

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
[Parent], Complainant, vs. ACADEMY DISTRICT 20 aka EL PASO DISTRICT 20, Respondent.	▲ COURT USE ONLY ▲
	CASE NUMBER: EA 2021-0020
DECISION	

Complainant alleges that Academy School District 20 (School District) denied her daughter, [Student], a free appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. A due process hearing, convened in accordance with 20 U.S.C. § 1415(f) and its implementing regulation 34 CFR § 300.511, was held before Administrative Law Judge (ALJ) Hollyce Farrell via Google Meet on December 6 through December 9, 2021. Samantha Baker, Esq., of Kishinevsky & Raykin, LLC represented Complainant. John R. Stanek, Esq. of Anderson, Dude and Lebel, P.C., and Tonya J. Thompson, Esq. of Academy School District 20, represented the School District. At hearing, the Complainant’s Exhibits 1, 2, 5, 6, 9, 13, 19, 24, 25, 27, and 28 were admitted into evidence. Complainant’s Exhibit 46 was offered into evidence, but not admitted. Complainant offered no other exhibits for admission. The School District’s Exhibits A, B, D, E, F, G, H, I, J, Q (page 1 through 4, only) and S were admitted into evidence. The School District offered Exhibit Q in its entirety into evidence, but only pages 1 through 4 were admitted. The School District offered no other exhibits for admission. For purposes of this decision, the ALJ took judicial notice of Governor Jared Polis’s Executive Orders D 2020 007, D 2020 041 and D 2020 074.

Case Summary

[Student] is a 13-year-old female, who prior to May of 2020, was a student at [Elementary School] ([Elementary School]), a school within the School District. In May of 2020, [Student]’s parents unilaterally withdrew [Student] from [Elementary School] and decided to home school her and have her receive Applied Behavioral Analysis (ABA) treatment instead of attending school.

In May 2021, Complainant filed her original Due Process Complaint alleging that the School District failed to adhere to [Student]’s IEP in the Fall of 2019. Complainant subsequently filed an amended complaint. The basis for the complaint was that [Student]’s IEPs required [Student] to be supervised full-time by school staff to ensure her

safety and provide for her learning needs. Complainant alleges that [Student] did not receive full-time supervision because [Student] had two unassisted falls at school in October 2019, which caused injuries to [Student]. Complainant further alleges that during the Fall of 2019, [Student] was prevented from attending physical education and/or not allowed to participate in adaptive physical education (PE). Complainant also alleges that the School District did not provide training, or provided wholly inadequate training, with regards to [Student]'s physical needs as outlined in her IEP.

Complainant alleges that [Student] was given an IEP that would not be followed because the IEP included more service time than it was possible for [Student] to attend school and those services were wholly inadequate to meet her educational needs and goal. Complainant alleges that [Student]'s IEP was not revised or reviewed, and did not provide compensatory education when she was absent from school recovering from surgery. Moreover, Complainant alleges that [Student] was only given one educational goal in her IEP, and absent revision or compensatory services, she was unable to achieve that goal. Finally, Complainant alleges that despite being capable of achieving more than one goal, [Student] still did not have the support she needed to achieve even the single goal.

On the first day of the hearing in this matter, the parties agreed that the issues were (1) whether [Elementary School] and the School District denied [Student] a FAPE by allegedly not adhering to her IEPs during the Fall semester of 2019 and the Spring semester of 2020 and (2) whether the School District failed to develop a proper IEP for [Student] in December of 2019.¹

The School District denies that it failed to provide [Student] with FAPE. The School District argues that the services in [Student]'s IEPs were delivered and/or developed in accordance with the IDEA. The School District argues that the contents of the IEPs were determined by [Student]'s IEP team and made available to [Student] at all times when she attended school during the time period relevant to the complaint. The School District argues that [Student]'s IEPs appropriately addressed [Student]'s needs as evidenced by her continued progress as demonstrated in regularly issued progress reports.

