DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

KEYWORD: Special Education

DIGEST: We conclude the Judge committed no harmful error. The decision is sustainable. As the Judge recommended, we also encourage the parties to work together to implement the School District's resolution offer to provide W compensatory recovery services. The Judge's order is Affirmed.

CASENO: E-20-003.a1

DATE: 12/14/2021

Date: December 14, 2021

In the matter of:	)	
---------------- by his Parents	)	Case No. E-20-003
Petitioner	)	

APPEAL BOARD DECISION

APPEARANCES

FOR PETITIONER
Pro se

FOR RESPONDENT
Nicole A. Smith, Esq., Department Counsel, Defense Office of Hearings and Appeals (DOHA)
Kelly M. Folks, Esq., Department Counsel, DOHA

DOHA Administrative Judge Gregg A. Cervi issued a decision in Petitioner's case on August 9, 2021, in which he held that the Respondent School District had not denied Petitioner, a

child with learning disabilities, a Free and Appropriate Public Education (FAPE) and had not denied Petitioner or his parents their procedural rights, in accordance with the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq*), Department of Defense (DoD) Instruction 1342.12, *Provision of Early Intervention and Special Education Services to Eligible DoD Dependents,* dated June 17, 2015, (Instruction), DoD Manual 1342.12, Implementation of E*arly Intervention and Special Education Services to Eligible DoD Dependents,* dated June 17, 2015 (Manual), and 32 CFR Part 57. Petitioner appealed this decision in accordance with the Manual, Encl. 6 ¶ 17.

Petitioner has raised the following issues on appeal: whether the Judge's decision is erroneous, whether Petitioner was denied due process, and whether the Judge erred in procedural rulings and findings of fact. Finding no harmful error, we affirm the decision of the Judge.

The Judge's Findings of Fact and Conclusions

Petitioner (also referred to as "W") is approximately 14 years old. A psychologist diagnosed W with Autism Spectrum Disorder (high-functioning ASD/Asperger's Syndrome). This diagnosis was confirmed by an institute for developmental disabilities in 2015. His parents describe W as an intelligent teenager who is planning to go to college. W hopes to participate in the Junior Reserve Officers Training Corps (JROTC) and aspires to lead others, hopefully, as a military officer. Based on W's score on an aptitude test in 2020, his parents are concerned that he will not be ready for college.

When the Petitioner's parents moved to Europe in January 2018, W transferred into the 5th grade at a DoD elementary school with an existing Individualized Education Program (IEP). In March 2018, W's IEP was modified to address communication goals, functional life skills, and reading goals. In May 2018, his IEP was again modified to address behavior goals and included a behavior intervention plan. In December 2018, a behavioral specialist's observations and recommendations were included. In March 2019, the School Psychologist conducted a Functional Behavioral Assessment (FBA) of W. The psychologist indicated the FBA was needed to address behaviors of concern because W was disruptive to himself and others and refused to do school assignments. The FBA recommended intervention strategies, replacement behaviors, and possible reinforcers.

In the fall of 2019, W entered the 7th grade at a DoD middle school. In October 2019, his mother sent a letter to an Autism/Behavior Specialist at the School District complaining that the data in the FBA was questionable and the behavior plan was not implemented. She claimed these flaws subjected W to questionable punishment techniques and warned a failure to implement IEP requirements may indicate a denial of FAPE and possibly discrimination.

In October 2019, W underwent a psycho-educational evaluation administered by a clinical psychologist to assess his learning disabilities. W's general ability score was average. He tested below average on fluid reasoning ability and processing speed tasks. Other weaknesses included written expression, spelling and sentence completion, reading accuracy and rate, reading

comprehension, and mathematics fluency. He demonstrated inattentiveness and impulsivity and was prone to becoming frustrated and quick to anger. "The report suggested diagnoses including autism spectrum disorder without cognitive impairment with pragmatic language impairment; and specific learning disorder with impairment in reading, written expression, and mathematics." Decision at 14.

