

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
February 20, 2019

PARENT,
on behalf of STUDENT,¹

Date Issued: February 20, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0326

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: February 6, 2019

Respondent.

Office of Dispute Resolution, Room 111
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 Petitioner (MOTHER), 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.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) since June 2018, by not ensuring that Student has had an assistive technology communication device, as specified by Student’s Individualized Education Programs (IEPs), at Student’s out-of-state residential placement.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on December 12, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on December 13, 2018. On January 2, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

The due process hearing was held before the undersigned impartial hearing officer on February 6, 2019 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 Petitioner appeared in person and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by LEA MONITOR and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called SPEECH PATHOLOGIST 1 and SPEECH PATHOLOGIST 2 as additional witnesses. DCPS called as witnesses RESOLUTION SPECIALIST and LEA Monitor. Petitioner's Exhibits P-2 through P-14 were admitted into evidence without objection. Exhibit P-1 was withdrawn. DCPS' Exhibits R-1 through R-21 were all admitted into evidence without objection. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written briefs.

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 issue for determination, as certified in the January 3, 2019 Prehearing Order, is:

Whether since June 22, 2018, DCPS has denied Student a FAPE by failing to provide a tablet computer with Proloquo2go software or equivalent AT device.

For relief Petitioner requests that the hearing officer order DCPS to provide Student with a tablet computer with Proloquo2go software or an equivalent assistive technology (AT) device. In addition, Petitioner seeks an award of compensatory education for DCPS' allegedly not providing the AT device since June 2018.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE adult is a legal resident of the District of Columbia. Testimony of Mother. By order entered June 13, 2018, Student was determined by the Superior Court of the District of Columbia to be an incapacitated individual and Mother was appointed Student's General Guardian. Hearing Officer Notice.
2. On September 8, 2015, Student's eligibility for special education was confirmed by DCPS under the IDEA disability classification Autism Spectrum Disorder (ASD). Student's IEP team met for an annual IEP review on April 26, 2016. At the time, Student was enrolled in SPECIAL EDUCATION DAY SCHOOL, a private school in suburban Maryland. Student's April 26, 2016 DCPS IEP provided for full-time specialized instruction outside the general education setting. The IEP stated that Student was able to write, as well as use a voice output device (VOD) (an iPad with Proloquo2go software installed), signs, gestures, and verbal approximation to effectively communicate. The IEP provided for Student to have an iPad as AT for communication, with software. Exhibit P-2.
3. Since reaching the age of puberty, Student's behavior problems increased.

Student became stronger and more difficult to handle. Student's sibling was fearful and Mother struggled to manage Student. An in-home aide was available to provide Applied Behavior Analysis (ABA) therapy, but Student continued to have outbursts, some of which were unpredictable. Exhibit R-11.

4. On March 22, 2017, Student was placed by Mother and MANAGED CARE ORGANIZATION, affiliated with the District of Columbia Department of Healthcare Finance, at RESIDENTIAL FACILITY, a residential setting in Virginia, to address Student's medical, behavioral, and functional issues associated with a seizure disorder and autism. Testimony of LEA Monitor, Exhibit R-11. In a November 2018 psychological evaluation report by a Residential Facility psychologist, Student was reported to be less physically aggressive and self-injurious, although Student continued to engage in both at a level that creates significant management problems. Student was reported to be intrusive, to disrupt by jumping around and banging on windows and furniture, to steal food from peers and to grab and hit peers and staff. Student was reported to be able to communicate needs by using single words or short phrases and to assist with activities of daily living (ADL's). Student's classroom teacher noted that Student makes loud noises during instruction and is disruptive, that Student needs prompting to stay seated and refuses to do work and that Student had not made any academic progress. For adaptive functioning, Student was reported to be functioning below the 1st percentile in the Extremely Low range. As tested in March 2018, Student's receptive language and visual-motor integration fell in the Severely Impaired range. Overall results for Student were consistent with severe Intellectual Disability. Exhibit R-11.

