) failed to implement Student’s Individualized Education Program (IEP) after Student was released from a D.C. Department of Youth Rehabilitation Services (DYRS) school at the end of November 2016.

¹ Personal identification information is provided in Appendix A.

Student, an AGE young adult, is deaf and requires instruction to be provided in American Sign Language (ASL). On or about November 30, 2016, Student was placed by DYRS at a foster home in [REDACTED]. Petitioner's Due Process Complaint, filed on January 26, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on January 27, 2017. On February 14, 2017, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties convened for a resolution session on February 17, 2017, which did not result in an agreement. My final decision is due by April 11, 2017.

On March 16, 2017, Petitioner, by counsel, filed a motion for summary judgment, which I denied by an order issued March 22, 2017.

The due process hearing was convened before this impartial hearing officer on March 23, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The entire proceeding was interpreted for the benefit of Student by ASL and Certified Deaf Interpreters. Petitioner MOTHER and Student appeared in person and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by COMPLIANCE CASE MANAGER and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother and Student testified and Petitioner called ATTORNEY as an additional witnesses. By agreement of counsel, an attested declaration of FOSTER PARENT was also admitted into evidence. DCPS called as witnesses PROGRAM MANAGER, TRANSITION DIRECTOR, and NONPUBLIC UNIT DIRECTOR. Petitioner's Exhibits P-1 through P-7 and DCPS' Exhibits R-1 through R-7 were all admitted into evidence without objection. By agreement of counsel, a January 28, 2016 Independent Educational Evaluation (IEE)

psychological evaluation report on Student was admitted, after the hearing, as Joint Exhibit 1.

Counsel for the respective parties made opening statements and closing arguments. By agreement of counsel, the parties were directed to file compensatory education proposals no later than April 5, 2017, for my consideration in the event that I were to find that Student has been denied a FAPE. Both parties timely filed written compensatory education proposals.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issue for determination was certified in the February 14, 2017 Prehearing Order:

Whether District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to implement ■■■ DCPS IEP since ■■■ was placed in a therapeutic foster home in late November 2016.

For relief, Petitioner requests that the hearing officer order DCPS to immediately provide Student special education and related services through its Home and Hospital Instruction Program (HHIP) and to provide a certified special education teacher for Student who is fluent in American Sign Language (ASL). In addition, the Petitioner seeks an award of compensatory education for the denials of FAPE alleged in the complaint. Petitioner also requests that the hearing officer order DCPS to fund an independent evaluation to determine appropriate compensatory education for Student.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this

case, as well as the arguments and legal memoranda of counsel, this hearing officer's Findings of Fact are as follows:²

1. Student is AGE. ■ currently resides in a foster home in ■, where ■ was placed by DYRS. Testimony of Student, Exhibit P2. Student is eligible for special education under the disability classification Multiple Disabilities.

Exhibit P-1.

2. Student is deaf and communicates using ASL. Student's ASL ability is not perfect and ■ can have trouble communicating with deaf peers. July 20, 2016 HOD, ¶ 2.

3. The Student has a long history of difficulties that impact on education. There is profound bilateral hearing loss, aggression, difficulty regulating behavior, and well below grade level performance in academics. As of December 2015, Student was functioning far below grade level in math, at an approximate 2.3 grade level equivalent. In reading, the Student was functioning at an even lower level, measuring at an approximate 1.5 grade level equivalent. July 20, 2016 HOD, ¶ 3.

4. Student's educational history is notable for the sheer number of educational placements that the Student has been in over the years. Since 2009, placements include a non-public school in ■ (2009-2010), a DCPS ■ school (2010-2011), a DCPS ■ school (2011-2012), a private academy for deaf students (February 2012-November 2012), the CENTER (a program for detained students), a residential program for deaf students, another DCPS ■ school, and then,

² On July 20, 2016, former Hearing Officer Michael Lazan issued a Hearing Officer Determination in a prior case concerning this student (Case No. 2016-0115) (Exhibit R-1). Counsel for the parties have agreed that I may adopt relevant findings of fact from the July 20, 2016 Hearing Officer Determination (July 20, 2016 HOD).

again, the Center. The Student then went to another residential program for deaf students, from January 2014 through April 2014. The Student returned again to the Center from April 2014 through August, 2014 and was placed at another residential program for deaf students from August 2014 through November 2014. July 20, 2016 HOD, ¶ 4. After December 2014, Student continued to move from placement to placement. The Student was at a residential school for the deaf from November, 2014 through July, 2015. Then the Student attended a vocational school from July 2015 through November 2015. Student was back at the Center from on or about November 28, 2015 through the end of November 2016, as a result of assault charges. July 20, 2016 HOD, ¶ 7, Testimony of Mother.

