

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
MOFFAT COUNTY SCHOOL DISTRICT RE-1, Petitioner, vs. [Parent], parent, on behalf of [Student], a minor, Respondent.	
DECISION	

Petitioner (“School District”) filed this due process complaint after a State Complaints Officer (SCO) found that the School District failed to provide [Student] with a free appropriate public education (FAPE). Hearing was held in accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, § 2220-R-6.02. Hearing was held May 29 and 30, 2018, before Administrative Law Judge (ALJ) Robert Spencer at the School District’s administrative offices in Craig, Colorado. Tammy M. Eret, Esq., Hoskin Farina & Kampf, PC, represented the School District. David Monroe, Esq., Disability Law Colorado, represented Respondent.

Case Summary

[Student] is a 17 year-old boy who will be a high school senior this fall. [Student] suffers from [Disorder], which impairs his ability to learn. As required by the IDEA, the School District assessed [Student] and found him eligible for special education and related services, which he receives through an Individualized Education Program (IEP).

When a student with disabilities is 15 years old, the student’s IEP must include appropriate postsecondary goals as well as a plan for services necessary to meet those goals. In [Student]’s case, his most recent IEP completed in November 2016 included a goal of “attend[ing] a college where I will play collegiate sports and earn my degree.” Most colleges require at least two years of foreign language at the high school level; therefore, the IEP appropriately provided that [Student] would successfully complete two years of foreign language. In order to meet [Student]’s anticipated graduation date of May 2019, it was necessary for [Student] to begin his two-year foreign language study no later than the fall of 2017.

Spanish is the only foreign language the School District offers. [Student]’s mother, [Parent], believes that American Sign Language (ASL) would be a better foreign language alternative to Spanish because [Student] struggles with reading and writing the English

language and therefore will likely have great difficulty successfully completing Spanish. Her research informs her that ASL would be a better alternative by capitalizing on [Student]’s good oral and physical skills.

After discussing these concerns with the IEP team in November 2016, the team agreed to “explore” ASL as an alternative to Spanish. However, over the following nine months, the IEP team did little to fulfill that obligation. Instead, the School District concluded that [Student] was capable of successfully completing Spanish and therefore unilaterally declined [Parent]’s request for ASL. Although the School District agreed to accept ASL as a foreign language credit, it declined to pay for ASL, to allocate school time for it, or to provide staff to support it.

When advised of this position, [Parent] asked for an emergency IEP meeting to discuss her request that the School District pay for and support ASL. That meeting was ultimately held on September 11, 2017, two weeks after the start of [Student]’s junior year. Although the meeting concluded without a firm decision by the IEP team, the School District agreed to issue a Prior Written Notice (PWN) regarding [Parent]’s request for district funded and supported ASL. The PWN, issued September 20, 2017, declined [Parent]’s request for ASL.

[Parent] filed a state complaint and in December 2017 the SCO ruled in her favor. In response, as permitted by 34 CFR § 300.508, the School District filed this due process complaint.¹ The School District asks the ALJ to find that it complied with the IDEA, that it made an appropriate offer of FAPE, and that it has no financial responsibility to provide [Student] with ASL as an alternative to Spanish.

For reasons explained below, the ALJ concludes that the School District was obligated by the November 2016 IEP to diligently and in good faith investigate ASL as an alternative to Spanish, but failed to do so. Because its failure to comply with the IEP was substantial and material, the School District failed to provide FAPE. To remedy that failure, the School District must fund [Student]’s participation in an on-line ASL course through the completion of his senior year, must accommodate his coursework during the school day, and must provide support necessary for [Student] to access the on-line course.

