

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
[Parents], on behalf of student [STUDENT], Complainants, vs. MESA COUNTY VALLEY SCHOOL DISTRICT 51, Respondent.	
AGENCY DECISION	

On May 4, 2021, the Colorado Department of Education (“CDE”), Exceptional Student Services Unit, received a due process complaint filed by [Parents] (“Complainants” or “Parents”) on behalf of their minor son, [Student] alleging that Mesa County Valley School District 51 (“District”) violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, (“IDEA”), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act, 1 CCR 301-8, by failing to provide [Student] with a free appropriate public education (“FAPE”). Specifically, Parents filed the due process complaint alleging that the District failed to prevent pervasive and serious bullying of [Student] which culminated in an attack of him on October 19, 2020. Parents assert that the bullying and assault resulted in [Student] not receiving meaningful educational benefit, which is a denial of FAPE.

Parents seek compensatory education, paid tutoring until [Student] graduates or turns 21, whichever is earlier; paid mental health services, including psychological services; District-wide training of staff on identifying and addressing bullying; District-wide training of staff on identifying and addressing bullying of special needs students; paid mental health services and parental counseling for students with disabilities similar to [Student’s]; and attorneys’ fees. The District denies the allegations and asks the court to dismiss all claims.

On May 6, 2021, the due process complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Tanya Thiessen Light for an impartial due process hearing. The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held by video and Google Meet in Denver, Colorado on March 10, 13, 14, 15, and 17, 2023. Miriam Kerler, Esq., of Kishinevsky & Raykin, LLC, represented Complainants, and Tammy Eret, Esq., in-house counsel, represented the District. [Compliance Officer], Compliance Officer for the District, served

as the District's advisory witness. At hearing, the ALJ admitted into evidence the following exhibits: Complainants' exhibits G, H, K, W, T, U, AA (pp. 4-10, 12, 13, and bottom of page 19 of AA), KK, LL, OO, RR, WW (pp.1- 2 of WW); YY, ZZ (pp 85-87, 92-94, 143-149, 246, 247), CCC, FFF, GGG, and HHH; and the District's exhibits: 1, 1A, 2-11 and 12 (pages 1, 2, 6, 9, 10, 14, 15, 20, 25, 26, 38-40, 42, 46, 47, 57-59, 62-64, 75-78, 81, 83, 92, 93, 97-102, 110, 112-114, 116-118, 121-124, 127, 128, 141, 144-163, 165, and 169 of Exhibit 12).

ISSUES PRESENTED

Whether Complainants have met their burden of proof establishing that the District failed to provide [Student] FAPE and, if so, what the proper remedy is, if any.

FINDINGS OF FACT

[Student]

1. [Student] is 15 years-old (date of birth[Month/Day], 2007) and is a social, kind young man who frequently encouraged younger special education students in his classes. He loves football and the Broncos, and has the goal of becoming a football announcer.

2. [Student] was born with a rare genetic defect called [Genetic Defect]. [Genetic Defect] affects the body's tumor suppression gene and causes [Student] to have [affected features] than is typical. [Genetic Defect] caused [Student] to have developmental delays in all areas. [Genetic Defect] causes "pseudo-tumors," which develop when extra fluid builds up behind [Student's] eyes. The fluid must be drained through [Student's] spine, and it causes severe headaches. [Student] also has hand tremors and memory loss. [Student's] IQ is below 70. [Student's] [Genetic Defect] medication makes him tired and causes him to work more slowly. [Student] qualifies for special education and related services in the categories of Intellectual Disability and Other Health Impairment ("OHI").

3. It is undisputed that at all times relevant to this decision [Student] was eligible for special education and related services, and that the District was responsible for provision of the same. [Student] had an Individualized Educational Program ("IEP") in place at all times discussed in this decision.

[Parent]

4. [Parent] is [Student's] mother. She has five children including [Student] and works fulltime. [Parent] and [Student] have a close relationship, and she is a caring, concerned, involved parent. [Parent] testified that the attack on [Student] was a traumatic event that negatively affected her memory. While the ALJ does not find that [Parent] was purposely untruthful, the court does find for reasons explained in the discussion section that her recall of the events in question was not entirely reliable.

[Student's] Sixth Grade Year: 2018-2019

5. In the fall of 2018, [Student] began sixth grade at [Middle School] (“[Middle School]”).¹ [Middle School] is a school within the District. [Parent] believes [Student] started having problems at [Middle School] beginning on his first day of sixth grade. She testified that everything was a struggle for [Student] in sixth grade, but that he did have a little growth in reading that year.

6. [Student] played football in sixth grade in a non-District, city recreation league. [Parent] testified that when he was on the field, other students would take pictures of [Student] and post them on social media with captions such as “look at the retard run.” [Parent] reported these incidents to [Middle School], and she testified that school personnel told her they would keep an eye out for issues. However, according to [Parent], these students never stopped making fun of [Student], and he dealt with their bullying on a daily or weekly basis.

7. On April 19, 2019,² [Parent] texted [Middle School] Vice Principal [Vice Principal] in pertinent part:

I tried to call and couldn't get hold of anyone, there is a couple snap chats going around...They are calling [Student] a retard and harassing [[Student's][sibling]]. She said she reported it to a counselor and a principal why is nothing being done. Someone please call me so I can report this to the resource officer and you...I have screen shots please call me ASAP. Exhibit WW at 2.

8. On May 15, 2019, [Student] was suspended after he participated in an altercation at school in which he slapped another student, and that student slapped him. Exhibit 9 at 3.

9. [Teacher/Assistant Principal] worked for the District for 32 years and was an [Middle School] teacher and Assistant Principal when [Student] was in sixth grade. [Student] was one of her students. She credibly testified that [Student] and other students played football almost every day at recess and that on some days the games went smoothly, but on other days there were normal, “middle-school boy” conflicts. If the conflicts escalated, she stopped the game, sometimes for several days or for the week.

10. [Teacher/Assistant Principal] established that she never saw [Student]

¹ The statute of limitations started running on May 3, 2021, and therefore events that occurred prior to May 3, 2019 are not considered in this decision other than for context.

² This date is outside the statute of limitations, and the information is provided as background only.

bullied, and that [Student] never complained to her that he was being bullied. She credibly testified that [Student] was a nice, easy-going sixth grade boy who was happy and engaged at school, and that he never appeared fearful. [Teacher/Assistant Principal's] job duties included monitoring the students, which she did, and she never felt that [Student] was unsafe.

11. [School Counselor] was a school counselor at [Middle School] when [Student] was in sixth grade. She established that she had conversations with [Student] almost every day on the playground. [School Counselor] explained that approximately 20 kids, including [Student], played football every day during recess, and that [Student] was always included. Sometimes, the students would get mad at each other during the games about the play of the game, such as a ball being out of bounds, a call being unfair, and other student-to-student conflicts of that nature. [School Counselor] intervened when necessary, but she never had to intervene because of bullying. [School Counselor] credibly testified that she never saw [Student] bullied, and that [Student] never complained to her of being bullied. He was, however, upset about student-to-student conflict over football issues, like calls that were made or other things he felt were unfair.

12. [School Counselor] credibly testified that [Student] was fun-loving and athletic and had many friends. He never appeared to her to be a target of bullying. [School Counselor] felt that [Parent] described any conflict that [Student] had as bullying even when it was normal student conflict.

13. [Special Education Teacher] is a special education teacher at [Middle School] and was [Student's] special education teacher and case manager in sixth through eighth grades. [Special Education Teacher] did not recall [Student] ever telling her he was being bullied. Concerning comments made about [Student] during football games such as "look at that retard run," [Special Education Teacher] established that the football games in which those comments may have been made were not during the [Middle School] recess football games.