For the reasons explained below, the ALJ concludes that the School District did not deny [Student] FAPE and did develop a fully compliant IEP for [Student] in December of 2019.

Findings of Fact

Background

1. [Student] is a 13-year-old female ([Date of Birth]) who lives in [City] with her parents. [Student] was born with a rare chromosome A abnormality. Her medical conditions include a [medical conditions]. [Student] is non-verbal and has very limited

¹ The first Due Process Complaint was filed on May 4, 2021. The IDEA has a two-year statute of limitations on claims. Therefore, any allegations of denials of FAPE prior to May 4, 2019, are time-barred.

means to express her needs.

2. [Student] has impaired motor functioning. She is able to walk, but shuffles her feet and cannot see to transition from different surfaces. [Student] has low muscle tone, coordination issues, and balance issues. [Student] is a fall risk due to a combination of disabilities, and needs to have someone close to her to prevent her from falling. One of [Student]’s seizure types is known as “atonic” which may cause [Student] to drop her head and possibly fall. [Student] does not have an automatic reflex to put out her hands when falling or to deflect something that may hit her.

3. [Student] needs assistance with every aspect of her life, including all her activities of daily living (ADLs).

4. [Student] has sleep issues, and cannot enter into REM or deep sleep. This greatly affects [Student]’s ability to cope, and she falls asleep during the day, including when she was at school.

5. [Student]’s mother, [Parent], is [Student]’s CNA and primary caregiver. [Student] also receives physical therapy (PT) and occupational therapy (OT) from private providers to meet her needs. [Student]’s CNA care and her private PT and OT are paid by Medicaid.

6. [Student] attended [Elementary School], which her parents chose, instead of her home school when she began attending preschool. [Elementary School] has what is considered a significant needs program for students with intellectual and physical needs. [Student] has been on an IEP since she started preschool.

7. [Special Education Teacher], the special education teacher at [Elementary School], is considered by others in the School District to be extremely qualified. [Special Education Teacher] was [Student]’s special education teacher from kindergarten through fifth-grade, and knows [Student] very well. The paraprofessionals at [Elementary School] work under [Special Education Teacher]’s license and take direction from her.

8. [Special Education Teacher] works closely with general education teachers to ensure that the needs of special education students are met. [Special Education Teacher] also trained the paraprofessionals who worked with [Student] on [Student]’s goals and on how to take data on [Student]’s progress towards her goals.

9. [Student] was well loved by both [Elementary School] staff and her general education peers at [Elementary School]. [Student] loved being with her general education peers, and [Elementary School] made every effort to include [Student] in all aspects of the general education classroom.

10. [Student]’s communication book, which was sent home daily to her parents to give details regarding her day, documents that when she was present, [Student] usually had a good day at school.

[Student]'s IEPs

11. There are two IEPs at issue in this case, one that was developed on December 7, 2018, for the Spring semester of [Student]'s fourth-grade year (2018-2019 school year) and the Fall semester of her fifth-grade year (2019-2020 school year). The second IEP was developed on December 6, 2019, for the Spring semester of her fifth-grade year (2019-2020 school year).

12. [Student]'s IEP team for both years determined that [Student]'s services should be delivered through an inclusive model. With this model, [Student] was integrated into her general education classroom and received some services such as special education instruction and speech language services directly in the general education classroom, as well as the Significant Support Needs (SSN) classroom. A paraprofessional assisted [Student] in the general education classroom by doing a modified curriculum created by [Special Education Teacher].

13. According to [Student]'s IEPs, she has a primary disability classification of Multiple Disabilities and secondary disabilities of Deaf and Blind.

14. In developing [Student]'s IEPs, her IEP team, which included [Student]'s parents, the School District's Physical Therapist; the School District's Teacher of the Visually Impaired; the School District's Speech Pathologist; the School District's Teacher for the Deaf and Hard of Hearing; [Student]'s General Education Teacher, and [Elementary School]'s Special Education Teacher, met to create the IEPs. Each of those individuals provided input into [Student]'s IEPs. [Student]'s parents were given the opportunity to raise any concerns or issues they had in the development of [Student]'s IEPs.

