KEYWORD: Special Education

DIGEST: We interpret the guidance and precedents cited above as standing for the proposition that DoDEA schools, in appropriate circumstances, could legitimately provide special education services remotely during the Covid-19 pandemic, utilizing a different methodology from what would have been expected were IEPs being implemented during normal times. Public health concerns were an appropriate factor to address in evaluating the kind of special educational services a school provided, concerns which, in the case before us, were of especial pertinence insofar as they had a direct bearing upon the capacity of the U.S. military to preserve operational effectiveness. *See, e.g.*, DoD Instruction 6200.03 ¶ 1.2.a., which acknowledges the duty of the DoD to protect personnel and property from health emergencies. *See also* ¶ 3.2.b.5, which authorizes commanders to close "any asset or facility" to prevent danger to public health. As witnesses testified, the January 2020 IEP remained in effect during the time in question, and we note that the goals set forth in that IEP did not change.
After considering the evidence as a whole, we conclude that the Judge did not err in holding that during remote learning Petitioner had the benefit of an educational program reasonably calculated to enable her to make progress appropriate in light of her circumstances and that, in fact, she made such progress. Given this conclusion we do not need to discuss the issue of compensatory services. The Judge's order is affirmed.

CASENO: E-20-002

DATE: 12/09/2021

Date: December 9, 2021

In the matter of:	)	
----------	)	Case No. E-20-002
Petitioner	)	

APPEAL BOARD DECISION

APPEARANCES

For Respondent: Kelly M. Folks, Esq., Defense Office of Hearing and Appeals
Nicole A. Smith, Esq., Defense Office of Hearings and Appeals

For Petitioner: *Pro se*

Administrative Judge Matthew E. Malone issued a decision in Petitioner's case on July 10, 2021, in which he held that the Respondent School District had not denied Petitioner, who is learning disabled, a Free and Appropriate Public Education (FAPE) and had not denied Petitioner or her 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 Early 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 Manual, Encl. 6 ¶ 17.

Petitioner has raised the following issues on appeal: whether the Judge erred in his rulings on the admission of evidence, whether the Judge erred in his conclusion that Petitioner had not been denied a FAPE, whether the Judge considered all of the evidence, and whether the Judge was biased against Petitioner. Finding no harmful error, we affirm the decision of the Judge.

The Judge's Findings of Fact

Petitioner suffers from Down Syndrome. Her father is an active duty member of the U.S. military stationed at an installation in the U.S. She received early intervention services (EIS) at a civilian school during her father's previous assignment. When Petitioner was three years of age, the civilian school began delivering special education and related services specified in an Individualized Education Program (IEP) implemented on February 17, 2017, with her parents' agreement. Petitioner and her family moved to her father's current place of assignment in mid-2019, and she was enrolled in kindergarten in a DoD Education Activity (DoDEA) school (School). At a Case Study Committee (CSC) meeting soon after, Petitioner's civilian IEP was modified and adopted as her initial DoDEA IEP. Her parents agreed to the changes made in that IEP. On January 23, 2020, the CSC, after performing required review, approved an IEP which commenced implementation the next day, again with the parents' agreement.

The following March, the installation was subject to Health Protection Condition Charlie (HPCON-C) in response to the Covid-19 epidemic.[1] As a consequence, DoDEA schools were

[1] This health condition is appropriate in situations involving a "[h]igh morbidity epidemic or contamination." Health protection measures include "social distancing," which could entail limitations on or cancellation of in-person meetings, gatherings, etc. DoD Instruction 6200.03, *Public Health Emergency Management (PHEM) Within the DoD*, March 28, 2019, Figure 8.

closed to in-person ("brick and mortar") instruction. Instead, DoDEA implemented a regime of remote instruction through various on-line means, both for general education as well as special education students. This method of instruction prevailed during the remainder of the 2019/2020 school year (March through June 2020) and through the first half of the 2020/2021 school year (August 2020 through February 2021). In-person instruction resumed on February 18, 2021. During HPCON-C, DoDEA schools were not permitted to provide any in-person instruction or services, nor were they allowed to provide services at the student's home.