14. In sixth grade, [Student] was on an IEP that had been developed on October 1, 2018. [Student's] progress on his IEP goals toward the end of sixth grade was as follows:

Goal 1: Mathematics: Given specialized instruction, [Student] will be able to add two 2-digit numbers that require regrouping with 70% accuracy in 4 out of 5 attempts as measured monthly by informal assessments and classroom work samples. Exhibit 3 at 4.

Goal Progress and Status:

05/31/2019: 3/12/2019-5/30/2019: Progress Made

[Student] has this concept down. He is able to add the two two digit numbers together. He does well until he regroups then he sometimes forgets to add in the number he carried over. Exhibit 3 at 4.

Goal 2: Reading: Given specialized instruction [Student] will decode CVC words with 90% accuracy in 4 out of 5 attempts. *Id.*

Goal Progress and Status:

05/31/2019: 3/12/2019-5/30/2019: Progress Made

[Student] has made great strides in this goal. He is at least 95% correct in 3 out of 4 attempts. *Id.* at 5.

Goal 3: Writing: Given specialized instruction [Student] will complete a topic sentence/green when given a writing prompt and then two complete, stand alone supporting sentences/yellow/detail with correct or phonetically correct spelling and the proper use of the period, question mark and the exclamation mark in 4 out of 5 trials. Exhibit 3 at 5.

Goal Progress and Status:

[Student] is still working on this. He is getting the hang of coming up with his supporting sentences and making sure they are related to the topic sentences. Paragraphs are better when it is a subject that he likes or has a greater knowledge of. When have been working on other types of sentences. [sic]. *Id.*

Goal 4: Speech/Language: [Student] will demonstrate use of fluency shaping strategies 8/10 opportunities in guided conversation over 5 consecutive sessions. *Id.* at 6.

Goal Progress and Status:

05/31/2019: 3/12/2019-5/30/2019: Progress Made

[Student] currently uses cancellation and easy onset/light touch 40% of opportunities in speech. *Id.*

15. There was no evidence or testimony that [Student's] sixth grade IEP was inappropriate.

[Student's] Seventh Grade Year: 2019-2020

16. [Parent] testified that in the fall of seventh grade, [Student] was upset about the way he was being treated: that he was being touched, pushed, tackled to the ground, and called names. She testified that he was unable to follow along in class and was not allowed to use his speech-to-text device, his iPad, headphones, and other tools, and he was not on a routine.

17. On November 19, 2019, [Parent] emailed [Special Education Teacher] the following:

Hello who would I speak to regarding the gym teacher's filthy mouth to [Student]? Telling him man you have problems and issues, and giving him a .5 cause his paper was turned in backwards? Exhibit 12 at 9.

18. On January 13, 2020, [Parent] emailed [Special Education Teacher] the following concerning the gym teacher (quoted verbatim):

Could you talk to [Student] regarding [Science Teacher] threats regarding [Student] being late. He was marked tardy long before the poorly set up classes now. Has nothing to do with the new. I don't know how to be any more clear to teachers there [Student] has a disability that affects the way he remembers his motor skills. I know its difficult for the teachers to try to understand it, but I have medical documents proving his gene mutation they don't see it so they don't want to understand him getting a bit ridiculous. I'm sure once he gets the hang of his routine he will be just fine. If there is an issue any teachers are more than welcome to contact me. Exhibit 12 at 10.

19. On January 30, 2020, [Parent] texted [Special Education Teacher]:

This is night number three of [Student] coming home crying. I need to find something different for him. Teachers don't want to take the time to know who he is and the bullying is bad. Sounds like we need a meeting. Exhibit ZZ at 145.

20. On February 5, 2020, [Special Education Teacher] responded:

Sorry, I have been out (I was helping my daughter move). What type of meeting do you want? Just to go over the bullying issue? When I spoke to [School Counselor], she thought she had the bullying thing taken care of. If you want a meeting with the principal and I what time of day works best for you? *Id.* at 144.

21. Later that same day, [Parent] emailed back:

How is the tardy issue? I did talk to [School Counselor] she was supposed to talk to the principal and get back with me. [Student's] talking is getting bad cause he's stressed and his EarPods disappeared after he was made fun of for wearing them. I will check in with [Student] and let you know if we should meet or not. *Id.* at 144.

22. [Parent] testified that bullying of [Student] got so bad in seventh grade that it did not matter what [Student] did or what he wore, he was always bullied. She testified that the bullying was almost unbearable and that some days [Student] did not want to go to school because of it. [Parent] always worried about [Student] and never felt that he was safe at [Middle School] in seventh grade.

23. [Special Education Teacher] never saw any [Middle School] students picking on [Student] in seventh grade. She never saw him bullied, and if she had seen him bullied, she credibly testified that she would have done something about it.

24. For the seventh grade IEP meeting, [Parent] expressed that she wanted teachers and people at school to understand [Student] and not get frustrated with him. See exhibit 4 at 9.

25. [Special Education Teacher] credibly testified that if [Student's] parents had raised any concerns about his IEP or bullying, she would have included those concerns in the "Parent/Student Input" section of [Student's] IEP. There are no concerns with bullying noted in [Student's] seventh grade IEP. [Student's] parents did not ask for any corrections to this IEP.

26. In seventh grade, [Student's] IEP goals and his progress on those goals were as follows:

Goal 1: Reading. Given specialized instruction, [Student] will improve his reading score on a Curriculum Based Reading Assessment from a 2nd grade level multiple choice comprehension of 33% correct to 50% correct in 4 out of 5 attempts. Exhibit 4 at 21.

Goal Progress and Status:

10/14/2019: 8/12/2019-10/11/2019: IEP held this quarter.

01/06/2020: 10/15/2019-12/20/2019: Progress made.

[Student] improved his overall score to 38%.

03/12/2020: 1/7/2020-3/11/2020: Progress made.

[Student] improved his score to 40%.

05/15/2020: 3/23/2020-5/14/2020: Progress made.

Progress is slow but there is a steady increase in his comprehension.

[Student] has matured a great deal this year and is holding himself accountable for his own learning. *Id.*

Goal 2: Mathematics. Given specialized instruction, [Student] will improve his score on a CBMA at a 2nd grade level on a Common Core State Standard of 40% correct to 57% correct at a 2nd grade level. *Id.*

Goal Progress and Status:

10/14/2019: 8/12/2019-10/11/2019: IEP held this quarter.

01/06/2020: 10/15/2019-12/20/2019: Progress made.

[Student] improved his score to 43%.

03/12/2020: 1/7/2020-3/11/2020: Progress made.

[Student] increased his score to 45%, he does better when he reads out loud about [sic] he does like to do that.

05/15/2020: 3/23/2020-5/14/2020: Progress made.

[Student] grew .3 this quarter, he seems much more willing to tackle new things with confidence. Exhibit 4 at 21.

Goal 3: Writing. Given specialized instruction, [Student] will complete a topic sentence/green when given a writing prompt and then two complete, stand alone supporting sentences/yellow/detail with correct or phonetically correct spelling and the proper use of the period, question mark and the exclamation mark in 4 out of 5 trials. *Id.* at 22.

Goal Progress and Status:

10/14/2019: 8/12/2019-10/11/2019: IEP held this quarter.

01/06/2020: 10/15/2019-12/20/2019: Progress made.

[Student] is able to self check that each sentence has the two key parts with 70% accuracy.