15. Prior to each of the IEP meetings, [Student]'s parents received a Notice of Meeting which informed them that they could bring other people to the IEP meeting if they wished to do so. Additionally, pursuant to 34 C.F.R. § 300.503, the [Elementary School] IEP team members provided [Student]'s parents with Prior Written Notice of each IEP meeting, which included her Procedural Protections.

16. The IEP team reviewed data regarding eligibility, present levels of performance and present levels of functioning. The present levels serve as a blueprint for a student's IEP as it establishes the need for direct goals. Prior to each of the IEP meetings at issue, [Student]'s parents received a copy of a draft of the IEP. [Parent] provided extensive information for each of the IEPs regarding [Student]'s medical history, medical conditions, and limitations.

17. In accordance with both of her IEPs, [Student]'s services included special education services, speech language services, vision services, hearing services, nursing services, occupational and physical therapy, and other related services and accommodations.

18. [Student]'s only IEP goal for both IEPs was communication. Although she had deficits in all academic areas, she most needed communication to better access the

curriculum. [Student] did work on other subjects such as reading and writing during her classes, but they were not included as IEP goals.

19. [Special Education Teacher], together with [Elementary School]'s Speech Language Pathologist, and the Vision Teacher collaborated to determine what [Student] needed to be successful at school; they determined that it all came down to communication because communication was the foundation for everything else, including quality of life and academics. Although communication was the only goal, [Elementary School] SSN staff worked on communication and other subjects at the same time.

20. Because [Student] is nonverbal, the School District worked on [Student]'s communication by holding up 3" x 3" pictures in front of [Student]. [Student] would then gaze at one of the pictures to indicate her preference. She would also sometimes walk towards or move her hand toward the picture she preferred.

21. For the 2019 IEP, the communication goal was for [Student] to select from a field of three pictures with 70% accuracy, and then to refine her choice by picking from a field of two pictures with 70% accuracy. In the 2018 IEP, [Student]'s goal was to make a selection from a field of two. Thus, the 2019 goal was more complex.

22. In working with [Student] on her communication skills, some of the goals included increasing [Student]'s vocabulary and using fewer prompts because [Student] showed the ability to learn new words. The speech therapist, [Special Education Teacher], and the paraprofessionals worked collaboratively on these goals.

23. Pursuant to her 2018 IEP, [Student] was to receive adaptive physical education. Adaptive PE adapts the regular PE curriculum to accommodate a student's special needs.

24. Adaptive PE was not discussed and was not included in the December 6, 2019 IEP and the District was not offering adaptive PE when the December 2019 IEP was created because it no longer had an adaptive PE position. Adaptive PE is not a state requirement. [Elementary School] continued to offer [Student] adaptive PE even though it was not included in her 2019 IEP.

25. Pursuant to the IEPs, [Student] was to be in the general education classroom 40 to 79% of the time and the remainder of the time in the SSN classroom receiving one-on-one instruction from [Special Education Teacher]. During her school day, [Student] also needed sensory breaks and time for diapering.

26. The IEP team also included the consideration and inclusion of various special factors and plans such as a Media Learning Plan, a Communication Plan, Assistive Technology, and in, in accordance with expanded standard Extended Evidence Outcomes (EEOs), modified academic content standards, which are aligned with, and derived from, larger academic skills and knowledge sets. [Student] was also to have a gait belt or alternate support device when walking and close supervision for other mobility for safety.

27. A gait belt, a recognized tool in physical therapy, is a device that looks like

a seat belt and goes around [Student]’s stomach or waist. In [Student]’s case, as instructed by [Parent], it went over [Student]’s feeding tube. The person assisting [Student] held onto the gait belt while [Student] was walking to prevent her from falling. The physical therapist for the School District, [Physical Therapist], thoroughly instructed all [Elementary School] SSN staff on the proper use of the gait belt. The gait belt allowed staff to safely lower [Student] to the ground if she was falling or having a seizure. It also allowed SSN staff to assist [Student] in getting up if she did need to be lowered to the ground.

