

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Salem and East Lyme Boards of Education

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Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Salem Board's failure to implement the Student's IEP during the first semester of the 2008-09 school year result in a denial of FAPE?
2. What is the appropriate remedy for the Salem Board's denial of FAPE to the Student for the first semester of the 2008-09 school year?
3. Did the Salem Board harass and/or retaliate against the Student for attempting to protect his rights under IDEA by further threatening his entitlement to FAPE with an unsubstantiated and procedurally flawed residency challenge which resulted in a denial of FAPE?
4. Did the Salem Board's failure to provide the Student a Board hearing further jeopardize his entitlement to FAPE and result in a denial of FAPE?
5. If there were such violations, what are the appropriate remedies for these violations?
6. Did the Board's actions substantially contribute to the Student's decision to unilaterally remove himself from his IEP placement and enroll at the Model Secondary School for the Deaf in Washington, D.C.?
7. Is the Board responsible for the out of pocket costs associated with the Student's enrollment at MSSD, such as travel expenses for reasonable visitation to his residence in Connecticut?¹

¹ Exhibits HO-1, HO-2

PROCEDURAL HISTORY:

The Boards received this request for hearing on December 22, and a prehearing conference convened on January 12, 2009.

Motions to Dismiss were filed by both Boards. The Motion to Dismiss filed by the Salem Board was denied. No issues submitted in this hearing by the Student's attorney were directed at the East Lyme Board of Education, so the Motion to Dismiss filed by East Lyme was granted. Any further reference to the "Board" in this final decision and order is addressing the Salem Board of Education only.

The hearing proceeded on four hearing dates: January 27, February 12, February 26 and February 27. Both counsel requested an extension of the mailing date so that briefs could be filed. Briefs were submitted on March 20. The Student's attorney appended an exhibit to his brief, and the Board's attorney submitted an objection to that document. That objection is hereby sustained, the evidentiary hearing was closed on the last day of hearing, and no further exhibits can become part of the record after the evidence is closed.

The Student's witnesses were: the Mother; the Father; Fayne Molloy, Board Director of Special Programs; Jennifer Cox, NECHEAR audiologist; Donna Leake, Board Superintendent; Holly Miller, American School for the Deaf [ASD] school psychologist; Annamarie Andrews, ASD teacher; Denise Monte, ASD educational audiologist; Donna Blain, ASD cochlear implant audiologist; Cindy Paluch, ASD director of admissions and family educational services.

The Salem Board's witness was Fayne Molloy, Board Director of Special Programs.

To the extent that the procedural history, summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Callallen Independent School Board, 835 F. Supp. 340 (S.D. Tex. 1993)

SUMMARY:

The 20 year old Student who is eligible for special education under the primary disability of hearing impairment was attending the American School for the Deaf during the 2008-09 school year. In December 2008, the Student requested this hearing to challenge the implementation of his IEP at the ASD and claimed harassment/retaliation. He also sought payment for out-of-pocket expenses associated with his unilateral placement at the Model Secondary School for the Deaf in Washington, D.C.

FINDINGS OF FACTS:

1. The Student is 20 years old and currently attending the Model Secondary School for the Deaf in Washington, D.C., as a unilateral placement. The Student's rights under IDEA transferred to him at age 18.