In December 2019, a Case Study Committee (CSC) meeting convened to review the psycho-educational evaluation. The committee concluded the criteria for a specific learning disability were met. Present levels of performance were established for each area of concern. Petitioner's mother expressed concerns about W's speech needs. The Speech-Language Pathologist offered to open a formal speech and language assessment once a new IEP was completed. The committee agreed that special education services would be provided during the seminar period so that W would not lose an elective course. Proposed IEP goals and objectives were provided to Petitioner's parents for review.

On January 13, 2020, the CSC meeting continued. The CSC members, including Petitioner's parents, signed an amended IEP that took effect the next day. Under this IEP, W was to receive for a year the following special education services:

Type of Service	Anticipated Frequency	Duration	Provider
Special Education	10 days	335 minutes	Learning Impaired Teacher
Counseling Services	10 days	60 minutes	School Psychologist
Speech & Language	10 days	60 minutes	Speech-Language Pathologist

The IEP had five language goals, six mathematics goals, and six reading goals. Under this IEP, W would be in general education classes 88% of a 10-day school cycle and in special education classes the remaining 12% of that cycle.

At a meeting in December 2019, Petitioner's mother indicated Applied Behavioral Analysis (ABA) would be an appropriate means of teaching W replacement behaviors and noted W had years of private ABA therapy in the past. The School Psychologist stated she did not provide ABA therapy and proposed using an evidence-based check-in/check-out (CICO) procedure, which required W to evaluate how he believed he was doing. The Principal noted the proposed behavior plan was consistent with the expected behavior for all students. In February 2020, Petitioner's mother rejected the proposed behavior plan and CICO procedures. In the end, no formal behavior plan or CICO procedures were adopted due to the absence of parental consent and CSC agreement.

On March 14, 2020 Petitioner's school closed for three days due to COVID-19. When it reopened, the school had moved to a virtual or remote online environment. The DoD Education Authority (DoDEA) published "best practices" guidance during remote learning. The School District also issued several guidance documents, including one addressing special education

services during remote learning. The typical minute-for-minute classes were not necessarily appropriate or successful on a digital platform. Parents were provided information about the interruption in services resulting from the school closure, informed that classes would be abbreviated for remote learning, and given information about how to communicate with teachers. Periods were reduced to 30 minutes. The Learning Impaired Teacher testified that remote learning was difficult for students and replicating an in-person school day was not practical remotely. She noted students found working on the digital platform for extended periods tiring. IEPs were not modified because the school thought the COVID-19-related remote learning environment would be a temporary situation lasting only about a couple of weeks.

On March 31, 2020, the Learning Impaired Teacher notified Petitioner's parents that special education service would continue in the virtual setting, requested they review the guidelines, and sign a written consent. The parents did not return the consent form. During virtual learning, W had the opportunity to meet with the Learning Impaired Teacher between 1:00 and 3:30 on Mondays through Fridays. The Speech-Language Pathologist continued providing W instruction from March through June 2020. W's speech goals were mastered with the exception of him not being able to pronounce certain phonemes. The school kept parents informed via email of events, assignments, and schedule changes.

Between January 28 and February 18, 2020, W's speech-language evaluation was conducted. The Speech-Language Pathologist issued her report on March 8, 2020. From March 16 to May 25, 2020, in-person meetings were not permitted due to COVID-19 precautions. Petitioner's parents were offered the opportunity to meet online. They did not feel comfortable doing so because of privacy concerns. They requested to meet in-person to review the speech-language assessment and to make necessary adjustments to the IEP. The school proposed a meeting on March 23, 2020 to present the results. Petitioner's mother objected because the school was closed due to COVID-19. Petitioner's parents then requested a face-to-face meeting after school hours. The Principal informed them the meeting would have to be held during working hours. Petitioner's parent decided to postpone the meeting until the school reopened in the fall.