28. [Student]’s IEP services included adult supervision and support for [Student] throughout the school day to ensure her safety and provide for her learning needs and her access to the general education curriculum. [Student] sometimes had a one-one-one paraprofessional and sometimes she shared one with another student, but she was always safe.

29. Pursuant to both IEPs, the speech therapist, [Speech Therapist], provided direct services to [Student] to work on her communication skills one-on-one for 30 minutes per week unless [Student] was absent and not able to receive the services. [Special Education Teacher] and the School District’s vision therapy specialist assisted [Speech Therapist] in developing [Student]’s goals and evaluating her progress.

30. The goal and objectives in [Student]’s IEPs were appropriate given her level of functioning, and her overriding need for communication skills.

31. [Student]’s parents signed both of the IEPs as members of the IEP team, and did not express any dissatisfaction or disagreement with the developed IEPs, their goals, or other services.

32. The IEP services were based on [Student] being present at school every day for the full school day.

Requested Modified Schedule

33. At [Elementary School], the school day was from 8:15 a.m. to 3:15 p.m.

34. [Student] had frequent absences from school during all her school years at [Elementary School].

35. [Student] missed school to go to her weekly private PT and OT appointments and her weekly massage appointments. She also missed school because of her sleep issues so she was rarely, if ever, in school for a full day. [Student]’s parents requested modifications to her schedule to accommodate her sleep problems and appointments. [Elementary School] made every effort to accommodate these requests.

36. The IEP team was aware of [Student]’s parent-requested schedule changes, and did the best they could to provide services to [Student] while she was at school. The IEP service minutes excluded holiday breaks, assemblies, class projects and student absences.

37. The schedule changes were not an IEP accommodation, but rather to

accommodate [Student]’s parents’ requests.

38. [Parent] testified that [Student] could not be at school for a full day because of her endurance and, she was “pretty much done” by 2:30 p.m. due to her lack of stamina. Moreover, [Parent] felt that it was academically best for [Student] to have a shorter school day.

39. Sometimes, [Student] would miss full school days because of illnesses or because she did not sleep the previous night.

40. Because [Student] did not attend school on a full-time basis, the School District was not able to provide all the service minutes designated in her IEP. The School District never prevented [Student] from attending school, and was willing to provide all of the service minutes in [Student]’s IEPs.

September 2019 Surgery

41. In the summer before her the 2019-2020 school year, [Student] fell at home and suffered [injury]. Because of the [injury], [Student] was scheduled to have [] surgery on September 11, 2019.

42. [Student] did have the scheduled surgery on September 11, 2019. [Parent] told [Elementary School] staff that [Student] would be out of school for three to four weeks. [Student] also did not attend school the week prior to her surgery because [Parent] did not want her to get sick.

43. On September 13, 2019, [Special Education Teacher] called [Parent] to check on [Student]. [Parent] explained to [Special Education Teacher] that the surgery was more extensive than they thought it was going to be. She also told [Special Education Teacher] that [Student] was in a lot of pain and would most likely be out most of the next week.

44. [Student]’s absences were excused and [Special Education Teacher] and other SSN staff maintained communication with [Parent] while [Student] was absent to determine her availability to receive instruction. While the School District has the option for in-home tutoring if a student is out for ten days or more, it was not offered to [Student] because [Parent] kept telling SSN staff that [Student] would be back the “next week” every time they spoke with her. Additionally, [Special Education Teacher] did not think [Student] was available for home instruction because she was in pain following her surgery.

45. [Student] returned to school on October 7, 2019. [Elementary School] staff began working with her on her IEP goal when she returned to school.