2. It is undisputed that the Student is eligible for special education and related services under the primary disability of Hearing Impairment, and that the Student's significant disabilities include a bilateral severe to profound hearing impairment and a complex language based learning disability. [Testimony Ms. Molloy] The Student has had surgery for his cochlear implants on two separate occasions, his right ear at age 9 and his left ear at age 17. [Exhibit P-2]
3. The Student has been active in extracurricular activities as a competitive runner, and has done extraordinarily well. [Testimony Ms. Molloy]
4. The Student's Parents are divorced. The Mother owns a home in Salem, and moved to the Washington, D.C. area for a new job. The Father lives in East Lyme. [Testimony Mother, Father]
5. As early as September the Student was interested in transferring to the Model Secondary School for the Deaf in Washington, D.C. [Testimony Mother, Ms. Paluch; Exhibit S-48]
6. In the fall 2008, the Mother had moved to Maryland, her house was for sale, and the Student attended ASD residentially. The Father lived in East Lyme. On the weekends, during the fall semester, the Student did not stay at his Mother's home in Salem. Rather, the Student was sleeping at friends' homes in Salem, at his Father's home in East Lyme, and at the Mother's apartment in Maryland. [Testimony Mother] According to the Father, the Student lives out of a suitcase, as he is an elite athlete who is pursuing his dream. [Testimony Father]
7. The Board hired an independent company to conduct a surveillance of the Student to determine if he was a resident of Salem. The Student was unaware of the surveillance which was conducted in mid November. [Testimony Mother, Exhibit P-22]
8. The Director of Special Programs had no involvement in the residency proceeding. [Testimony Ms. Molloy] The Board superintendent requested that the surveillance be done in the residency hearing to ascertain whether the Student was a resident of the town. The PPT process and the residency proceeding were two different processes. The scheduling of the residency hearing is the responsibility of the Board of Education. The disenrollment proceedings were initially dropped and then renewed as the superintendent was waiting to determine whether the residency issue could be resolved without a hearing. The Board did not deny any accommodations while the residency issue was pending. [Testimony Ms. Leake]
9. The Superintendent waited until November to proceed with disenrollment as she was aware that the Mother was involved in taking another job in Maryland. The residency proceeding had nothing to do with the fact that the Student had brought a federal court case, requested due process or was receiving accommodations. [Testimony Ms. Leake]
10. Based on the evidence presented, the Board had a reasonable basis to take actions to ascertain the residency of the Student and challenge his residency. The Board's challenge to the Student's residency did not jeopardize the Student's entitlement to FAPE and did not result in a denial of FAPE, nor was it harassment and/or retaliation for the Student asserting his rights under IDEA.

11. In July, the Salem Board convened a Planning and Placement Team [PPT] meeting to plan a program for the Student for the 2008-09 school year. The Parents requested that the East Lyme Board also attend the meeting. [Testimony Mother] During the previous school year, the Student had attended East Lyme High School for his senior year. East Lyme High School is the home high school for Salem students as Salem does not have its own high school. During the 2007-08 school year, the Student made good progress and completed all of his high school graduation requirements, the PPT agreed that the 2008-09 school year would be an additional year for the Student to address deficits in working independently and developing independent living skills. [Testimony Ms. Molloy]
12. The Mother suggested that the Student be placed at the American School for the Deaf [ASD]. The PPT agreed to the ASD placement as it was best prepared to offer the additional academics to see if the Student's reading level could be improved, plus ASD offered vocational experience in tech ed, working on life skills in the dorm and vocational experience in the community. [Testimony Ms. Molloy]
13. The Student was placed in the Excel program at ASD, which is a nontraditional program that goes beyond 4 years of high school. [Testimony Ms. Paluch]
14. At the time of the July PPT meeting, the Mother communicated about her fellowship in the Washington D.C. area. [Testimony Mother] The Mother had indicated at that time that she had been offered a position in the Washington D.C. area, and was going to start in middle of September and was putting her house on the market. [Testimony Ms. Molloy]
15. The Student attended the summer program at ASD. In an email, the Mother told the Salem Board that the FM system was not necessary for the summer program. [Exhibit S-62]
16. After the July PPT, the Mother objected to a mention in the IEP that this was a transition year, so the IEP was amended and that statement was deleted from the IEP. [Testimony Ms. Molloy; Exhibits S-52, S-57, S-4] The amended IEP was sent to the Student with that requested deletion. [Exhibit P-3]
17. The IEP provided for placement at the American School for the Deaf during the 2008-09 school year with a dormitory life skills component. ASD provides a total communication environment for the Student, with spoken and signed communication. His program included four academic blocks [two English, one geometry and one science] and four vocational blocks. The IEP also provided that the program at ASD would not preclude the Student's participation in private track experiences. The Student also was to complete the summer program at ASD. The IEP noted that the Student would participate in ACT prep classes and repeat the testing during the 2008-09 school year. It was noted that the Student had profound bilateral hearing loss, with cochlear implants for both ears.[Exhibit P-3]
18. The Student's goals for the 2008-09 school year included: 1. The Student will increase his language and communication skills; 2. The Student will improve his written language skills; 3. The Student will improve basic math skills; 4. The Student will increase his knowledge in the area of algebra and geometry; 5. The Student will improve his study skills; 6. The Student will