On August 18, 2020, the school resumed in-person classes in a "pod" or "cohort" environment to mitigate the spread of COVID-19. Under this program, students stayed in one room and the teachers would come to them. Classes were limited to 40-minute periods and a 20-minute seminar period at the end of the day. From August to the end of October 2020, W did not attend special education classes due to the pod program and lost special education services. On October 26, 2020, the school's daily schedule was revised again. Teachers could then call students as needed and special education classes resumed.

On September 4, 2020, a CSC meeting was held to discuss W's speech-language assessment from March 2020 and possible changes to the IEP. Petitioner's parents requested an Independent Education Evaluation (IEE) to assess W's speech and language. On October 1, 2020, a CSC meeting convened to discuss the IEE request. On October 23, 2020, DoDEA approved the

IEE request. The IEE was conducted by a private local provider in October and November 2020. The report was issued on November 9, 2020.

On the day the IEE was issued, Petitioner's mother notified the school that she was requesting a "stay put" order for any changes to W's IEP pending the results of a mediation the parents requested about two months earlier. As a result of the "stay put" order, the CSC ceased all IEP modification discussions. On December 3, 2020, a CSC meeting was proposed for about two weeks later, but the meeting was never held.

On December 14, 2020, Petitioner's parents filed the due process petition. The petition raised 13 allegations that the School District failed to comply with the Instruction, Manual, and IDEA. The allegations are summarized as follows: (1) failure to conduct a speech-language evaluation of W, (2) material failure to implement W's IEP, (3) refusal to provide explanations on how W's IEP goals were measured, (4) refusal to refer W to an ABA provider, (5) predetermination that W should receive reduced instruction during virtual learning without prior written notice, (6) change in the provision of FAPE by placing W in remote learning without providing other options, (7) denial of IEP meetings, (8) failure to provide W with CICO procedures, (9) failure to provide requested student-related information, (10) failure to reassess W after the 2020 summer break, (11) failure to provide progress reports, (12) failure to honor a "stay put" request, and (13) the School District's offer of compensatory services amounts to a denial of FAPE.

The parties generally agree W lost special education services due to the pandemic. In January 2021, a required resolution meeting was held with CSC members and Petitioner's parents. The School District offered to provide W augmented services to include 860 resource minutes missed during the remote learning from March to June 2020 and an additional 1675 resource minutes missed during the "pod" environment from August to November 2020. The offer also included updating W's assessments and completing the IEE process. The missed minutes would be recouped during the next 18 months while W was attending another DoD school in Europe.

Petitioner's parents rejected the School District's offer and decided to proceed with the due process petition. They wanted in part for DoDEA to fund ABA therapy from an outside source. Under IDEA, however, parents are not empowered to dictate the kind of programs schools will provide their children. Decision at 36, citing *Roy and Anne A v. Valparaiso Community Schools*, 951 F. Supp. 1370, 1380 (N.D. Ind. 1997). ABA therapy is not authorized by DoDEA or generally offered at W's school but the psychologist agreed to use some ABA methods in working with W. In general, Petitioner's parents also sought continued services for W until he was "made whole." At the meeting, a discussion occurred as to how to quantify that proposed standard, and school officials felt they could not commit to it.

The Judge addressed individually each of the allegations in the petition. He concluded:

> In assessing whether the school provided 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." *Endrew F.*, 137 S. Ct. at 1001.[1]
>
> 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. [Decision at 35.]

He also concluded the demand of Petitioner parents for W to be "made whole" was vague, unmeasurable, open-ended, and beyond the scope contemplated by IDEA and DoD regulations. The petition, as amended, was denied. The Judge further stated, "Pursuant to DoDEA's pandemic-related policies and at the discretion of DoDEA and [Petitioner's current CSC team], the previous offer of compensatory services such as missed IEP minutes, appropriate assessments, and completion of the IEE, should be implemented as soon as practical." Decision at 40.

In January 2021, Petitioner and his parents moved to a different country in Europe and W was enrolled in another DoD school.