46. When [Student] returned to school, she reengaged with her routine and did well at school.

47. [Student] normally navigated the school by walking with a gait belt. However, after the surgery [Parent] thought it would be safer for [Student] to get to her classes using her [support], and then switch to the gait belt when she got to her destination. [Elementary School] agreed to this request. [Parent] later had concerns that

[Elementary School] staff were leaving [Student] in her [support] too long during the day. That allegation was not established at hearing.

48. According to [Student]'s 2018, IEP, [Student] was to have adaptive PE. [Student] was supposed to go to PE two or three times per week, depending on the schedule and the rotation of specials classes.

49. When [Student] returned to school following her surgery, there were some days when the general education students were learning to play basketball in PE class. To keep [Student] safe following her return from surgery and protect her from balls flying all over the gym, [Student]'s paraprofessional and a general education student walked [Student] around the building as an alternative physical activity on October 8, 2019. On October 23, 2019, [Student] walked laps and watched soccer as an alternative activity. [Parent] told school staff that she did not want [Student] kept out of the regular PE class; thereafter, [Student] was left in the PE classroom with the general education students even when they played basketball.

50. Having [Student] do an alternate activity outside of the gymnasium during basketball instruction following her surgery was reasonable given the fact that she had just had surgery and she lacked the reflex to protect [herself] if a ball came flying towards her. [Student] was never prevented from attending PE; she was simply given an alternative activity to protect [herself].

[Student]'s Assisted Falls in October 2019

51. On October 25, 2019, when [Parent] picked up [Student] from school, [Student] was very upset. The paraprofessional who was accompanying [Student] said [Student] was fine, but tired. To [Parent], [Student] seemed terrified; she walked over to [Parent] and gave her a big hug, and when they got in the car, [Student] started crying.

52. When they got home, [Parent] was changing [Student]'s diaper, and saw dirt and scuff marks on the left knee of [Student]'s jeans. [Parent] also noticed swelling and a little bruise on the knee. [Parent] thought it was odd to see a bruise on [Student]'s knees because [Student] is never on her knees unless she falls or hurts herself.

53. [Parent] looked in [Student]'s communication book but there was nothing in the communication book which would have explained the bruising.

54. [Parent] emailed [Special Education Teacher] to see if she knew anything about what happened. October 25, 2019 was a Friday and [Special Education Teacher] said they would touch base on Monday.

55. [Parent] took photos of [Student]'s knee to document the swelling and the bruises as they continued to get worse. She also took a picture of the jeans [Student] was wearing on October 25, which showed dirt on the left leg.

56. Because Monday was a snow day, [Parent] and [Special Education Teacher] did not touch base until Tuesday. When [Parent] brought [Student] to school, [Special Education Teacher] met her in the hall, and said she asked everyone if [Student]

had fallen. [Special Education Teacher] learned that [Student] had an assisted fall, and had been lowered to the ground with the gait belt by paraprofessional [Paraprofessional] but did not have an unassisted fall. The incident was not written down in [Student]'s communication book because lowering [Student] to the ground was not an abnormal occurrence for her. The source of the bruises on [Student]'s knees was never discovered or established at hearing.

57. [Parent] speculates that [Student] got the bruises on her knee following the October 25, 2019, fall at school. However, there was insufficient evidence presented to conclude that [Student]'s bruises were caused by the assisted fall or that [Student] did not always have adult supervision at school.

58. [Student] always had a one-on-one paraprofessional when she was walking at school.

59. After October 25, 2019, [Parent] told [Special Education Teacher] that she was upset that [Student] did not have a full-time one-on-one paraprofessional. [Special Education Teacher] said that she would contact [SSN Coordinator], the School District's SSN coordinator, about the request for a one-on-one paraprofessional.

60. On October 31, 2019, [Parent] picked up [Student] from school and [Student] was again very upset. [Special Education Teacher] told [Parent] that [Student] had an assisted fall outside the SSN classroom, but the fall had been assisted by the gait belt, and [Student] did not hit her face. Because of the gait belt, [Student] was safely lowered to the ground and assisted back to a standing position. The fall was documented in [Student]'s communication book, which notes that [Student] had been checked for marks, but none were seen.