5. A psychological evaluation of the Student was conducted on or about January 28, 2016 by EVALUATOR A, a psychologist. The Student's academic testing scores were extremely low, with standard scores of below 40 in sentence reading fluency and sentence writing fluency, a standard score of 41 in calculation, and a standard score of 42 in math facts fluency. Behavioral testing revealed clinically significant scores in hyperactivity, aggression, conduct problems, and externalizing problems. This evaluator recommended a placement that is fully ASL accessible, meaning instruction provided by a teacher who is fluent in ASL. July 20, 2016 HOD, ¶ 13.

6. Evaluator A reported that Student presents with difficulty controlling ■■■ impulses and regulating ■■■ mood and behaviors. Socially, Student often presents to others as friendly and engaging, however, at times this appears to mask underlying cognitive and linguistic limitations. Behaviorally, Student has difficulties managing impulsive responses and is prone to react in an aggressive fashion. While Student denied significant symptoms of depression or anxiety, others report sadness and

loneliness. Adaptively, Student requires more support than other individuals █ age, particularly with regard to functional language and academics, health and safety awareness, self-direction, and work skills. █ does, however, demonstrate age appropriate abilities to engage in leisure activities and to take care of █ living environment. Student has a complex profile including both strengths and weaknesses, the etiology of which is likely to be multi-faceted. At the then-present time, Student was functioning at the Borderline level of functioning both intellectually and adaptively. Academically █ had fallen significantly behind █ peers. █ ability to regulate █ behaviors and emotions is the area of greatest need, and is interfering with █ self-reported goals of getting █ GED, living independently, and obtaining employment. From a diagnostic classification perspective, Evaluator A reported that Student's overall level of intellectual and adaptive functioning at the time continued to be consistent with a diagnosis of Borderline Intellectual Functioning. Further, █ impulsive and behavioral difficulties meet the criteria for Intermittent Explosive Disorder and Attention Deficit-Hyperactivity Disorder, Combined Type. Evaluator A emphasized that it does not appear that Student's aggressive incidents are pre-meditated or committed to achieve a particular objective; rather they appear to be impulsive and anger-based.

Joint Exhibit A.

7. Student's last IEP was developed on December 17, 2015 by a DCPS IEP team. At the time, Student was housed at the DYRS Youth Services Center. The IEP identified Mathematics, Reading, Written Expression, Hearing, Motor Skills/Physical Development and Emotional, Social and Behavioral Development as areas of concern. For special education and related services, the IEP provided for Student to receive 25 hours per week of Specialized Instruction and 180 minutes per week of Behavioral

Support Services, all outside the general education setting. The IEP also specified that Student required a full-time dedicated aide and that ■ would have an ASL teacher and behavioral specialist for ■ classes within a residential school for the deaf and/or residential treatment center only. Exhibit P-1.

8. DYRS is the D.C. public agency responsible for ensuring FAPE is provided to youth committed to DYRS who are housed at the Center, for all purposes except for determining educational placement and location of services after discharge from the Center. In a Memorandum of Agreement (MOA) among the D.C. Office of the State Superintendent of Education (OSSE), DYRS and DCPS, effective August 16, 2016, DYRS is responsible for coordinating with DCPS for all Students who will be attending DCPS schools upon release, including notifying DCPS within one business day of a youth's return to the community from the Center. Exhibit R-2.

9. On November 30, 2016, Attorney notified Nonpublic Unit Director, by email, that Student had been released from the Center to a therapeutic foster home and he inquired what were the options for Student. Exhibit P-6. Attorney's testimony differed from that of Nonpublic Unit Director about what happened next. According to Nonpublic Unit Director, prior to November 30, 2016, Attorney had spoken with him by telephone and told him that Student did not want to go to another school but wanted to be provided services to allow ■ to become proficient in ASL. Attorney testified that he informed Nonpublic Unit Director that Student needed an updated IEP. A conference call meeting was convened on December 6, 2016 among Attorney, Nonpublic School Director and two other DCPS staff. Nothing conclusive came out of that meeting. Testimony of Nonpublic Unit Director. On December 13, 2016, Nonpublic Unit Director wrote Attorney by email that "one of the best bets" for Student to receive services may