Findings of Fact

[Student]’s Academic Skills and History

1. [Student] is a 17 year-old boy (d.o.b. [Date of Birth]) who lives with his mother, [Parent], in [City], Colorado.
2. [Student] attends [High School] and will be a senior in the coming 2018/2019 school year.
3. [Student] suffers from [Disorder], which impairs his ability to learn. The School District has identified [Student] as a child with a disability eligible for special

¹ See the commentary at 71 Fed. Reg. 46,607 (2006), which allows a party who disagrees with an SCO decision to “initiate a due process hearing” provided that the subject of the state complaint involves an issue about which a due process hearing may be filed.

education and related services under the IDEA.

4. In February 2016, the School District reassessed [Student]'s academic abilities using the Woodcock-Johnson III Normative Update Tests of Achievement. Although [Student] was then 15 years old and in 10th grade, his academic skills in reading, writing, and mathematics were at the level of a 9 to 10 year-old with a grade-level equivalent between 3rd and 5th grade, depending upon the skill. Ex. C, pp. 1, 3, 5, 6.

5. [Student] scored lowest in the areas of reading and writing, where his abilities were deemed to be "very limited" and in the 1st or 2nd percentile nationally. Ex. C, p. 9.

6. [Student] scored higher in oral language and recall skills, with a 6th grade equivalent in oral language, a 7th grade equivalent in story recall, and a freshman college equivalent in delayed story recall. Ex. C, p. 3.

7. [Student] has good physical ability. He participates and does well in sports, including football, baseball and wrestling.

8. [Student]'s most recent Determination of Eligibility, dated November 7, 2016, identifies his educational disabilities as "Other Health Impairment" (primary) and "Specific Learning Disability" (secondary). Ex. C, p. 18-19. The criteria supporting Other Health Impairment are described as "[l]imited alertness as indicated by an inability to manage and maintain attention, to organize or attend, to prioritize environmental stimuli, including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment." His Specific Learning Disabilities are identified as reading, writing, and mathematics. *Id.*

9. [Student]'s most recent IEP, dated November 7, 2016, states that although his academic skills are within the very low range and he has "difficulty with abstract concepts," his language skills are in the average range. According to the IEP, when he "receives adult support he is able to be very successful with his work." Ex. 2, pp. 26-27.

10. Currently, [Student] is in the general education classroom 96.6 percent of the time, with weekly direct support in literacy, mathematics, and counseling outside the general education classroom. Ex. 2, pp. 33-34. Per the IEP, [Student] receives a variety of accommodations, including having instructions read to him and repeated, having extended time to complete tests and assignments, participating in small group and multi-modal instruction, and having assignments and tests modified to match his cognitive level. Ex. 2, p. 30.

11. With the supports and accommodations provided by his IEP, [Student] has done well in high school, achieving passing grades in all his classes. Ex. 30, 31.

[Student]'s College Plans and the Request for ASL

12. Because [Student] was 15 years old in November 2016 when the most recent IEP was developed, the IEP needed to include a postsecondary transition plan. As required by state regulation, the plan had to include "appropriate measurable postsecondary goals" and the "transition services . . . needed to assist [[Student]] in reaching those goals." Transition services includes instruction focused on improving a

disabled child's academic and functional achievement to facilitate movement from school to post-school activities, including postsecondary education.

13. According to the IEP, [Student]'s postsecondary goal is to "attend a college where I will play collegiate sports and earn my degree." Ex. 2, p. 28.

14. To achieve that goal, the IEP appropriately planned for [Student] to complete all the classes needed for graduation from high school. In addition, because most colleges require at least two years of foreign language at the high school level, the IEP states that [Student] "will take 2 years of foreign language."

15. The only foreign language course offered by the School District is Spanish.

16. [Parent] is legitimately concerned that, given his very low reading and writing proficiency, [Student] will not be able to successfully complete two years of Spanish. Stated another way, she doubts that [Student] can succeed in Spanish given that he struggles with his native language.

17. As an alternative to Spanish, [Parent] asked the School District to consider American Sign Language (ASL) as an alternative to Spanish. Based on her research of literature discussing [Disorder] and ASL, [Parent] concluded that ASL would better fit [Student]'s strengths, particularly his good physical and oral language skills. Given her knowledge of her son's strengths and weaknesses, the research she has done, and her experience as an educator, [Parent]'s belief that ASL is a better alternative to Spanish is reasonable.