61. [Parent] thought [Student]'s [previous injury] looked odd and crooked with a white mark on it.

62. [Parent] again asked [Special Education Teacher] about her request for a full-time one-on-one paraprofessional for [Student]. [Special Education Teacher] said she had spoken with [SSN Coordinator] and suggested a meeting about the request, but they could not have the meeting for three weeks. At that time, [Parent] kept [Student] home from school until the meeting was held because she was concerned for [Student]'s safety.

63. A meeting was held on November 6, 2019, with [SSN Coordinator], [Special Education Teacher], [Physical Therapist] and [Principal], the Principal at [Elementary School]. Following the meeting, [SSN Coordinator] said she would have to observe [Student] in the classroom before deciding on the request for a full-time one-on-one paraprofessional.

64. [Parent] decided to keep [Student] out of school until after the meeting. [Student] did return to school on or about November 13, 2019.

65. On November 13, 2019, [Parent] requested videos from [Principal] from October 31, 2019, to see if the videos would show her what happened when [Student] had the assisted fall. [Parent] further requested that [Paraprofessional] never work with

[Student] again. [Principal] agreed to the request to not have [Paraprofessional] work with [Student] again.

66. On November 14, 2019, [Principal] called [Parent] and said she looked at the videos during the relevant time frame and saw only [Student] walking with [Paraprofessional]. The video also showed [Paraprofessional] sitting outside and leaving [Student] with [Maintenance Man] (a maintenance man) while she went to get something, but [Student] never looked upset. [Parent] never received a copy of the videos. In February of 2020, she was told the videos no longer existed.

67. [Parent] acknowledged that [Student] is a fall hazard, but she was upset about the perceived lack of transparency and communication from the school because it prevented [Student] from getting the medical attention [Parent] believed [Student] needed.

68. In January of 2020, [Student] saw her [doctor] as a follow up for her surgery. The doctor asked what happened to [Student]'s [previous injury] and noted that it looked like it did prior to being surgically corrected.

69. It was never discovered, and there is insufficient evidence to establish what, if anything, happened to [Student]'s [previous injury] at school on October 31, 2019.

70. When [Student]'s IEP team met on December 6, 2019, to create her IEP for the Spring semester of her fifth-grade year (2019-2020 school year), [Parent] discussed her concerns about lack of communication and her safety concerns for [Student]. Thereafter, [Elementary School] provided more communication to [Parent], as she requested.

71. Because of her concerns regarding [Student]'s safety, [Parent] began considering alternate options for [Student]'s education. [Parent] was not confident that [Student] was receiving adequate supervision at [Elementary School] without a full-time one-on-one paraprofessional.

Covid-19 Pandemic and Remote Learning

72. In March of 2020, the worldwide Covid-19 pandemic caused the School District to switch from in-person learning to remote learning for all its students. Governor Jared Polis issued Executive Order D 2020 007 on March 18, 2020, suspending in-person learning for Colorado students.

73. [Elementary School]'s IEP team immediately created an alternative contingency plan to deliver [Student]'s general education curriculum and her special education and related services pursuant to her IEP.

74. The alternative plan included participation in [Student]'s general education curriculum, differentiated instruction in the general education curriculum, special education services, and related services. [Student]'s teachers and other providers at [Elementary School] continued to work with [Student] on her IEP goal and objectives. [Student]'s progress was appropriately monitored.

75. After going to remote learning, [Parent] testified that all the communications from the teachers and service providers were “the same,” which the ALJ understands to mean that the communications were lacking. However, the evidence does not support her allegation.

76. Both [Special Education Teacher] and [Teacher], [Student]’s general education teacher, sent emails to [Parent] providing her with a schedule of the instruction times they could meet with [Student]. They also offered office hours if [Parent] needed to discuss anything with them. In addition, a paraprofessional was assigned to [Student] to work with her to meet her IEP goal.