Recognizing that neither general nor special education students could be expected to sit through the same number of hours of computer-based instruction as they did in brick and mortar, the School adjusted its services. Special education students received instruction in proportion to that received by general education students, with assessments, testing, progress reports, CSC meetings, etc., continuing, usually through remote means. One exception to this was special evaluations of a child which could be conducted safely through social distancing and other Covid-19 precautions.

In September 2020, Petitioner's parents spoke with her CSC case manager to request that some remote services be scaled back because they found Petitioner to be uncooperative, especially in transitions from one activity to another. Petitioner's mother asked that physical therapy (PT) and occupational therapy (OT) services be suspended and that other adjustments be made to the remote execution of Petitioner's IEP. After consulting with the case manager, the PT and OT providers agreed to incorporate their services into other IEP instruction and services. "Emails between the Case Manager and the other service providers on [Petitioner's] IEP reflect extensive efforts to accommodate [Petitioner's] mother's requests in ways that would provide educational and developmental benefit to the [Petitioner]." Decision at 6. These emails show concern that Petitioner's mother felt overwhelmed by challenges of facilitating remote learning for her daughter.

During the summer of 2020, Petitioner was examined by a civilian audiology clinic and determined to have a complete hearing loss in her left ear. The CSC met the following October to discuss the implications of this diagnosis for Petitioner's education and to consider modifications to her IEP. During the meeting, Petitioner's mother expressed concern about the difficulties of assisting in her child's remote instruction. She also expressed concern that Petitioner was not benefiting from remote learning. Mother and a parent advocate disagreed that Petitioner had been showing progress toward reaching her IEP goals. Rather, they insisted that Petitioner had either simply maintained her pre-virtual level of achievement or that she had actually regressed. This meeting became contentious due to the presence of a social worker the CSC had invited as a possible resource for the mother. Petitioner contends that this was a violation of her parents' privacy rights, although "[she] offered no support for this claim." Decision at 7. The meeting was eventually suspended until November 2020, at which time the CSC proposed an IEP amendment including services from a specialist providing services for hearing impaired (HI) students and a board certified behavioral analyst (BCBA). These additional services were agreed upon and the IEP amended accordingly.

Petitioner's parents have alleged certain procedural violations in addition to the presence of the social worker at the CSC meeting. For example, they contend that the School's effort to

ensure that both of them were informed about Petitioner's receipt of services was an attempt to retaliate against them for having filed a due process petition. They also alleged that the superintendent of education improperly contacted the father's chain of command as an effort to intimidate them. "There is no support for this allegation. The superintendent's testimony made clear that the military sponsor was asked to attend CSC meeting after October 15 as a best practice to ensure both parents could participate fully in and understand the IEP process for their child. This witness was credible when she denied having contacted the father's chain of command, and [Petitioner] presented nothing to corroborate any of their claims of intimidation." Decision at 8.

The CSC met in January 2021 to address changes to Petitioner's IEP regarding assistive technology that had been verbally agreed to by Petitioner's parents. Eventually the parents agreed to the changes and the modified IEP was implemented in early February 2021. About a month later, the CSC met to discuss further IEP changes based upon providers' assessments of Petitioner, along with the results of an evaluation requested by the parents that had been conducted during February. The CSC recommended that Petitioner receive an additional 120 minutes of OT and 60 minutes of PT to make up for time missed earlier in the academic year. The CSC stated that these services were not being offered due to any lack of progress, and, in any event, the mother did not accept this offer. Petitioner's parents took issue with multiple progress reports prepared during the third and fourth quarters of the 2019/2020 school year and during the first half of the 2020/2021 school year that evaluated Petitioner as having shown ongoing progress, partial mastery, or mastery regarding her IEP goals. "[Petitioner] did not identify or document any instances in which [she] was assessed as having regressed or even stagnated in her academic and developmental progress." Decision at 8.