18. In light of [Parent]'s concerns, the IEP team agreed to "explore avenues for sign language as an alternative" to foreign language. Ex. 2, p. 28.

19. In order for the IEP team to know whether ASL would be an alternative to Spanish, it necessarily had to ascertain four things: 1) whether an ASL course was available that the School District would accept for credit; 2) whether one or more colleges of [Student]'s choosing would accept ASL in satisfaction of its foreign language requirement; 3) what support and accommodations would be necessary for [Student] to take ASL during the school day;² and 4) whether ASL would fit [Student]'s unique strengths and weaknesses.

20. The IEP team's agreement to explore ASL as an alternative to Spanish necessarily included the obligation to do so diligently and in good faith.

21. Because [Student] needed to begin his foreign language coursework in the fall of 2017 if he was to complete two years of study before he graduated in May 2019, the IEP team's investigation had to be completed well before the 2017/2018 school year began.

22. The School District's Director of Special Education, [Director], testified that if a satisfactory ASL course was found, a second IEP team meeting would be needed to make the final decision. Therefore, that meeting also had to be conducted and a final decision made well before the 2017/2018 school year began.

2 The IEP states that, "[a]ll assignments will be completed at school with staff." Ex. 2, p. 30.

23. Following the September 2016 IEP team meeting, the School District and the IEP team (other than [Parent]) did very little to investigate whether ASL would meet the requirements identified above. The following timeline and evidence demonstrates this fact:

- 9/7/2016 – the IEP team committed to exploring ASL as an alternative.
- There is no evidence in the record that any School District employee or any IEP team member other than [Parent] did anything in the following six months to investigate the availability of an acceptable ASL course.
- 3/7/2017 – [Parent] expressed concern to [Student]’s special education case manager, [Case Manager], that the fall 2017 schedule would be set on March 15, 2017 but would not fit [Student]’s needs. She suggested ASL “might need work.” Ex. D.
- 3/15/2017 – a school counselor met with [Student] and prepared a fall schedule that included Spanish, not ASL. Ex. 34, p. 1. [Parent] was not consulted about this decision. When she learned that the schedule included Spanish but not ASL, she objected. Spanish was removed, but ASL was still not included. Ex.34, p. 2.
- At some point, [Parent] advised [Case Manager] that a college of [Student]’s choice, the University of [State], accepts ASL to satisfy its foreign language requirement. Furthermore, the college has a program designed to assist students with learning disabilities.³ Thereafter, [Case Manager] called the university and confirmed what [Parent] had said.
- April 25, 2017 – At a meeting with [Parent] and [Director], [Case Manager] acknowledged that the University of [State] was an acceptable option, but believed it was risky to rely upon a single choice of college. [Parent] subsequently found at least two other colleges of [Student]’s choice that also accept ASL to satisfy their foreign language requirement.
- At the meeting on April 25th, [Director] expressed reservation that the school board would approve ASL for credit. However, there is no evidence in the record that, up to that point, anyone at the school had done anything to investigate that uncertainty. Rather, as [Parent] observed, “[t]he school has done zero research on providing this for [[Student]].” Ex. H.
- According to [Parent], [Director] said she would inquire into whether the Colorado School for the Deaf and Blind (CSDB) offered an acceptable ASL course. [Director], however, testified that she did not recall contacting CSDB or agreeing to do so. In fact, there is no evidence in the record that any School District employee or IEP team member did anything in the following four months to investigate the availability of an acceptable ASL course.
- At some point, [Case Manager] had an “informal passing conversation” with Spanish teacher [Spanish Teacher] about whether she would be able to

3 Known as the SALT (Strategic Alternative Learning Techniques) Program.

accommodate an unidentified special education student functioning at an elementary grade level in her Spanish class. [Spanish Teacher] responded that she could. However, [Case Manager] did not identify the student she was inquiring about, [Spanish Teacher] had never met [Student] and had not reviewed his IEP, and there was no discussion of [Student]'s unique needs.