5. On February 8, 2018, DCPS convened an IEP team annual review meeting

for Student. Mother, the DCPS representatives and Residential Facility representatives all participated by telephone. Student's IEP present levels of performance were mostly carried over, unchanged, from the April 26, 2016 IEP. Student's Least Restrictive Environment (LRE) placement category was changed to residential facility. The February 8, 2018 IEP continued to provide for Student to have an iPad with software as AT for communication. Exhibit P-3.

6. On November 14, 2018, DCPS convened another IEP meeting for Student. LEA Monitor and Residential Facility's Program Coordinator attended by telephone. Mother and her representatives did not participate. To draft the IEP, LEA Monitor continued to use mostly old data from the April 26, 2016 DCPS IEP. The November 14, 2018 IEP continued to provide for Student to have an iPad with software as AT for communication. Exhibit R-12.

7. DCPS developed an amended IEP for Student on January 31, 2019, after the due process complaint was filed. Most of the amended IEP content is carried over from the April 26, 2016 IEP and the amended IEP continues to provide that Student will have an iPad as AT for communication. Exhibit R-15.

8. Residential Facility does not allow residents to have iPad devices because of HIPAA (Health Insurance Portability and Accountability Act of 1996) Privacy Rule concerns for other patients and because of potential for physical injury to patients from abuse of the device. Since being placed at Residential Facility, Student has not had an iPad with Proloquo2go software or another VOC device for communication. Testimony of LEA Monitor. DCPS first became aware that Student did not have access to an iPad at Residential Facility at the November 14, 2018 IEP team meeting. Testimony of Resolution Specialist.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument 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 the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. Petitioner must bear the burden of persuasion in this case. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

Has DCPS denied Student a FAPE since June 22, 2018, by failing to provide Student a tablet computer with Proloquo2go software or an equivalent AT device?

Student is severely disabled by Autism Spectrum Disorder, which, among other challenges, limits Student's ability to communicate without supports, including a voice output device (VOD). Since at least April 2016, Student's DCPS IEPs have specified that Student would have an iPad tablet computer with Proloquo2go voice output software. In March 2017, for non-educational reasons, Student was placed by another District agency and Mother at Residential Facility. Student has never had access to a computer

VOD at Residential Facility because that institution, out of privacy and safety concerns, prohibits patients from having iPad-type computers. DCPS only learned in November 2018 that Student did not have the iPad at Residential Facility.

Petitioner contends that since June 22, 2018, by not ensuring that Student had an iPad at Residential Facility, DCPS failed to implement Student's IEPs. DCPS argues that it is not responsible for Student's not having the iPad VOD because the decision to place Student at Residential Facility, which does not allow iPads, was made by Mother and another District agency. The failure to implement an IEP is a procedural violation under the IDEA. For that reason, the "hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies . . . caused a deprivation of educational benefits." *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34, 49 (D.D.C. 2016), citing 20 U.S.C. § 1415(f)(3)(E)(ii)(III). In this case, assuming that not having the iPad VOD at Residential Facility deprived Student of educational benefits, this was not caused by DCPS' failure to implement Student's IEP, but rather by Residential Facility's prohibition of such devices. In her due process complaint, Petitioner acknowledges that DCPS provided Student with the iPad VOD, which Student was able to use at Nonpublic Day School. Student lost access to the iPad VOD because Residential Facility barred such devices, not due to DCPS' not providing the VOD.

Notwithstanding, under District law, DCPS is solely responsible for making a FAPE to Student. See 5E DCMR § 3002.1(b). Even though Mother and another D.C. agency were responsible for placing Student at Residential Facility in March 2017, DCPS had a continuing obligation to ensure Student was provided a FAPE. See D.C. Code § 38–2561.06. That included the obligation to revise Student's IEP, as appropriate, in response to changed circumstances. See, e.g., *Pinto v. District of Columbia*, 938 F. Supp.

2d 25, 30 (D.D.C. 2013) (IEP must be revised regularly in response to new information regarding the child's performance, behavior, and disabilities.) When Student's placement was changed from Special Education Day School to Residential Facility in March 2017, the IDEA mandated that DCPS ensure that Student's April 26, 2016 IEP was promptly reviewed and appropriately revised. If that had occurred, DCPS would have learned that Student was not allowed to use the iPad VOD at Residential Center and Student's IEP team could have considered alternative AT or other services to address Student's communication needs. To date, a DCPS IEP team has still not comprehensively reviewed and appropriately revised Student's IEP.