Discussion

<u>IDEA and Implementing Regulations</u>

The Manual implements policy, assigns responsibilities, and prescribes procedures under IDEA. It mandates FAPE for "children with disabilities who are entitled to enroll in DoDEA schools[.]" Manual, Encl. 2 ¶ 3b. The U.S. Supreme Court, in a seminal case, addressed IDEA's requirements for FAPE:

---

[1] The quoted language does not appear in *Endrew F.*, but instead in *N.P. v. Maxwell*, 711 Fed. Appx 713 (4th Cir. 2017).

> The statutory definition of "free and appropriate public education" . . . expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education" . . . [T]he "basic floor of opportunity" provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. [*Board of Education v. Rowley*, 458 U.S. 176, 201 (1982).]

In *Rowley*, the Supreme Court did not articulate a specific standard for evaluating whether a child had received FAPE or not. In a more recent decision, the Supreme Court announced such a standard, derived from its consideration of the ultimate purpose of IDEA, that a child be provided an opportunity for progress.

> The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement . . . This reflects the broad purpose of the IDEA, an "ambitious" piece of legislation enacted "in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" . . . A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to Act. [*Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 580 U.S. __, 137 S.Ct. 988, 999 (2017) (internal citations omitted).]

Accordingly, FAPE "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id*. at 1001.

Implementing the policy set forth in IDEA, the Manual gives parents the right to participate in the evaluation process and in IEP development, to obtain independent evaluations, and to challenge adverse determinations through a due process hearing. At a due process hearing the burden of persuasion falls upon the party seeking relief. *See Schaffer ex. rel. Shaffer v. Weast*, 546 U.S. 49, 62 (2005). The DOHA Appeal Board is responsible for conducting appellate review of due process hearings. The Board employs a *de novo* standard of review, giving due deference to the Judge's credibility determinations and resolution of conflicting evidence. *See* Case No. E-07-002 at 6 (App. Bd. Jul. 25, 2008).

<u>Disruption of Special Education Services and Compensation Offer</u>

In their appeal brief, Petitioner's parents contend that, "by issuing the resolution offer, [Respondent School District] fully agreed with the parents on FAPE and its provisions in regards to [W's] needs." Appeal Brief at 2. We do not disagree that W's IEP service were significantly disrupted due to the COVID-19 pandemic.

It is undisputed that W did not receive the special education services to which he was entitled under his IEP of January 2020. The COVID-19 pandemic created exceptional educational challenges. On March 14, 2020, W's school was closed when the facility was placed in Health Protection Condition (HPCON) C.[2] Decision at 23 and 34. Due to the pandemic, traditional "brick and mortar" education ceased, and safer means of providing those services were instituted. All students were subjected to these modifications and restrictions. From March 16 to June 2020, when classes resumed in a remote learning setting and again from August 8 to October 26, 2020 when the school transitioned to the "pod" or "cohort" setting, W's special education services were reduced and disrupted. W's situation was not unique.

Federal courts have considered the unparalleled circumstances presented by the COVID-19 pandemic in addressing the provision of FAPE under IDEA. *See, e.g.*, *E.M.C. v. Ventura Unified School District*, 2020 WL 7094071 (2020) ("[O]n balance, given the unprecedented health crisis to which the School District's IEP implementation seeks to respond to the public interest factor favors [the district]."); *Hernandez v. Grisham*, 508 F. Supp. 3d 893 (D. New Mexico 2020) (holding, among other things, that virtual learning does not *per se* violate IDEA); and *Marrero v. Puerto Rico*, 2021 WL 219195 (2021) (citing Department of Education guidance to the effect that school districts might be called upon to provide FAPE by remote or virtual means). While Petitioner's parents contend the school "did not make every effort to provide special education and related services" (Appeal Brief at 4), Respondent's reply brief correctly points out that "every effort" is not the proper standard for determining whether FAPE was provided. That said, the key issue in this case is what, if any, remedial action should be taken to compensate W for the disruption of services he experienced.