likely come from the D.C. Rehabilitation Services Administration (RSA). He brought Transition Director into the email chain because Transition Director was familiar with the RSA enrollment process. Exhibit P-6. Attorney did not respond to the email. Testimony of Nonpublic Unit Director. Nor did Attorney communicate with Transition Director. Testimony of Transition Director. Attorney testified that “we did not want” RHA services and that he told Nonpublic Unit Director that Student would need HHIP services. Testimony of Attorney. Both witnesses’ testimony was credible even though their recollections of what was said differed. What is clear is that Attorney did not communicate in writing with Transition Director after the December 6, 2016 telephone conference or after receiving Nonpublic Unit Director’s December 13, 2016 email, to correct any misunderstanding and make a record of his client’s request for an IEP with HHIP services. Based upon the email communications, I find that after the December 6, 2016 telephone conference, DCPS understood that Student was requesting ASL training in place of IEP special education and related services.

10. As of the date of the due process hearing, since on or about November 30, 2016 when Student was placed at the foster home in [REDACTED] DCPS has not provided any IEP services to Student. Stipulation of DCPS’ Counsel.

11. An IEP team meeting for Student was scheduled, after the due process hearing, for March 31, 2017. Testimony of Attorney.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this hearing officer’s own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. See D.C. Code § 38-2571.03(6). The complaint in this case does not concern the appropriateness of an IEP or educational placement. Therefore the burden of persuasion is on the Petitioner. The burden of persuasion shall be met by a preponderance of the evidence. *Id.*

Analysis

Did DCPS deny Student a free appropriate public education (FAPE) by failing to implement [REDACTED] DCPS IEP after [REDACTED] was placed in a therapeutic foster home in late November 2016?

Student's last IEP, developed in December 2016, provided for Student to receive 25 hours per week of Specialized Instruction Services and 180 minutes per week of Behavioral Support Services. All of Student's services were to be delivered by an ASL fluent provider. On or about November 30, 2016, Student was moved by the D.C. Department of Youth Rehabilitation Services (DYRS) from the Center to a foster home in [REDACTED]. Pursuant to the August 16, 2016 MOA among DCPS, DYRS and OSSE, DCPS became responsible for providing a FAPE to Student upon [REDACTED] "return to the community." It is undisputed that, from November 30, 2016 through the March 23,

2017 date of the due process hearing, DCPS had not provided special education or related services to Student.

DCPS argues that it is not at fault because Student's attorney advised DCPS staff that after being released from the Center, Student did not want to receive IEP services, but only sought services to enhance ■■■ ASL fluency. While the email documentation at the hearing tended to support this contention, that did not relieve DCPS from providing IEP services to Student. It is correct that a school district is not required to continue to implement IEP services after a parent or adult student has revoked consent. The relevant IDEA regulation provides,

If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

(i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with §300.503 before ceasing the provision of special education and related services; . . .

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP under §§300.320 and 300.324 for the child for further provision of special education and related services.

34 CFR § 300.300(b)(4). *See, also*, U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 73 Fed. Reg. 73006, 73009 (December 1, 2008) (The Secretary strongly believes that a parent also has the authority to revoke that consent, thereby ending the provision of special education and related services to their child.)

In this case, Student had reached the age of majority before being returned to the community and parental rights under the IDEA have transferred to [REDACTED]. See 34 CFR § 300.520. Therefore, Student did have the right to revoke consent for special education. However, the hearing evidence establishes neither that Student or [REDACTED] authorized representative revoked consent in writing, as foreseen in § 300.300(b)(4) or that DCPS provide prior written notice to Student that it would cease the provision of special education and related services. On these facts, DCPS was not relieved of its obligation to make FAPE available to Student after [REDACTED] returned to the community, even if Attorney did represent to DCPS that Student did not want to go back to school. I conclude that DCPS may be liable for not implementing Student's IEP after [REDACTED] left the Center in late November 2016.

The standard for failure-to-implement claims, used by the courts in this jurisdiction, was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner “must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C. 2013) (*quoting Bobby R.*, 200 F.3d at 349).

While Student was placed at the Center, DYRS was Student's local education agency (LEA). After Student was moved out of the Center by DYRS, DCPS became Student's LEA. Under the IDEA provision for students who transfer between LEAs in the same state, DCPS (in consultation with Student) was required to provide FAPE to [REDACTED] including services comparable to those described in the December 17, 2015 IEP.