define employment options and his own career goals and then identify strategies for reaching his goals; 7. The Student will increase his independent living skills; 8. The Student will improve speech intelligibility; 9. The Student will increase his receptive and expressive sign language skills. [Exhibit P-3]

19. The Student's accommodations included assistive technology, FM system, captioning, teacher notes, additional and/or modified worksheets, class content notes, modified tests, rephrase test questions orally and with sign as needed, extra time on tests, modified long term projects, grades based on IEP, write assignments in planner, place and organize handouts and notes in binders, preferential seating – maintain line of sight, maximize use of FM, ongoing communication by case manager to monitor classroom progress and self advocacy skills, and additional instructional strategies. [Exhibit P-3]
20. The Student's related services at ASD included speech and language and aural habilitation.[Exhibit P-3]
21. Early in the fall, the Student told staff members at ASD that he was thinking of transferring to the Model Secondary School for the Deaf in Washington D.C., because his Deaflympics coach was in Virginia and he would be close to the coach. The Student also said he didn't like the dorm rules either. [Testimony Ms.Miller]
22. On September 25, 2008, the Mother contacted the Board to have them correct an error in the transcript so that it could be forwarded to the Model Secondary School for the Deaf, as the Student was applying to that school. [Exhibit S-42]
23. The Student has the two cochlear implants to aid his hearing, and has utilized an FM system as an accommodation in classroom instruction. [Exhibit S-63, Testimony Ms. Molloy]
24. The goal with an FM system is to reduce distance, reduce reverberation and reduce background noise so you hear the primary source which is the teacher. The FM system is not necessary when the Student is in close proximity to a teacher. The rooms are small so there is no concern for reverberation at ASD. [Testimony Ms. Blain] The class size at ASD was 5 to 6 per class, with up to 10 in a vocational technical class. [Testimony Ms. Paluch]
25. According to the audiologist, if you are within 3 feet of a listener, and in a small group of 4 or 5, the use of an FM system with the cochlear implant would not be necessary. [Testimony Ms. Cox] The Student does not require an FM system with his cochlear implant at all times. [Testimony Ms. Blain]
26. The ASD cochlear implant specialist checked the Student's implants regularly. The cochlear implant specialist saw the Student many times when he was having issues with his implants, such as when they were not receiving full charge and when the coil broke. The specialist also mapped the implants in September and then did remappings. [Testimony Ms. Blain]
27. During the summer program at ASD, the Student did not utilize or access an FM system, even though FM was available as a possible accommodation. The Mother indicated that the Student

had told her the summer instruction was very individualized and that the FM system would not be helpful. [Exhibit S-62]

