

REDACTED



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
 W [REDACTED], by his Parents)
 [REDACTED],)
 Petitioners)
)

Case No. E-20-003

Appearances

FOR PETITIONERS
Pro Se

FOR RESPONDENTS

Nicole A. Smith, Esq., Department Counsel, Defense Office of Hearings and Appeals
Kelly M. Folks, Esq., Department Counsel, Defense Office of Hearings and Appeals

August 9, 2021

Decision

CERVI, Gregg A., Administrative Judge

Petitioner W [REDACTED] (hereinafter “W” or “child”), by and through his parents (hereinafter Petitioners, Mr. S, or Mrs. S), filed a petition for due process. The petition generally alleges that the special education (SPED) program offered at a Department of Defense Education Authority (DoDEA) school in [CITY 1], violated the Individuals with Disabilities Education Act (IDEA) and DoD regulations¹ by failing to provide their child a free appropriate public education (FAPE). Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) represented respondents DoDEA, DoDEA

¹ Individuals with Disabilities Education Act (IDEA) 20 U.S.C. ¶ 1400 *et seq.*, was implemented in DOD by Department of Defense Instruction (DoDI) 1342.12, Provision of Early Intervention and Special Education services to Eligible DOD Dependents, June 17, 2015 (Instruction); and Department of Defense Manual (DoDM) 1342.12 Implementation of Early Intervention and Special Education Services to Eligible DoD Dependents, dated June 17, 2015 (Manual).

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[REDACTED] [REDACTED] District, and [REDACTED] ([SCHOOL 1]) [REDACTED] Middle School (Respondents). At the time the petition was filed, W was a student at [SCHOOL 1] (hereinafter [SCHOOL 1] or [REDACTED]), a DoDEA school.²

PROCEDURAL HISTORY AND PRELIMINARY MATTERS

Petitioners filed a Petition for Due Process on December 14, 2020, with the Director, Defense Office of Hearings and Appeals (DOHA). (Petition) (Hearing Exhibit (HE) 1) On December 15, 2020, the Director, Defense Office of Hearings and Appeals, assigned me to serve as an impartial hearing officer, and Petitioners were so informed. (HE 2)

On December 22, 2020, Respondents requested an extension to January 7, 2021 to answer the petition, because of the unavailability of [SCHOOL 1] personnel. On December 22, 2020, I granted Respondents' request for good cause shown.

On January 4, 2021, DC notified Petitioners of the delay in scheduling the mandatory resolution meeting³ due to the unavailability of [SCHOOL 1] personnel. DC asked Petitioners whether they desired to hold a resolution meeting or waive it. Petitioners replied that a resolution meeting was preferable. Petitioners noted that they would wait for Respondents' answer to the Petition before deciding on a course of action. On January 7, 2021, DC submitted Respondents' Answer to Petitioners' Request for Due Process. (HE 3)

On January 17, 2021, Petitioners submitted a letter to DoDEA [REDACTED] [REDACTED] District, rejecting a proposed resolution meeting scheduled for January 22, 2021, due to the failure of DoDEA to meet mandatory resolution timelines and based on their previous failure to reach an agreement in mediation.⁴ On January 21, 2021, DC replied that Petitioners previously indicated their preference for a resolution meeting and informally agreed to wait for the respondents' answer to the petition. DC argued that Petitioners' email of January 4, 2021, was an informal agreement to extend the timeline in which they were to hold the resolution meeting. However, DC expressed their readiness to schedule the due process hearing while remaining open to a resolution meeting or settlement with the Petitioners in the interim.

On January 20, 2021, Petitioners emailed notification that as of January 17, 2021, they "...relocated due to permanent change of station...." They noted their child enrolled in a "different DoDEA school." On January 22, 2021, Petitioners again emailed notification that they were in mandatory quarantine in [CITY 2] for 10 days due to COVID-19 pandemic restrictions, and that their child was enrolled in another DoDEA school,

² The Department of Defense Educational Activity (DoDEA) [SCHOOL 1] [REDACTED]

³ Manual, encl. 6 § 7.

⁴ Manual, encl. 6 § 4.

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[SCHOOL 2] Middle School ([SCHOOL 2]), [REDACTED], [CITY 2], which was instructing virtually.

I initiated a conference call with both parties on January 25, 2021. Various background and scheduling matters were discussed, including the inability for an in-person due-process hearing in [CITY 2] and the need to maneuver through other scheduling obstacles due to the COVID-19 pandemic restrictions in place in [CITY 2], [CITY 1], and within DoD. In addition, the parties were encouraged to attempt to resolve the matter through collaborative consultations with both DoDEA schools.

Respondents notified me that the parties participated in a resolution meeting on February 2, 2021, but they were unable to come to an agreement. Petitioners also filed a Motion *in Limine* (HE 4) on February 2, 2021, objecting to Respondents access and use of their child's "personally identifiable information" (PII) purportedly obtained from or shared between [SCHOOL 1] and [SCHOOL 2] schools. DC responded to the motion on February 3, 2021 (response dated February 2, 2021). (HE 5). I denied Petitioners' motion on February 8, 2021. (HE 6)

A second conference call with the parties was held on February 17, 2021. Petitioners discussed additional background information regarding their positive experience with [SCHOOL 2] and their future plans when their assignment in [CITY 2] ends and they return to the [REDACTED]. They also agreed to allow Respondents to set up a meeting with [SCHOOL 2] officials to try to resolve the dispute. However, Petitioners did not want DoDEA counsel or DC involved.

On March 15, 2021, Petitioners notified me that they spoke to the [SCHOOL 2] school Principal, and concluded that a resolution of the due process complaint involving potential assessments and services provided by [SCHOOL 2] was not possible because [SCHOOL 2] administrators were unaware of the details of the complaint. As a result, Petitioners requested I schedule the due process hearing at the end of March or early April at the conclusion of spring break. Respondents noted their availability for a hearing beginning May 20, 2021, that would continue until completed, and Petitioners concurred. On April 2, 2021, I sent the parties a Pre-Hearing Order, setting the hearing dates and deadlines for amended pleadings and the exchange of hearing exhibits and witness lists. (HE 7)

On April 29, 2021, Petitioners filed an Amendment to the Petition for Due Process, amending their claim for relief (labeled as their proposed resolution). On May 3, 2021, Respondents filed an objection to the amended petition and a motion to extend times for document production and the hearing. On May 11, 2021, I sent the parties an Order on the Amended Petition and Respondents' Objections, accepting the amended petition and overruling Respondents' objections and request to change the hearing date. (HE 8) On May 14, 2021, DC filed Respondents' Answer to Petitioners' Amended Request for Due Process. (HE 9)

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On May 17, 2021, I held a pre-hearing online conference call and test of the Defense Cyber Command's Defense Collaborative System (DCS)⁵ video teleconference system. During the teleconference, Petitioners raised objections to the timeliness of Respondents' proposed exhibits because they could not open the electronic file and had to request that DC resend the file in separate emails. DC immediately complied and Petitioners' acknowledged receipt. Petitioners then asked that Respondents' exhibits be excluded because of their inability to open them by the due date. I denied Petitioners' motion on the grounds that the documents were known to Petitioners, they were submitted per the timeline set out in my Order, and Petitioners had sufficient time to review them before the hearing once they were able to open the files. Petitioners also objected to Respondents' witness list because they claimed the witnesses were untruthful and biased against them. I denied Petitioners' motion to exclude the DoDEA witnesses.

During the conference call, I raised apparent errors in Respondents' Answer to the Petition and similar references in the Respondents' Answer to the Amended Petition. The parties agreed to amend the Respondent's answer to the Petition for Due Process as follows: delete from the first page, first paragraph, "[REDACTED]" (with the same deletion in the Answer to the Amended Petition); and change in the first paragraph on page nine, section "K," "Quarter 1 (dated 1/16/20)" to "Quarter 1 (dated 10/16/20)." Petitioners did not object to the amended pleadings. I inquired as to whether Petitioners desired to utilize the assistance of counsel or a personal representative with knowledge of the subject matter. Petitioners confirmed their desire to represent themselves and to have a closed hearing to protect the privacy of the child.

On May 18, 2021, I sent the parties a formal Notice of DCS Hearing. (HE 10) The hearing was held from May 20 to May 25, as scheduled. Petitioners and five witnesses for Respondents testified. The proceedings were transcribed and published in four volumes.⁶ (Tr.) Petitioners' exhibits (PX) A through CC and Respondent's exhibits (RX) 1 through 9 (with sub-exhibits) were admitted in the record. Objections by both parties to the admission of certain documents were overruled and all exhibits offered were admitted into evidence. (See, Tr. 30 to 40) At the conclusion of the hearing, the parties were offered an opportunity to submit detailed written closing arguments. The parties timely submitted written arguments (HE 11 and 12) and the record was closed on June 6, 2021. The hearing transcript was received on June 9, 2021.

After reviewing all of the exhibits and testimony presented in this case, I conclude that Petitioners did not establish that Respondents committed any substantial procedural violations, failed to provide a FAPE, or violated the IDEA. Petitioners' amended request for relief is denied.

⁵ The U.S. Cyber Command's Defense Collaborative System (DCS) is an internet-based video conferencing system.

⁶ The hearing was conducted over four days. The transcript is comprised of four volumes, one for each day of the hearing, totaling 505 pages. Citation to the transcript consists of the volume number and page. For example, Tr. 2-150 refers to the second volume of the transcript, on page 150 of that volume.

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Individuals With Disabilities Education Act (IDEA)

IDEA ensures that children with disabilities receive special education services as needed. In summary, the U.S. Supreme Court described IDEA as an offer of federal funds to states [and DoDEA] in exchange for providing a "free appropriate public education," known as a FAPE, to all children with certain physical or intellectual disabilities. A FAPE comprises "special education and related services"; both "instruction" tailored to meet a child's "unique needs" and sufficient "supportive services" to permit the child to benefit from that instruction. §§ 1401(9), (26), (29); see *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 203 (1982).

Under the IDEA, an "individualized education program" (IEP), serves as the primary vehicle for providing each child with a FAPE. *Honig v. Doe*, 484 U.S. 305, 311 (1988). The child's IEP team or "case study committee" (CSC), comprised of a group of school officials, teachers, and parents, design the IEP, which spells out a personalized plan to meet the child's educational needs. Most notably, the IEP documents the child's current levels of academic achievement, specifies measurable annual goals for how the child can make progress in the general education curriculum, and lists the special education and related services to be provided so that the child can advance appropriately toward those goals. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I), (II), (IV)(aa). *Fry v. Napoleon Community Schools, et al.*, 137 S. Ct. 743 (2017). Ultimately, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017).

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S. Ct. at 988 (2017). When evaluating an IEP, courts cannot "substitute their own notions of sound educational policy" for that of school authorities. *Id.* at 1001. The question is not whether the IEP is "ideal"; it need only be "reasonable." *Id.* at 999 (*citing Rowley*, 458 U.S. at 206-207 (1982)). That is why the IEPs reasonableness is measured at implementation. See *K.D. by & through Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 255 (3d Cir. 2018) ("We may not rely on hindsight to second-guess an educational program that was reasonable at the time."). *Esposito v. Ridgefield Park Board of Education*, 20-2246, 78 IDELR 241 (3d Cir. 2021).

The IDEA and its implementing regulations have remained in full effect during the COVID-19 pandemic. See, e.g., *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children with Disabilities*, 76 IDELR 104 at 2, Office of Civil Rights (March 21, 2020). School districts must provide a FAPE consistent with the need to protect the health and safety of students with disabilities, and those individuals providing education, specialized instruction, and related services. In fact, the Federal government has repeatedly emphasized that the IDEA includes no exceptions to implementation for physical school closures caused by pandemics or governmental directives to close schools. School districts remain responsible under the IDEA for materially implementing IEPs despite the school closure, even if by alternate methods of delivery. 76 IDELR 104 at 3. When a school district

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provides educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of a FAPE. *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 at 3, U.S. Department of Education (March 12, 2020).

Parents and educators may disagree about what a child's IEP should contain. When disagreements arise, parents may turn to dispute resolution procedures established by the IDEA. The parties may resolve their differences informally, through a resolution meeting, or through mediation. If these measures fail to produce an agreement, the parties may proceed with a due process hearing. *Andrew F.*, 137 S. Ct. at 999.

Of note, allegations of civil rights violations raised in the Petition are not actionable in this forum, but should be addressed to the U.S. Education Department, Office of Civil Rights.⁷ However, substantive disputes about the contents of an IEP (or Section 504 plan) generally must be resolved in a due process hearing.