Respondent school presented extensive evidence in the form of records and data compiled by service providers supporting its position that, even when she had not achieved mastery she was progressing despite the limitations resulting from mandatory remote learning. In those instances in which she had mastered or partially mastered goals, the evidence shows that the CSC and Petitioner's parents approved appropriate modifications to the IEP establishing new goals. Both the service providers and Petitioner's parents were concerned about Petitioner's difficulties transitioning between activities, a problem noted early on in her civilian IEP. The evidence shows that, once Petitioner's hearing loss was properly diagnosed and reported, the HI and BCBA services added in November 2020 yielded improvement.

Another procedural violation alleged by Petitioner's parents is that a DoDEA Instructional Systems Specialist (ISS) deliberately altered a report to indicate progress in Petitioner's behaviors when in fact there was none. At the hearing, Petitioner argued that this alleged conduct was an effort to intimidate the parents.

> In detailed and credible testimony, [the ISS] denied trying to falsify any data or reports and described her actions as consistent with her oversight role . . . In that capacity, she is required to monitor the processes and quality of the work of [non-DoDEA] personnel contracted to perform certain jobs. In this case, all available information probative of [the parents'] allegations of malfeasance by the ISS, including testimony by both the ISS and the BCBA, shows neither [of these

officials] did anything to undermine the legitimacy of the data and results being reported by the BCBA or any other service provider. [Decision at 9.]

Each provider testified as to their qualifications and experience and their efforts to provide services to Petitioner since March 2020. The speech therapist and HI therapist testified that Petitioner had made steady progress during the latter part of the 2019/2020 school year and into the next. As soon as Petitioner's hearing loss was addressed in November 2020, she made better progress in her IEP goals for those areas. However, there was no time during which she was not progressing. "The school's progress reports are thoroughly documented and were not effectively controverted by [Petitioner's] documents or arguments." Decision at 9.

Discussion

The Manual implements policy, assigns responsibilities, and prescribes procedures under the IDEA. It mandates a 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 the IDEA's requirements for a FAPE:

> 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 a FAPE or not. In a more recent decision, the Supreme Court announced such a standard, derived from its consideration of the ultimate purpose of the 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, a 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 the 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).

A. Whether the Judge erred in evidentiary rulings

There is an appeal issue regarding audio recordings which Petitioner proffered into evidence. The exhibit was initially identified as AF but was at some point re-titled FF. Tr. I: 24. AF is described as "all audio recordings for all CSC meetings from October 2020 through March 2021." *Id.* The issue was first discussed at a pre-hearing conference for which there is no transcript in the record. It is evident that the Judge declined to accept the recordings into evidence but offered to accept transcripts. At the Hearing the Petitioner again proffered FF. The Judge again declined. He inquired about the transcripts. Petitioner explained that they tried to get transcripts made but the transcription service said that, though they could make transcripts, the transcriber would not know who was speaking. Accordingly, no transcripts were made. The Judge ruled that he was not admitting FF into evidence. Tr. I: 44-51.

On appeal the Petitioner challenged the Judge's decision regarding Exhibit FF. While the case was still in briefing, the Board noticed that there was no physical exhibit in the record that might contain the audio files at issue (*e.g.*, tapes, CDs, DVDs, etc). E-mails were exchanged between the Appeal Board and the parties to obtain the audio files. (A detailed history of the Appeal Board's efforts to cure the record in this regard and to encourage the parties to work together is contained in the Chairperson's e-mail to the parties of October 6, 2021, at 4:52 pm).

On October 25, 2021, Respondent's Counsel brought a DVD to the Appeal Board containing eight audio files. Two of the files were partly duplicative of a November 12 meeting.

It was error for the Judge not to have taken the proffered audios into the record. The Board has cured that error by taking the audios into the record.

Concerning Petitioner's argument on appeal that the Judge erred by not admitting FF, the Judge's stated reasons were that the evidence did not appear relevant; that the speakers were not identified, which would render the audios confusing; that he had previously given Petitioner the opportunity of presenting transcripts of the audios but Petitioner had not done so; and that information about the CSC meetings was available from other evidence in the record. Tr I: 46-51. After listening to the audios, we conclude that, had they been admitted and considered, there is nothing in them that would likely have resulted in a different overall decision. Therefore, we conclude that any error in the Judge's ruling was harmless.