28. Due to an unforeseen problem with the renovation process at ASD, ASD didn't have FM in all of the Student's classes at the beginning of the fall semester. [Testimony Ms. Monte, Ms. Paluch, Ms. Molloy] As of mid November, these problems had been resolved and the FM system was available in all academic courses. [Testimony Ms. Paluch, Ms. Molloy]
29. Use of an FM System was not appropriate for the vocational woodshop and automotive shop classes that the Student was taking. Woodshop didn't have FM, as there were a few safety issues involved in using an FM system in the woodshop area. If a teacher is talking, and the students are using FM, they might not hear an immediate safety issue of another person talking or of the machinery. [Testimony Ms. Monte] In addition, the hanging cords, even if placed underneath the shirt of the wearer of the transmitter, could pose a safety issue if the cord got caught in machinery. [Testimony Ms. Blain]
30. The Student was in the automotive shop, which did not have an FM system as the teacher was a non-speaker, and taught by demonstration. [Testimony Ms. Blain]
31. The Student never complained to the ASD audiologist that he was unable to hear in class. [Testimony Ms. Monte]
32. ASD provided accommodations including small class size, smart boards, one on one assistance, class outlines and instruction in sign language. [Ms. Monte]
33. One of the Student's English courses did not have an FM at the beginning of the school year, but that classroom is smaller, has a fairly quiet HVAC system and the walls are fairly sound absorbent. With that type of classroom, FM would not be necessary for the Student to access his education. [Testimony Ms. Monte]
34. The Student does not require an FM system to receive educational instruction. [Testimony Ms. Monte]
35. The Student had extraordinary access and excellent service from the cochlear implant specialist at ASD. [Testimony Ms. Blain]
36. While it does not appear that the ASD staff notified the Parents and the Board director that the Student was not receiving FM in all of his classes at the beginning of the school year [Testimony Ms. Paluch], the Student who was 19 years old at the time was aware of it. While this might be a mere technical violation of the IEP, the Student never indicated that he had difficulty hearing and participating in the small classrooms, difficulty accessing his education, nor was he unable to benefit from his education at ASD. On the contrary, the evidence supports that the Student was able to access his education and progress well at ASD without the use of the FM system, as he had over the summer session.
37. ASD carried out the Student's IEP and did not change his goals and objectives. [Testimony Ms. Paluch]

38. The Mother had a lengthy discussion about the English class for the Student during the open house in November, and the ASD staff was responsive to the requests for changes. [Testimony Mother] The issues involving the English course were that one was too difficult, and one was too easy. The ASD staff responded swiftly and appropriately to requests for changes in the English courses. [Testimony Ms. Andrews]
39. While the Parents were aware about the lack of availability of FM in some of the Student's classes as of the open house on November 11, they didn't communicate this to the Salem Board, complain to ASD or ask for a PPT meeting until December 1. [Testimony Father] The Parents were very experienced in the PPT process and had previously filed for due process regarding the Student's educational program. The almost three week delay in requesting a PPT, or even contacting the Board or ASD, belies their claim that the FM system was a critical component of the Student's program.
40. As the PPT liaison the admission director met with the Student weekly during the first weeks of school. During those meetings, he said "things were cool, fine," and never indicated that he had any problems. [Testimony Ms. Paluch]
41. On December 2, the Board director received emails from the Mother, but received no other such complaints from the Parents from the time the Student started at ASD until December 1. [Testimony Ms. Molloy] These emails were copies of emails that were sent directly to ASD by the Mother. [Exhibit P-7] Prior to December 1st, the Mother did not communicate to the Board director about any of these issues at ASD. [Testimony Mother]
42. When the Board Director was forwarded a copy of complaints of December 1 [Exhibit P-7], she called ASD and was told that they addressed the issues. The Director wanted to convene a PPT immediately to address the Parents' and Student's concerns, but was informed that that was not a possibility due to the family's scheduling conflicts and difficulty in being present in Connecticut for a PPT. [Testimony Ms. Molloy] In an email, the Mother indicated that she is working in Baltimore and only commuting to Connecticut some weekends. In that email, the Mother said that it was "not essential that the meeting happen before the holiday break – as long as we are communicating on and developing solutions to the issues that need to be resolved." [Exhibit S-24]
43. The first time the Director learned of any these issues – computer access issue, ACT accommodations, difficulty leaving campus for extracurricular running activities and FM system problems – was when she was copied in the December emails. [Testimony Ms. Molloy, Exhibit S-28]
44. The primary reason for the Parent contacting ASD and the Board at the time was because of her annoyance that the ACT accommodations were not in place for the December 2 test date. On December 1, when the Student told the Mother that he was going to be given the ACT test without the accommodation of extra time, the Mother was furious. The lack of ACT accommodations "broke the camel's back" for the Mother. [Testimony Mother]