The provisions of IDEA have been incorporated in DoD Directive (DoDD) 5124.02; DoD Instruction (DoDI) 1342.12 (Provision of Early Intervention and Special Education Services to Eligible DoD Dependents) (Instruction), and implemented within DoD by DoD Manual (DoDM) 1342.12 (Implementation of Early Intervention and Special Education Services to Eligible DoD Dependents) (hereinafter Manual). The hearing officer is responsible for determining whether the child received a FAPE, and if appropriate, order such relief as is necessary for the child to receive a FAPE.⁸ An independent hearing officer may find a denial of FAPE based on a procedural violation only if that violation impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit.⁹

⁷ The Office for Civil Rights (OCR) enforces laws that prohibit discrimination based on disability: Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability by programs or activities receiving federal financial assistance; and Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination based on disability by public entities. OCR enforces Section 504 with respect to recipients of federal financial assistance from the U.S. Department of Education. OCR, along with the U.S. Department of Justice, enforces Title II with respect to public educational entities. OCR generally will not review an IEP or Section 504 team's substantive decisions about a student's special education services or placement; it will only consider whether the district complied with Section 504's procedural requirements. See generally <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>.

⁸ Manual, encl. 6, § 8 (10).

⁹ 34 CFR 300.513 (a)(2). See, e.g., *T.K. and S.K. v. New York City Dep't of Educ.*, 67 IDELR 1 (2d Cir. 2016) (holding that the district impeded the parents' participation in the IEP process when it allegedly informed them that peer bullying was not an appropriate IEP meeting topic); and *R.F. v. Cecil County Pub. Schs.*, 74 IDELR 31 (4th Cir. 2019), cert. denied, 119 LRP 38775, 140 S. Ct. 156 (2019) (Although a special education teacher erred when he unilaterally increased the amount of time that a 7-year-old girl with disabilities spent outside of the general education setting, his misstep did not make a Maryland district responsible for a denial of FAPE.). Compare, e.g., *C.F. v. New York City Dep't of Educ.*, 62 IDELR 281 (2d Cir. 2014) (observing that the district's failure to conduct a functional behavioral assessment of a 6-year-old boy with autism led to the development of an inappropriate behavioral intervention plan and caused the

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A party may appeal the hearing officer's findings of fact and decision by filing a written notice of appeal.¹⁰ A determination denying the appeal of a parent, in whole or in part, shall give rise to the right of the parent to seek redress on the matters in dispute, in a civil suit filed in a U.S. district court of competent jurisdiction.¹¹

Parents' Petition for Due Process

The Petition for Due Process was at times repetitive and somewhat unclear in areas. In an effort to fully capture the substance of the Petition, and to ensure that the Petitioners' concerns are adequately represented, I have endeavored to summarize their allegations as follows:

1. Speech Language Evaluation from Jan/Feb 2020

[SCHOOL 1] failed to evaluate W in "agreed upon areas of language and speech" by not evaluating his written speech, written language expression, and pragmatic language.

2. Material Failure to Implement the IEP

[SCHOOL 1] failed to implement "substantial and significant provisions of the IEP, and its accommodations." This occurred when [SCHOOL 1] switched to online instruction at the end of March 2020 (after a 3-day closure) due to COVID-19 pandemic restrictions. As a result, IEP services in math and language were decreased from 80 minutes to 30 minutes per session. After returning to in-person learning in August 2020 to early November 2020, [SCHOOL 1] did not provide IEP services in language and math, and did not monitor enforcement of "some" accommodations.

3. IEP Goals

[SCHOOL 1] refused to provide explanations on how exactly W's IEP goals were measured, and how mastery of some goals were determined.

district to offer an inappropriate placement), with *M.W. v. New York City Dep't of Educ.*, 61 IDELR 151 (2d Cir. 2013) (holding that the availability of parent counseling and training at the child's assigned school nullified the district's failure to include those services in the child's IEP).

¹⁰ Manual, encl. 6, § 17. See also *Notice of Appeal Rights* at the conclusion of this decision.

¹¹ Any party aggrieved by the final administrative decision of a due process complaint shall have the right to file a civil action in a district court of the United States of competent jurisdiction without regard to the amount in controversy. Manual, encl. 6, § 21. "[A] federal district court's review of a state hearing officer's [IDEA] decision is virtually de novo." *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003) (internal quotation marks and citation omitted). Under this standard, a district court should give "due weight" to a hearing officer's findings, but "must arrive at an independent conclusion based on a preponderance of the evidence." *Id.* (internal quotation marks and citation omitted). However, a district court must afford "greater deference" to credibility determinations based on live testimony. *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 218 (5th Cir. 2019) (quotation omitted).

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4. ABA (Applied Behavioral Analysis) Referral Request From Petitioners

[SCHOOL 1] ruled out the use of applied behavioral analysis (ABA) to teach social and behavioral skills as Petitioners requested, and did not refer them to an outside ABA provider. Therefore, Petitioners allege [SCHOOL 1] “predetermined” W’s placement and accommodations without “meaningfully discussing Petitioners’ request, or minimally referring Petitioners to outside resources.” They claim that the predetermination of the method used, infringed on W’s “civil rights” and denied Petitioners the right to collaborate in educational decisions.

5. Predetermination and Prior Written Notice (PWN)

Once [SCHOOL 1] began remote learning at the end of March 2020, the school violated W’s “educational and civil rights” by “predetermining” that he should receive reduced instruction in virtual learning, and significantly deprived him of IEP services and accommodations at home in the virtual learning environment.

Petitioners also allege that [SCHOOL 1] failed to provide prior written notice (PWN)¹² explaining policy decisions during the pandemic, except for a general information memo dated April 3 2020, on special education (SPED) services. [SCHOOL 1] was indifferent toward their obligations under the IDEA by making predetermined changes and lack of procedural safeguards. In this regard, Petitioners were prevented from understanding that FAPE was supposed to continue regardless of disruptions.

6. Predetermination of Placement and FAPE

Since March 19, 2020, through the fall 2020 quarter, [SCHOOL 1] engaged in “predetermination” in W’s placement and changes to provision of FAPE. W was placed in a universal online placement by DODEA and [REDACTED] [REDACTED] District (at the exclusion of the IEP team) without offering other options.

DoDEA [REDACTED] [REDACTED] District and [SCHOOL 1] predetermined W’s FAPE by barring the IEP team and Petitioners from addressing or developing possible

¹² Prior written notice (PWN) is required when the school proposes to initiate or change, or refuses to initiate or change the identification, evaluation, educational placement, or provision of FAPE to a child with a disability. Manual, encl. 4, § 19(4). The notice shall include: 1. A description of the action that is being proposed or refused; 2. An explanation of why the agency proposes or refuses to take the action; 3. A description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action; 4. A description of the factors that were relevant to the agency’s proposal or refusal; 5. A description of any other options considered by the CSC and the reasons why those options were rejected; 6. Each of the procedural safeguards that is available in accordance with Reference (b) [DoD Instruction 1342.12], the IDEA, and this Manual; 7. Sources for parents to contact to obtain assistance in understanding the provisions Reference (b), the IDEA, and this Manual; 8. Dispute resolution procedures, including a description of mediation, how to file a complaint, due process hearing procedures, and applicable timelines. Manual, encl. 4, § 19(4)(a).

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amendments based on W's unique needs (e.g. all IEP meetings were cancelled until May 25, 2020, just before summer break).

[SCHOOL 1] administrators promoted a universal policy to bar IEP amendment meetings, especially during online school. Per progress reports, several IEP goals were not addressed during online instruction "due to COVID." From March to June 2020, [REDACTED] [REDACTED] District and [SCHOOL 1] removed Petitioners and the IEP team from the process of determining the provisions of a FAPE.

7. Denial of IEP Meetings

[SCHOOL 1] initially planned to hold all IEP meetings once the school reopened after a 3-day closure in March 2020, but the school declined to hold any IEP meetings until May 25, 2020.

8. Predetermination of Behaviors

[SCHOOL 1] failed to provide W with a "check in/check out" (CICO) list for self-monitoring as was "agreed" to in the IEP. [SCHOOL 1] "forced" the school psychologist to develop a Behavioral Intervention Plan (BIP) without proper data or a functional behavioral assessment (FBA), after the school psychologist stated that she was not trained to provide behavioral intervention plans nor does she have the data to support a plan. No PWN was issued regarding the plan and no data supporting the plan was released by the school.

9. Failure to Provide Requested Student-Related Information

[SCHOOL 1] denied providing requested work samples based on W's IEP work in the resource room. [SCHOOL 1] provided some information but denied all requested data despite Petitioners' written requests.

10. Failure to Reassess W After the 2020 Summer Break

[SCHOOL 1] notified Petitioners on April 3, 2020, that the case study committee (CSC) would contact parents after school reopened to review their student's programs and determine adjustments to IEPs. [SCHOOL 1] was closed for three days in March 2020, and then continued online without an IEP adjustment meeting. As a result, W's academic skills after the 2020 summer break were not assessed and his math and language support was abandoned.

11. Failure to Provide Progress Reports

[SCHOOL 1] did not provide progress reports in accordance with the IEP. Progress reports were not provided to Petitioners (in Jan 2020) or were provided after Petitioners requested them (in Nov 2020). The progress reports provided to Petitioners show that not all of W's IEP goals were addressed.

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12. Failure to Honor “Stay Put” Request (Allegation was withdrawn during hearing)

During mediation that occurred before filing their due process petition, DoDEA did not honor a “stay put” request. [SCHOOL 1] scheduled an IEP meeting for December 16, 2020, in disregard to the stay put request.

13. District’s Offer to Compensate W for Denial of FAPE

During voluntary mediation, school officials were informed that Petitioners were given a permanent change of station (PCS) and the child would transfer to another school in January 2021. During the final mediation session (Nov 24, 2020), Petitioners requested “compensational education” after W leaves [SCHOOL 1]. DoDEA [REDACTED] [REDACTED] rejected Petitioners’ request for compensational education, but made an offer of compensation that was limited to January 13, 2021. Petitioners rejected the offer as insufficient to make up for lost services.

Petitioners’ Proposed Resolution

DoDEA is to provide or reimburse educational expenses to make W “whole,” including expenses for:

- Assessments and evaluations;
- Academic instruction and/or remediation, including full-time school and tutoring services;
- Behavioral interventions and services;
- Social skills development;
- Training for paraprofessionals, teachers, qualified instructors and related service providers; and parents;
- Related services including transportation costs; and/or
- A settlement amount for compensatory relief.

The amended request for relief (HE 8) included the following proposed resolution:

- Administrative Judge issue detailed findings of fact and determine if [SCHOOL 1] failed to implement W’s IEP and denied FAPE in 2020;
- Include the petition and Administrative Judge’s decision in W’s IEP;
- Reapprove funds for completing the independent speech evaluation previously started;
- Compensate W for failure to implement his IEP in 2020. Educational compensation should focus on making the child “whole”, rather than providing missed hours;
- Provide W FAPE and include Petitioners in the development of an appropriate IEP and goals;
- Provide or contract an ABA therapist to assist with data gathering and development of IEP goals in areas of functional and social skills;

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- Provide appropriate training to staff to ensure full, discrete compliance with implementing the IEP;
- Appoint a “special counsel” at DoDEA [REDACTED] to monitor the proper implementation of an updated IEP and provision of FAPE until the child is “whole” again;
- In the case of W’s relocation to a different school district before he is made whole, the appointed DoDEA special counsel would be responsible to monitor and approve:
 - Appropriate reimbursable educational expenses to make the child “whole” including services to ensure the child benefits from education.
 - Reimbursable education expenses shall include, but are not limited to:
 - assessments and evaluations; academic instruction and/or remediation, including full time school and tutoring services;
 - behavioral intervention and services;
 - social skills development;
 - training for paraprofessionals, teachers, qualified instructors, “related service” providers, and parents; and/or
 - related services within the meaning of IDEA, 20 U.S.C. § 1401 (26),¹³ including, but not limited to transportation costs to be calculated at the rate of X cents per mile.
- Issue an appropriate PWN for the educational change of placement in 2020; and
- Provide missing educational documents as outlined in the petition.

In response, Respondents generally averred that there was no denial of a FAPE or failure to implement IDEA while W attended [SCHOOL 1], including during the 2020 closure period, while school was conducted remotely, or during the fall 2020 quarter. Respondents also demurred to the amended request for relief.