In December 2020, DoDEA issued guidance on COVID-19-related compensatory recovery services. Respondent's Exhibit (RX) 8d. These services "are an equitable remedy designed to repair educational functional deficits resulting from disruptions, delays, and/or access to student services created by the COVID-19 global pandemic when schools are in operation." *Id*. at 2. CSC teams were tasked to make "individualized" determinations as to whether compensatory services were "needed to address progress or skills lost due to the disruption to the provision of a free and appropriate public education (FAPE)." *Id*. Under this guidance, there is no requirement to provide minute-for-minute compensation. CSCs were to "offer compensatory recovery services sufficient to allow the student to recoup lost skills and continue to make progress on IEP goals." *Id* at 14.

During the resolution meeting, the School District offered to provide Petitioner the minutes of IEP services he missed due to the pandemic, to complete W's IEE, to update assessments, and

[2] HPCON C – high morbidity epidemic or contamination – social distancing (limit or cancel in-person meetings, gatherings, etc.). *See, e.g.,* DoD Instruction 6200.03, *Public Health Emergency Management (PHEM) within the DoD*, March 28, 2019, Figure 8, page 37. *See also* ¶ 1.2.a., which acknowledges the duty of the DoD to protect personnel and property from health emergencies, and ¶ 3.2.b.5, which authorizes commanders to close "any asset or facility" to prevent danger to public health.

to conduct other assessments as appropriate. RX 7a at 2, 6, and 7. Petitioner's parents rejected the offer, indicating they wanted an assurance that W would be "made whole."

In their appeal brief, Petitioner's parents characterize the resolution offer as the "*ultima ratio*"[3] for any future assessment whether W's IEP is appropriate or not. Appeal Brief at 2. We do not agree. The offer is directed toward remedying the past disruption of services. It does not set any limitations or restrictions on future assessments. In their brief, the parents also contend there is a discrepancy between what was supposed to be provided under W's IEP and what the school district offered in the proposed resolution. The parents do not identify this purported discrepancy. We are unable to discern its nature. This bare assertion without providing specifics fails to demonstrate the School District's offer of compensatory recovery service was deficient in any manner.

The School District's offer would have provided W with the special education services to which he was entitled had the pandemic not occurred. To put it another way, the offer would have "made W whole" from the provision of services perspective under the IEP. Petitioner has failed to show the School District's offer of compensatory recovery services was deficient or was not reasonably calculated to allow W to continue to make progress on IEP goals. Based on our review of the record, the School District's offer was a reasonable proposal to compensate W for the disruption of FAPE he experienced.

Due Process, Bias, and Lack of Impartiality

In their brief, Petitioner's parents contend the admission into evidence of W's 2019 Functional Behavioral Assessment "violated their right to a fair and impartial due process." Appeal Brief at 3. At the hearing, Petitioner's mother objected to this exhibit (RX 4a) basically questioning its relevance. She noted it was written almost a year before the IEP of January 13, 2020, and stated it "was in no way subject to the current IEP." Tr. Vol. 1 at 37. Department Counsel responded by noting Petitioner raised an issue in his petition regarding the behavioral intervention plan and the FBA was relevant on that issue. *Id*. at 38. The Judge admitted the FBA into evidence, noting he would give it whatever weight it deserved. *Id*. at 38-39. We find no error in the Judge's ruling. As shown by the Judge's reliance on the FBA in making various findings, the FBA was a relevant document in this proceeding. The FBA was a basis for establishing W's behavioral goals in his IEP. This evidentiary issue does not rise to the level of a due process concern.

Petitioner's parents take issue with the Judge making a finding about W's birthplace and the mother's citizenship and professional background. They contend this information was not relevant to the issues in the case and "it might have been a factor in the hearing officer's decision." Appeal Brief at 2. Additionally, the parents assert the Judge "excessively mischaracterized the

[3] The final possibility for solving a problem after all other options have been tried and have failed. *See* https://www.macmillandictionary.com/us/dictionary/american/ultima-ratio.

timeline between March 2020 until October 2020 to the benefit of the Respondent" and he "mischaracterized the facts in the case, in almost all issues presented, he exclusively weighted the exhibits and testimonies to benefit the respondent." *Id*. at 4 and 5. The Judge's findings regarding the mother's background were unnecessary. However, to the extent that the parents are contending the Judge lacked the requisite impartiality, a Judge is "presumed to be impartial" and the party raising the issue of judicial bias bears a "substantial burden of proof." *See U.S. v. Minard*, 856 F.3d 555, 557 (8th Cir. 2017). In examining the record as a whole, including the decision, we find nothing that would persuade a reasonable observer that the Judge held an inflexible predisposition against the Petitioner or his parents during the course of the proceeding below.