- At no point did the School District or IEP team (other than [Parent]) investigate whether ASL would be the best option suitable to [Student]'s unique needs.
- 8/14/2017 – [Parent] sent an e-mail to [Director] and [Case Manager] asking, “Has there been an update in regard to [[Student]'s] ASL?” Ex. 1, p. 1.
- 8/18/2017 – In response to [Parent]'s inquiry of 8/14, [Director] told [Parent], “[W]e offer Spanish as a foreign language. We do not provide any other option.” Ex. 1, p. 2. There is no evidence this decision was based on the results of any investigation of ASL and is a contrary to the IEP obligation to explore ASL as an alternative. The decision was made without any Prior Written Notice (PWN) or second IEP team meeting.
- 8/21/2017 – [Parent] sent [Director] and [Case Manager] an e-mail asking for an “emergency” IEP team meeting to discuss ASL as an alternative to Spanish. She explained [Student]'s interest in ASL and said, “[s]tudies also show that students with [Disorder] do well with ASL as it works in different areas of the brain and has been shown to increase brain functioning in other academic areas.” [Parent] attached to her e-mail information regarding [Disorder] and [Disorder] educational strategies. Ex. 8. There is no evidence in the record that any School District personnel or any IEP team member other than [Parent] read this informational material or conducted any research of their own.
- 8/22/2017 – [Director] sent [Parent] an e-mail questioning why an immediate IEP meeting was necessary. The parties exchanged possible dates for a meeting, but a date was not set. Ex. 10.
- 8/24/2017 – [Parent] made an unscheduled visit to see the school guidance counselor, [Guidance Counselor], about [Student]'s fall schedule. During the meeting, [Guidance Counselor] reviewed a [Private University] ([Private University]) catalogue and learned that [Private University] offers an on-line ASL course that the School District will accept for credit. As far as the record shows, this is the first time the School District made any effort to locate an acceptable ASL course.
- Later that day, [Parent] sent an e-mail to [Director] alerting her to the availability of the [Private University] course and inquiring about payment for the course and scheduling the course during school hours. Ex. 19.
- After receiving [Parent]'s e-mail, [Director] exchanged e-mails with [Case Manager] regarding the course. [Director] stated that she needed to discuss the matter with [Guidance Counselor], but was “fairly certain that we have paid for these and allowed students to take them during the day. If that is the precedence then we

may have to offer the same to this student.” Ex. K.

- 8/25/2017 - [Director] informed [Parent] that although the [Private University] class “is an option” that would be accepted by the School District, the School District would not pay for it and would not permit [Student] to take it during school hours. Ex. K. This is the first time anyone at the School District informed [Parent] that even if an acceptable ASL course was found, the School District would not pay for it and would not permit [Student] to work on it during the school day. [Director]’s advice is not consistent with the School District’s IEP obligation to investigate, in good faith, whether ASL would be an alternative to Spanish. It is also not consistent with the IEP requirement that, “[a]ll assignments will be completed at school with staff.” Ex. 2, p. 30.

- Later that day, [Parent] made a formal request that the School District pay for the [Private University] course. She asked for confirmation of her understanding that the School District was denying that request. Ex. 11.

- 8/28/2017 – The 2017/2018 school year started. Despite the availability of an acceptable ASL course and colleges that would accept it, the IEP team had not yet met to consider it as an alternative to Spanish.

- 8/30/2017 – [Parent] again asked [Director] to respond to her formal request that the School District pay for the ASL course.

- 9/2/2017 – Believing she could delay no longer, [Parent] enrolled [Student] in the online [Private University] course at her own expense.

- 9/11/2017 – The IEP meeting that [Parent] requested on 8/21 was held.