45. The Student was taking the ACT for college entrance and ultimately took the test in January. This one month change did not affect the Student's ability to go to college. [Testimony Mother] Moreover, the IEP did not provide for a date that the ACT would be taken; rather it notes that the ACT would be taken during the 2008-09 school year. [Exhibit P-3]
46. When the director received the request for PPT in the December 2 email, she emailed the Mother back immediately and asked her administrative assistant to schedule the PPT meeting. The administrative assistant began working on scheduling the PPT meeting on that same day. [Testimony Ms. Molloy] The Board administrative assistant contacted the Mother to schedule the PPT meeting. [Testimony Mother]
47. The Board was able to schedule the PPT meeting for December 17, but the Parent requested that it be held on one of three dates: Friday, Jan. 9, Monday, Jan. 12 or Friday, Jan. 16. The PPT was scheduled on one of the dates suggested by the Mother because she was working in Baltimore and only commuting to Connecticut some weekends. [Testimony Mother, Ms. Molloy, Exhibit S-25] Moreover, the January 16 date was the one that the Father indicated would be the easiest for him to attend. [Exhibit S-25] The PPT meeting date was scheduled in accordance with the specific request by the Mother and Father for dates that would not conflict with their schedules. The Mother was emailed on December 8 to confirm that ASD staff was available at her selected date of January 16. Therefore, the Board had accommodated the Mother's requested date for the PPT. [Testimony Mother, Father; Exhibit P-9] The Board did not stonewall, but responded swiftly and appropriately to the request for a PPT, scheduling it on the exact date that the Parents selected.
48. The Director provided the written notice of PPT on January 5. While the parties were all notified of the January 16 PPT meeting prior to that written notice, and the written notification of the January 16 PPT meeting on January 5 was timely, there was a slight delay in the mailing out of the notice due to the holiday vacation schedule of the administrative assistant. The Director went in during the holiday vacation to personally ensure that the notice went out to all parties. [Testimony Ms. Molloy, Exhibit P-7a]
49. The Parents and Student requested this hearing on December 21. [Exhibit HO-1]
50. The Parents and Student also requested a residency hearing on December 21, and requested documentation that the Board relied upon. Prior to Christmas, and per their request, the Parents and Student received a copy of the surveillance report. [Testimony Mother, Father]
51. The Student made good progress in his courses at ASD, whether or not FM was present in the class. [Testimony Father, Exhibit S-165]
52. At the resolution meeting on January 5, the PPT scheduled for January 16 was postponed by the Parents. The Mother testified that they had a productive discussion at the resolution meeting, and decided therefore that there was no need for the PPT meeting. [Testimony Mother] The Board Director understood that all of the issues set forth in the hearing request were resolved at the resolution meeting. [Testimony Ms. Molloy]

53. At the resolution meeting on January 5 there was no discussion brought up by the Parents and Student that the Student would be attending the Model Secondary School for the Deaf. [Testimony Father]
54. Prior to that time the Student had applied to both the Maryland School for the Deaf and the Model Secondary School for the Deaf in Washington, D.C. [Testimony Mother]
55. After the resolution meeting, there was an amendment made to the Student's IEP that changed counseling to 15 minutes per week, rather than on an as needed basis. [Testimony Mother]
56. On January 14, the Board received a copy of the Student's acceptance letter from the Model Secondary School for the Deaf in Washington D.C. [Testimony Ms. Molloy, Exhibit S-2]
57. By letter dated January 11, the Student submitted notification that he was unilaterally placing himself at the MSSD, a tuition free school, effective January 22, 2009. [Testimony Ms. Molloy, Exhibit P-17] On January 15, the Student revised his unilateral placement notification, indicating the date of his unilateral placement was effective as of the close of business, Friday, January 16. [Exhibit S-0]
58. The Student took the ACT at ASD on January 13, and began at MSSD on January 22. [Testimony Father]
59. During his first semester, the Student's goals and objectives were implemented at ASD. [Testimony Ms. Molloy]
60. The program at ASD provided the Student an opportunity to develop his independent living skills, participate in individualized courses, live in a dorm and have his speech and language needs met in one spot. The qualifications of the ASD staff that provided educational services to the Student in terms of length of service and credentials were outstanding. [Testimony Ms. Molloy]

DISCUSSION/CONCLUSIONS OF LAW:

The Student brought this action in accordance with the Individuals with Disabilities Education Act which provides for special education and related services to children with disabilities, from birth through age 21.

