

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

## **Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order**

### **Closed Hearing**

### **ODR File Number**

24436-20-21

### **Child's Name**

D.A.

### **Date of Birth**

[redacted]

### **Guardians**

[redacted]

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### **Local Educational Agency**

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### **Hearing Officer**

Michael J. McElligott, Esquire

### **Date of Decision**

09/20/2021

## Introduction

This special education due process hearing concerns the educational program and placement of D.A. (“student”), a student who resides in the Upper Merion Area School District (“District”).<sup>1</sup> The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>2</sup> as a student who requires special education.<sup>3</sup>

In December 2020, the student’s guardians filed the special education due process complaint which led to these proceedings. The complaint alleged that the District had denied the student a free appropriate public education (“FAPE”) in the 2019-2020 school year and 2020-2021 school years in its handling of online learning instruction and services related to the COVID-19

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<sup>1</sup> The generic use of “student”, and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 (“Chapter 14”).

<sup>3</sup> At the time the complaint was filed, the student was identified by the District as a student with a health impairment related to multiple physical disabilities which broadly impacted the student’s cognitive, communication, physical, and social-emotional-behavioral functioning. During the opening statements (Notes of Testimony [“NT”] at 4-54), it became apparent that, although not part of the guardians’ complaint, the parties appeared to dispute the student’s identification status. The guardians felt that the student had an intellectual disability—an opinion held by an independent evaluator (see below). The District took that opinion under advisement but wanted to see how the student’s academic and social-emotional-behavioral development continued before moving to a potential identification of the student as a student with an intellectual disability. The hearing officer ordered and structured a District re-evaluation of the student to allow the District to formalize its recommendation regarding the student’s identification status. Toward the end of the hearing, as that process was finalized, the District issued a re-evaluation report, finding that the student was eligible as a student with an intellectual disability, health impairments, and a speech and language impairment. (School District Exhibit [“S”]-39). Therefore, this decision need not address the student’s identification status, as the parties have a meeting of the minds on that issue.

pandemic. The Guardians seek in-person instruction and services in the home going forward, as well as compensatory education for the relevant periods of the 2019-2020 and 2020-2021 school years.

The District's position is that, given the circumstances of the statewide school closure in March 2020, it provided FAPE to the student under those circumstances for the 2019-2020 school year during the statewide school closure. Its position is that it proposed an appropriate program and placement for the 2020-2021 school year in the school environment and did not deny the student FAPE when the guardians chose to keep the student at home for that school year. Therefore, it argues that the guardians are not entitled to remedy and that its proposed programming is appropriate.

For the reasons set forth below, I find in favor of the District.

### **Issues**

Did the District provide FAPE to the student in the 2019-2020 school year after the statewide school closure in March 2020, including extended school year ("ESY") programming in the summer of 2020?

Was the proposed programming/placement for the student appropriate in the 2020-2021 school year?

## **Findings of Fact**

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student was born with a number of medical conditions, including significant gastro-intestinal issues and conditions that affected the student's brain development. (S-1, S-6, S-19, S-21, S-31, S-39; NT at 77-196, 385-455).
2. The student received early intervention services before transitioning to [redacted] at the District for the 2019-2020 school year. (S-6, S-8, S-9; NT at 77-196, 211-378, 574-610, 617-652).
3. The student's individualized education program ("IEP") for [redacted] was crafted in June 2019 and revised in October 2019 and again in January 2020. (S-9, S-10, S-11).
4. Prior to March 2020, the student experienced success in the 2019-2020 school year. (Guardians Exhibit ["P" for "parents exhibit"]-8; S-12, S-15; NT at 77-196, 211-378, 514-568, 617-652, 715-790, 792-859, 1073-1144).

5. In March 2020, District schools, along with all other educational entities in the Commonwealth, were closed by government order in light of the COVID-19 pandemic.
6. The student's programming, along with all other students in the District, moved to an online learning environment. (S-14; NT at 77-196, 211-378, 514-568, 617-652, 715-790, 792-859, 938-1037, 1073-1144).
7. For two weeks immediately after the closing of schools, the District worked to establish its online learning environment and provide technology/training to parent who might need it. In the two weeks following that period, the District worked in a "maintenance period" to align student's instruction and skills in the online learning environment. (NT at 211-378, 938-1037).
8. In approximately May 2020, the District revised the student's IEP for delivery in the online learning environment. (S-14; NT at 211-378, 514-568, 617-652, 660-713).
9. The student's guardians had a very difficult time utilizing the technology, and accessing the online learning environment, in the spring of 2020. (NT at 77-196, 211-378, 514-568, 617-652, 715-790, 792-859, 1039-1068, 1073-1144).