77. The specials’ classes teachers put together supplies for students to pick up and created Bingo sheets so students could choose different activities to do. Every specials’ class teacher had a link for students to join specials. [Student] was also given the option to participate in PE remotely with the PE teacher.

78. Like all the students in the School District, [Student]’s instruction was completely online. Remote learning was problematic for [Student] as it was sometimes hard to get her engaged on a device.

79. [Student] and [Parent] were given the option to meet with a paraprofessional four times per week for 30 minutes. They also met with [Special Education Teacher] for 20 minutes per week for direct learning and to go over things [Student] should work on. [Special Education Teacher] and the fifth-grade general education teacher sent lesson plans to [Student]. [Student] also had access to a virtual program called SeeSaw, where [Special Education Teacher] inserted assignments. [Student] also had access to her general education classroom and classmates through Zoom.

80. [Teacher] sent weekly emails to [Student] regarding the subject matter for the upcoming week with modifications. For example, [Teacher] sent [Student] a book to read online so she could participate with her peers and sent [Student] math assignments such as measuring things around her house. [Special Education Teacher] was working with [Teacher] to make sure that [Student]’s schoolwork was meaningful to her. [Special Education Teacher] did careful planning to meet [Student]’s needs to the best of [Elementary School]’s ability. The paraprofessional working with [Student] was there to support [Student] in meeting her goal.

81. [Physical Therapist] reached out by email to [Parent] on April 6, 2020, to see if [Student] needed anything in terms of physical therapy. [Parent] replied that [Student] was doing “great”, and she was trying to keep her busy. [Physical Therapist] reached out again by email on April 22, 2020. [Elementary School]’s occupational therapist also provided activities [Student] and [Parent] could do at home.

82. The remote time [Student] spent with the paraprofessional consisted primarily of the paraprofessional holding up pictures or physical items and [Student] would select by gazing at one of the pictures or items or sometimes by using her hands. By making the selection, [Student] would communicate which of the items was preferred. As indicated in her IEP, the goal was for [Student] to choose from a field of three highly

preferred items, and then to refine her choice from a field of two items.

83. The paraprofessional tried to keep the work fun for [Student], and [Parent] was always present on the remote sessions to help [Student]. The paraprofessional was flexible in meeting times to accommodate [Student]'s needs if [Student] did not sleep well the prior night or had scheduling conflicts.

84. The goal of the paraprofessional during the remote sessions was to keep [Student] engaged with the screen. [Student] was usually very good about engaging, and the paraprofessional noted that the sessions seemed to make [Student] happy. Sometimes, [Student] would stop engaging after only about fifteen minutes if she was tired. She was able to communicate that she was "done."

85. The paraprofessional kept notes of each remote session she had with [Student] in an online notebook, which was shared with [Special Education Teacher] and other members of the SSN team. The paraprofessional also collected data regarding [Student]'s progress. By the end of eight weeks of remote sessions with the paraprofessional, [Student] was meeting her IEP goal and making progress.

86. During the remote learning period, the special education team met weekly to discuss students, just as they did when school was in-person.

87. [Student] only attended 17 of the 30 paraprofessional sessions the School District offered to her during the period of remote learning because of [Student]'s outside appointments and a situation in her family. [Student] did not attend all of the general education sessions offered to her, and she did not access the assignments in the Seesaw program.

88. During the remote learning period, [Elementary School]'s speech therapist left messages for [Student]'s parents and emailed them to make arrangements to meet with [Student] and her mother remotely, but did not receive any response.

89. On April 22, 2020, Governor Polis issued Executive Order D 2020 041 amending and extending in-person learning for students through the end of the school year. That Executive Order also allowed the use of school buildings for small groups, special education, and mental health supports. The School District maintained remote learning for all students for the remainder of the school year.

90. On May 21, 2020, Governor Polis issued Executive Order D 2020 074 again suspending in-person learning until the end of the 2019-2020 school year.