However, one further point bears addressing. At the October 15, 2020 meeting (audio file labelled part 3 for that meeting, about 2/3 of the way through the audio file), the school official

(Superintendent?) says (approximately): In most cases, an advocate is not quite this vocal against the team. In most cases, the parent has the right to speak and the advocate says very little. I find that your advocate is really challenging our team on things that I'm not sure are within her legal purview to do.[2] This was followed almost immediately with a demand that the sponsor (the Petitioner's father) attend the next meeting and declarations as to whom the speaker would advise of the situation. Although the speaker's comment about the advocate was not specifically raised on appeal, the personal representative did allude to it during her testimony. Tr. I: 188. It was inappropriate for the school official to attempt to curb or silence the advocate (who had not, in fact, been overly aggressive). Furthermore, by coupling this statement with the demand for the sponsor and the declaration regarding her own expected actions, she possibly created the impression that she was trying to punish the parents for the activity of the advocate. Thus, whether or not she intended to create such an impression, she inflamed an already delicate situation.

B. Whether Respondent denied Petitioner a FAPE

Petitioner argues that the School failed to provide Petitioner a FAPE. Specifically, she argues that the School's transition to virtual learning in response to the COVID-19 crisis resulted in instruction and services being provided in modified form over what was described in Petitioner's IEP. Petitioner contends that, in arriving at his conclusions, the Judge erred by relying on evidence that asserted progress in achieving Petitioner's IEP goals rather than on these methodological changes in providing IEP services. She argues, "Assessed progress is irrelevant if the special needs child's IEP is not executed as it is written since it is a tailored individual plan for that child." Appeal Brief at 2.

The Judge's findings and the evidence upon which those findings are based show that parents and School officials signed the operative IEP in January 2020. Petitioner Exhibit (PX) Y; Respondent Exhibit (RX) 1b, *Triennial IEP*, dated January 23, 2020 (Several exhibits were offered by both parties). The record evidence shows that this IEP represented the judgment of all parties as to the best way to ensure that Petitioner received sufficient academic instruction and other services in order to make the progress required by law. However, as the Judge found, in March 2020, the installation where the School is located became subject to HPCON-C as a response to the Covid-19 pandemic, which resulted, among other things, in the cessation of brick and mortar education and in the implementation of virtual instruction conducted by means of electronic communications. In this the School was not alone. Witnesses testified that civilian schools in the local area were not conducting in-person instruction either. Tr. II: 174, 197. As a consequence, the means whereby Petitioner's IEP was to be effectuated were changed in a number of ways.

These changes included not merely the transition to remote learning but a reduction in the amount of Petitioner's time spent in receiving virtual instruction over what she received in brick and mortar. A School official testified that this was necessary because "[i]t's not developmentally

[2] The Manual authorizes a personal representative for parents during due process proceedings, including prehearing resolution meetings. *See, e.g.*, Manual, Encl. 6 § 7.a.2. It does not explicitly authorize a personal representative at CSC meetings, although it does state that such meetings can include "intermediaries who might be necessary to foster effective communications between the school and the parent about the child." Manual, Encl. 4 § 1.a. We find nothing in the Manual that would preclude the presence and participation of Petitioner's advocate at a CSC meeting, and the statements quoted above suggest that this practice is not unusual, at least in the school district at issue in this case.

appropriate for a child of her age and her ability level to be on the screen for six-and-a-half hours a day, we wouldn't expect that of ourselves, so we would not expect that out of a 6-year-old child[.]" Tr. III: 135. Accordingly, although some teaching was done synchronously, that is in conjunction with classmates online, other was to be done asynchronously, that is, during Petitioner's own time under adult supervision, utilizing instructional materials that the School made available electronically. Tr. II: 127, 172-174; III: 81. Witnesses testified that these changes were not directed to special education students alone but applied to all students attending the School, and special education students' course of instruction was modified in proportion to that afforded general education students. Tr. II: 124, 168; III: 282; IV: 7-8. The evidence cited above is consistent with the Judge's findings on the same matters.