The parents further argue the Judge overstepped his authority by "mandating" them to speak to the principal of W's new school. Appeal Brief at 4. This exchange apparently occurred during a prehearing telephonic conference. A document attached to Petitioner's brief indicates the Judge advised the parents to contact the principal at the new school to "discuss possibilities." PX-Appeal F, attached to appeal brief. *See also* Department Counsel's email of March 16, 2021, summarizing the prehearing conference call as the new and old schools "were to work together to see if [the new school] could provide additional services/assessments to close the gaps that resulted from [W's] attendance at [the old school]." Correspondence File at 100. Petitioner's parents cite no authority in support of their claim the Judge overstepped his authority. We find no basis for concluding the Judge erred in providing the purported settlement guidance.

Remaining Issues

In their brief, Petitioner's parents contend the Judge's conclusion about parental participation in the IEP meeting proposed for May 2020 contravenes 34 C.F.R. § 300.322(a), which provides that parents must be notified early enough of an IEP team or CSC meeting to ensure they will have an opportunity to attend. Encl. 4 ¶ 1.a of the Manual contains a similar provision requiring that reasonable steps shall be taken to provide for the participation of parents in their child's special education program. The Judge's decision reflects that Petitioner's parents were offered the option for an online CSC meeting in late March when in-person meetings were prohibited due to COVID-19, but the parents did not feel comfortable using an online platform due to privacy concerns. Decision at 23-24 and 38. A meeting was later proposed at the end of May. PX G. That meeting was never scheduled, let alone held. There is no evidence to support Petitioner's parents claim that they were denied adequate notice of an IEP team or CSC meeting in May 2020.

Petitioner's parents also challenge the Judge's ruling on their Motion in Limine. Hearing Exhibit (HE) 4. In that motion, the parents sought to preclude the School District from contacting and communicating with officials at W's new DoD school in Europe. In support of their motion, they cited the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232(g); 34 C.F.R. Part 99). In responding to the motion, Department Counsel argued that FERPA was not applicable to DoDEA schools. Rather, they contend the requirements of the Privacy Act of 1974 and DoD 5400.11-R, *Department of Defense Privacy Program*, dated May 14, 2007, did apply to

the non-consensual disclosure and, under those rules, the disclosure was permitted to perform educational duties. HE 5. In his ruling, the Judge concluded that "DoDEA and [Department Counsel] may obtain any relevant information as required to address the Petitioner's complaint and defend DoDEA's interests as part of the due process action. . . . Additionally, DoDM 1342.12 permits the schools in question to share appropriate student records, including Individualized Education Program (IEP) information, as necessary for the administration of a free and appropriate public education (FAPE)." HE 6 at 2. On appeal, they argue the Judge mischaracterized the facts surrounding this issue and rely upon an email that was not submitted to the Judge for consideration of this issue. PX-Appeal D, attached to appeal brief. We find no basis for concluding the Judge erred in his ruling. As a general matter, an agency is not required to obtain consent in order to disclose privacy-protected information to employees of the same agency who require it in the performance of their duties. *See* DoD 5400.11.R, ¶ C.4.2.1. *See also* 34 C.F.R § 303.414(a), which sets forth a similar policy under IDEA. The exchange of information at issue, to include exchanges to determine whether the new school could provide the special education services that were proposed in the resolution offer, did not violate W's privacy rights.