FINDINGS OF FACT

W was born in [REDACTED], [CITY 2], in 2007, to an [REDACTED] father and [REDACTED] mother. He has one younger sibling and lives with his parents. W speaks [REDACTED] with his mother, but typically they speak English in the home. W has always been educated in English. (PX N, p. 3) W was initially diagnosed with autism spectrum

¹³ 20 U.S.C. § 1401 (26) Related services. (A) In general: The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. (B) Exception: The term does not include a medical device that is surgically implanted, or the replacement of such device.

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disorder (high functioning ASD/Asperger's syndrome) by his psychologist. This diagnosis was confirmed in 2015 by the [REDACTED]. (PX N, pp. 3, 4)

W attended [SCHOOL 1] [REDACTED] Middle School from January 2018 until January 2021. His father, Mr. S, was employed as a [REDACTED] assigned to the [REDACTED] ([SCHOOL 1]), near [REDACTED], [CITY 1]. His mother, Mrs. S, is a [REDACTED]. (PX N)

On January 17, 2021, W's father relocated to another U.S. military installation in [REDACTED], [CITY 2], and the family moved. Petitioners enrolled W in [SCHOOL 2] Middle School ([SCHOOL 2]), another DoDEA school in [REDACTED].¹⁴ W is now 14 years old and preparing to enter high school in the fall of 2021. Petitioners describe him as an intelligent teenager who is planning to attend college. He aspires to lead others, hopefully as an officer in the U.S. military. (Tr. 1-19) He hopes to be involved in the Junior Reserve Officers Training Corps (JROTC) program during high school. (Tr. 1-117) Petitioners are concerned that W will not be ready for college, mainly because he scored in the 29th percentile on his Fall 2020 Preliminary Scholastic Aptitude Test (PSAT).¹⁵ (Tr. 1-116, 117; PX O)

The petition involves W's 2020 IEP and changes resulting from the COVID-19 pandemic-related changes to his learning environment from March 2020 through the fall 2020 quarter at [SCHOOL 1]. (Tr. 1-131)

2020 Individualized Education Program (IEP)

In January 2018, Petitioners moved from [REDACTED] to [CITY 1]. W transferred from a virtual charter school in an online homeschool environment, to the 5th grade at [SCHOOL 1] Elementary School in January 2018. He brought with him an IEP implemented in 2017. The IEP listed autism as his disability, and included three goals. (Rx 1a; Tr. 1-125, 126) The creation and implementation of an IEP to help a student be successful is considered a collaborative effort among the entire CSC team to include Petitioners. (Tr. 3-25)

Amended IEPs were implemented in May 2018 after a triannual review. (RX 1d, 1e), and after a September 2019 CSC meeting. (RX 1f) W's disability was listed as Autism Spectrum Disorder (ASD).¹⁶ W transitioned to the seventh grade at [SCHOOL 1] Middle School in the fall of 2019.

¹⁴ [REDACTED] Middle School is part of the DoDEA [REDACTED] District.

¹⁵ PSAT looks at a student's projected or current trajectory toward preparation for college academic skills. It records levels of reading, writing and math and how those will equate eventually to being prepared for college and college-level academics. It is administered across the board for all students regardless of disability status, and is normed based on multiple students within that age or grade level. (Tr. 3-27 to 30)

¹⁶ Autism spectrum disorder (ASD) is a neurodevelopmental disorder characterized by the following: Difficulties in social communication differences, including verbal and nonverbal communication; Deficits in social interactions; Restricted, repetitive patterns of behavior, interests or activities and sensory problems

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Between March 12 and March 29, 2019, the [SCHOOL 1] School Psychologist, Dr. SS, conducted a Functional Behavioral Assessment (FBA). She had known W since he was in 5th grade, and worked with him while he was in middle school. (Tr. 4-7, 8) Her report was completed on April 5, 2019. (RX 4a) The FBA noted that W's IEP was modified in March 2018, to accommodate communication goals, functional life skills, and reading goals. In May 2018, the IEP was further modified to accommodate behavior goals and added a behavior intervention plan. In December 2018, observations and recommendations from the District's behavior specialist were included. (RX 4a, p.8) The FBA suggested intervention strategies, replacement behaviors, and possible reinforcers. (RX 4a)

Dr. SS described the idea behind an FBA as:

[A]ll behavior meets a need or performs a function for the person exhibiting or engaging in the behavior. So if we can determine what the function is of a student's behavior - - behavior of concern. The behavior that's not working for the student and not working for whatever needs to be achieved. If we can determine that function, then we can teach the student new behaviors or replacement behaviors, or make the behavior that's concerning no longer necessary for the student by determining the function, then we can allow them to meet that same need with an expected or an acceptable behavior, rather than the unexpected or unacceptable behavior. (Tr. 4-19, 20)

Dr. SS believed that an FBA was needed to address W's behaviors of concern (BOC). W was disruptive to self and others and refused to do school work or assigned tasks. She discussed W's BOC with Petitioners after completing the FBA. (Tr. 4-9)

Petitioners sent a letter in October 2019 to the DoDEA [REDACTED] [REDACTED] District Instructional Systems Support Specialist and Autism/Behavior Specialist, Mr. L. (PX Q) Mrs. S noted in the letter, that she received the FBA on October 2, 2019, and complained that the data was questionable and that [SCHOOL 1] did not implement a behavior support plan. She claimed this omission allowed W to be subjected to "questionable punishment" techniques by teachers, and W did not receive any other behavioral support or social skills training. She expressed concerns regarding the disparity in student disciplinary actions based on disability, race, or ethnicity, and the lack of appropriate behavioral interventions for children with disabilities. Mrs. S also complained that speech services and social skills support were reduced or unavailable. Mrs. S warned that a failure to implement IEP requirements or provide needed behavioral support may indicate a denial of a FAPE and in some cases, discrimination against W. (PX Q)

Many of those with ASD can have delayed or absence of language development, intellectual disabilities, poor motor coordination and attention weaknesses. The American Psychiatric Association changed the term autism to autism spectrum disorder in 2013. <https://my.clevelandclinic.org/health/diseases/8855-autism>.

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Petitioners obtained a psycho-educational report, conducted in October 2019, to assess whether W had learning disabilities. A clinical psychologist administered various tests to assess W's performance in five areas of cognitive ability. His overall full-scale intellectual quotient (FSIQ) was "impossible to summarize because of the significant discrepancies between the index scores." (PX N) W's strongest areas of performance were shown on scores for verbal comprehension and working memory, suggesting average verbal reasoning and working memory skills. Likewise, W's performance on visual spatial reasoning was found to be average and typical for his age.

W tested below average on fluid reasoning ability and processing speed tasks. W's general ability score ranked as average. The report noted that this would predict average academic performance. However, his weaknesses included written expression, spelling and sentence completion, reading accuracy and rate, reading comprehension, and mathematics fluency. In addition, W showed difficulties with inattentiveness and impulsivity. W was well adjusted, but prone to becoming frustrated and quick to anger. The report suggested diagnoses including autism spectrum without cognitive impairment with pragmatic language impairment; and specific learning disorder with impairment in reading, written expression, and mathematics. (PX N, p. 18-19) The [SCHOOL 1] Speech-Language Pathologist (SLP), Ms N, testified that a psycho-educational evaluation is quite different from a speech and language evaluation, so she would not have used that type of an evaluation when assessing W. (Tr. 4-104 to 107)

On December 3, 2019, a case study committee (CSC) meeting was convened to review the results of the assessment that Petitioners presented to the school to determine whether "learning impairment" should be added as a secondary area of concern. In addition, present levels of performance (PLAAFS) were to be established for the 2020 IEP. The attending committee members included the school Principal/Administrator (Dr. H), the SLP (Ms N), a General Education Teacher (Ms B), the Learning Impaired Mild to Moderate (LIMM) SPED teacher and W's Case Manager (Ms J), and Petitioners. (RX 2a)

The [SCHOOL 1] CSC committee members and Petitioners participated in a dynamic and inclusive exchange of views and discussions of the issues. The Principal described the CSC members as a team in which Petitioners were an integral part. (Tr. 2-98) The committee determined that the criteria for specific learning disability were met,¹⁷ and areas of concern were discussed. PLAAFS were established for each area of concern. The team also discussed ways for ensuring that W would receive the support and remediation he needed to improve his educational progress.

¹⁷ "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage. <https://sites.ed.gov/idea/regs/b/a/300.8/c/10>

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Mrs. S raised concerns about W's speech services and needs. The SLP/Assessor, Ms J, offered to open a formal speech and language assessment once a new IEP was completed to determine W's specific needs. Mrs. S also expressed concern about ensuring that W would not lose an elective course in order to receive special education services. The committee agreed to provide those services during the seminar period in the resource room.

The Principal, Dr. H, inquired about a behavior plan for W. She and the LIMM SPED Teacher, Ms J, agreed to meet with the school psychologist to review concerns raised by Petitioners regarding the FBA that was completed in April 2019 (RX 4b), and to write a draft behavior plan for Petitioners to review before the next meeting. At the conclusion of the meeting, draft IEP goals and objectives were provided to Petitioners for their review prior to a later scheduled CSC meeting to develop the IEP. (RX 2a) PWN signed by the CSC members, along with procedural safeguards notice, were provided to Petitioners.¹⁸ (RX 2a)

On December 12, 2019, a CSC meeting was held to complete a new IEP and behavior plan based on the results of the December 3, 2020, eligibility meeting. (RX 2b) In addition to the previously listed CSC members and Petitioners, the School Psychologist, Dr. SS, also attended. The committee discussed the appropriate number of goals and their attainability. Petitioners expressed concerns about having too few goals, and the need to help W "catch up" on regular work because they believed him to be two-years behind his peers. Dr. SS discussed her behavioral goals for W. She noted that the team was lacking data regarding observed behaviors, and that she wanted to "know what makes him tick." She believed W had a "greater ability than we are giving him credit for." (RX 2b) She believed that the proposed number of goals proposed for W could not be reasonably accomplished. The number of goals was modified accordingly. Mrs. S inquired about the school's reading program and attainment of the goals was discussed. Likewise, the math, reading, and writing goals were discussed and adjusted accordingly. (RX 2b)

In crafting the FBA, Dr. SS conducted a comprehensive review of records, noting an abundance of descriptive information about W's behaviors of concerns. Over about two weeks, she met with and interviewed teachers to talk about their perspectives, their descriptions, and rating scales they had completed for her. Except for the band teacher who reported no behaviors of concern, teachers typically reported that W demonstrated behaviors of concern such as noncompliance and defiance. (Tr. 4-23, 24) Dr. SS believes that all of the information in the FBA remained valid. (TR. 4-11)

Dr. SS noted in testimony that by the time she prepared the FBA,

W had actually made quite a lot of progress ... and the direction that I thought we could go with counseling services -- because those were the direct services that I would provide to him -- would be along those lines of helping W understand his own behaviors. And when he gets to the point of

¹⁸ Manual, encl. 4, § 19(4).

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making a decision on whether to behave and act one way versus behave and act another way, that was generally where I wanted to spend my time working with him. If he can understand his own behavior, and what he wants to get out of that behavior, then he can better understand why we want him to exhibit a different behavior that would be more successful for him. So a lot of it was helping W determine his own success by his own behavioral challenges. (Tr. 4-11)

Petitioners asserted in the meeting that W's behavioral issues usually result from saying something that is inappropriate, getting a physical response, then not knowing how to extract himself from the situation. Dr. SS stated that the limited data available to her included some detentions and Saturday school, but that much of W's behavior is typical of middle school adolescent boys experiencing normal changes. She noted that W understands his behavior and she is helping him to "self-regulate." (RX 2b)

Mrs. S noted that an applied behavioral analysis (ABA) therapist would be the appropriate individual to teach W replacement behaviors. W had "years" of private ABA therapy in the past. (Tr. 1-91, 92) She described ABA therapy and behavior in testimony as follows:

ABA therapy can address everything. They teach you how to brush teeth. And back to the school environment, there are some skills that W didn't have that he would benefit from, like he was not able to finish his work on time. He was just all over the place. He didn't know how to concentrate, how to fill out the paper. Which over the years with the school, he was punished for, like, when he was not able to finish work, he was looking around, he had difficulties to concentrate, the school would punish him for it. Or to keep his attention, they would shine a laser pointer in his eyes. So for us, it was, hey, we need a functional behavior plan to protect him so the teachers have guidance how to address him and to teach him these replacement behaviors that he's capable and he knows how to concentrate on a piece of paper for 30 minutes... Or just every skill that a middle-schooler basically needs in order to be successful in daily life. And these are all kinds of skills. (Tr. 1-91, 92)

Dr. SS stated in the meeting that she does not do ABA therapy, such as in the school setting, and that the proposed goals were intended to address W's social-emotional functioning. Mrs. S noted that as a family with a disabled child, they were trying to make changes to support W, but that therapy resources were not readily available in [CITY 1]. Dr. SS proposed a goal using an evidence-based check-in/check-out (CICO) procedure. The CICO would require W to evaluate how he believes he is doing. At the meeting, Mr. S alluded to a discussion of a CICO procedure with the former treating SLP, but did not elaborate. Dr. SS developed a proposed behavior plan for unstructured and structured time, so that teachers can seamlessly document W's behavior. Petitioners raised concerns at the meeting about clearly identifying expected behaviors, but Dr. H noted that the proposed behavior plan was consistent with the expected behavior of all students.