Petitioner does not contend on appeal that her remote services were not, in fact, proportional to those offered the general education population at School. Rather, she argues that these changes were not consistent with the IEP, and we construe her arguments to mean that the shift to virtual learning constituted a *de facto* amendment to the IEP, one to which her parents did not consent. School officials, on the other hand, contend that this shift did not constitute a change to the IEP but, rather, an alternative means by which by which Petitioner's goals were to be achieved. In addressing this disagreement as to the significance of virtual instruction we will consider both guidance provided by agencies charged with overseeing special education services as well as available legal precedent.

In proceeding as they did, the School officials stated that they were acting in accordance with guidance from DoDEA (*See* Tr. III: 135-6). This guidance acknowledged that the pandemic was "an unprecedented event," requiring schools to consider a variety of means to assist the special education student in achieving IEP goals. DoDEA stated that its policy "does not mandate specific methodologies," thereby encouraging flexibility in meeting academic goals.

> [T]here is no one way or defined method to adequately and equitably meet [special education] student's needs during building closures. Now, more than ever, it is important for special education personnel to stay flexible and consider a wide variety of educational strategies and practices as DoDEA makes reasonable efforts to provide equal access to learning for all students with disabilities. [RX 9b, *Best Practices for Remote Learning in Special Education and Student Support Services*, at 1-2.]

A principal strategy for maximizing access to education and support services was remote learning, including virtual or online instruction. DoDEA recognized potential limitations in that method of education, acknowledging that some students may as a consequence experience a loss of skills. "Once school resumes, CSCs should make individualized determinations on a case by case basis utilizing all available data" to see if compensatory services are required. *Id*. at 4.

This guidance was consistent with information provided by the U.S. Department of Education. This agency asserted that federal law did not prevent remote learning and stated that, in a time of pandemic, schools should take "into consideration the health, safety, and well-being of all their students and staff" in providing educational services.

> [T]he provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, on line, or telephonically. The Department understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided . . . It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities . . . FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students. [United States Department of Education (DoE), *Supplemental Fact Sheet Addressing the Risk of Covid-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, March 21, 2020 (included among Hearing Officer Exhibits).]

Although this fact sheet was advisory only, it encouraged schools to balance methods of academic and other instruction with a jurisdiction's compelling interest in preserving the health and safety of parties involved.

Unsurprisingly, as of this writing, there is not a plethora of case law addressing virtual or remote instruction implemented in response to the pandemic. One court that has done so held, among other things, that virtual learning does not *per se* violate IDEA. *Hernandez v. Grisham*, 508 F.Supp.3d 893 (D. New Mexico 2020). Another stated that public health concerns posed by Covid-19 are properly brought to bear in evaluating the sufficiency of a school's provision of special education services. *E.M.C. v. Ventura Unified School District*, 2020 WL 7094071 (C. D. CA 2020). Yet another cited DoE guidance to the effect that school districts might be called upon to provide FAPE by remote or virtual means. *Marrero v. Puerto Rico*, 2021 WL 219195 (D. Puerto Rico 2021).

We interpret the guidance and precedents cited above as standing for the proposition that DoDEA schools, in appropriate circumstances, could legitimately provide special education services remotely during the Covid-19 pandemic, utilizing a different methodology from what would have been expected were IEPs being implemented during normal times. Public health concerns were an appropriate factor to address in evaluating the kind of special educational services a school provided, concerns which, in the case before us, were of especial pertinence insofar as they had a direct bearing upon the capacity of the U.S. military to preserve operational effectiveness. *See, e.g.,* DoD Instruction 6200.03 ¶ 1.2.a., which acknowledges the duty of the DoD to protect personnel and property from health emergencies. *See also* ¶ 3.2.b.5, which authorizes commanders to close "any asset or facility" to prevent danger to public health. As witnesses testified, the January 2020 IEP remained in effect during the time in question, and we note that the goals set forth in that IEP did not change. Moreover, Petitioner's mother consented on her behalf to remote learning. PX G; RX 10, *Provision of Special Education Services*. We have considered the evidence as a whole and conclude that the School's use of remote learning and the different methodologies inherent therein constituted a permissible means for achieving IEP goals during the pandemic. Indeed, given DoDEA policy and the military's decision to impose HPCON-C, the School had little choice but to proceed as it did.