The initial issue to be determined is whether the Salem Board failed to implement the Student's IEP, and whether that implementation resulted in a denial of a free appropriate public education [FAPE] to the Student.

The Supreme Court standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Education Plan [IEP] is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 206-207.

The Board fully complied with the procedural requirements of the Act.

As to the second inquiry, the IEP as written and as implemented was reasonably calculated to enable the Student to receive educational benefit, and did so. The audiological specialists confirmed that the Student did not require FM in all environments at ASD to obtain educational benefit. The lack of FM in the first couple of months in some of the classes did not result in a denial of FAPE. The Student was in low enrollment classrooms, in small classrooms with no reverberation. An FM system would be necessary for the Student in lecture hall classrooms with more than the several students who were in the ASD classes. He was not enrolled in such classes at ASD. He routinely met with the audiologist and never complained that he could not hear in his classes. Moreover when the Student left ASD, with virtually no notice of his unilateral placement, FM was in all of his academic classes.

Any additional claimed deficits in the implementation of the program were also of no significance. The Parents claimed that the Student’s track training schedule was thwarted by ASD, but the Board and ASD did not interfere with the track training schedule. Instead, ASD took reasonable steps to ensure for the safety of the Student who went off campus for track training. The Student was able to take the ACT in a timely manner; any claim that the delay in setting up accommodations was a significant issue is a red herring – nothing in the IEP provides that the ACT must be taken by a certain

date. And, the evidence does not support the Student's claim that he lacked access to the computer because he had some type of log-in problems which were ultimately resolved.

This is not the forum in which to determine whether or not the Student was a resident of the Board's town. Nevertheless, it is found that there was a good faith belief that residency was an issue, the Board acted appropriately, and the Board did not threaten the Student's entitlement to FAPE, nor take actions in the residency proceedings that resulted in a denial of FAPE.

A LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. 34 CFR 300.148 (a). The Student left ASD and enrolled in the tuition-free MSSD, although FAPE was made available and was being provided to the Student. Interestingly, the only alleged deficit in the program at ASD at the time of the Student's notice of his precipitous departure was that he had not yet taken the ACT. By the time he had left, he had been administered the test. The FM system was in place, the Student was allowed to participate in a more extensive track training schedule, and he had full use of the computer system.

There may have been a number of reasons that the Student decided to leave ASD – to be near his training coach, to attend a different school, to be closer his mother. Nevertheless, there is no evidence that supports the conclusion that the Board's program was inappropriate or was not appropriately implemented, nor that supports a conclusion that the Student was harassed/retaliated against for attempting to protect his IDEA rights. The Board's actions did not substantially contribute to the Student's decision to unilaterally remove himself from his placement and enroll in the Model Secondary School for the Deaf in Washington, D.C. The Board is not responsible for the out of pocket costs

associated with that enrollment at MSSD, nor for any claimed compensatory education or special education trust.

FINAL DECISION AND ORDER:

1. The Salem Board did not fail to implement the Student's IEP during the first semester of the 2008-09 school year, and the implementation of the Student's IEP did not result in the denial of FAPE.
2. As there was no denial of FAPE, the Student is not entitled to any remedy for such alleged denial of FAPE.
3. The Salem Board did not harass and/or retaliate against the Student for attempting to protect his rights under IDEA.
4. The Salem Board did not fail to provide the Student with a Board hearing and therefore did not further jeopardize his entitlement to FAPE nor result in a denial of FAPE.
5. As there were no such violations, there are not remedies available to the Student.
6. The Board's actions did not substantially contribute to the Student's decision to unilaterally remove himself from his IEP placement and enroll at the Model Secondary School for the Deaf in Washington, D.C.
7. The Board is not responsible for any of the costs associated with the Student's enrollment at MSSD, is not responsible for any claimed compensatory education and is not responsible for setting up a special education trust for the Student as there was no denial of FAPE, and the Student elected to leave ASD and attend MSSD.