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Petitioners requested the ability to modify the wording of the behavior plan. Dr. H asked Petitioners at the meeting, whether they would like W to have an adult shadow him during unstructured time at school. Mrs. S responded that it is the principal's responsibility to keep the students safe at school and that she does not want W to have an adult shadow. (RX 2b)

At the conclusion of the meeting, Mrs. S stated that the only things she saw as problematic were W's communications skills, and she had questions about the proposed behavior plan. She suggested that an ABA therapist could analyze the proposed behavior plan, but Dr. H reiterated that the team was trying to make the data collection as seamless as possible. Dr. SS noted that she is a generalist and that she is trying to help W understand that his choices affect outcomes. She had not reviewed Petitioners' proposed goals, but that she would follow up. Petitioners asked that the next meeting be delayed until after the holidays and winter break. (RX 2b)

The CSC meeting continued on January 13, 2020. Mrs. S noted that the team still needed to address social skills and a behavior plan. She rejected the proposed CICO form (Petition, p.41) because she said it did not address the skills necessary. Dr. SS stated that she could not work with W in the same way that an ABA therapist would, but she wanted to work with W to help him understand how his decisions affect his behavior. Mrs. S wanted an IEP to teach W the skills in which he was deficient. Dr. SS explained that the goals in the IEP were to teach the necessary skills, but the behavior plan was to reduce the behaviors that W was using to extract himself from difficulties. Mrs. S believed that giving W a card stating that he should not hit or kick was demeaning and discriminatory. The meeting minutes noted that the "card" was a suggestion or starting point in the development of a behavior plan and was not shown or given to the child. (RX 2b)

Mrs. S suggested at the meeting that a behavior plan was needed to protect W and to give teachers a method for working with him without penalizing him. Mrs. S commented that W was punished in the past for not doing classwork. Dr. H noted that there is a separation between behavior and classwork. Mrs. S wanted W to have the skills to get out of difficult situations, and asked how the behaviors on the plan were selected; claiming that two past incidents were isolated. It was explained that W's behavior was typical of middle school students, but Mrs. S claimed that W verbalized his thoughts and feelings inappropriately, to the extent that others misinterpreted his expressions. Ms B explained that W made inappropriate comments or statements during class that were not directly related to classwork. (RX 2b)

Also at the meeting, Dr. SS and Mrs. S reviewed the suggested social goals for W. Dr. SS agreed to use the goals presented by Petitioners. (See, Petition, p.18) Communication goals were adjusted accordingly, and service times were adjusted to allow W to receive counseling and speech services. Classroom and testing accommodations were adjusted and the least restrictive environment statement was reviewed. The team agreed to a trial CICO procedure to see if it helped W self-monitor. Dr. SS was to work with Petitioners on modifications to the CICO form to reflect positive,

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proactive language. Upon completion of the assessments, the team was to meet to review W's communication goals and service times. (RX 2b; Petition, pp. 40-44)

In February 2020, Mrs. S wrote the principal regarding the proposed behavior plan and CICO list. Petitioners rejected the proposed behavior plan and CICO. Mrs. S made extensive comments on the proposal and requested Dr. H to reevaluate the proposed behavior strategies. She also asked that if an IEP change for behavior is proposed, that a behavior specialist trained in developing behavior plans do it. (PX R)

On February 17, 2020, Mrs. S again wrote Dr. H about the proposed behavior plan. Dr. H acknowledged Mrs. S's concerns, and stated that she consulted with Mr. L, and developed a revised behavior support/classroom support plan, and solicited Petitioners' comments before the next CSC meeting. On February 18, 2020, Mrs. S challenged the need for a behavior plan at all. She noted that the CSC team agreed that a behavior plan was unnecessary, and requested PWN before any change of services were made. In reply, Dr. H noted that she understood that a behavior plan was necessary, and despite the school psychologist's opinion that it was not needed, the entire CSC team did not come to a consensus. (RX 5a)

In a February 19, 2020 email exchange, Dr. H invited Petitioners to attend an IEP modification meeting on March 11, 2020, to review the behavioral data and the proposed behavior plan. She noted that their goal was to support W and address Petitioners' concerns, but reiterated that the behavior of concern included W making inappropriate comments. She stated that Petitioners would have an opportunity to express their opinions at the meeting and accept or reject the plan. She said that the school would issue a PWN for an IEP change only after an official meeting was completed. (RX 5a)

Mrs. S responded that the IDEA required the school to inform parents of any changes to the services provided to a disabled child with a PWN. She said that once a PWN was issued, she would react. Dr. H repeated that once a meeting was held, a PWN would be issued at the same time to provide notice of any changes to the IEP. Changes to the IEP would typically take effect the following day.¹⁹ (RX 5b) In the same email

¹⁹ Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

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exchange, Mrs. S also requested W's behavioral "ASPEN" file and the PWN by February 20, 2020. Dr. H replied that besides the disciplinary documentation provided to Petitioners in December 2019, there were no additional formal disciplinary actions or changes in the ASPEN file. (RX 5b)

In the end, no formal behavior plan or CICO was adopted because of the absence of parental and CSC team consent. Petitioners never requested that a behavior plan be implemented other than a plan that would be included with ABA therapy. (Tr. 1-88 to 90; 2-49; 2-210, 211; 4-54) However, Mrs. S testified that they had meaningful input into the development of W's IEPs. (Tr. 1-130)

Petitioners asserted that the school's denial of ABA therapy resulted in a denial of a FAPE. (Tr. 1-149) Dr. SS provided services based on W's request that his IEP services be delivered during the seminar period. Dr. SS stated that she wanted to honor W's wishes as much as possible, and still adhere to the number of minutes that he needed to have in a flexible manner in which he felt comfortable. (Tr. 4-14) Dr. SS provided counseling services per W's IEP after the school began remote learning in the spring, and continued in the fall 2020 quarter. (Tr. 4-17) She noted W's behavior improved during the remote learning period and through the fall. She testified that, "I have not observed any deterioration in W's behavior. I've only seen improvements over time." She noted that conflict with teachers was decreasing and W was taking a more active role in acknowledging his own participation and his own problems. She relayed that W had an incident with a teacher, but returned independently on his own and apologized to the teacher. This was different from past behavior. (Tr. 4-36, 37)

Dr. SS incorporated aspects of ABA therapy in her work with W, despite DoDEA policy not to use ABA therapy methods. (Tr. 4-33, 34) Dr. SS does not view ABA therapy as the only therapy available to attain the same behavioral goals. (Tr. 4-35, 36) She acknowledged having some off-base ABA resources that she could share with Petitioners, but could not recall if she indeed shared that information with them. (Tr. 4-34)

The CSC team agreed at a meeting on January 13, 2020, that additional assessments were necessary for a more accurate picture of W's speech and language (communication) needs. A PWN was issued. (Response, Ex.1) The team agreed that an assessment plan would be opened for speech and language testing only. Assessments would be done in articulation, language, and the oral/peripheral examination. (RX 2c) Petitioners agreed and signed a permission form specifying these three areas for assessments. Mrs. S signed the form on January 21, 2020, and wrote on the form, "only speech/language assessments." (RX 2c) The speech-language evaluation was conducted by the school's Speech-Language Pathologist/Assessor, Ms N, between January 28 and February 18, 2020, and the report was issued on March 8, 2020. (RX 4b)

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503

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The amended IEP was signed by the CSC members and Petitioners (hereinafter “2020 IEP”) and implemented on January 14, 2020. (RX 1g)

The IEP lists special education services (direct services to student) that were to be provided to W from January 2020 to January 2021 as follows:

<u>Type Of Service</u>	<u>Location</u>	<u>Anticipated Freq</u>	<u>Duration</u>	<u>Provider</u>
Special Education	Resource Rm	10 days	335 min	Teacher, LI
Counseling Services	Therapy Rm	10 days	60 min	School Psychologist
Speech & Language	Therapy Rm	10 days	60 min	Sp/Lang Pathologist

The 2020 IEP provided that W would be in general education classes about 88% of the 10-day school cycle, and 12% in a SPED setting. (RX 1.g, p. 10) W was not eligible for extended school-year services, transportation assistance, or physical education modifications. (RX 1.g, pp. 3, 4)

The 2020 IEP set out five language arts goals, six mathematics goals, and six reading goals. (Tr. 2-13) As the SPED/LIMM teacher, Ms J, worked with W on language arts, reading, and mathematics goals during the seminar period.²⁰ She testified that the goals were intended to assist students who may be below grade level, to close the gap but not necessarily to reach a particular grade level. (Tr. 2-13 to 2-14)

Ms J described a typical school day schedule before the COVID-19 pandemic and remote learning as follows:

W's school day, prior to remote learning -- on what we call green days or “A” days, he would've had accelerated math for 85 minutes, from 8:50 to 10:15, with a five-minute passing time. From 10:22 to 11:45, he would've been in an English language-arts class. From 11:45 to 12:30, it was luncheon recess. 12:35 to 2:00 was science. And 2:05 to 3:30 would've been an elective: either video production or business enterprises, depending -- I don't remember offhand which occurred in which semester. On gold days, or “B” days, from 8:50 to 10:15 was strings, some music class. 10:20 to 11:45 was U.S. history. 11:45 to 12:30 was lunch recess. 12:35 to 2:00, English-language arts. And then 2:05 to 2:30 was seminar time -- and it was during that time I worked with W. (Tr. 2-17 to 2-18)

COVID-19 Pandemic

Due to the COVID-19 worldwide pandemic,²¹ [SCHOOL 1] closed on March 14, 2020, and stayed closed for three school days until it moved to a virtual or remote online

²⁰ The entire school had a seminar period as the last class on gold days. (Tr. 2-18) Seminar was non-instructional and not a graded period. (Tr. 2-71)

²¹ “Children are a source of COVID-19 transmission, and children, therefore, present a risk [*12] of spreading COVID-19 to parents, teachers, school staff, and other children. See Scrase Decl. ¶ 16, at 9

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environment on March 19, 2020.²² (RX 8a) DoDEA adjusted all general education class schedules and times accordingly. Special Education and related services were also proportionately adjusted. W attended school remotely along with the general school population. (RX 6a) The DoDEA [REDACTED] Superintendent sent a letter dated March 13, 2020, to parents discussing the COVID-19 related closure. (RX 6a) On March 31, 2020, Ms J notified Petitioners that SPED services had continued in the virtual setting, and requested that they review the guidelines and sign a written consent. (RX 5f, RX 8e) Petitioners did not return the consent form to the school. (Tr. 2-24, 2-25, 2-109) On April 3, 2020, DoDEA [REDACTED] District provided Petitioners with information about the interruption of special education programs and services resulting from the recent closure and pause in school operations. (PX C; Petition, p.28; RX 8a, 8b) The spring term ended on June 8, 2020.

