

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	Room: 2006
Petitioner,)	Hearing: June 17, 2016
)	HOD Due: July 20, 2016
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2016-0115
District of Columbia Public Schools,)	Issue Date: July 20, 2016
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Multiple Disabilities. (the “Student”)

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 6, 2016 in regard to the Student. On May 16, 2016, Respondent filed a response. A resolution meeting was held on June 7, 2016. The resolution period expired on June 5, 2016.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On June 7, 2016, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order issued on June 10, 2016, summarizing the rules to be applied in this hearing and identifying the issues in the case.

There was one hearing date in this case, June 17, 2016. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. and Attorney C, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved in Exhibits 1-15. Respondent objected to Exhibit 10 on hearsay grounds. This objection was overruled. Exhibits 1-15 were admitted. Respondent moved into evidence Exhibits 1-8. There were no objections. Exhibits 1-8 were admitted.

During the hearing, American Sign Language (ASL) interpreters were used to translate the Student's testimony. At the close of testimony, both sides presented oral closing statements.

Petitioner presented as witnesses: the Student; Witness A, a mentor; and Witness B, an employee of Washington, D.C. Public Defender Service ("PDS"). Respondent presented: Witness C, from the Center, a detainment facility that provided the Student with educational services during the period of time in question.

IV. Credibility.

In this case, all the witnesses were reasonably credible and consistent with each other, their prior statements, and the other documents in the record.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the sole issue to be determined is as follows:

Did DCPS fail to implement the Student's Individualized Education Program ("IEP") from November 28, 2015 through June, 2016? If so, did DCPS materially deviate from the terms of the IEP and thereby act in contravention of such precedent as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that, while at the Center, the Student did not receive the special education instruction that were due. As memorialized in the Prehearing Order, Petitioner alleged that: 1) the Student did not receive the required amount of instruction from a special education teacher; 2) the instruction was delivered in a ratio that was greater than the ratio required by the IEP; and 3) that instruction was not provided by a teacher who is fluent in American Sign Language.

The issue in the Due Process Complaint relating to evaluations was withdrawn at the prehearing conference, as memorialized in the prehearing order.

As relief, Respondent seeks compensatory education, an order "officially" placing the Student at the current residential school, an update of the IEP, an award of appropriate compensatory program, and a finding that DCPS has denied the Student a FAPE.

VI. Findings of Fact

1. The Student is a X year old who is eligible for services as a student with Multiple Disabilities. The Student is currently enrolled in a residential school for the

deaf that is being funded by the Office of the State Superintendent of Education. (R-7-1; P-3-1)

2. The Student is deaf and communicates through American Sign Language. (“ASL”) The Student’s ASL is “not perfect” and the Student can have trouble communicating with deaf peers. The Student has a strong desire to increase self-knowledge. (R-4-14; Testimony of Witness A)

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, the 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. (P-3-4, 6, R-4-2)

4. The 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 Maryland (2009-2010), a DCPS [REDACTED] school (2010-2011), a DCPS [REDACTED] 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 [REDACTED] school, and then, 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. (R-4-3; P-6-3)

5. An IEP was written for the Student on December 2, 2014. The Student was determined to be eligible for services as a student with Multiple Disabilities. The IEP provided for goals in mathematics, reading, written expression, hearing, emotional, social and behavioral development, and motor skills/physical development. Twenty-five hours per week of specialized instruction outside general education are recommended, with behavioral support services outside general education for two hours per week. The IEP stated that the Student is considered to be deaf or hard of hearing. The Student's behavior was deemed to interfere with the Student's learning or the learning of other children, and it is noted that the Student uses American Sign Language to communicate with peers. The IEP specifically indicates that the Student needs a sign language interpreter to access the general curriculum as well as assistive technology. The IEP says that the Student will have an ASL teacher and behavioral specialist within a residential school for the Deaf and/or Residential Treatment Center only. A 1:3 staff to student ratio was required for group instruction and socialization, with medication monitoring and a therapeutically-infused education and residential environment. (P-2)

6. After this IEP was written in December, 2014, the 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 School A Vocational School from July, 2015 through November, 2015, and then was back at the Center on or about November 28, 2015 as a result of assault charges. (R-4-3; P-3-4; P-6-3; Testimony of Witness B)

7. A revised IEP was written on December 17, 2015. This IEP again determined that the Student was eligible for services as a student with Multiple

Disabilities, and contained goals in the same subject matter areas as the prior IEP. Specialized instruction hours stayed the same, at twenty-five hours per week outside general education. Behavioral Support Services were increased 60 minutes per week to 180 minutes per week. Again, it was indicated that behavior interferes with the Student's learning. Again, the IEP specifically indicated that the Student needed a sign language interpreter to access the general curriculum as well as assistive technology. Again, the IEP said that the Student will have an ASL teacher and behavioral specialist within a residential school for the Deaf and/or Residential Treatment Center only. Again, the IEP required a 1:3 staff to student ratio for group instruction and socialization, with medication monitoring and a therapeutically-infused education and residential environment. (P-3)