[Student]'s Progress at [Elementary School]

91. The general education and special education services reflected in [Student]'s 2018 and 2019 IEPs, including the period of remote learning, resulted in [Student] passing her general education classes with 2's and 3's.

92. A "3" indicates that she "Consistently Demonstrates" and a "2" means that she "Consistently Demonstrates with Guidance" progression towards a goal. Having 2s and 3's showed that [Student] was where she needed to be academically. [Student] also

had “N”s on her report card. An N could mean that [Student] had not been evaluated in that area, or the material had not been taught that quarter.

93. [Student]’s report cards for fifth-grade showed that she was a successful learner as evidenced by the scores of 2s and 3, including PE. She also demonstrated a good attitude and even though the skill level she was learning was more complex, she could still do it with adult support.

94. In addition to passing her general education classes, [Student] demonstrated progress on six of seven progress report periods, including the 2019 IEP review, and the reports indicated that [Student] was progressing on her goal and objectives. The progress reports were completed using progress monitoring data and were issued collaboratively among [Special Education Teacher], the speech language therapist, the physical therapist, and the special education vision teacher.

95. The progress reports show [Student] making progress in May of 2019 and July of 2019. [Student], however, did not meet her goal in October of 2019.

96. For both the 2018 and 2019 IEP periods, [Student]’s communication goal, and its related objectives, were regularly monitored by service providers. The evidence established that the monitoring was based on observational information and was accurate, valid and reliable, and was the basis for [Student]’s IEPs and Progress Reports. There was no evidence presented that the data was in any way manipulated.

97. [Student]’s 2018 and 2019 IEPs were delivered with fidelity to [Student]. [Special Education Teacher] made certain that the paraprofessionals were trained and that the IEPs were followed.

98. [Student] progressed on her goal and objectives from 2019 to 2020, with the exception of her October 2019 goal, and specifically demonstrated progress following her return from surgery in the Fall of 2019, and after remote services provided during the remote learning period.

ABA Therapy

99. In May of 2020, at the end of the 2019-2020 school year, [Parent] withdrew [Student] from the School District and put her in full-time Applied Behavior Analysis (ABA) therapy where she could focus on her ADLs and communication skills. In addition, [Parent] decided to homeschool [Student].

100. ABA therapy does not provide special education services.

101. ABA therapy does not have educational goals, but focuses instead on behavioral goals.

102. An IEP and [Student]’s ABA treatment plan are not the same; they serve two different functions.

103. IEPs assist students to access an academic curriculum, while ABA therapy focuses on behavioral goals.

104. [Parent]'s unilateral decision to remove [Student] from the School District effectively eliminated [Student]'s access to special education supports and services.

105. When [Student] was in school, she was making progress towards her educational goal of communication, which was an appropriate goal. While she was enrolled in the School District, despite her frequent absences and remote learning, she was making progress towards that goal. Moreover, while [Student] was at school, there is no persuasive evidence that she had any unassisted falls or was left unsupervised.

Discussion and Conclusions of Law

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) (“The burden of proof . . . rests with the party claiming a deficiency in the school district’s efforts.”) Complainant therefore bears the burden of proving that the School District denied [Student] FAPE by allegedly not adhering to her IEPs during the Fall semester of 2019 and the Spring semester of 2020, and that the School District failed to develop a proper IEP for [Student] in December of 2019.

The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them FAPE that emphasizes 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 Individualized Education Program (IEP) calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d).

Two inquiries are involved in deciding whether the School District has met its obligation to offer FAPE. One, the ALJ must decide whether the School District complied with the procedures set forth in the IDEA. Two, the ALJ must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. If both requirements are met, the School District has complied with its obligations. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). In this case, there are no allegations that the School District failed to comply with the procedures set forth in the IDEA in developing or providing adequate notice. Therefore, no procedural FAPE violations have been found.

A school district satisfies the requirement for FAPE when, through the IEP, it provides a disabled student with a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). An IEP must be reasonably calculated to enable a child to make progress considering the child’s circumstances. Developing an IEP requires prospective judgment by school