03/12/2020: 1/7/2020-3/11/2020: Progress made.

[Student] understands the topic sentences but struggles with supporting sentences.

05/15/2020: 3/23/2020-5/14/2020: Progress made.

[Student's] writing is improving in spelling, sentence structure and paragraph structure. Spelling is improving in both correct spelling and phonetic spelling of words he is not familiar with. Exhibit 4 at 22.

Goal 4: Speech/Language: [Student] will demonstrate use of fluency shaping strategies 8/10 opportunities in guided conversation over 5 consecutive sessions. *Id.* at 23.

Goal Progress and Status:

10/14/2019: 8/12/2019-10/11/2019: Progress made.

[Student] does not always use strategies, but is ability to describe them and attempts to expand his repertoire of strategies has improved from last year.

01/06/2020: 10/15/2019-12/20/2019: Progress made.

He is using some fluency shaping strategies, but the treatment focus has shifted slightly towards using pseudostuttering as a disclosure, ownership, and desensitization strategy.

03/12/2020: 1/7/2020-3/11/2020: Progress made.

[Student] is improving in identifying opportunities and rationale for both speech modification strategies as well as desensitization strategies.

05/15/2020: 3/23/2020-5/14/2020: Progress made.

During the Covid-19 pandemic in Spring 2020, District 51 instituted a remote learning environment for students and their safety. [Student] continues to identify strategies he prefers to use when stuttering occurs. He is a willing contributor to group conversation. Exhibit 4 at 23.

[Student's] 8th Grade Year: 2020-2021

27. On August 25, 2020, the District sent Complainants a Prior Notice and

Consent for Reevaluation to evaluate [Student] in the areas of Communicative Status and Health.

28. On September 28, 2020, [Student] reported that a student slapped him on the back of his head in gym class. The student apologized. [Student] reported he felt fine at first but then felt dizzy. Exhibit 9 at 8.

29. [Assistant Principal] is a [Middle School] Assistant Principal. He was a credible witness. [Assistant Principal] established that the September 28, 2020 incident above occurred during a time when students were participating in what they called the “redneck slap game,” which had been circling through [Middle School] as a Tik Tok challenge. The “challenge” involved students going up to each other and slapping each other on the back of the neck. The student who slapped [Student] apologized to him because he had slapped him harder than he meant to. [Assistant Principal] investigated the situation and disciplined the student who slapped [Student]. He was able to shut down the prank. He credibly testified that [Student] participated in the “challenge” as well.

30. On September 29, 2020, [Student] reported that he was playing flag football during PE class when another student started calling him names and then hit him down to the ground, where his mouth hit the ground. [Student] reported that he, [Student], tried to kick the other student in the leg, but was uncertain whether he made contact. Exhibit 9 at 73. [Assistant Principal] established that a teacher was present and supervising the PE class when this incident occurred.

31. [Assistant Principal] testified that [Student] played football almost daily in recess and he enjoyed it. [Student] was included in the games and he appeared to enjoy them. [Assistant Principal] monitored the football games almost every day.

32. [Assistant Principal] credibly testified that kids would get competitive during the football games. Sometimes the kids, including [Student], would get too competitive and would start name calling, and when that happened, [Assistant Principal] would take the football away for the day or the week because things were escalating. He testified that there were incidents on the field that did not involve [Student]

33. [Assistant Principal] established that he saw [Student] every day and that he was a normal, typical middle school kid. He had a friend group; he seemed happy; he loved football, and [Assistant Principal] thought he functioned really well.

34. An IEP meeting was held on October 12, 2020. An August 25, 2020 Parent Contact Log note on the IEP states: “[Parent] agreed that additional evaluation to establish disability or determine educational needs was not needed.” Exhibit 5 at 4. Despite this log note, [Parent] testified that she had requested that other areas be tested, but that her requests were not specifically discussed.

35. In the “Parent/Student Input” section of the 2020 IEP [Parent] wrote that she

wished teachers would understand [Student] and his gene mutation better, and “give him a fair shot.” Exhibit 5 at 35.

36. [School Psychologist] was a school psychologist for the District for over 20 years. In the fall of 2020, [School Psychologist] spoke with [Parent] about evaluations necessary to determine continuing special education eligibility for [Student]. His health was an issue of significant concern to [Parent], who explained that [Student] was being seen by [Name of Hospital]. The IEP team also felt the area of communication should be evaluated. [Student’s]’s cognitive needs were not brought up as a concern.

37. [Parent] gave [School Psychologist] consent to evaluate [Student] in the areas of health and speech/language. See Exhibit 5 at 16. [School Psychologist] attended the October 12, 2020 IEP meeting and she credibly testified that everyone at the meeting agreed with intellectual disability and OHI as [Student’s] categories of eligibility. [School Psychologist] further established that [Parent] did not raise any specific concerns with the IEP.

38. [Student’s] October 12, 2020 IEP called for [Student] to receive 1100 direct minutes of math per month, 550 minutes monthly of reading, 440 minutes of written expression, 3900 minutes per month of academic access, and 45 minutes per month of direct speech language service minutes. Exhibit C at 16.

39. The October 12, 2020 IEP goals and [Student’s] progress on those goals were as follows:

Goal 1: Given specialized instruction, [Student] will improve his score on a third grade Common Core Standard Math Assessment from a 48% to a 55% correct in 4 out of 5 attempts. Exhibit 5 at 36.

Goal 2: Reading. Given specialized instruction, [Student] will improve his score on a second grade multiple choice comprehension test from a 44% correct to 50% correct in 4 out of 5 attempts. *Id.* at 37.

Goal 3: Writing. Given specialized instruction after writing his first draft [Student] will use a self editing check list to self correct 20% of his mistakes in 4 out of 5 attempts. *Id.* at 38.

40. Concerning Goal 4, Speech/Language, [Student] received a new measurable goal: “over 36 instructional weeks, [Student] will demonstrate effective desensitization techniques to reduce negative impacts of stuttering with 80% consistency.” *Id.* at 39.

41. [Speech Language Pathologist], a District certified speech language pathologist, established that the IEP team agreed with this goal, including [Parent]. Since 2020, [Student] has received 45 minutes per month of speech/language direct services

from [Speech Language Pathologist].

42. Concerning the October 12, 2020 IEP, [Special Education Teacher] credibly testified to the following, which the court finds as fact:

- a. Bullying of [Student] was not discussed.
- b. All members of the IEP team agreed that no additional information about [Student] was needed except for a file review.
- c. All members agreed that [Student] showed a great deal of improvement overall.
- d. He was improving in his goal of writing.
- e. Everyone agreed [Student] made progress in math, and [Student] surpassed his 2019 math goal. [Parent] agreed with [Student's] math goal.
- f. Everyone agreed [Student] had made progress in reading. [Parent] had no concerns with [Student's] reading or the reading goals.
- g. Everyone agreed that [Student] had made progress in his speech/language goals.
- h. Everyone on the IEP team, including [Parent], agreed that this IEP was appropriate for [Student] to make progress.

43. [Parent] was sent a finalized copy of the IEP. She did not raise any concerns about it.

The October 19, 2020 Assault

44. On October 19, 2020, [Student] was attacked at [Middle School] by another student. The student punched [Student] on his face approximately 27 times, and the assault was filmed by the student's girlfriend. The girlfriend posted the video of the attack to social media. Exhibit YY.