The DoDEA [REDACTED] [REDACTED] District Instructional Systems Support Specialist and Autism/Behavior Specialist, Mr. L, testified that several guidance documents were distributed once remote learning commenced. DoDEA headquarters published "best practices" guidance during remote learning, and the District issued guidance for SPED services and considerations during an interruption. The District provided a letter to parents and a "norms and consent" letter as remote learning started. (Tr. 3-11, 12; RX 8a, b, c, e) Mr. L described the notices as follows:

For general education students, it informed parents and community members that instruction would continue, but it would be shifting to a virtual platform. And at that time, Google Classroom and Schoology were both specifically identified as the digital platforms that would be used and that sessions would be adjusted and modified appropriately for the virtual setting. In the digital platform, it was deemed that typical minute-for-minute classes were not necessarily appropriate or successful. Students weren't proving successful so it was informing parents and community members that in the virtual setting that classes or sessions might be abbreviated. The

(citing Mubbasheer Ahmed et al., Multisystem Inflammatory Syndrome In Children: A Systematic Review, *The Lancet* (Sept. 4, 2020), [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30271-6/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30271-6/fulltext)); COVID-19 in New Mexico. Children who recover from COVID-19 may experience complications, including cardiac lesions and multisystem inflammatory disorder, after recovering from the disease. See Scrase Decl. ¶ 16, at 9 (citing Mubbasheer Ahmed et al., Multisystem Inflammatory Syndrome In Children: A Systematic Review, *The Lancet* (Sept. 4, 2020), [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30271-6/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30271-6/fulltext)).” *Hernandez v. Lujan Grisham*, 78 IDELR 12, 2020 U.S. Dist. LEXIS 238477, at 11 (D. N.M. 2020).

²² “For some students, remote learning is not an effective model for learning. See Catlin Rivers et al., Public Health Principles [*30] for a Phased Reopening During COVID-19: Guidance for Governors, Bloomberg School of Public Health at Johns Hopkins University at 5 (Apr. 17, 2020), filed September 29, 2020 (Doc. 15-1)(“Johns Hopkins Report”). Online education for school age children “is not a substitute for in-person learning and socialization in a school setting.” John Hopkins Report at 5. Further, “schools and childcare facilities enable parents to work outside the home,” and “offer meals, safe environments, and other services, particularly to vulnerable families.” John Hopkins Report at 5.” *Hernandez v. Lujan Grisham*, 78 IDELR 12, 2020 U.S. Dist. LEXIS 238477, at 29 (D. N.M. 2020).

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guidance that was supplied to parents and community members was that special education services would continue. That they would not be in person due to the digital learning environment and that times or sessions might be adjusted or modified like the remote classes being provided to all students. (Tr. 3-12, 13)

After [SCHOOL 1] began remote learning, Ms J described the remote learning day as alternating green and gold days. Periods were 30 minutes. Fridays were basically an open schedule for drop-in office time for all teachers. Teachers could also meet with individual or small-groups of students throughout the day, and were available from 8:30 in the morning to 3:30 in the afternoon. Seminar time was from 11:45 to 12:15 on gold days, which were Tuesdays and Thursdays. Seminar period included all students, and was the time in which Ms J worked with W. She was also available on Fridays or other days by appointment or unscheduled drop in. (Tr. 2-19 to 22)

Ms J testified that W and Petitioners were aware of the optional times that W could work with her if needed. (Response, Ex. 7) She noted that W had an opportunity to meet with her for any additional assistance on Mondays through Thursdays between 1:00 and 3:30, and on Fridays any time before 8:30 am until 3:30 pm. Ms J testified that remote learning was difficult for the students, and replicating an in-person school day was not practical remotely. She said that most students found that working in a digital platform for an extended period of time was very tiring. Many students found it hard to stay engaged with school work while online. (Tr. 2-20 to 22)

The Speech-Language Pathologist/Assessor, Ms N, testified that she met with W from January 2020 to March 2020, for 30 minutes per week for speech therapy and speech IEP goals during his seminar period because she agreed with Petitioners not to pull him from his core classes. From March 2020 to June 2020, SLP continued per his IEP. W's goals were mastered, except for pronouncement of the "s" and "z" phonemes across word positions and in consonant clusters. W was physically unable to produce those sounds. In the fall 2020 quarter, speech therapy continued with 30-minute weekly services. (Tr. 4-88 to 90; RX 3a)

[SCHOOL 1] kept parents informed of events and schedule changes via emails, sending calendars, lesson plans, and assignments. Also, the school newsletter; teacher emails; and the [REDACTED] website were available where parents and students could access a weekly "agenda"²³ of academic classes and assignments, and access "parent connect" or "grade speed" online. (PX D, S, T, and U; RX 5g; RX 6a; RX 8a; Tr. 2-23, and 2-46, 47; 2-50, 51; 2-90, 91) The record contains various examples of emails from February to November 2020, where [SCHOOL 1] teachers notified Petitioners and

²³ While the school was in remote learning from March to June of 2020, SPED students did continue to maintain their own agendas. Ms J kept an online agenda for each grade. She checked with teachers daily to see what they were covering and what their assignments were, and the assignments were posted to the website. All students were notified of where the agenda was posted to help them track their assignments. (Tr. 2-46, 47)

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students of missing work assignments, homework and quizzes, due dates for projects, and an invitation for an unscheduled help session. (PX S)

DoDEA and [SCHOOL 1] administrators thought the COVID-19-related remote environment was a temporary situation to last only two weeks, so IEPs were not modified. (Tr. 2-23; 3-14) The [SCHOOL 1] Principal, Dr. H, testified that the school was initially temporarily closed the week of March 16, 2020, due to military HPCON (Health Protection Condition) level guidance, guidance from the [REDACTED] government, and U.S. Center for Disease Control (CDC) guidance. The school moved to a virtual platform after three days of teacher preparation for remote instruction. The move to a virtual platform was thought to be temporary. Dr. H believed the school was going to reopen on April 3, 2020, but she was later notified by District authorities that the virtual environment would continue throughout the school year. (Tr. 2-99, 100) No changes were made to W's IEP goals and objectives once remote learning began, but SPED service time was reduced based on the abbreviated remote learning schedule instituted for all students. (Tr. 3-14)

Families were notified by letter, and parents of special education students were given general information on how to communicate with teachers and the principal regarding support services. (RX 8a, RX 8b, PX C; Tr. 2-99 to 105; Response, Ex. 7)) Ms J sent a DoDEA form detailing the provision of special education services during this period to parents of students with an IEP, including notice and a consent form. The notice stated that, "schools are committed to providing specially designed instruction to students through online virtual instruction and alternate methods tailored for the needs of the student. The online platform may include the provision of services in whole group, small group, and independent sessions intended to reflect as close as possible the services provided within the school building." (RX 8e) Petitioners did not sign or return the document. (Tr. 2-24, RX 8e)

CSC meetings were typically scheduled based on Petitioners' availability, but meetings during the pandemic were scheduled differently because in-person meetings were not permitted, so the option to hold meetings online, via Google Meet, was provided. (Petition, p.45) Although Petitioners allege a PWN is required for proposed meetings or for the shift to remote learning, Dr. H testified that a PWN is not necessary unless changes to an IEP are to be made after a CSC meeting involving the school team and parents. She stated that no PWN was necessary for moving to remote learning, however notice regarding SPED services during remote learning was sent to Petitioners. (Tr. 2-109,110; 2-124 to 128) Of note, each notice to convene a CSC meeting is done on a form entitled "Notice of Case Study Committee Meeting / Individualized Education Program (IEP) Meeting." (See, e.g., RX 2a; 2e) During a meeting, all participants sign a form entitled "Consolidated Minutes and Prior Written Notice (PWN) of Case Study Committee Meeting." (See, e.g., RX 2.a; 2.b)

Dr. H denied that the school refused to provide Petitioners the ability to have IEP meetings. (Tr. 2-98, 99) From March 16 to about May 25, 2020,²⁴ in-person meetings

²⁴ Ms N noted in an email dated May 25, 2020, that [SCHOOL 1] was authorized to hold meetings virtually, via Google Meet. (Petition, p. 45)

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were prohibited due to the COVID-19 pandemic. However, Petitioners were offered an option to meet online. Petitioners did not feel comfortable in using the online platform because they did not believe it was secure and claimed it was a violation of the Health Insurance Portability and Accountability Act (HIPAA). They requested an in-person meeting to review the speech-language assessment results conducted by Ms N, then to make necessary adjustments to W's IEP. (Tr. 2-105,106)

[SCHOOL 1] proposed a CSC meeting for March 23, 2020, to present the results of the speech-language evaluation. Mrs. S. objected to holding this meeting while the school was closed during the COVID-19 outbreak. Dr. H agreed to reschedule it for a later time when school reopened. (RX 5d; Tr. 2-107) Petitioners then requested a face-to-face meeting to be held after school working hours and asked that the school provide child-care services. Dr. H attempted to accommodate Petitioners by agreeing to call in teachers for an in-person meeting, but notified Petitioners that the meeting would have to be held during regular teacher work hours. Instead, Petitioners agreed to wait to meet once school reopened in the fall.²⁵ (Tr. 2-107,108)

[SCHOOL 1] resumed fall classes in person on August 18, 2020. There was no requirement to assess all SPED students at the start of the school year, but case managers reviewed IEPs and contacted parents when necessary. (Tr. 2-111, 212) The previously canceled CSC meeting for W was rescheduled for September 4, 2020. (Tr. 2-106 to 108; RX 5c and 5d) The meeting was to review the speech-language assessment and a follow-on meeting would be held to discuss modifications to W's IEP. (Tr. 2-107)

When school resumed in the fall of 2020, students attended classes in the “brick-and-mortar” school building in a “pod” environment as a continuing effort to mitigate COVID-19 spread. Classes were limited to 40-minute periods, plus two outdoor 10-minute “mask” breaks and a 20-minute seminar period at the end of the day for all students. Normally, W would attend a seminar with the LImm/SPED teacher, Ms J, but from August to October, 2020, W did not attend the seminar period because students were grouped into cohorts (or pods) and rarely moved from classroom to classroom to limit contact and potential COVID-19 exposure between students and teachers. (Tr. 2-33, 34) Most students were not permitted to move to their individual seminar teachers outside of their cohorts to minimize contact between teachers and students.²⁶

²⁵ It is unclear when in-person meetings resumed for the school. Regardless, Petitioners refused to utilize Google Meet and agreed to an in-person meeting once school resumed in the fall 2020 quarter.

²⁶ Ms J stated: “When a cohort had PE, the entire cohort went to PE. When they had band, then they would go to band. However, for most of their classes, they stayed in one room and the teachers came to them.” “Certain classes were not held within the cohort-class assigned classroom. At certain points of the day, students did go to other instructors and other locations.” (Tr. 2-74)

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Ms J testified that,

[U]nder the block schedule, teachers can call students -- there's two periods, within that seminar, that they can call students to come to them to receive help, get makeup work, whatever's necessary. From August to October, we did not have that luxury; the ... students were not being allowed to go to teachers. And they wanted the minimum amount of teachers, adults, possible, in a classroom, again, to try and maintain the COVID recommendations and limit the amount of contact that anybody had with anybody else. (Tr. 2-34)

Ms J testified that nobody was working with W during the seminar period because “he wasn’t getting general-education push-in support; that was removed prior to the current IEP. W was sensitive to having anybody work with him in the general-education classroom, so it had been requested that we do not provide what we call push-in support. So no -- which is also why I was not going to the seminar to work with him during those 20 minutes.” (Tr. 2-35) In order to provide W the additional 20-minutes seminar time outlined in his IEP that were lost during the fall 2020 schedule, he would have to be pulled from one of his general education classes. “There was essentially nowhere else in the day to make up that time.” (Tr. 2-33) As a result of the lost seminar time and lack of contact, Ms J was unable to provide meaningful progress notes for some of W’s IEP goals during that period. (Tr. 2-36, 37; RX 3b)

The daily school schedule was again revised on approximately October 26, 2020. (RX 6b) The two 10-minute “mask” breaks were eliminated, the ending times for classes were adjusted, and the seminar period was extended to 40 minutes. Teachers were permitted to call students to their classes during that period to offer help or extra work, as needed. SPED services also resumed, including working with W on IEP goals. (Tr. 2-36) Ms J noted that “in order to allow maximum integration into the general-education setting, all special education students have regular seminar classes. That included W. ... I could call [him] to me for seminar, but he still had to report to his seminar teacher and was still considered part of that class. And when there were events or activities going on that involved either his group or his grade, W was part of those, where, if he had been given to me, that changes the situation.” (Tr. 2-71) From the end of October to November 2020, Ms J was able to reflect the work she did with W on his IEP goals progress notes. (Tr. 2-37)²⁷

IEP goals were typically developed during CSC meetings. Petitioners provided written goals to the CSC team that they believed W needed to work on. (Tr. 1-137; 166, 167; 2-39) Progress on IEP goals was generally measured on work samples from teachers, work completed during a period, whether the student’s level of skill and difficulty for a particular goal had increased, the number of times the student turned in an