In their brief, Petitioner's parents contend the CICO procedures were part of W's IEP and were not implemented properly. This contention has merit. The IEP of January 13, 2020, states, "Provide a daily check in/check out procedure as needed[.]" RX 1g at 4. The Judge found that Petitioner's mother wrote the Principal rejecting the proposed behavior plan and CICO procedures in February 2020. Decision at 18, citing Petitioner's Exhibit (PX) R. In PX R, Petitioner's mother stated, "The proposed Behavior Plan is very confusing and not acceptable. While we as parents can give our input on the 'Check in and check out sheet', the Behavior Plan needs to be addressed by a person who is specialized and trained in addressing Behaviors." PX R at 1-2. From our reading of PX R, the Judge erred in finding Petitioner's mother rejected the CICO procedures. Additionally, the School Psychologist testified that she did not recall whether the CICO procedures were an agreed upon function, and "I don't know when it was going to be implemented because we never got there." Tr. Vol. 4 at 42-44. Consequently, it appears the CICO procedures were not implemented. In any event, the Judge's error regarding the CICO was harmless. By using the term "as needed" in the IEP, the implementation of CICO procedures was situation dependent and no evidence was presented to show CICO procedures were needed on any specific occasion.

In the decision, the Judge made findings about the grades W received while he was in the 7th and 8th grade. Decision at 26. Petitioner's parents contend those findings contravene 34 C.F.R. § 300.101(c), which provides "Each state must ensure that FAPE is available to any individual child with a disability who needs special education and related services even though the child has not failed or been retained in a course or grade and is advancing from grade to grade." Of note, this provision applies to states, not Federal agencies. Nonetheless, § 300.101(c) does not prohibit the consideration of grades in a due process proceeding of this nature. Although grades may not be used as a decisive factor in deciding whether FAPE was provided, they are a relevant factor in determining whether a child made progress toward reaching his or her IEP goals. In this case, there is no basis for concluding the Judge considered W's grades as a decisive factor in making his FAPE determination.

The parents take issue with the Judge's determination that Petitioner's allegations of civil rights violations were not actionable in this proceeding. Decision at 6. In their brief, the parents contend the Judge was never asked to rule on civil rights issues. Appeal Brief at 5. On pages 4 and 5 of the petition, however, the parents claimed W's civil rights were infringed or violated. We find no error in the Judge addressing the civil rights issue in the decision. In their brief, the parents also state that there are discrepancies between what other students were provided and what was provided to their son. They do not identify the nature of these discrepancies. This apparent assertion of discrimination fails for a lack of specificity.

The parents also challenge the Judge's findings regarding the nature of JROTC, online school agendas, and the characterization of their statements in an email regarding their preference for a resolution meeting. We find no harmful errors in these findings. These challenges involve peripheral matters that are not likely to have any bearing on the outcome of this case.

Finally, Petitioner's parents submitted a document that was not presented to the Judge for consideration. This document is a "Notice of Intent," dated September 4, 2020, in which they advised the School District of their intent to obtain special education service from an outside source and to submit claims for reimbursement of such services. PX – Appeal E, attached to Appeal Brief. The parents now contend this Notice of Intent was never disputed and claim they are entitled to reimbursement for some unidentified services. They presented no proof that outside special education services were obtained or that a claim for reimbursement of such services was submitted and denied. This issue was neither raised in their due process petition nor addressed by the Judge. It is unclear whether Petitioner's parents are seeking an advisory opinion on this matter. The Appeal Board, however, does not issue advisory opinions. Our jurisdiction is limited to reviewing assignments of error in decisions of DOHA judges. Having failed to raise this issue below, it is not reviewable on appeal.

Conclusion

We conclude the Judge committed no harmful error. The decision is sustainable. As the Judge recommended, we also encourage the parties to work together to implement the School District's resolution offer to provide W compensatory recovery services.

This constitutes the final agency decision in this case. Accordingly, the Board hereby advises Petitioner that he has a right under 20 U.S.C. § 1415(i)(2) to bring a civil action on the matters in dispute in a district court of the United States without regard to the amount in controversy.

Order

The decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board