45. The assault lasted approximately 22 seconds. [Student] was sitting on a padded bench in a school hallway with other students walking through the hallway. After a couple seconds a young male in a yellow shirt came into the picture and started pummeling [Student's] head. He punched [Student] in rapid succession for about five seconds when a male teacher, [Teacher], rushed to the scene, yelling "hey, hey, hey, hey" and "no, no, no, no." [Teacher] placed his body between the attacker and [Student] and used his left arm and elbow to keep the attacker from hitting [Student] further, and then he used his entire body. The attacker continued to try to reach around [Teacher] to hit [Student], unsuccessfully, all while yelling at [Student] repeatedly, "What's up [N-word]?" ([Student] is Caucasian), and "What's up bitch?" [Teacher] continued yelling at the attacker, "no, no, no, no, no, no, no, no!" The last punch occurred around the six second mark. Throughout the assault, [Student] remained sitting on the bench trying to protect his face with his arms and hands, but the attacker was still able to punch his face repeatedly. The attacker was clearly very angry, and [Student] was clearly the victim. Exhibit YY.

46. Earlier that day, [Student] was eating lunch with his friends, [Friend 1] and [Friend 2]. At some point, [Friend 1] threw a fruit snack at two boys sitting at another table, one of whom was the aggressor in the attack. The attacker retaliated by throwing a milk carton back, which hit [Friend 1] in the head. After lunch, the same five boys were at recess. When the boys came back into school after recess, one of the two boys that had been sitting at the other table assaulted [Student]. All of the boys involved were interviewed, and [Student's] two friends and the attacker's friend expressed surprise that [Student] had been the victim instead of [Friend 1]. They speculated that the aggressor chose [Student] instead of [Friend 1] because he believed [Student] was less likely to fight back. Exhibit 9 at 28.

The Aftermath

47. [Assistant Principal] heard about the assault about one minute after it happened. He took the student who attacked [Student] and placed him in a quiet room. He suspended the student, and eventually expelled him. The student never came back to [Middle School] after October 19, 2020. [Assistant Principal] credibly testified that he did not leave [Student] alone. [Assistant Principal] called [Parent] to come pick up [Student] and she testified that he told her to take [Student] home because he did not feel [Student] was safe at school. [Assistant Principal] credibly testified that he did not state that he felt that [Student] was unsafe at school. [Assistant Principal] believed [Student] was safe and wanted him to come back to school.

48. [Assistant Principal] established that there had been no problematic interactions between the student who attacked [Student] and [Student] prior to the assault, and that [Student] had never complained about that student prior to the attack.

49. When [Parent] arrived at school, she testified that she arrived to find [Student] sitting by himself on a couch with no one helping him or around him. [Parent] testified that [Assistant Principal] apologized and said he did not know what happened.

50. [Student] had a bloody nose immediately after the assault. According to [Parent], the school did not call her for about an hour. Once they did, she took [Student] to the doctor, who diagnosed [Student] with a concussion. [Student] also had swelling and scratches on his head and face. The attacker broke the brackets of [Student's] braces, and his mouth was swollen such that [Student's] braces could not be repaired for a week or two. The braces had to be removed and replaced. [Student's] concussion was a result of the hits to his head and from the back of his head hitting the wall. Exhibit 7 at 66.

51. Criminal charges were filed against [Student's] attacker and he was adjudicated. At sentencing, the judge presiding over the criminal case made these comments:

The victim's injuries in this case may be the most serious injuries in a juvenile case that I have seen at a misdemeanor level offense. The video evidence presented here today was very disturbing. As best I could see, it corroborated the officer's report that the victim was unable to defend himself, and that [defendant] waited for the victim before committing the assault. Despite repeated physical strikes to the upper part of the victim's body, [defendant] initially did not listen to the teacher who had pulled him off of [Student]. But I also remember how disturbing it is that someone not only filmed this but distributed it to others as well. Exhibit 9 at 69.

The Remainder of [Student's] Eighth Grade Year: October 20, 2020-May 2021

52. [Compliance Officer] received a phone call in November of 2020 informing her of [Student's] attack and that he had not returned to school. She established that the District followed its brain injury policies, which included contacting the family every week to obtain [Student's] medical information to determine if he was cleared by his doctor to return to school.

53. [Compliance Officer] oversaw the District's brain injury team and protocols. She credibly testified that the District has concussion protocols in place and had them in place at the time of the attack. The District gathers information to determine when the child is able to access education. The school nurse is required to contact the family within one week of the brain injury or concussion so that the District knows whether any accommodations are necessary. The District followed these protocols with [Student]

54. [School Nurse] is a registered nurse and is the [Middle School] school nurse. [School Nurse] established that a student with a concussion can return to school if the student's doctor clears the student to do so.

55. After the assault, [School Nurse] received a standard concussion form from [Student's] doctor which stated, "released from concussion protocol 10/26/2020 if symptom free." Exhibit 7 at 7. No one at the District, including [School Nurse], received any medical records indicating that [Student] was released to return to school. For that reason, no one at [Middle School] knew if or when [Student] was released by his doctor to return to school.

56. [School Nurse] credibly testified that every school in the District would have required [Student] to have a medical release before returning to school.

57. [School Nurse] established that after the assault, she reached out to [Parent] a minimum of once a week. [Parent] testified that no one from [Middle School] reached out to her or [Student] after the assault.

58. After the assault, [Special Education Teacher] brought math, reading, and

writing school work to [Student's] home about once every other week. She offered to provide progress monitoring of [Student] at [Middle School] after school when students were gone, but Complainants did not feel [Student] would be safe at [Middle School].

59. Approximately three weeks after the assault, [Compliance Officer], who was head of special education services for the District at the time, felt that [Middle School] should convene another IEP meeting for [Student] since he had been out of school for three weeks. She had [School Psychologist], the school psychologist, contact [Parent]. [Compliance Officer] hoped to convene the meeting before winter break in December, but the meeting was not held until January 6, 2021, through no fault of the District.

60. On November 16, 2020, [School Nurse] emailed Complainants:

Hi[Parents], I tried calling again today but didn't have any luck so I thought I'd email. I hope you and [Student] are doing well. I have received 2 doctor's notes regarding his concussion. I've attached a medical release for you to sign so I can speak to the doctors also. I look forward to hearing from you and hope to see [Student] in school as soon as school is back in session after remote learning has ended.³ Exhibit 12 at 39.

61. On December 3, 2020, [School Nurse] emailed [Parent] the following:

Thanks for visiting with me yesterday, [Parent]. I saw [Special Education Teacher] and she says she visited with you as well. I'm thankful she has been such a support to [Student] over the past 3 years and especially the past 6 weeks. Like I said yesterday, [Special Education Teacher] is going above and beyond for a teacher to communicate with a child that is absent from school when the school does not have any substantial medical documentation stating what is happening with [Student] Yesterday you stated he has 'swelling on the side of his head but he is not struggling with lights, noise, activity, or stimulation.' I'm thankful he's not struggling with lights, noise, activities, or stimulation. That's encouraging. I'm forwarding you the request I asked for a couple weeks back when I asked for permission to speak with [Student's] concussion doctors. The fall of [Student's] 6th grade when he was receiving medical procedures for his pseudotumors I requested permission and asked you to sign the same form. No matter what MCVSD #51 school [Student] attends the school nurse will ask for permission to speak with [Student's] doctor. This form allows the doctor, school, parent, and student to all work together to help the student succeed in school. Please let me know if you have any questions or the form doesn't make sense. Exhibit 10 at 13.

³ The District had shut down its schools and was in a remote learning phase at this time due to an increase in Covid cases in the area.

62. [Parent] refused to sign a medical release for [School Nurse] to speak with [Student's] medical providers.