²⁷ Since Dr. SS did not have access to the computer program used to input the progress notes for social skills, she provided the data to Ms J to insert them into the program, resulting in Ms J’s name appearing on the progress notes. (Tr. 2-48, 49)

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assignment, and logs from the resource room and general education classroom. Ms J testified that in W's case, no logs were used to assess progress since his goals did not support their use. (Tr. 2-38, 39) Progress on goals was discussed with the CSC team at the meetings, including teachers' observations on W's progress, his success with the goals, how his progress was affecting his general education classroom, and whether he was making progress in general education. Teachers and team members collaboratively assessed W's progress within the goals. The overall objective was to reduce the gap in W's grade-level work. (Tr. 2-40)

During the 2019-2020 school year, W's 7th-grade marks for accelerated math and language arts improved from the third quarter to the fourth quarter.²⁸ W was primarily a B student during the fourth quarter; generally an improvement from previous quarters that included failing grades in math and language arts. (RX 9, p. 2) During W's 8th-grade school year (2020-2021), his grades included a C- in mathematics, and a B- in language arts. Ms J noted that W did not appear to have any major difficulty maintaining what he had learned from the end of 7th grade to the first quarter of 8th grade. However, his first quarter 8th grade math mark slipped. Ms J noted however, that the two quarters are incomparable since the mathematical concepts taught at the beginning of the year were not a continuation of those taught at the end of the previous year. (Tr. 2-41, 42) [SCHOOL 1] completed IEP progress reports to the extent practicable, and provided them to Petitioners. (RX 3a; 3b)

On September 2, 2020, notice of a CSC meeting to be held on September 4, 2020, was provided to Petitioners.²⁹ The meeting was to discuss W's speech-language assessment from March 2020 and possible changes to his IEP. (RX 2d)

Petitioners annotated the meeting notice as follows:

- Parent request for IEP meeting. The school's failure to provide FAPE.
- Refusal to issue PWN about reduction in services & denial to provide services in accordance to IEP. Discrimination of child by school.
- * Request from parents for independent evaluation (written notice).
- * Written 10-day notice from parents to IEP team about private services.
- * Parent request for mediation at next meeting.
- * Missed progress reports. (RX 2d)

During the meeting, Petitioners submitted their request for an independent educational evaluation (IEE) in the form of a "speech evaluation and assessment." (RX 2d). Ms N relayed the results of the speech-language assessment. At the time, Petitioners did not raise concerns about the scope of the assessment, but asserted that a new speech

²⁸ Remote learning was implemented during the fourth quarter 2019-2020.

²⁹ The Principal, Dr. H, was unavailable for the meeting. Mr. L, the DoDEA [REDACTED] District Instructional Systems Support Specialist and Autism/Behavior Specialist, attended the meetings as the Acting Assistant Principal. Additionally, an additional general education teacher, Mr. W, attended. (RX 2d)

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assessment should be conducted since the last one was done in March 2020. Petitioners requested that a meeting to adjust the IEP be delayed until October 2020. (RX 2d) The CSC meeting minutes do not reflect a complaint by Petitioners that the assessment did not include “pragmatic speech and written language.”

Petitioners requested mediation in September 2020, and Mr. L stated that he became aware of the request and Petitioners’ intentions on September 10 and 15, 2020. (PX P; Tr. 3-18) Petitioners allege that they also requested a “stay put” pending completion of the mediation. (Pet. p. 7 (Denial to honor ‘stay put’)) Mediation occurred from late October to early November 2020. (Tr. 3-38, 39; 4-112) The mediation process failed to resolve the dispute.³⁰

On October 1, 2020, a CSC meeting was convened to discuss Petitioners request for an IEE. The District required that the IEE be done by a qualified assessor within the District or Petitioners could choose an external assessor, subject to District qualifications. The assessment was required to be in person, rather than online. Mr. L proposed three speech/language pathologists within the district, two in the [SCHOOL 1] complex and one in [Redacted], [CITY 1]. W’s IEP services would continue unchanged until the assessment was completed. (RX 2e) The “Parent Permission for Evaluation” form noted that the assessment was to include individualized testing for articulation assessment; language assessment; and oral/peripheral examination. (RX 2e) Petitioners testified that they only requested an IEE for speech, not for pragmatic and written language, as they now assert. Petitioners planned to request a pragmatic and written language evaluation directly from the provider, rather than note it as part of their IEE request.³¹ (Tr. 1-105, 106)

On October 23, 2020, DoDEA approved the IEE to be conducted by a local [REDACTED] provider. A Receptive and Expressive Language Assessment was conducted in October and November 2020, but the final day of testing was not completed due to COVID-19- related restrictions in [CITY 1]. (RX 4c) The assessment report was released on November 9, 2020. The provider assessed oral language ability including both receptive and expressive language skills. (Tr. 4-86) The [SCHOOL 1] Speech Language Pathologist, Ms N, analyzed the IEE report as follows:

So per the CELF-4, that's the Clinical Evaluation of Language Fundamentals, fourth edition, which was administered by the examiner. Sub-test scores for the four sub-tests that were administered are profiled in the average range to significantly above average range. The core language

³⁰ A parent ... may request mediation at any time, whether or not a due process petition has been filed, to informally resolve a disagreement on any matter relating to ... the identification, evaluation, or educational placement of a child, or the provision of a FAPE to such child. Mediation shall be confidential. No hearing officer or adjudicative body shall draw any inference from the fact that a mediator or a party withdrew from mediation or from the fact that mediation did not result in settlement of a dispute. *See generally*, Manual, encl. 6, § 4.

³¹ Petitioners believed that an evaluation for speech included pragmatic speech and written language. They define pragmatic speech to include a child making inappropriate pronouncements in social settings.

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score at the very bottom, the scaled score actually there is an error there in her score. She reported it as a 45. That actually was the raw score. She neglected to convert that to a standard score. The correct standard score would be a 108. And the percentile rank is reported accurately as the 70th percentile. So a core language index score of 108 profiled at the 70th percentile is a score which is profiled solidly within the average range. (Tr. 4-87)

Ms N noted the core language assessment was consistent with the findings of the previous speech/language assessment she reported in March 2020. (Tr. 4-88; RX 4c)

On November 9, 2020, Mrs. S notified [SCHOOL 1] that she was requesting a “stay put” for any changes to W’s IEP pending the results of mediation. (PX I) Although [SCHOOL 1] and Petitioners had previously agreed to move forward with the IEE, the CSC team ceased all other IEP modification discussions based on the “stay put” concept, which generally prohibits any changes to a child’s status during the pendency of any administrative proceeding.³² If committee members and Petitioners determined that it was necessary to augment or compensate W for services impacted by the COVID-19-related schedule changes, the IEP could have been modified with Petitioners’ permission. However, due to Petitioners’ stay-put request, no IEP modifications were considered despite the fact that a due process petition had not yet been filed. (Tr. 3-19)

At Petitioners’ request, the [SCHOOL 1] Principal met with them on October 7, 2020, to review W’s academic file. (PX Q) On November 3, 2020, Petitioners formally requested the Principal provide copies of W’s educational records. Dr. H testified that she requested W’s academic records and logs from his teachers and the school psychologist, and provided everything she received to Petitioners. (Tr. 2-139 to 146) On November 30, 2020, Petitioners acknowledged picking up envelopes from the school office, but made a second request for “outstanding” student information that they believed was not included in the envelopes. Dr. H replied to Petitioners on December 1 and 4, 2020, that “all existing files have been provided to you.” (PX H)

Petitioners filed another stay-put request on December 14, 2020. (Petition, p. 53) On November 24, 2020, Dr. H emailed the CSC team and Petitioners proposing an IEP meeting to review and modify W’s current IEP, as needed, “in order to make sure it is current and accurate for his needs.” In addition, the meeting was to “administer the WISC and WIAT educational assessments necessary to ascertain W’s current ‘snapshot’ on his present levels of academic achievement and functional performance.” Finally, the team

³² Maintenance Of Current Educational Placement a. Except when a child is in an interim AES for disciplinary reasons, during the pendency of any proceeding conducted pursuant to this enclosure [Enclosure 6], unless the school and the parents otherwise agree, the child will remain in the then current educational placement. Manual, encl. 6, § 18. See *also*, 34 C.F.R. § 300.518 (Child’s status during proceedings. (a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.)

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was to develop a plan to provide W with any “compensatory educational services” he needed to address the impact of missed services from August 18 to October 27, 2020. If the compensatory services could not be satisfied or completed while W was attending [SCHOOL 1], services would be provided until the date of W’s annual review on January 13, 2021. (Petition, p. 51)

A CSC meeting notice was issued on December 3, 2020, for a meeting on December 16, 2020. The notice was signed by Petitioner Mr. S., and was mentioned in Dr. H’s email to Mrs. S on December 4, 2020. (Petition, p. 52; PX H) However, no meeting was held. As a result, during testimony, Petitioners’ withdrew the Petition allegation claiming a violation of the stay-put notice. (Tr. 1-82 to 84)

Petitioners filed a due-process petition on December 14, 2020. (Response, Ex. 9) A resolution meeting required by statute and DoD regulations was held in January 2021.³³ (RX 7; Tr. 1-105) Mr. L, who was present at the resolution meeting with [SCHOOL 1] CSC team members and Petitioners, stated that Petitioners requested that the student be “made whole.” There was a discussion on how to quantify that, and how to compensate W into the future. The discussion included items that the school district did not feel that they could commit to at that point. (Tr. 3-22) He stated that a standard to make a student “whole” was open ended and was not used to determine what, if any, compensatory services were needed. Mr. L testified that the standard would be to place or return a student to a position that he would have been in, had there not been a lapse or reduction in services due to circumstances. (Tr. 3-23)

During the resolution meeting, the school offered minute-for-minute services to replace missed SPED service time from August to October 2020 in the seminar room. For the March 2020 to June 2020 period, [SCHOOL 1]’s position was that additional assessments were needed to determine what, if any, impact the missed time had on W. Mr. L noted that if it was determined that W still required compensatory services upon leaving the district, DoDEA would provide them or support appropriate services until it was determined that the student was in a position that he would have been in, had there not been a lapse or reduction in services. (Tr. 2-24)

At the resolution meeting,³⁴ [SCHOOL 1] noted that IDEA and Federal fiscal laws prohibited monetary compensation, but payments could be made to reimburse services provided by an outside provider. (RX 7a) [SCHOOL 1] offered augmented services, based on the impact of the remote learning period, to include 860 resource-setting minutes that were missed from March to June 2020. During that period, all student sessions went from

³³ A resolution meeting shall be convened by DoDEA and a resolution period afforded, in accordance with this enclosure, for any dispute in which a due process petition has been filed regarding the identification, evaluation, or educational placement, or the provision of FAPE for children ages 3 to 21, inclusive. Manual, encl. 6, § 7.

³⁴ The resolution meeting minutes note that “discussions held, minutes, statements, and other records of a resolution meeting, and any final executed resolution agreement are not presumed confidential and therefore are discoverable and admissible in a due process proceeding, appeal proceeding, or civil proceeding, except when the parties have agreed to confidentiality. (RX 7a)

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approximately 67 minutes per session, to 30 minutes per session because of the remote learning platform. [SCHOOL 1] also proposed to compensate W with 1,675 resource minutes missed from August to November 2020. In addition, [SCHOOL 1] offered to update assessments to determine the impact on W, to determine his present levels, and to complete the IEE process. They also offered any other appropriate assessments to help the team determine any potential impact, and to supply current present levels for appropriate IEP and program development. The school pledged to share work samples and performance data from the school and providers with Petitioners as they became available.

The offer was extended to include W's current school, [SCHOOL 2], who would provide continued service and compensatory services. Mr. L offered to include assessments for speech and language that would analyze pragmatics and an educational assessment for written language, as requested by Petitioners.

Petitioners noted their continued desire for DoDEA-funded ABA therapy from an outside source, and testing for speech, pragmatics, and written language. Petitioners also suggested that [SCHOOL 2] provide education services, and that other services could be provided by an outside ABA provider. They also requested that DoDEA pay for outside assessors to determine W's social emotional/functional behavior needs. They also asked about the continuation of services once they leave [CITY 2] and W attends another school outside of DoDEA, and they wanted compensatory services to continue until W was "made whole."