Petitioner cites *Endrew* for the proposition that assessed progress is not relevant and that the key issue is whether the methodology described in the IEP is faithfully provided. It is true that there is nothing in *Endrew* to the effect that schools may change IEP methodology in light of exigent circumstances. That is to be expected, insofar as *Endrew* was decided before the Covid-19 pandemic, and, accordingly, such an issue was not before the Court. However, as noted above, *Endrew* explicitly makes progress the standard for evaluating whether a child has received a FAPE rather than some other standard. Contrary to Petitioner's arguments on appeal, *Endrew* does not provide support for the proposition that the School's shift to remote learning in response to an unparalleled health crisis constituted a *per se* denial of a FAPE to Petitioner.

The next issue that we must address is whether the actual regimen of virtual services that Petitioner received enabled her to make adequate progress, construing her brief as challenging the Judge's conclusions on that matter. In accordance with *Endrew*, we must take into account the Petitioner's actual circumstances. As noted above, she suffers from Down Syndrome. The record includes an *Individual Psychological Assessment Report*, dated February 22, 2021, that examined Petitioner's cognitive ability based upon her performance on various tests, including a test of her intelligence that yielded a "full scale IQ" of 59, for which the qualitative description was "Extremely Low." Assessment at 2, included PX X and RX 4b. Other tests included one that measured Petitioner's functioning in everyday life, based upon information provided by her mother and teacher, which yielded a result described as "moderately low." Assessment at 6. The school psychologist who prepared the report concluded:

> Overall, [Petitioner] presents with significant impairments in intellectual functioning and in adaptive behavior, although functional life skills are a relative strength for her in both the home and school settings. Fluid reasoning, while still low, is significantly stronger than verbal skills. Deficits in verbal reasoning impact academics and social interaction . . . Verbal skills assessed during the evaluation were low relative to fluid reasoning skills. It is recommended that communication and verbal skills are a continued focus of intervention. [Assessment at 6.]

The psychologist who prepared this report testified that its findings were consistent with a diagnosis of Down Syndrome. Tr. IV: 144. In addition to that, Petitioner also has a total hearing loss in one ear, which likely exerted an impact upon her capacity to profit from the services the School provided her. *Auditory Brainstem Response (ABR) Evaluation*, dated July 9, 2020, included in RX 4B. Accordingly, in assessing Petitioner' circumstances, we must take into account that she suffers from significant disabilities, the nature of which must be brought to bear in determining whether she made the progress that *Endrew* contemplates.

As noted above, the Petitioner's January 2020 IEP governed the provision of special education services during the entirety of the time at issue here. All parties agreed to it, including Petitioner's parents. It was modified in November 2020 to include services by an HI and a BCBA, and there is no issue before us as to whether the goals set forth in the IEP were inappropriate for a student in Petitioner's circumstances. *See, e.g.*, the testimony of the special education teacher, to the effect that, based upon assessment, observation, and historical data, the goals set forth in all of Petitioner's IEPs at the School were appropriate. TR. III: 114-115. As to whether Petitioner's achievement of these goals was impaired by the use of remote learning, the record contains

considerable documentary evidence as well as testimony that she made appropriate progress during the time under consideration.

The documentary evidence included progress reports and the data underlying them. *See, e.g.*, RX 2, *Progress Reports*; 6, *Provider Data*, and 7, *Literacy Graphs*. It also included a document that summarized Petitioner's progress from March 2020 until the following October, prepared after the contentious October 2020 CSC meeting. PX F; RX 2b, *Summary of Progress*. Testimonial evidence was provided by Petitioner's special education teacher; her general education teacher; the ISS, who exercises oversight of special education services in the district to which the School belongs; Petitioner's speech pathologist, her occupational therapist, and her physical therapist. These witnesses were actually called by the Petitioner in presenting her case in chief at the hearing, and, given their education and experience in their various disciplines and their knowledge of Petitioner, we have paid particular attention to their testimony on the crucial issue of progress. *See Endrew* at 1001, to the effect that the expertise and judgment of school authorities are entitled to deference.