63. According to [Parent], [Student] received no education from the District from the day after the attack through December 31, 2020. She testified that at times, [Special Education Teacher] brought assignments to [Student's] house, some of which he could complete with [Parent's] help. [Parent] testified that after the attack she tried to tell the school about how the attack had affected [Student], but that no one from the school checked in with her or followed up with her to see how [Student] was doing.

64. On January 6, 2021, a meeting was held virtually between [Student's] IEP team, [Parent], [Parent's] counsel, and [Parent's] and [Student's] advocate, [Advocate] to discuss [Student's] education and steps going forward. [Parent], counsel, and [Advocate] requested that the District develop a safety plan for [Student] prior to his return to school.

65. Concerning a safety plan, [Compliance Officer] credibly testified that the District needed to know which school [Student] would be attending because each school building had different needs. She explained that the District does not have a generic safety plan, but that she was happy to write a safety plan for [Student] as a team. [Compliance Officer] offered to give [Parent] tours of the different schools that [Student] could attend within the District and stated that the District would pay for [Student's] transportation to the school of his choice.

66. On January 6, 2021, Complainants requested an Independent Education Evaluation ("IEE") in writing. Exhibit 12 at 42.

67. On January 6, 2021, [Parent] took [Student] to the emergency room for symptoms of [Condition]. Exhibit 7 at 22. Specifically, [Student] had progressively worsening right-sided drooping with difficulty swallowing and closing his eyes. *Id.* at 34.

68. On January 8, 2021, [Parent] took [Student] to his primary care physician for a follow-up appointment concerning the [Condition]. That doctor wrote: "[[Parent]] is convinced that the assault he sustained several months ago caused the [Condition]. I am unable to come to that conclusion." Exhibit 7 at 35.

69. On January 12, 2021, [Student] began attending the District's Online School ("[Online School]"). [Online School] was created specifically because of Covid as an option for students and parents who did not want their student to attend school in person.

70. On January 12, 2021, [Parent] emailed [Compliance Officer] the following:

I still have not received any contact from anyone regarding [Student's] special education online, he has classes online but they are all regular classes. I have left messages with the online counselor since last Thursday with no response. I also reached out to his advisory teacher she also had

no knowledge of [Student] needing special ed or the process. Can you please let me know who to contact to get this straightened out? [Student] is falling behind because of all these hold ups and lack of communication. Exhibit AA at 4.

71. About an hour later [Compliance Officer] responded, saying “[Parent], I spoke with [Online Assistant Principal], the Assistant Principal for the On-line school. She will take care of getting [Student] into the right classes. He will be assigned a special education teacher there who will provide him the work. You should hear from them shortly.” Exhibit AA at 5.

72. [Parent] testified that there were several weeks of delays getting [Student] in the proper online classes. She testified that the District would “mess up” his schedule and that nothing was being done to place [Student] in the correct classes. [Parent] did not remember exactly when she enrolled [Student] in [Online School] but believed it may have been at the end of eighth grade.

73. On January 13, 2021, [Parent] emailed [Compliance Officer], stating “It is really important that I speak to someone. [Student] has developed [Condition] as a result of his assault which is nerve damage in the face from trauma. I do not want to throw him on google meets without them being aware.” Exhibit AA at 9.

74. On January 15, 2021, [Compliance Officer] emailed [Parent]:

You requested an Independent Educational Evaluation on January 6, 2021. The district has agreed to do that IEE. Please know that you have the right to an IEE at public expense if you disagree with an evaluation of your child obtained by the administrative unit. We agreed to an IEE for the last evaluation completed for your son in October, 2020, which included Communication and Health.

When you request an IEE, the administrative unit, which is District 51, must provide you with information about where you may obtain an IEE and about the administrative unit’s criteria that apply to IEEs. Those persons conducting such assessments must hold the appropriate credentials much the same as those conducting the evaluations in the district, We are currently in the process of compiling a list of providers, outside of the district, who could complete a Health Evaluation and a Communication Evaluation for your son, We are locating certified School Nurses, Certified Speech Language Pathologists, and Special Education teachers outside of our district that you could choose from.

Also know that you are entitled to only one IEE of your child at public expense each time the administrative unit conducts an evaluation of your child in which you disagree. The evaluation you mention in the previous emails would not be considered eligible under IEE. Exhibit 12 at 59.

75. [Parent] testified that the District only offered people within the District to perform the IEE, but that she wanted someone from outside the District in order to ensure the evaluation was fair. However, on January 21, 2021, the District offered two nurses and two speech language pathologists from outside the District; namely, from [School District 1], the [School District 2], and [School District 3]. Exhibit 12 at 63.

76. On January 21, 2021, [Parent] responded:

I am responding to the message regarding the IEE. None of the people listed will do, I want to use [Licensed Psychologist/Licensed School Psychologist] she is more than qualified for this evaluation. I also wanted to let you know that January 26 will work for us for a follow up meeting we can do 10:30 if that works for you, please let me know. Exhibit 12 at 64.

77. On January 26, 2021, the District convened a meeting for [Student] because, as [Compliance Officer] stated, “we are very concerned about [Student] not receiving all the services that...he’s afforded with his IEP. He has been out for quite some time. I understand he’s had some injuries, and – but we are really concerned about getting him quickly as possible into services so that he does not fall further behind.” Exhibit 6 at 12.

78. At the meeting [Compliance Officer] asked [Parent], “if there are accommodations or things that we need to – to know about to put into place because of the concussion or any of the injuries that he may have suffered...We do have a District protocol for concussions that we typically follow, and we needed to – to look at how we need to move forward with that also and try to get him back into school.” Exhibit 6 at 12.

79. [Compliance Officer] established at hearing that while [Student] may not have received all of his IEP service minutes in a given month in early 2021, that fact was possibly due to the fact that there were some months with more weeks and some months with fewer weeks, and that she was able to confirm that by the end of each academic year, [Student] had received all the service minutes his IEP called for.

80. Concerning the requested IEE, [Compliance Officer] asked [Parent] at this meeting if there was a particular assessment that she did not agree with from [Student’s] prior evaluation in October of 2020. [Parent’s] counsel stated, “we would seek an evaluation for all areas in which he’s previously been evaluated in October.” Exhibit 6 at 33.

81. On February 10, 2021, [Parent] took [Student] back to his primary care physician, who noted that the [Condition] had shifted to the left side of [Student’s] face. The doctor noted that a [Name of Hospital] neurologist had indicated [Condition] is associated with [Genetic Defect]. The doctor further noted that [Student’s] face was almost back to normal. Exhibit 7 at 75.

82. On February 18, 2021, [Compliance Officer] emailed [Parent]:

Though we agree [Licensed Psychologist/Licensed School Psychologist] may be qualified to conduct evaluations in her area of expertise (psychology) she is not a certified school nurse, nor a certified speech language pathologist and therefore, she does not have the same credentials, nor does she meet the same criteria as those who performed the evaluations and that used by the District. As of today, you have not communicated with us regarding which individual you have chosen from the list provided. If for some reason you do not want to use any of the individuals suggested, please let us know your concern as to why these individuals should not complete the IEE. If you would like the District to provide additional names from which you can choose, please let us know and we would gladly do additional research to find individuals on the western slope qualified to conduct the IEE. If for some reason we have misunderstood any prior communication or have a misunderstanding as to any of the issues raised, please let us know immediately so we may attempt to remedy the situation. Exhibit 12 at 75.