DoDEA offered to ensure that the missed minutes were recouped during the next 18 months while W was at [SCHOOL 2], but DoDEA could not project W's level of performance beyond that time. Petitioners reiterated that they wanted assurances that W would receive services until he was made whole, regardless of whether it takes "five months or five years." At that time, Petitioners rejected all of the school's offers and opted to continue with due process. (RX 7a)

Petitioners expressed their view of the resolution meeting and expected outcomes in testimony as follows:

The school might have offered us many things, but our question was from our personal perspective, if you deal with somebody who can't even hold up to all the promises that were made -- can't even fulfill a simple IEP, how would they be able to fulfill when there would be a resolution agreement? What would change? How would we know that what they promise us in the resolution meeting would be really what they do for W? And when W is going to high school and looking at his PSAT scores, I think we as parents -- we just cannot waste any more time and just deal with noncompliance and just the inability to address his needs in an appropriate manner. And we thought that the only possible resolution would be -- or part of the resolution would be due process where there's some type of independent supervision or at least an order that has that additional weight for the school

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to fulfil whatever will be decided. And like we said, if W goes to college or not, that's like another page for him. But we should all agree that nobody should stand in the way of him at least trying. (Tr. 4-120, 121)

CONCLUSIONS OF LAW

The parties generally agree that W lost some of the service time he was required to receive under the IEP during the remote learning period from March to June 2020, and during the fall 2020 quarter, August to December 2020. The lost service time was not due to an intentional or malicious act by DoDEA or [SCHOOL 1]. Rather, it resulted from a most unusual and unexpected event, a global pandemic that closed schools and fundamentally changed the way people interacted with each other. In response to a local (and global) health crisis that endangered children and adults alike, DoDEA and [SCHOOL 1] ensured that their students maintained a healthy and safe environment, while still providing educational services in the best way possible. The resulting remote learning environment and later “pod” environment once the students returned to the brick-and-mortar school, enabled teachers and students to limit potential interpersonal exposure to the COVID-19 virus while maximizing instruction under the circumstances. However, as witnessed in countless school districts worldwide, remote learning and the “pod” environment has its limitations, especially for those with learning impairments.

DoDEA and [SCHOOL 1], like districts and schools around the world, should be commended for their quick and efficient transition from the physical classroom to a fully-remote environment, a monumental task on short notice. All students lost education time and dealt equally with limited resources due to public health and military installation restrictions. Special education students also lost specifically designated instruction and support services designed to enable them to learn and progress academically.

As defined in the IDEA, a FAPE comprises special education and related services, both instruction tailored to meet a child’s unique needs and sufficient supportive services to permit the child to benefit from that instruction. 20 U.S.C. § 1401(9), (26), (29). *See, e.g., Fry*, 137 S. Ct. 743 (2017). Under the IDEA, the IEP serves as the primary vehicle for providing each child with the promised FAPE. *Honig*, 484 U.S. at 311 (1988). However, IDEA does not give the parents of disabled children veto power over a district’s decisions regarding the management of its schools. *N. D. v. State Dep’t of Educ.*, 600 F.3d 1104 at 1117 (9th Cir. 2010) (quoting *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)).

In an early pandemic-related temporary restraining order application case, a U.S. district court noted “the school district is operating under a statewide directive to provide online education until the COVID-19 outbreak improves.... These closures protect the health and safety not only of students but also of teachers, staff, families and anyone at risk of serious illness or death as a result of a school based outbreak ... there is a strong public health interest in maintaining uniform adherence to policies and in limiting the use of exceptions.... On balance, given the unprecedented health crisis to which the school district’s IEP implementation seeks to respond, the public interest factor favors the

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district.” (Citations omitted) *E.M.C. v. Ventura Unified School District*, 2020 U.S. Dist. LEXIS 232006, 2020 WL 7094071 (C.D. Cal. 2020).

The United States Department of Education (USDOE) issued guidelines on September 28, 2020, maintaining that even during the present COVID-19 pandemic and regardless of “what primary instructional delivery approach is chosen[,]” state and local educational agencies and IEP Teams “remain responsible for ensuring that a [FAPE] is provided to all children with disabilities. Regardless of what “primary instructional delivery approach is chosen . . . IEP teams remain responsible for ensuring that a FAPE is provided to all children with disabilities.” We understand circumstances are always subject to change and recognize that ultimately the health and safety of children, families, and the school community is most important. Districts must make “every effort to continue to provide children with disabilities with the special education and related services appropriate to their needs. As conditions continue to change throughout the country, some of the special education and related services included in a child’s IEP may need to be provided in a different manner; however, all children with disabilities must continue to receive FAPE and must have “the chance to meet challenging objectives.” (*citing, Andrew F.*, 137 S. Ct. at 1000).³⁵ See also, *Marrero v. Puerto Rico*, 2021 U.S. Dist. LEXIS 11602, 2021 WL 219195 (D. PR 2021).

The DoDEA special education “best practices” policy statement noted that:

[S]pecial education personnel recognize the importance of specially designed instruction to meet the unique needs of each student with an IEP and understand that there is no one way or defined method to adequately and equitably meet these students’ needs during the school building closures. . . . [T]his is an unprecedented event, and this guidance is balanced with the realization that district and school leadership manage rapid response processes to ensure the health and wellbeing of students, staff, spouses and out service men and women. As such, school and district leadership are encouraged to make the best decisions possible considering local response requirements, and resources, while balancing free appropriate public education requirements with the health and safety of our communities. (RX 8c)

DoDEA published COVID-Related Compensatory Recovery Services Guidance on December 28, 2020 (promulgated March 25, 2021). (RX 8d) The guidance notes that “COVID-related compensatory recovery services are an equitable remedy designed to repair educational and functional deficits resulting from disruptions, delays, and/or access to student services created by the COVID-19 global pandemic when schools are in operation.” DoDEA recognizes that “due to situational conditions (unavailability of services, constraints of remote learning methods, etc.), some students may not have

³⁵ United States Department of Education, Implementation of IDEA Part B Provision of Services in the COVID-19 Environment, Office of Special Education Programs, (Sept. 28, 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf>.

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received services specified in their IEPs or may have received only partial support and attention for some areas of their identified needs.” It tasks CSC teams to make individualized determinations whether and to what extent compensatory recovery services are needed, including specially designed instruction and/or any related services, and determine whether compensatory recovery services are needed to address progress or skills lost due to the disruption to the provision of a FAPE.

Two circumstances that will prompt consideration for compensatory services include delay or lapse in services and insufficient/ineffective services. Compensatory recovery services include educational services needed to make up for skills or learning that have been lost as a result of a lapse, delay, or insufficiency in the provision of IEP services due to COVID-19-related circumstances. Related services are those required for the student to benefit from his or her special education program and may include *inter alia*, psychological and counseling services, language, speech, and hearing services. (RX 8d)

The guidance notes that students are not automatically entitled to compensatory recovery services. “While schools may not have been able to provide all educational and related services in the same manner as their in-person instruction, many students still received an effective degree of services within the remote platform.” An individualized determination on whether a student requires compensatory recovery services should include information regarding:

- The provision of FAPE during school closure.
- What services were provided to the greatest extent possible during the time in-person instruction was suspended. The school should document the continuity of learning activities that were accessible to the student, the IEP services that were provided, and related communications with student and parents.
- The student’s educational progress and achievement. Progress monitoring during remote learning activities should be analyzed in conjunction with data about the student achievement and progress at other instructional intervals (during previous school years and first semester of SY 2019-2020 prior to closure due to COVID-19).
- Documentation, such as rate of learning or loss/regression of skills that had been previously mastered, to provide insights about the impact of the disruption of services due to school closures or other aspects of the virtual learning environment. (RX 8d, FAQ)

Services/remedies must be individually determined and directly linked to the denial of educational progress and achievement, including lack of progress toward the student’s IEP goals and ability to participate and progress in the general education curriculum. The services must also be reasonably calculated to enable the student to make appropriate progress in lights of his or her circumstances, including any regression or loss of skills that occurred as a result of disruption of services due to school closures or delays in the start of services. (RX 8d, FAQ)

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Petitioners asserted numerous procedural and substantive violations of the IDEA. The burden of proof and persuasion in due process cases is on the Petitioners. See, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Overall, the evidence in this case does not support a significant procedural violation, a denial of a FAPE, or a material failure to implement W's IEP.

Following are specific findings with respect to Petitioners' allegations:

1. Speech Language Evaluation from Jan/Feb 2020

In December 2019, Petitioners raised concerns about W's speech services and needs. The SLP/Assessor offered to open a formal speech and language assessment to determine W's specific needs. At the January 13, 2020 CSC meeting, the team discussed W's need for a speech and language assessment. The team agreed to an assessment plan for speech and language testing only. Assessments were to be done in articulation, language, and the oral/peripheral examination per the discussion at the CSC meeting and the recommendation by the speech language assessor. Petitioners agreed and signed a permission form in which they specified, "only speech/language assessments." The evaluation was conducted and the report was issued on March 8, 2020. In addition, [SCHOOL 1] agreed to an independent educational evaluation (IEE) and offered other appropriate assessments to help the team determine any potential impact from the 2020 school year, and supply current present levels for an appropriate IEP and program development.

This allegation reflects a disagreement or misunderstanding as to the scope of the assessment. To the extent it involved a procedural violation, it did not impede W's right to a FAPE, significantly impede Petitioners' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. Additionally, the evidence does not suggest W was denied a FAPE as a result. Simple disagreement is not enough to demonstrate error by the school.

2. Material Failure to Implement the IEP

Throughout the 2019/2020 spring and 2020/2021 fall quarters, a FAPE was provided to W. In light of the changes to the provision of education necessitated by the COVID-19 pandemic and HPCON CHARLIE restrictions, all [SCHOOL 1] students were treated equally and all received educational instruction in a remote environment. [SCHOOL 1] and DoDEA acknowledge that W's service minutes as prescribed in his IEP were not fulfilled as originally intended. However, the [SCHOOL 1] administration, teachers, and school staff made every effort to adapt their instruction to the new realities of online schooling, and provide SPED services the extent practicable. They also ensured continuous communication with W and Petitioners through various means, and remained open to discussion of any problems or educational shortcomings. Near the start of online learning, Petitioners were notified of the changes to the provision of educational services in the general and special education environments, the school's efforts to provide specially designated instruction online, and special education services in the group and

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independent settings in an effort to mirror as closely as possible, the IEP requirements. Petitioners were informed and asked to consent, but Petitioners refused to acknowledge the notice and submit their consent.

Petitioners have not carried their burden to show that W failed to make meaningful progress under the circumstances, or that FAPE was denied by the changes in educational operations. Although [SCHOOL 1] acknowledged that IEP service minutes were missed as a result of the online and restricted fall school schedules, and offered compensatory services, there is insufficient evidence to show that W regressed as a result or was denied FAPE at any time. W's grades showed a general improvement despite remote learning and the restricted fall schedule, and he advanced to the next grade on time.

The Supreme Court noted that the IEP must, at a minimum, "provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. In addition, "[the IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." Further, "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id.* (emphasis in original). *Andrew F.*, 137 S. Ct. at 999.

In assessing whether a school provided a FAPE, "courts should endeavor to rely upon objective factors, such as actual educational progress, in order to avoid substituting [their] own notions of sound educational policy for those of the school authorities which [they] review." *MM ex rel. DM v. School Dist. of Greenville Cnty.*, 303 F.3d 523, 532 (4th Cir. 2002) (internal quotation marks and brackets omitted). Indeed, "it is a longstanding policy in IDEA cases to afford great deference to the judgment of education professionals." *Andrew F.*, 137 S. Ct. at 1001

The evidence shows that W's IEP was reasonably implemented during the 2020 school year, given the unprecedented operational changes required to keep students and teachers safe. The evidence suggests that W made satisfactory progress in his educational goals, and appropriately advanced to the succeeding grade level. Insufficient evidence was introduced to support the contrary. The evidence did not support petitioners' claim that W was materially affected by the implementation of pandemic-related policies. Petitioners failed to meet their burden of production and persuasion in attempting to show that Respondents erred in any aspect of the delivery of special education and related services under the circumstances, or that the school engaged in any procedural violations or denied him a FAPE at any time.

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3. IEP Goals

Petitioners were properly notified of the IEP goals, and were an integral part of their development. The evidence suggests that appropriate methods of measurement were satisfactorily explained to Petitioners and the goals were appropriately evaluated. At times, some goals could not be measured due to incomplete data because of operational changes brought about by the pandemic. [SCHOOL 1] and the CSC team remained engaged with Petitioners during CSC meetings and by other means when CSC meetings were unavailable or limited. Petitioners' ultimate disagreement with W's attainment or failure to attain certain goals is not supported by substantial or persuasive evidence. Likewise, it did not rise to a procedural violation that impeded W's right to a FAPE or the parent's opportunity to participate in the decision-making process, nor did it cause a deprivation of educational benefits.