24. At the IEP team meeting, several team members stated their belief that [Student] could succeed in Spanish and should be given the opportunity to try. [Parent] explained her concern that although he might be able to handle the first year, he would not be successful in the second year. Given that [Student] had to successfully complete two years of course work and had only two years to do so, there was not sufficient time to try Spanish and then switch to ASL if he failed. Ex. 1.

25. At the meeting, [Director] reiterated that, “Spanish is what we offer here” and “we could meet his needs through that class.” Nonetheless, [Director] and the other IEP team members discussed the accommodations, staff support, and schedule adjustments that might be necessary and feasible if [Student] were to take the online ASL course during the school day. Toward the end of the meeting, [Director] and [Case Manager] expressed the need for more information about what [Student] needed from the school if he took the online [Private University] course during the school day. [Case Manager] concluded the meeting by saying, “So, it sounds like we’re at an impasse right now. Like we need some questions answered.” In response, [Parent]’s advocate offered to help the team “find some answers if you want,” but asked for a PWN as “to where we’re standing right now.” Ex. 1.

26. On September 20, 2017, the School District issued a PWN denying [Parent]’s request for ASL because “the IEP team determined they could support [[Student]’s] educational needs in the Spanish class through the use of his classroom

accommodations.” Ex. 4.

27. In light of the foregoing evidence, the ALJ finds that the School District and the IEP team did not comply with their obligation under the November 2016 IEP to diligently and in good faith explore whether ASL was a suitable alternative to Spanish to fulfill [Student]’s transitional need for two years of foreign language. This is true because:

- The commitment to “explore” ASL as an alternative to Spanish meant that the School District and the IEP team had the obligation to diligently and in good faith investigate: 1) whether an ASL course was available that the School District would accept for credit; 2) whether one or more colleges of [Student]’s choice would accept ASL to meet the foreign language requirement; 3) what support and accommodations were necessary for [Student] to take the course during the school day; and 4) whether ASL would meet [Student]’s educational needs in light of his unique strengths and weaknesses.

- As noted in Finding of Fact 23, for over nine months the School District and the IEP team did virtually nothing to explore the availability of an ASL course the School District would accept for credit. As far as the record shows, the first time the School District looked for an acceptable ASL course was August 24, 2017 when, fed up by the delay, [Parent] visited the school counselor.

- The School District states in the September 20, 2017 PWN that, “there is no guarantee that all universities will accept sign language as a foreign language.” However, the relevant question is not whether “all universities” accept ASL, but whether one or more colleges of [Student]’s choosing will accept ASL. [Parent] identified three colleges of [Student]’s choice that will accept ASL. The School District presented no evidence to the contrary.

- Despite the availability of an acceptable ASL course and the existence of at least three colleges of [Student]’s choosing that will accept it, the School District did not convene a second IEP team meeting to discuss ASL until September 11, 2017, two weeks after the start of the school year, and then only at [Parent]’s insistence. This delay was inconsistent with the obligation to diligently explore and consider ASL as an alternative.

- It was not until the IEP team met on September 11, 2017 that the School District finally discussed how to support and accommodate ASL within [Student]’s school day. Had the School District taken seriously its obligation to explore ASL as an alternative, it would have considered this issue long before the start of the school year. Waiting until after the school year started to say, “we need some questions answered,” was inexcusable.

- Despite the availability of an acceptable ASL course and [Parent]’s belief that ASL was necessary to successfully satisfy the foreign language requirement, the School District and IEP team never did any research of its own to determine whether ASL would better fit [Student]’s needs. Instead, they relied solely upon the belief that because [Student] had been successful in other courses with accommodation, he could also be successful in Spanish. In so doing, they discounted [Parent]’s belief, supported by her research, that ASL would be the better fit; and discounted her reasonable concern that because of his very low proficiency in reading and writing, [Student] could not successfully

complete two years of Spanish.