DCPS' failure since June 22, 2018 – the date asserted in Petitioner's claim for relief – to ensure that Student's IEP team reviewed and revised Student's IEP, as appropriate, was a procedural violation of the IDEA. *See, e.g., D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18 (D.D.C.2009) (DCPS' delay in convening the team meeting amounts to a failure to meet procedural deadline.)

Procedural violations may only be deemed a denial of FAPE 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 § 300.513(a)(2). I find that by not ensuring that Student's IEP was appropriately revised since June 22, 2018, to account for Residential Facility's prohibition of tablet computer VODs and to substitute alternative ways to meet Student's communication needs, DCPS impeded Student's right to a FAPE and impeded

Mother's opportunity to participate in the IEP decision making process. This was a denial of FAPE.

Remedy

Petitioner requests that I order DCPS to provide Student with a tablet computer with Proloquo2go software or an equivalent assistive technology (AT) device. In addition, Petitioner seeks an award of compensatory education for DCPS' not providing an iPad to Student since June 2018. I decline to order DCPS to provide Student with a tablet computer because Residential Facility prohibits such devices.

With regard to compensatory education, that inquiry requires "figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position." *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017). The iPad VOD device was provided in Student's IEPs as Assistive Technology (AT) to enhance Student's communication capabilities.² Petitioner's compensatory education witness, Speech Pathologist 2, was unable to make a recommendation for compensatory education because he lacked data on Student's baseline communication skills in June 2018 and on whether those skills had deteriorated. As compensatory education, I will order DCPS to fund a speech and language assessment of Student by an independent speech-language pathologist qualified to evaluate students on the autism spectrum, who have severe communications deficits. In addition to recommending future speech and language services and AT for Student, the speech-language pathologist will be charged with assessing what, if any, deterioration in communications skills Student has suffered since June 2018 as a result of not being provided an

² In the IDEA Regulations, "Assistive technology" means a device "that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 34 CFR § 300.5.

appropriate alternative to the iPad VOD or other service in the IEP to enhance Student's communication capabilities. As part of the assessment, the speech-language pathologist shall be charged with recommending what services would be calculated to get Student back to the position Student would have been after June 2018, had Student's IEP been revised to provide appropriate alternative AT or other communication enhancement services. DCPS will then have the option to either provide those recommended compensatory services or file a new due process complaint regarding this aspect of the provision of FAPE to Student.

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE in this case, not later than 21 school days from the date of this decision, subject to obtaining Petitioner's consent, DCPS shall schedule a publicly funded speech and language assessment of Student by an independent speech-language pathologist qualified to evaluate students on the autism spectrum with severe communications deficits. In addition to recommending future speech and language services and AT for Student, the speech-language pathologist shall be charged with recommending what services would be calculated to get Student back to the position where Student would have been, had Student's IEP been appropriately revised by June 2018 to provide alternative AT or other communication enhancement services. Upon receipt of the independent speech-language pathologist's report and compensatory services recommendation, DCPS must promptly provide the recommended compensatory services. This is without prejudice to DCPS' right to file, without unreasonable delay, its own due process complaint regarding this aspect of the provision of FAPE to Student;
2. Within 45 days of the issuance of this decision, DCPS shall ensure that a duly constituted IEP team, including the parent, is convened for Student to comprehensively review Student's IEP and make revisions, as appropriate, in accordance with this decision and 34 CFR § 300.324 *et seq.* The revised IEP must be based upon the IEP team's careful consideration of Student's present levels of achievement, disability and potential for growth, *see Andrew F., supra*, 137 S.Ct. at 999, and shall set out a plan for pursuing academic and functional advancement. DCPS must ensure that

the IEP team is provided all of the data and information on Student the team reasonably requires to determine Student's current education needs and

3. All other relief requested by the Petitioner herein is denied.

Date: February 20, 2019

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