8. The IEP meeting notes from DCPS state that the Student needs instruction in a "deaf" environment, and that the Student has struggled in a non-deaf environment in which there was a 1:1 aide. It says the Student needs to be "fully engulfed" in the deaf community. (P-4-3)

9. At the Center, the Student was frustrated on a social level. The Student could not communicate with anyone other than interpreter. The Student could not communicate with peers and felt isolated because the Student was the only deaf person. (Testimony of Student; Testimony of Witness A)

10. In the Student's classes, there were between 3 or 4 adults in the room, and sometimes less than 7 students. Other than the teacher, the additional adults in the class were youth development workers, who provided behavior support on an as needed basis. Seventy percent of the students in the class were special needs students. The Student

took math, career classes, life skills classes, English, and a remedial reading class. There was an ASL interpreter in each class. There was a special education teacher in the remedial reading class, the math class, the English class, and at least some of the career classes. The Student received 25 hours of instruction from special education teachers per week. (Testimony of Student; Testimony of Witness C; P-12-1)

11. None of the Student's aides or teachers were fluent in ASL. The Student received the 180 hours per month of behavioral support services in the IEP through a social worker and ASL interpreter. The Student communicated well in class, appeared stimulated by the material, and engaged in studies. (P-12-1-2; 10-3)

12. Nevertheless, during this time at the Center, the Student had a mixed academic experience. The Student followed the teacher's instruction in math, reading, and writing. In math, the Student did well with a calculator, but struggled when having to use language. In reading, the Student struggled to read words that the Student had not memorized and was unable to use phonics. The Student's attention was variable. There was minimal improvement in written expression. The Student participated in class discussions in reading and writing, and was friendly to teachers, but there were reports of impulsivity, aggression and defiance. (R-4-6-8, 11)

13. A psychological evaluation was conducted of the Student 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. (P-6-4-5)

14. The Student's progress report dated April 21, 2016 showed progress on all math goals, written expression goals, and reading goals. No progress was reported on Emotional, Social and Behavioral goals, and hearing goals were not introduced. (P-15)

VII. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

For this hearing, the burden of proof lies with the party seeking relief. 5-EDCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) 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 (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

Issue: Did DCPS fail to implement the Student's Individualized Education Program ("IEP") from November 28, 2015 through June, 2016? If so, did DCPS materially deviate from the terms of the IEP and thereby act in contravention of such precedent as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

The IDEA is violated when a school deviates materially from a student's IEP. Wilson v. District of Columbia, 770 F.Supp.2d 270, 275 (D.D.C. 2011) For the hearing officer to find a failure to implement an IEP, the school must have "failed to implement substantial or significant provisions of the IEP." Wilson, 770 F.Supp.2d at 274 (citing

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is “the crucial measure for purposes of determining whether there has been a material failure to implement” an IEP. Holman v. District of Columbia Public Schools, No. 14-1836, 2016 WL 355066 at *2 (D.D.C. January 28, 2016).

As a preliminary matter, there is no dispute between the parties that students in detainment facilities are entitled to a FAPE, and Petitioner points to the applicable “Dear Colleague” letter which specifically states that such facilities must implement IEPs as written. Dear Colleague Letter, 114 LRP 51903 (OSEP/OSERS December 5, 2014).

Petitioner makes three contentions about the Student’s education in this detainment facility, which I am referencing as the Center. Petitioner contended that, while at the Center at the time period in question: 1) that instruction was not provided by a teacher who is fluent in American Sign Language; 2) the instruction was delivered in a ratio that was greater than the ratio required by the IEP; and 3) the Student did not receive the required amount of specialized instruction outside general education.

First, Petitioner argued that the IEP provided that the Student receive services directly through an ASL teacher. That is, Petitioner argued that the two IEPs at issue² required the Student to receive a teacher who actually speaks in ASL instead of communicate through an ASL interpreter. However, there is language in the IEPs to the contrary. The IEPs say clearly, on page 3, that the Student “continues to need support for instructional delivery via an interpreter.” The IEPs also state that the Student “requires a

² The December, 2014 IEP was in effect from approximately November 28, 2015-December 17, 2015. Thereafter, the December, 2015 IEP was in effect.

sign language interpreter to access the general curriculum.” Petitioner does not explain why these sentences would be included in any IEP that requires an ASL teacher to provide all instruction, as Petitioner is arguing.