- The School District's position, stated in the PWN, that Spanish is the only foreign language it offers, and that [Parent] cannot compel delivery of ASL even if the course would result in greater educational benefit, overlooks the obligation it incurred in November 2016 to diligently and in good faith explore ASL as an alternative to Spanish. Because it failed to fulfill that obligation, it failed to comply with the IEP.

Discussion

A. Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” That is to say, “the person who seeks court action should justify the request.” *Id.* at 56 (quoting C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p. 104 (3d ed. 2003)). Although parents are typically the party seeking relief, the rule applies with equal effect to a school district when it is the party seeking court action. *Id.* at 62. Because the School District is the party asking the ALJ to enter an order finding that it made a timely offer of FAPE and complied with the IEP, it bears the burden of proof.

B. The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). Central to the IDEA is the requirement that school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d); *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (“[t]he IEP is ‘the centerpiece of the statute's education delivery system for disabled children’ . . . and is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child”) (internal citations omitted).

In this case, three inquiries are necessary to decide whether the School District met its obligation to provide FAPE. First, was the November 2016 IEP reasonably calculated to meet [Student]'s specific educational needs particularly as they related to his postsecondary goal of attending college? Second, did the School District comply with the IEP? Third, if it did not, was the failure material?

C. Analysis

1) The IEP was a reasonable offer of FAPE.

A school district satisfies the substantive requirement for FAPE when it offers a disabled student “an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Andrew F.*, 137 S.Ct. at 1001.

When an eligible student reaches age 15, the IEP must include appropriate postsecondary goals and a plan for transition services to meet those goals. 20 U.S.C. §

1414(d)(1)(A)(i)(VIII) and 34 CFR 300.320(b); as modified by 1 CCR 301-8, ECEA Rule 4.03(6)(d). Transition services include courses of instruction that are “based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests.” ECEA Rule 2.51(1)(b)(i).

The issue in this case relates solely to [Student]’s postsecondary goals and transition services. There is no dispute that the November 2016 IEP included an appropriate postsecondary goal of attending college and a plan for [Student] to successfully complete two years of foreign language to meet that goal. There is also no dispute that given [Student]’s unique educational needs, it was appropriate for the School District and the IEP team to “explore avenues for sign language as an alternative” to Spanish, which was the only course the School District regularly offered. Thus, the November 2016 IEP was an offer of FAPE reasonably calculated to meet [Student]’s unique needs and make progress in meeting his postsecondary goals.

2) The School District did not comply with the IEP.

As noted in the Findings of Fact, the IEP imposed an obligation upon the School District and the IEP team to “explore” ASL as an alternative to Spanish. That necessarily meant that the School District and IEP team had to diligently and in good faith investigate whether, 1) an ASL course was available that the School District would accept for credit, 2) whether one or more colleges of [Student]’s choice would accept ASL in satisfaction of its foreign language requirement, 3) what support and accommodations were necessary to permit [Student] to take the course during the school day, and 4) whether ASL was suited to [Student]’s strengths and weaknesses.

Though these four conditions are not explicitly set out in the IEP, the IEP team could not decide whether ASL was a reasonable alternative to Spanish without the answers to these questions. Moreover, to satisfy the goal of meeting college entrance requirements, these questions had to be investigated and an IEP team decision made sufficiently far in advance of the start of the 2017/2018 school year that the decision could be implemented when the school year began. The School District’s failure to diligently explore the answer to these questions and to timely convene an IEP team meeting to make a decision was an abdication of its IEP obligation.⁴

The School District’s position, as stated in the PWN, that “we only offer Spanish,” “we think [Student] can successfully complete Spanish,” and “you can’t compel us to offer ASL even if it is the better alternative,” does not satisfy its IEP obligation. Had the School District taken this position in November 2016 it might have been justifiable. If a student can reasonably be expected to succeed with necessary support and accommodations in the course a school district offers, it has no obligation to offer something different simply because a parent thinks it would be better. *O’Toole v. Olathe Dist. Schools Unified Sch.*

4 In addition, [Director]’s e-mails to [Parent] of August 18 and 25, 2017 stating that the only option the School District offers is Spanish appear to be an improper “predetermination” of the issue. See *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004) and *K.D. ex rel. C.L. v. Dep’t of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011) (holding that predetermination of IEP placement decisions violates the IDEA).