Petitioner's special education teacher defined progress as growth toward mastering the goals set forth in the IEP.

> [Q]: . . . And how would you measure progress or growth? What are the different ways that progress is denoted in an IEP or a progress report?
>
> [A]: So progress can be measured in a variety of ways . . . [I]f you look at [RX 2a, Progress Report for School Year 2019-2020], page 4 of the annual review reading goal, you can see that [Petitioner] had met the criteria established within that goal of identifying ten capital letters, six lowercase letters, and five sounds . . . [W]hen you read the body of that present level, you can really see how she's performing and how that data was disseminated and determined. [Tr. III: 115-116.]

Insofar as Petitioner had met the IEP goal in question, the special education teacher characterized her progress level as mastery. However, most of the progress reports characterize Petitioner's progress as ongoing. The special education teacher addressed this matter as follows:

> [A]: When you look at this term ongoing, that's when you're really seeing how a student is moving forward . . . If you look at [RX 2c, Progress Report for School Year 2020-2021], page 2 of the annual review reading goal, you can see how she's continuing to make gains towards . . . letter knowledge . . . However, it's not consistent. So that's why it was not marked as partially mastered or mastered. [Tr. III: 116.]

This witness explained that a student could demonstrate progress not only by acquiring additional skills but also by maintaining current skills with less adult support. Her testimony addressed RX 2a, IEP for School Year 2019-2020.

> If you notice third quarter she was identifying her letters and her sounds with minimal adult support for 38 letters and 18 sounds. When you go into fourth quarter

> you notice that the support is not present. So that is showing a growth in progress related to the level of support you are providing . . . [G]rowth is not just I can identify this number of letters, it's also I can do this independently[.] [Tr. III: 61.]

The essence of the special education teacher's testimony was that Petitioner demonstrated measurable and appropriate progress in those areas for which the teacher was responsible. Other providers stated that Petitioner had shown progress during remote learning. The physical therapist, the language pathologist, and the occupational therapist offered assessments similar to that of the special education teacher. Tr. III: 221, 278; IV: 28. In addition, the ISS testified that "the progress reports indicate that [Petitioner] is making ongoing progress in the majority of her goals . . . specifically in the June progress report, all progress notations indicate ongoing progress." Tr. II: 112.[3] We note that, in light of the Petitioner's diagnosis of a total hearing loss in one ear, the CSC added services by the HI specialist and the BCBA with a view toward facilitating her ability to communicate and to address other perceived difficulties. In compliance with DoDEA requirements, at the return to in-person instruction, the CSC evaluated the Petitioner. The special education teacher testified as follows:

> [Q]: [D]id you make that assessment of [Petitioner]?
>
> [A]: That's correct.
>
> [Q]: [I]n the context of, doing the same evaluation that you did, for all of your other students, when they returned to the brick and mortar environment, was it your opinion that . . . compensatory services would've been appropriate for [Petitioner]?
>
> [A]: My data supports that it would not be appropriate[.] [Tr. III: 159.]

The other witnesses testified in a similar manner, although, as the Judge found, they did offer to restore lost minutes of occupational and physical therapy that they had removed in response to Petitioner's mother's complaint that she felt overwhelmed by her responsibilities. Tr. II: 178; 181-184; III: 159, 246, 281.

Petitioner disagrees with the conclusion that compensatory services were not required, and we understand the frustration that her parents must have experienced while directly assisting in their daughter's education for the better part of a year. However, the teachers and other professionals—witnesses called by Petitioner herself—provided testimony on the central issue of this case that was not contradicted by other evidence and that appears generally consistent with the voluminous documentary record.[4] Neither at the hearing nor on appeal has Petitioner

[3]Petitioner alleges that the ISS improperly directed the BCBA to change the content of a report. However, the BCBA testified that, while the ISS often suggested changes in reports to enhance clarity, etc., she had never directed the BCBA to change a report to reflect progress that the BCBA did not believe had occurred. Tr. IV: 100-101. The special education teacher and the physical therapist testified to the same effect. Tr. III: 244; IV: 145-146. The ISS herself stated that she does not alter the content of reports (Tr. II: 71), and there is no evidence in the record to contradict this.