4. ABA Referral Request From Petitioners

Petitioners' request that [SCHOOL 1] provide or utilize a specialized form of social and behavioral therapy using the applied behavioral analysis (ABA) method was properly considered, fully discussed with Petitioners during CSC meetings, and ultimately denied. ABA therapy is not generally offered at [SCHOOL 1] or authorized by DoDEA, but the school psychologist, Dr. SS, agreed to use some ABA methods in her work with W. She noted however that other types of behavioral therapy options were reasonably available and appropriately utilized, and that W's behavior improved during the remote learning period and through the fall 2020 quarter.

Special education legislation was designed to involve parents and give them a voice in the education program being offered their child with special education needs. See *Clay T. v. Walton County School District*, 25 IDELR 409, (Jan. 29, 1997). However, there is nothing in the legislation itself, in its history, or in its interpretation by the courts, which suggests that it was intended to empower parents to the point where they can dictate the kind of program they want the school to provide, without providing sound and persuasive evidence or authority that what they are proposing is necessary to assure that their child will receive an educational benefit. See *Roy and Anne A v. Valparaiso Community Schools*, 25 IDELR 413 (Jan. 30, 1997). No such "sound and persuasive" evidence or authority was introduced by Petitioners. Nor was there compelling evidence that their preferred method of behavioral therapy was necessary to ensure that W received an educational benefit not otherwise provided by [SCHOOL 1]. The CSC team's denial of Petitioners desired method of social and behavioral therapy was appropriate and does not constitute a denial of a FAPE.

In addition, there was no predetermination of W's placement during the remote learning or fall 2020 quarter. Petitioners were an integral part of CSC team discussions and 2020 IEP development with respect to placement of W in the least restrictive environment. His placement did not materially change as a result of the remote learning environment or fall schedule, and the evidence suggests W was "educated to the

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maximum extent possible with children who are not disabled.”³⁶ The use of alternative social and behavioral therapies instead of a specific ABA therapy is an appropriate exercise of discretion of the CSC team, and does not constitute a change in placement.

Although Dr. SS did not recall providing outside ABA resource information to Petitioners, the provision of such information is optional. The school’s decision with regard to outside recommendations is within the discretion of the CSC team and did not rise to a denial of FAPE or a failure to appropriately implement W’s IEP.

5. Predetermination and Prior Written Notice

The evidence does not support Petitioners’ claim that W’s “educational and civil rights” were violated by the school’s decision to institute remote learning and a restricted fall schedule during the pandemic. As stated earlier, changing school operations for all students to ensure their health and safety does not constitute “predetermination.” Any suggestion to the contrary is unreasonable and ignores the realities of the unprecedented circumstances with which the school faced.

As stated above, reasonable and appropriate notice was provided to Petitioners of educational changes as they occurred, to the best of the school’s ability. The school’s decision with regard to how and when they provide notice to parents is an administrative matter that did not rise to a procedural violation that impeded W’s right to a FAPE or the parent’s opportunity to participate in the decision-making process, nor did it cause a deprivation of educational benefits. The evidence does not suggest a denial of a FAPE or imply a failure to appropriately implement W’s IEP. Likewise, Petitioners’ claim that [SCHOOL 1] failed to provide PWN explaining policy decisions during the pandemic, or notice that a FAPE was to continue during these periods, are unfounded. Petitioners’ claims are unsupported by the evidence and fail to show that W was denied a FAPE due to PWN inadequacy or timing.

6. Predetermination of Placement and FAPE

The allegation that [SCHOOL 1] engaged in “unilateral” predetermination of W’s placement and impeded his ability to obtain a FAPE are unsupported by the evidence. The decision to close [SCHOOL 1] and implement a remote learning plan was applied to all students, regardless of education status. Alternative options were not realistically available, and Petitioners never raised questions about alternate schooling options. Their ability to opt out of DoDEA managed schools and attend a private school was never impeded, had they desired to utilize that option. In a pandemic-related case, a U.S. district court noted “when children with disabilities are offered the same remote instruction that is available to children without disabilities, the remote instruction setting qualifies as a regular educational environment, or regular class, under the ‘least restrictive environment’ (LRE) provision.” *Hernandez v. Lujan Grisham*, 78 IDELR 12, 2020 U.S. Dist. LEXIS 238477, at 4 (D. N.M. 2020).

³⁶ Manual, encl. 4, § 10b(a).

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Insufficient evidence was presented that supports Petitioners' claim that their participation in the IEP process was significantly or unreasonably impeded during the remote learning or the restricted fall 2020 quarter. Remote education utilizing online resources was widely used, and was [SCHOOL 1] and DoDEA's preferred option. The reality of the health and safety risks posed to teachers and students during the pandemic left the District with limited options, and the risk of spreading a pandemic virus outweighs the perceived harm Petitioners allege, without basis. No actual harm to Petitioners or W has been established.

Finally, Petitioners were not excluded from the IEP process, or from participating in CSC meetings. In fact, no meetings were held without Petitioners attendance. In March 2020, Petitioners were offered an opportunity to participate in a CSC meeting via online resources, but they refused and opted to wait until the start of the new school year in the fall. The evidence shows that [SCHOOL 1] made every effort to accommodate Petitioners while working within the confines COVID-related restrictions. There was no evidence submitted that suggested that CSC meetings were held without Petitioners' participation or that they were ever barred from the process. A FAPE was never restricted or denied as a result of alleged procedural violations, and there was insufficient evidence presented to show that W's access to services or the parent's opportunity to participate in the decision-making process were significantly impeded.

7. Denial of IEP Meetings

This allegation is unsupported by the evidence. There was no procedural violation that impeded W's right to a FAPE or the Petitioners' opportunity to participate in the decision-making process, nor did it cause a deprivation of educational benefits.

Due to the COVID-19 pandemic, HPCON CHARLIE, and local government restrictions beginning in March 2020, [SCHOOL 1] was not permitted to hold in-person meetings. As previously discussed, Petitioners were provided an option to hold a CSC meeting online, but they refused based on unfounded concerns about risks to medical privacy rights on Google Meet. [SCHOOL 1] provided an alternate, in-person meeting option in March 23, 2020. Petitioners objected to holding a meeting while the school was closed during the COVID-19 outbreak. The [SCHOOL 1] Principal agreed to reschedule the meeting for a later time when school reopened. Petitioners then requested a face-to-face meeting to be held after school working hours and asked that the school provide child-care services. The Principal attempted to accommodate Petitioners by calling in teachers for an in-person meeting, but notified Petitioners that the meeting would have to be held during regular teacher work hours. Instead, Petitioners agreed to meet once school reopened in the fall. A meeting with all parties was eventually held in September 2020.

8. Predetermination of Behaviors

The school psychologist proposed an IEP goal using an evidence-based check-in/check-out (CICO) procedure. This would require W to evaluate his own progress.

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Petitioners raised concerns about clearly identifying expected behaviors and requested the ability to modify the wording of the proposed behavior plan that included the CICO. Although it was suggested by the school psychologist as part of a behavioral plan, Petitioners rejected the CICO list along with the proposed behavior plan, and they were never implemented. There is no “right” to a CICO or a particular behavioral plan. Petitioners objected to the methods and data obtained by the school psychologist used to develop the FBA, and refused to support a plan that did not include their preferred ABA therapy. Insufficient evidence was submitted to show that the school psychologist was unqualified to write behavioral plans or that her compilation of data was insufficient. This allegation is unfounded.

9. Failure to Provide Requested Student Related Information

There was insufficient evidence presented that [SCHOOL 1] denied Petitioners all available student work or data. At Petitioners’ request, the [SCHOOL 1] Principal met with them on October 7, 2020, to review W’s academic file. On November 30, 2020, Petitioners acknowledged picking up envelopes from the school office, but made a second request for “outstanding” student information that was not included in the envelopes. The principal provided all available academic records and logs to Petitioners, and no evidence was presented that available information was withheld from production. This allegation amounts an administrative matter that has been adequately addressed by the school. The allegation is unfounded.

10. Failure to Reassess W After the 2020 Summer Break

[SCHOOL 1] notified Petitioners on April 3, 2020, that the CSC would contact parents after school reopened to review student programs and determine adjustments to IEPs. Petitioners allege the school was closed for three days in March 2020, and then continued in a restructured remote format, without an IEP adjustment meeting. As a result, W’s academic skills after the 2020 summer break were not assessed and his math and language support was abandoned. Although W was not reassessed at the start of the fall 2020 quarter, there is no requirement that he be reassessed immediately upon returning to school. In fact, Petitioners suggested waiting for the fall quarter to hold the next CSC meeting, and a meeting to discuss W’s speech-language assessment from March 2020 and possible changes to his IEP was held on September 4, 2020. However, at that time, Petitioners alleged a violation of a FAPE, requested an IEE, and asked for mediation and a “stay put.” No further action by [SCHOOL 1] occurred except as requested by Petitioners. [SCHOOL 1] agreed to continue with the IEE process while respecting Petitioners’ stay-put request. The evidence presented does not support the allegations of a procedural violation or a denial of a FAPE.

11. Failure to Provide Progress Reports

The evidence shows that progress reports were provided to Petitioners, and that goals that could be measured during the spring remote learning period or the fall restricted

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schedule period were provided. Any allegation of procedural violations or denial of a FAPE as a result are unsupported by the evidence.

12. Failure to Honor “Stay Put” Request (Allegation was withdrawn during hearing)

Petitioners alleged that during mediation and after they filed a “stay put” request, [SCHOOL 1] did not honor the request when they scheduled an IEP meeting for December 16, 2020. The meeting never occurred. The allegation during the hearing was withdrawn by agreement of the parties.

13. District’s Offer to Compensate W for Denial of FAPE

This allegation fails to state a claim. Rather the allegation appears to be an additional request for relief and implicates mediation that is confidential and not a part of the record, except to the extent the parties referred to it during the hearing. No hearing officer may draw any inference from the fact that a mediator or a party withdrew from mediation or from the fact that mediation did not result in settlement of a dispute. Regardless of the crafting of the allegation, the facts show that during the resolution meeting, the compensatory offer of services was extended to include W’s attendance at his current school, but the offer was ultimately rejected by Petitioners.

CONCLUSION

Due to reduced IEP services that resulted from pandemic-related operational changes at [SCHOOL 1] in 2020, DoDEA offered to compensate W with all missed resource minutes. In addition, [SCHOOL 1] offered to update assessments for W, to complete the IEE process that was started in [CITY 1], and to offer any additional appropriate assessments necessary to determine W’s present levels to amend his IEP and support programs, including for speech and language pragmatics and written language as requested by Petitioners. The offer was extended to W’s current school and was to be completed during the period in which he was expected to remain at the school.

This offer of compensatory services and assessments in light of DoDEA’s pandemic-related policies, directly and appropriately addressed the gravamen of Petitioners’ concerns; however, Petitioners summarily refused the offer. Instead, Petitioners advocated for DoDEA’s funding of an outside ABA therapist, and for services to continue until W was made whole in some unmeasured manner, regardless of the length of time or whether W remained in a DoDEA school. Petitioners’ prayer for relief in this regard is vague and open-ended. As such, it is wholly beyond the scope of relief contemplated or authorized by IDEA and DoD regulations.

Petitioners have not proven that Respondents failed to provide a FAPE or violated IDEA during the period W attended [SCHOOL 1], including during pandemic-related school closure, remote learning, and fall 2020 operational changes. Pursuant to DoDEA’s pandemic-related policies and at the discretion of DoDEA and the [SCHOOL 2] CSC team, the previous offer of compensatory services such as missed IEP minutes,

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appropriate assessments, and completion of the IEE, should be implemented as soon as practical. However, Petitioners' request for DoDEA-funded ABA therapy, monetary compensation, or other relief requested in this matter is **DENIED**.

NOTICE OF APPEAL RIGHTS

Either party may appeal this decision by filing written statements of issues and arguments with the DOHA Appeal Board. To preserve the right of appeal, a written notice of appeal must be submitted within 15 business days of receipt of this decision. Instructions for delivery of a notice of intent to appeal, as well as deadlines for filing statements of issues and arguments, can be found in the Manual, encl. 6, § 17. Filing is complete upon mailing.

/original signed/
Gregg A. Cervi
Administrative Judge

Copies to:

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