83. There was extensive testimony about two evaluations of [Student] that were performed in 2021. [Parent] believed the District was only giving her names of evaluators who worked for the District, which was not the case, and therefore she and her husband decided to pay privately for an evaluation of [Student] done by [Licensed Psychologist/Licensed School Psychologist]. The District was not aware that Complainants were having [Student] evaluated, so the District proceeded forward with an IEE of [Student] performed by District school psychologist [District School Psychologist]. In the end, the two evaluations produced similar results.

84. [Student] finished his eighth grade year at [Online School].

85. [Student's] goals on his IEP and his progress toward those goals in eighth grade were as follows:

Goal 1: Mathematics: Given specialized instruction [Student] will improve his score on a third grade Common Core State Math Assessment from a 48% to a 55% correct in 4 out of 5 attempts. Exhibit 1A at 1.

Goal Progress and Status:

01/05/2021: 10/14/2020-12/18/2020: Student did not work on this goal. [Student] did not attend school this quarter and was not able to be progress monitored. *Id.*

3/11/2021: 1/6/2021-3/10/2021: Progress Made

[Student] has been working on addition and subtraction with up to three digits and needs just a few reminders for regrouping. [Student] has also been working on multiplication and is able to do 0's, 1's, 10's, 11's, and

multiply by 100. On a third grade assessment, he averages about 50%. Exhibit 1A at 1.

Goal 2: Reading: Given specialized instruction [Student] will improve his score in a second grade multiple choice reading comprehension test from a 45% correct to 50% correct in 4 out of 5 attempts. *Id.* at 2.

Goal Progress and Status:

01/5/2021: 10/14-12/8/2020: Student did not work on this goal. [Student] did not attend school this quarter and was not able to be progress monitored. *Id.*

3/11/2021: 1/6/2021-3/10/2021: Progress made.

While [Student] is able to answer questions about a second grade level text with at least 50% accuracy, he has some difficulty reading a second grade level text. Exhibit 1A at 3.

5/24/2021: 3/15/2021-5/21/2021: Progress made.

[Student] is able to answer questions from a second grade level text with 50% accuracy, but only when it is read to him. He tends to skip words when he is reading, which changes the meaning. *Id.*

Goal 3: Writing: Given specialized instruction after writing his first draft [Student] will use a self editing check list to self correct 20% of his mistakes in 4 out of 5 attempts. Exhibit 1A at 4.

Goal Progress and Status:

01/5/2021: 10/14/2020-12/8/2020: Student did not work on this goal. [Student] did not attend school this quarter and was not able to be progress monitored. *Id.*

3/11/2021: 1/6/2021-3/10/2021: Progress made.

[Student's] first draft writing does not contain correct punctuation or capitalization. He is able to make some spelling corrections, as well as some capitalization and punctuation corrections. Exhibit 1A at 4.

5/24/2021: 3/15/2021-5/21/2021: Progress made.

[Student] is able to correct capitalization and punctuation, as well as simple speaking. He has a more difficult time correcting the way the sentence is put together or knowing when something sounds wrong, without support. *Id.*

Goal 4: Speech/Language: [Student] will demonstrate use of fluency shaping strategies 8/10 opportunities in guided conversation over 5 consecutive sessions. *Id.* at 6.

1/5/2021: 10/14/2020-12/18/2020: Progress made. IEP meeting this

quarter takes the place of a progress report.

3/11/202: 1/6/2021-3/10/2021: Progress Made

[Student] is able to use desensitization techniques but not actively throughout the week, and reports he feels like his speech is smoothing out.

05/24/2021: 3/15/2021-5/21/2021: Progress Made

[Student] reports not using desensitization techniques, per his preferences, demonstrating autonomy. He has verbalized being uncertain how he wants to proceed in management of his communication. Exhibit 1A at 5.

[Student's] Ninth and Tenth Grade Years: 2021-2022 and 2022-2023

86. The [Online School] had been created specifically in response to Covid and was not in operation for [Student's] freshman year of high school. However, the District had always operated an online school, [District Online School] ("[District Online School]"), for students who, for whatever reasons, did not want to attend school in person.

87. At the end of July 2021, [Parent] informed [Compliance Officer] that [Student] would be attending [District Online School] in the fall. Exhibit 12 at 92.

88. [Parent] testified that [Student] was still scared to go to school in person in ninth grade, and that the District did not create a safety plan for [Student] despite her request. [Compliance Officer] credibly testified that a safety plan was never developed for [Student] because his parents never chose for him to attend school in-person.

89. On February 17, 2022 an IEP meeting was held. At the meeting, [Student's] parents expressed that they did not feel he would be safe to attend school in person. Concerning a safety plan, the IEP team wrote:

The District offers the opportunity for [Student] to return to in-person learning at [Student's] current high school of residency with a safety plan that is developed by the school and IEP team including the parents. It was proposed that [Student] begin with a shortened day to provide an opportunity to monitor his stress level and safety as recommended by [Licensed Psychologist/Licensed School Psychologist]. During this transition period, [Student] may continue to access classes through the on-line program for the portion of the day he is not at the high school....Services were offered to support the anxiety through the counselors or school psychologist on campus. Exhibit 8 at 2.

90. On March 2, 2022, [Compliance Officer] contacted [Parent], explaining:

The District is again proposing to return [Student] to in-person learning and agreeing to implement the Individual Support Plan as written by [] which you provided us on Feb. 16, 2022. [Student's] current high school of residence is [High School] but we are willing to consider other high schools in the

district. A full safety plan can be written as soon as the school is determined as each school has its own safety needs. At this point we acknowledge that factually there is a dispute on what has or has not occurred up to this point, but we continue to propose that in-person learning provides the best education for [Student] Exhibit 8 at 1.

91. On March 18, 2022, [Compliance Officer] sent [Parent] an email proposing to hold another meeting to discuss [Student's] IEP. [Compliance Officer] gave [Parent] several dates and times to choose from. Exhibit 12 at 141. [Parent] did not respond.

92. On March 29, 2022, [Compliance Officer] emailed [Parent] proposing additional dates to meet to complete [Student's] IEP. *Id.* at 145. [Compliance Officer] did not receive a response about the second set of proposed meeting dates.

93. On May 26, 2022, [Compliance Officer] sent a third email to [Parent] with proposed dates to meet to discuss [Student's] IEP. [Compliance Officer] was hoping to have a meeting before the end of the school year. *Id.* at 169. [Compliance Officer] did not hear back after sending this email.

94. On September 9, 2022, [Compliance Officer] texted [Parent] about convening an IEP meeting. *Id.* at 146. As of the date of hearing (March 2023), the District had not heard back from Complainants about scheduling an IEP meeting for [Student]

95. The goals and objectives of [Student's] IEP in place during ninth and tenth grades were as follows:

Goal 1: Mathematics: Given specialized instruction [Student] will improve his score on a third grade Common Core State Math Assessment from a 48% to a 55% correct in 4 out of 5 attempts. Exhibit 1A at 1.

2/14/2022: Supplemental: Progress Made

[Student] is making progress with his mathematics. His confidence is growing and he is starting to work on math problems that he has not attempted in the past. Due to intense frustration with third grade mathematics, currently he is working on second grade level math. As noted below, [Student] is averaging 63% in his math progress monitoring. On a third grade common core math problem, [Student] is less than 30%. 3rd grade Common Core math probes are used to assess progress. *Id.*

3/11/2022: Supplemental: Progress Made.

[Student] is making progress with his mathematics. His confidence is growing and he is starting with work on math problems that he has not attempted in the past. Due to intense frustration with third grade

mathematics, currently he is working on second grade math. As noted below, [Student] is averaging 63% in his math progress monitoring. On a third grade common core math problem, [Student] is less than 30%. 3rd grade Common Core math probes are used to assess progress. Exhibit 1A at 1 and 2.