Dist. No. 233, 144 F.3d 697, 708 (10th Cir. 1998) (a disabled child is “not entitled . . . to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential”) (internal citation omitted).

However, the School District did not take that position in November 2016. Instead, after considering [Parent]’s reasonable concern that [Student] could not successfully complete two years of Spanish but would do well with ASL, the IEP team agreed to explore ASL as an alternative. Having failed in that obligation, the suggestion now that [Student] should “try Spanish” to see if he can succeed before resorting to ASL is inadequate because there is not sufficient time for him to complete two years of ASL if he fails Spanish. Having assumed the obligation to make a timely investigation of ASL as an alternative, the School District and IEP team were bound to fulfill it. Unfortunately, they did not.

3) The School District’s failure to comply with the IEP was material.

Failure to comply with an IEP amounts to a failure to provide FAPE only if the failure was material. *Sumter County Sch. Dist. 17 v. Hefferman*, 642 F.3d 478, 484 (4th Cir. 2011) (“[T]he failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education; [however] . . . the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE.”) *See also, Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); and *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“a material failure to implement an IEP violates the IDEA.”) The Tenth Circuit has adopted a similar approach. *Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1123 (10th Cir. 1999) (“failure to comply with statutory IEP content requirements did not amount to a substantive deprivation, so there was no violation of the student’s right to a FAPE.”)

The School District’s failure to diligently explore ASL as an alternative is a substantive and material violation of the IEP because successful completion of two years of foreign language (be it ASL or Spanish) is essential to meet [Student]’s postsecondary goal. The IEP team agreed to explore ASL because of [Parent]’s legitimate concern that [Student] could not successfully complete two years of Spanish, but could do well with ASL. The evidence shows that an acceptable ASL course was available, and that at least three colleges of [Student]’s choosing would accept it. By failing to timely investigate and decide whether ASL will give [Student] a better chance of meeting his postsecondary goal, the School District and IEP team jeopardized achievement of that goal.

Summary

Because the School District is the petitioner, it bears the burden of proving that it complied with the IEP. It has not met this burden. To the contrary, the evidence shows that it did not make a timely and good faith effort to explore ASL as an alternative to Spanish, and that its failure to do so jeopardized [Student]’s chances of meeting his postsecondary goal. Therefore, there is a denial of FAPE.

Order

The preferred remedy would be for the School District to do now what it promised to do in November 2016. Unfortunately, because of the School District's delay, that is no longer practical. Because the School District did not make a timely and good faith investigation of ASL as an alternative, [Parent] felt compelled to enroll [Student] in the ASL course at her own expense. The ALJ does not fault her for doing so. Because the evidence produced at the hearing suggests [Student] is doing well in ASL thus far, he must be permitted to continue as it now offers the best chance to meet his postsecondary goal.

The ALJ therefore directs the School District to:

- 1) Reimburse [Parent] for the tuition fees and expenses she has thus far incurred for the ASL course;
- 2) Bear the cost of the tuition fees and expenses for the balance of the two-year course of study;
- 3) Provide [Student] time and access to internet facilities during the school day to complete the on-line ASL course; and
- 4) Provide staff to support [Student]'s access to the on-line course.

So Ordered

June 12, 2018

/s/ Robert N. Spencer
ROBERT N. SPENCER
Administrative Law Judge

Exhibits admitted

For Petitioner: exhibits 1-4, 7, 8, 10, 11, 14, 19, 27, 30-34

For Respondent: exhibits A, C, D, H, I, K, L