See 34 CFR § 300.323(e). In this case, Student's attorney informed DCPS on November 30, 2016 that Student had been returned to the community. Given Student's intensive special education and related services requirements resulting from ■■■ being deaf, DCPS was entitled to a reasonable period to review Student's needs and propose a suitable program for ■■■ Cf. 34 CFR § 300.323(g) (new public agency to take reasonable steps to promptly obtain the child's records from the previous public agency.) Here, DCPS convened a telephone conference between responsible DCPS representatives and Attorney on December 6, 2016 to discuss Student's needs. The DCPS representative moved promptly to line up services for Student (albeit not the HHIP services which Student now requests). Considering that DCPS' winter break ran from December 22, 2016 to January 2, 2017, I find that starting services following winter break, by January 3, 2017, would have allowed DCPS a reasonable period of time to have obtained Student's records from DYRS and to devise a program for ■■■ By not providing any IEP services to Student through the date of the hearing, DCPS failed to provide Student almost 60 school days of Specialized Instruction and Related Services between January 3, 2017 and March 23, 2017. I find that this was a failure to implement substantial provisions of Student's IEP and that Student was denied a FAPE as a result.

Relief Requested

For relief in this case, Petitioner requests that I order DCPS to provide Student special education and related services through DCPS' Home and Hospital Instruction Program (HHIP). However, this would be a radical change of Student's educational placement from a special school setting, as was specified in the December 17, 2015 IEP. Student's IEP team was scheduled to meet on March 31, 2017. Until Student's IEP team, including the student, has the opportunity to review and update ■■■ December 17, 2015

IEP and determine ■ educational placement, it would not be appropriate for the hearing officer to dictate ■ ongoing placement. *Cf., e.g. Paolella ex rel. Paolella v. District of Columbia*, 210 F. App'x 1, 3 (D.C. Cir. 2006) (Choice of school, based on knowledge of how those programs could meet the special education needs of the child, reflected the expertise of the special education officials involved, to which a court gives deference.)

Petitioner also requested an award of compensatory education for Student. Where the adult student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those compensatory services that will compensate the student for that denial. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if ■ had received the required special education services and the type and amount of services that would place the student in the same position ■ would have occupied but for the school district’s violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005)).

At the conclusion of the due process hearing on March 23, 2017, counsel for the parties agreed to my request that both parties submit compensatory education proposals for my consideration, in the event I concluded that DCPS had denied Student a FAPE by not providing IEP services after ■ was placed at the ■ foster home. Petitioner’s Counsel has submitted a recommendation by Student’s Gallaudet University mentor (MENTOR). This individual has worked with Student for years and recommends that ■ requires instruction in ASL to become fluent, and instruction in English via an ASL instructor to learn how to communicate with society at large with an

emphasis on obtaining and maintaining employment. Based on Student's December 17, 2015 IEP, and assuming that Student should have received services from DCPS from November 2016, Mentor concluded that Student missed approximately 200 hours of instruction in English and ASL after ■ was moved from the Center. She recommends as compensatory education that Student be awarded 150 hours of instruction split evenly between the English and ASL.

DCPS submitted a compensatory education proposal by Compliance Case Manager, who consulted with DCPS' Manager of Low Incidence Disabilities. If a denial of FAPE were found, Compliance Case Manager recommends that Student be awarded 120 hours of compensatory education in the form of independent ASL tutoring. He referred to a note in Evaluator A's January 28, 2016 report that Student's ASL-based language abilities are an area of weakness and that, while ■ can communicate in basic ASL, ■ struggles with more complex language.

Both recommendations are helpful and generally credible. However, I have found that a reasonable start date for DCPS to have initiated IEP services was January 3, 2017, not November 2016 as asserted by Mentor. The period of harm is therefore several weeks less than assumed by Mentor. Accordingly, I will adopt the recommendation of Compliance Case Manager that DCPS be ordered to provide Student 120 hours of compensatory education services in the form of individual tutoring by a teacher qualified to teach Student ASL and, as Mentor recommended, to teach Student English. Mentor also recommended, as an alternative, that Student's eligibility for special education and related services be extended beyond when ■ eligibility terminates at Age 22. However, I find that an award of 120 hours of individual tutoring, without more, is calculated to place the student in a reasonably equivalent position to

that [REDACTED] would have occupied, had DCPS initiated services, pursuant to [REDACTED] December 17, 2015 IEP, beginning January 3, 2017.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. As compensatory education, within 10 business days of the date of this order, DCPS shall arrange for Student to be provided 120 hours of individual tutoring, by an instructor qualified to teach Student ASL and to teach student English using ASL communication. DCPS may provide the tutor or issue funding authorization at the market rate for Student to retain an independent tutor.
2. All other relief requested by the Petitioner herein is denied.

Date: April 6, 2017

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(I).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team