5/20/2022: Supplemental: Progress Made

[Student] is making progress with his mathematics. His confidence is growing and he is starting with work on math problems that he has not attempted in the past. Due to intense frustration with third grade mathematics, currently he is working on second grade math. As noted below, [Student] is averaging 63% on his math progress monitoring. On a third grade common core math problem, [Student] is less than 30%. 3rd grade Common Core math probes are used to assess progress. *Id.*

11/1/2022: Supplemental: Progress Made.

[Student] is making progress with his mathematics. His confidence is growing and he is starting with work on math problems that he has not attempted in the past. On a third grade common core math probe, [Student] is scoring 60%. *Id.*

1/6/2023: Supplemental: Progress Made.

[Student] is making progress with his mathematics. His confidence is growing and he is starting with work on math problems that he has not attempted in the past. On a third grade common core math probe, [Student] is scoring 75%. *Id.*

Objective 1

[Student] will improve his score on a 3rd grade Common Core Standard Math Assessment by approximately 1% each of the 8 months of the school year. I don't count the first month of the school year for recoupment. Exhibit 1A at 2.

96. [Online School Special Education Teacher] is [District's Online School] Special Education teacher and has worked for the District for 17 years in that capacity. [Online School Special Education Teacher] has been [Student's] special education teacher and case manager since [Student] started [District Online School] in the fall of his ninth grade year. [Online School Special Education Teacher] was a credible witness. [Online School Special Education Teacher] established that [Student] exceeded his goal of improving 1% each of eight months, and that [Student] has moved on to the 4th grade Common Core math topics, which he is beginning to understand.

97. [Student's] goals and progress on his goals on his second area, Reading, were as follows:

Goal 2: Reading: Given specialized instruction [Student] will improve his score in a second grade multiple choice reading comprehension test from a 45% correct to 50% correct in 4 out of 5 attempts. Exhibit 1A at 2.

2/14/2022: Supplemental: Progress made.

When a story is read to [Student], he has around 70% comprehension accuracy at this time. Exhibit 1A at 2.

3/11/2022: Supplemental: Progress made.

On a story of high interest to [Student], he has scored 80% accuracy on comprehension when a story is read to him. *Id.*

5/20/2022: Supplemental: Progress made.

On a story of high interest to [Student], he has scored 80% accuracy on comprehension when a story is read to him. *Id.*

11/10/2022: Supplemental: Progress made.

On a story of high interest to [Student], he has scored 80% to 85% accuracy on comprehension when a story is read to him. *Id.*

1/6/2023: Supplemental: Progress made.

On a story of high interest to [Student], he has scored 80% to 85% accuracy on comprehension when a story is read to him. *Id.*

Objective 1: [Student] will increase his score by .68% each month for 8 months of the school year. This leaves the first month for refresher after the summer break. Exhibit 1A at 3.

98. [Online School Special Education Teacher] credibly testified that in reading, [Student] was eventually able to reach 100% of the goal. There were dips in his achievement, but [Online School Special Education Teacher] explained that was common with special education students, and that eventually [Student] mastered the goal. Currently, [Student] has surpassed the objective.

99. [Student's] third goal was writing. His goals and progress toward those goals were as follows:

Goal 3: Writing: Given specialized instruction after writing his first draft [Student] will use a self editing check list to self correct 20% of his mistakes in 4 out of 5 attempts. Exhibit 1A at 4.

Goal Progress and Status:

2/14/2022: Supplemental: Progress made.

When given a writing topic of high interest, [Student] is able to generate a multi paragraph response with self-correcting of mistakes 20% of the time. [Student] is still very inconsistent with his writing at this time. *Id.*

3/11/2022: Supplemental: Progress made.

When given a writing topic of high interest, [Student] is able to generate a

multi paragraph response with self-correcting of mistakes 20% of the time. [Student] is still very inconsistent with his writing at this time. *Id.*

5/20/2022: Supplemental: Progress made.

When given a writing topic of high interest, [Student] is able to generate a multi paragraph response with self-correcting of mistakes 20% of the time. [Student] is still very inconsistent with his writing at this time. Exhibit 1A at 4.

11/10/2022: Supplemental: Progress made.

When given a writing topic of high interest, [Student] is able to generate a multi paragraph response with self-correcting of mistakes 15% of the time. [Student] is still very inconsistent with his writing at this time. *Id.* at 5.

1/6/2023: Supplemental: Progress made.

When given a writing topic of high interest, [Student] is able to generate a response with self-correcting of mistakes 20% of the time. [Student] is still very inconsistent with his writing at this time. *Id.*

100. The court finds as fact that the District offered appropriate services and supports to [Student] in his IEP from sixth grade through the present.

101. The court finds as fact that the District took reasonable steps to determine what measures were necessary to allow [Student] to safely return to school after the assault, and continued to provide FAPE once [Student] attended school at [Online School] and at [District online School].

DISCUSSION

The Requirement of a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). To satisfy FAPE's requirement, the school district "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 County School District RE-1*, 580 U.S. ___; 137 S.Ct. 988 (2017).

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." *See also Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) (stating that, "[t]he burden of proof...rests with the party claiming a deficiency in the school district's efforts"). Parents therefore bear the burden of proving by a preponderance of the evidence that the District violated its Child Find obligations under the IDEA which resulted in a failure to provide [Student] with FAPE.

Discussion

Bullying

The majority of Parents' claims rest on the underlying issue of whether [Student] was a bullied student. The Colorado Department of Education defines bullying as "any written or verbal expression, or physical or electronic act or gesture, or a pattern thereof, that is intended to coerce, intimidate, or cause any physical, mental, or emotional harm to any student." § 22-32-109.1(1)(b), C.R.S. Key to the definition of bullying is the idea that the aggressor and the subject have differing levels of power: the aggressor has more real or perceived power. See *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP, August 20, 2013).

Parents, in their first amended complaint, allege that there was a distinct amount of imbalance between [Student] and his "tormentors." While [Student] was a special education student, there is no reliable evidence that he was bullied during the school day at [Middle School]. The credible and reliable evidence in the record shows that [Student] and the other boys who played football during recess got into arguments about the football game periodically. These were not incidents of students ganging up on [Student], bullying him, or tormenting him. These were not incidents where one student had more real or perceived power than [Student]. Rather, the evidence established that a group of boys, including [Student], complained to each other and sometimes to school personnel about how the football games played out: unfair calls, someone being out of bounds and getting by with it, etc. Furthermore, there is no evidence in the record that [Student] was called "retard" by [Middle School] students during the school recess football games or during the school day. That comment, and comments such as "look at the retard run," were made, if at all, at non-District events such as at the city recreation league football games. It is an untenable position to be asked to hold the District responsible for actions that occurred at non-District events, possibly by non-District students, and the court declines to do so.