The IEPs does mention ASL teachers, in a different section. However, the language relating to ASL teachers is not entirely clear. The IEPs state that the Student “will have an ASL teacher and behavioral specialist within a residential school for the Deaf and/or Residential Treatment Center *only*.” (emphasis added) I find the use of the word “only” in this sentence to be ambiguous, and there is no parol evidence in the record to clarify what this word might mean. It may suggest that the IEP team was not requiring an ASL teacher during his time at the Center, which was obviously not a residential school for the deaf or residential treatment center. There is nothing in the meeting notes, or the IEP, to specifically state that the Center had to have on staff, or hire, an ASL teacher for the Student. Rather, it appears that the IEP team may merely have been making sure that the Student received an ASL teacher when he was finally placed in a residential school or facility.

Clearly, the Student benefits from having an ASL teacher, and it certainly is arguable that the IEP did not provide the Student with a FAPE given DCPS’s own report which stated that the Student’s instruction at the Center causes “extreme challenges” because, among other things, the Student cannot write and listen at the same time. (R-4-13, 15) However, there is no substantive claim that the IEP is defective in this case. The sole certified issue in the Due Process Complaint and the Prehearing Order is whether the IEP was implemented, and that is the sole issue I will be deciding in this decision.

Petitioner also contended that the IEP was not implemented because it calls for a 3:1 ratio in the classroom. The record indicated that this requirement was substantially met by the Center, which provided from three to four staff in the classroom every day. The student population in the classroom was sometimes less than seven students, and, according to both the student and Witness C, variable in any event given that it the Student was part of a transient population at a detainment center. Moreover, the Student did not testify that there was a ratio of more than 3:1 in the classroom. Accordingly, Petitioner has not shown that DCPS failed to materially implement this IEP requirement. Compare Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 824-25 (9th Cir.2007)(even assuming Plaintiff's view that IEP required individualized or small group instruction, class size in self-contained classroom that varied from 7 to 15 students held no FAPE denial).

In connection to this argument, Petitioner has submitted declarations that were submitted to a federal judge in a corollary proceeding involving the Student and DCPS. One such declaration, from a Special Education Coordinator at DCPS, includes language that the student to teacher ratio was 5:1 at the Center while the Student was there during the relevant time period. However, the IEP does not require a 3:1 student to *teacher* ratio. It merely requires a 3:1 student to *staff* ratio.

Petitioner's final point, made during closing argument, is that the Center violated the IEP because it did not provide the Student with classes that contain only special education students. This is not quite in the Prehearing Order, which focused on Petitioner's argument that the Student was not provided the required amount of hours of specialized instruction. However, since the Due Process Complaint does reference this

claim (page 4) by objecting to the Center's practice of grouping all the students together at the Center, I will address this issue as well, without objection from DCPS.

The testimony is clear that the Student's classes, in fact, did not consist of all special education students. The testimony of Witness C specifically estimated that seventy percent of the students in the classes were special education students.

Moreover, Witness C testified that the IEP required twenty-five hours of specialized instruction with only special education students, although the IEP does not so state or otherwise define "outside general education."

Still, as Judge Walton pointed out in 2013, "perfect" compliance with an IEP is not required. Johnson v. District of Columbia, 962 F.Supp.2d 263, 268 (D.D.C. 2013)(where three hours of required instruction not possible at recommended location of services, no FAPE violation). The question is whether the presence of these general education students in the room necessarily constitutes a material violation of IEP. In this connection, the appropriate question to ask is whether these general education students had or would have had a material impact on the delivery of instruction for the majority special education population in the classroom, in particular the Student.

There is no such testimony in the record, expert or otherwise. There was no testimony, for instance, that the presence of general education students in the room would necessarily turn the class into one where instruction was too difficult for the special education population. In fact, the contrary is more likely to be true. More than two thirds of the students in these classes were eligible for services, suggesting that the classes were likely to be more akin to that of "self-contained" classes than "general education" classes. Moreover, the classes were led by special education teachers, not general education

teachers. These teachers should have been able to differentiate and modify instruction as needed for all the special education students, including the Student.

It is true, as Petitioner points out, that there need not be any showing of actual harm to prove a failure to implement claim. Still, for Petitioner to prevail, there should be some showing that the general education students changed the “proportion of mandated services,” as the Judge Collyer stated in Holman. There was no such showing in this case, where the record suggests that the presence of general education students in the classroom may not have changed the delivery of mandated services at all. As a result, I conclude that DCPS did not deny the Student a FAPE when it implemented the December, 2014 and December, 2015 IEPs at the Center from November 28, 2015 through to the date of the Student’s departure from the Center.

IX. Order

As a result of the foregoing, this matter is hereby dismissed with prejudice.

Dated: July 20, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

X. Notice of Appeal Rights

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 USC §1415(i).

Date: July 20, 2016

Michael Lazan
Impartial Hearing Officer