[4] Petitioner also called the parent advocate, who testified that she is an education specialist. She acknowledged that she had no experience in childhood education and that she had not personally observed Petitioner during receipt of remote instruction. This witness did not provide alternative data or attempt to demonstrate that the data actually

challenged the specific data cited in the progress reports, only the providers' interpretations of that data. We also note that the Judge found the testimony of the teachers and service providers to be credible, and we give deference to a Judge's credibility determinations.

Accordingly, after considering the evidence as a whole, we conclude that the Judge did not err in holding that during remote learning Petitioner had the benefit of an educational program reasonably calculated to enable her to make progress appropriate in light of her circumstances and that, in fact, she made such progress. Given this conclusion we do not need to discuss the issue of compensatory services.

C. Remaining issues

We have considered the other issues raised in Petitioner's brief. She argues that the Judge did not weigh PX II, *Consolidated Minutes and Prior Written Notice (PWN) of Case Study Committee Meeting*. However, a Judge cannot be expected explicitly to discuss every piece of evidence in a record, which would be a virtual impossibility, especially in a case whose record is as voluminous as this one. Indeed, a Judge is presumed to have considered the totality of the evidence in the record. *See, e.g., U.S. v. Baptiste*, 8 F.4th 30, 38 (1st Cir. 2021). We find no basis to conclude that the Judge did not consider or weigh the evidence in question. Even if the Judge erred by not explicitly discussing this document, such error did not undermine his conclusion that the record evidence overall demonstrated that Petitioner received a FAPE during remote learning.

Petitioner cites to a statement by the Judge in the Background portion of the Decision in which he notes that Petitioner's discovery documents were received by Respondent in March 2021. She argues that her parents kept the Judge and opposing party aware of the reasons for the delay, principally difficulty in securing assistance of counsel, and that it was "one-sided" of the Judge to claim that Petitioner was late in providing discovery. However, the Judge appears merely to have been setting forth the timeline of all activities leading up to the hearing. There is no reason to believe that his statement about the timing of discovery was erroneous or that it influenced his ultimate conclusions. Petitioner also contends that the Judge was not initially receptive to their request for an open hearing. There is nothing in the record specifically addressing this. However, this issue is moot insofar as the hearing was open. To the extent that Petitioner is contending that 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 proving otherwise." *U.S. v. Minard*, 856 F.3d 555, 557 (8th Cir. 2017). We have examined the record as a whole and find nothing that would persuade a reasonable observer that the Judge held an inflexible predisposition against the Petitioner during the course of the proceeding below.

Petitioner alleges what she characterizes as procedural violations which served to intimidate her parents. We have considered these arguments in light of the entirety of the record evidence and conclude that Petitioner has not demonstrated that the Judge's decision was in error. We understand that there may be parallel investigations arising from these matters. Nothing in our decision should be construed as prejudging any other investigation or adjudication.

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contained in Petitioner's progress reports did not support the providers' conclusions as to Petitioner's progress. Rather, much of her testimony consisted of a description of the October 2020 CSC meeting. Tr. I: 186-207.

Conclusion and Order

The Judge's decision is **AFFIRMED**. This constitutes the final agency decision in this case. Accordingly, we advise Petitioner that she 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.

See separate opinion
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

Separate Opinion of Administrative Judge Michael Y. Ra'anan

I do not disagree with or dissent from the majority opinion. My problem is that I do not understand how it is possible that a child with these disabilities kept out of "brick and mortar" school for so long could plausibly have received an appropriate education through remote learning. However, we apply laws and regulations to the evidence of record. That is how we decide cases in this system. The point may seem obvious, however, in this case it worth stating. The evidence of record does not support any other conclusion than that reached by the majority opinion.

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