The evidence of bullying presented at hearing consisted of [Parent's] testimony and emails or texts that she wrote. As mentioned earlier, the court does not believe [Parent] was being intentionally untruthful. She believed her testimony, and she believed [Student] was being bullied when she sent the District various texts and emails. Two facts prevent the court from being able to rely on [Parent's] recollection and understanding of the events surrounding [Student's] interactions with other [Middle School] students. The first fact is that [Parent] testified that the assault was a traumatic event for her, and that her memory had been negatively affected by the assault and by the fact that she was raising five children while working full time. The second fact is that multiple District witnesses credibly testified that they never saw [Student] bullied and that he never complained to them of being bullied. Significantly, these were witnesses who saw [Student] daily. [School Counselor] saw [Student] and had daily conversations with him during recess. She credibly testified that at times she had to intervene in the football games, but she never had to intervene due to bullying. [Assistant Principal] was a particularly credible witness, and he supervised the football games. He never saw

[Student] bullied and [Student] never complained to him of being bullied. Finally, [Special Education Teacher], as [Student's] case manager and daily special education teacher, saw [Student] daily and credibly testified that she never saw [Student] bullied and he never complained to her of being bullied. To a person, each of these witnesses would have stepped in and stopped bullying of [Student] had they seen it or had he complained of it. These witnesses were sequestered during hearing and did not hear each other's testimony. Each witness was credible in and of him or herself, and combined, they painted a persuasive picture of student-on-student conflict that had nothing to do with bullying of [Student]

[Student's] Evaluations

In order to trigger Parents' right to an IEE at public expense, the District must have conducted an evaluation with which Complainants disagree. 34 C.F.R. §300.502(b)(1). The amended due process complaint alleges that the District failed to timely reevaluate [Student] after the assault. This assertion is not accurate. [Compliance Officer] and the IEP team agreed that [Student] should be reevaluated after the attack, and proactively took steps to start the reevaluation process. The first step was asking Complainants in what areas they wanted [Student] reevaluated. Their counsel clearly indicated in January 2021 that Parents wanted the same areas to be evaluated that had been evaluated in October of 2020. Those areas were health and communicative status. The District was able to complete a reevaluation of [Student] in September of 2021. The delay between January and September of 2021 was due in large part to Complainants' refusal to choose any evaluators offered to them, even evaluators who were outside of the District, and their insistence on using [Licensed Psychologist/Licensed School Psychologist]. However, [Licensed Psychologist/Licensed School Psychologist] was not a registered nurse nor a certified speech/language pathologist, and therefore did not have the required credentials to evaluate [Student] in the areas Parents' counsel requested he be evaluated.

Moreover, the evidence established that [Compliance Officer] acted proactively after the assault. As soon as three weeks after the assault, upon first learning of it, [Compliance Officer] began trying to convene an IEP meeting, and her goal was to have the meeting before the December winter break. [Compliance Officer] also wrote detailed emails to [Parent] explaining exactly why [Licensed Psychologist/Licensed School Psychologist] did not have the appropriate credentials to evaluate [Student] in the areas counsel had requested. [Parent's] direct testimony at hearing evidenced confusion on her part that someone with as much education and credentialing as [Licensed Psychologist/Licensed School Psychologist] was not considered properly credentialed to conduct [Student's] evaluation. However, [Compliance Officer's] emails to [Parent] clearly explained the reasons why she was not qualified. In another email, [Compliance Officer] specifically gave [Parent] the names of evaluators who worked for other school districts, and specifically told [Parent] the names of the districts in which they worked. Despite [Compliance Officer's] email, [Parent] was still under the mistaken impression at hearing that the District had insisted on using District personnel for the evaluation. In any event, the court concludes that any delay in the reevaluation of [Student] was not due to anything

the District did or failed to do. The court further concludes that the evaluation the District conducted in September of 2021 was thorough, appropriate, and timely in light of the circumstances.

Compensatory Education

Complainants seek compensatory education and tutoring for [Student] due to allegations that the reason [Student] has not returned to in-person learning is because the District could not keep [Student] safe at school, and because the District refused to create a safety plan prior to [Student] returning to school. However, these allegations were not proven at hearing. What was proven was that the District, through [Compliance officer] and [School Nurse], tried repeatedly to obtain information about [Student's] concussion within three weeks after the assault, if not sooner, in order to determine if his physician had cleared him to return, and if so, whether he required any additional accommodations because of the concussion. [School Nurse] explained in writing to [Parent] this need for a medical release. A transcript was made of the January 2021 IEP meeting and there [Compliance Officer] again explained the need for medical information. Parents, however, refused to provide the requested release. Compensatory education is not warranted where, as here, it was Complainants who refused to provide the District with the medical release clearing [Student] to return to school. The District had a note from [Student's] doctor stating he was cleared to return on October 26, 2020 if his symptoms cleared up, but nothing was ever provided to the District stating that his symptoms had cleared up. Instead, [Parent] and one of her advocates told the District that [Student] developed [Condition]. Giving the District this information, without more, impeded the District's ability to determine what appropriate protocols, if any, were required to allow [Student] to access his education.

Concerning the safety plan, the credible and reliable evidence in the record established that District schools had different vulnerabilities requiring different safety measures. Some schools were contained within one building. Some schools had multiple buildings and thus a possible vulnerability in the passing periods. [Compliance Officer] offered to give [Parent] a tour of all the schools within the District that [Student] could have attended to help Complainants and [Student] choose which school he would feel most comfortable, but that offer was never accepted. [Compliance Officer] assured Parents that the District would pay for or provide [Student's] transportation to any of these schools. [Compliance Officer] indicated the District would adopt measures that [Licensed Psychologist/Licensed School Psychologist] had suggested in a safety plan. The District only asked that Complainants choose a school so that the safety plan could be created specific to that school. The court does not find that request unreasonable, nor does the court find any of the District's actions concerning the requested safety plan unreasonable.

Finally, the court concludes that the reason [Student] has been attending school online since the attack is not because of any failures by the District, but because Parents do not trust the District. However, that distrust is not grounds for compensatory education when, as here, there is no evidence in the record that [Student] failed to receive any of

the services or minutes called for in his IEP, and because the measures the District took, or was willing to take, to ensure [Student's] safety were reasonable. The only time there was any indication that [Student's] IEP minutes may not have been appropriately provided was during the first two weeks of school in January 2021 when the District was shut down due to Covid. While at first it appeared that [Student] may have been missing some minutes from those two weeks, further evidence established that [Student] ultimately received all the minutes mandated by his IEP.

FAPE

The ultimate question in any IDEA case is whether the student in question received FAPE. It is important to note that here, there is no evidence that Complainants ever challenged any of [Student's] IEPs as being inappropriate in light of his unique circumstances. There was no evidence or testimony presented at hearing indicating that Complainants were unhappy with [Student's] sixth grade IEP, its goals, or his progress toward those goals. There was no evidence or testimony that Complainants ever challenged [Student's] seventh through tenth grade IEPs, the IEP goals, or [Student's] progress toward those goals. Rather, the credible and reliable evidence in the record indicates that Complainants agreed with [Student's] IEP at his IEP meetings, and, more importantly, that each IEP was reasonably calculated to enable [Student] to make appropriate progress in light of his circumstances. Indeed, [Special Education Teacher], [Online School Special Education Teacher], and [Speech Language Pathologist], through extensive, detailed testimony, showed the court exactly how [Student] made progress over the years and how he was currently making progress in all four areas of his IEP. For these reasons, the court concludes that there was no denial of FAPE in this case.

Finally, the court wants to be clear that what happened to [Student] was terrible and not the fault of anything [Student] did. The court is also sympathetic to and understands Parents' fears and distrust. This decision is not meant in any way to diminish the trauma [Student] and his Parents suffered. This decision reflects the fact that Parents had the burden of proof in this case, and simply did not have sufficient evidence to meet that burden.

DECISION

For all of the reasons explained above, it is the decision of the ALJ to dismiss all of Complainants' claims and deny all of their requests for relief. This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

DONE AND SIGNED April 27, 2023

/s/ Tanya Thiessen Light

TANYA THIESSEN LIGHT
Administrative Law Judge