10. The guardians would often be unable to access the online learning environment. Even where the guardians could access the online learning environment, they would often be unable to orient the student to the technology (the student not participating or even actively fleeing). A community-based behavioral health aide was present at times, with multiple adults doing different things, at times seemingly at cross-purposes. The picture painted through this record shows that the home-based access of the online learning environment was chaotic and/or ineffective. (NT at 77-196, 211-378, 514-568, 617-652, 715-790, 792-859, 1039-1068, 1073-1144).
11. The student, along with all students in the District and the Commonwealth, completed the 2019-2020 school year without returning to schools.
12. In June 2020, the student's IEP team met for a tumultuous meeting where the guardian leveled personal recriminations at a District teacher and there was little progress toward program-planning. At this time, too, the exact nature and timing of a return to school-based programming at the District was unclear, given the vagaries of the COVID-19 societal circumstances. (S-17; NT at 77-196, 211-378, 617-652, 660-713, 938-1037).

13. Aside from the indications in the May 2020 notice of recommended educational placement (“NOREP”), the record is devoid of any substance regarding the ESY programming in the summer of 2020.
14. The District returned to school-based instruction for some special needs learners in the fall of 2020, although the student population generally remained in the online learning environment. (NT at 660-713).
15. In early September 2020, once the societal circumstances related to the COVID-19 pandemic became more clear, the student’s IEP team met to revise the student’s IEP. (S-18; NT at 77-196, 211-378).
16. The September 2020 IEP recommended a return to school-based programming, along with other special-needs learners, in the specialized classroom where the student had attended prior to the school closure in March 2020. (S-18; NT at 77-196, 211-378).
17. The guardians chose to keep the student at home and continue with the online learning environment. (NT at 77-196, 211-378, 574-610).

18. The online learning environment continued to be a challenge for the student, with the same chaotic home-based experiences and/or lack of engagement overtaking instruction and the delivery of services. (S-18; NT at 77-196, 211-378, 574-610, 715-790, 792-859, 866-937, 938-1037, 1039-1068, 1073-1144).
19. The student made very little progress in the home-based learning experiences in the period September – December 2020, almost primarily as the result of the student’s inability to engage in online learning. (P-9; S-34; NT at 211-378, 574-610, 715-790, 792-859, 866-937, 938-1037, 1073-1144).
20. In December 2020, the student’s IEP was revised in light of a functional behavior assessment (“FBA”) and positive behavior support plan (“PBSP”) for the student in the online learning environment. The FBA found that the student’s problematic behaviors in the online learning environment were both positively and negatively reinforced by the individuals—the guardians and/or community-based mental health aide—in the home-based environment. (S-24; NT at 866-937).<sup>4</sup>

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<sup>4</sup> The guardians rejected the District’s requests to speak with the community-base mental health aide to gain insights from those individuals and/or to coordinate services. (NT at 211-378, 660-713, 938-1037).



21. In December 2020, the guardians filed the complaint which led to these proceedings.
22. In January 2021, the District returned to school-based programming for all District students. (NT at 660-713, 938-1037).
23. For families that did not wish to return to school-based programming, the District continued to offer an online learning environment. (P-3; NT at 660-713, 938-1037).
24. In January 2021, the student's IEP team met to discuss the student's problematic behavior in the online learning environment and consider changes to the PBSP. The District continued to recommend a return to school-based programming. (S-26).
25. The parties agreed to have an independent neuropsychologist perform an independent educational evaluation ("IEE"). In March 2021, the independent evaluator issued the IEE.
26. The independent evaluator diagnosed the student with a moderate intellectual disability and made multiple recommendations for the student's education. (S-31; NT at 385-455).

27. In March 2021, the student's IEP was revised to include an offer of ESY programming for the summer of 2021. (S-32).
28. In May 2021, the District issued the student's annual IEP, again recommending that the student return to school-based programming and services. (S-35).
29. The May 2021 IEP is the programming last-offered by the District and, while the guardians do not agree with its provisions, the family recognizes that it is the student's programming under consideration for these proceedings. (s-35; NT at 1151-1153, 1156-1160).
30. In May 2021, the hearing commenced with opening statements. (NT at 4-54).
31. As a result of the information shared in the opening statements, the hearing officer ordered that the District undertake a re-evaluation process to gauge its views on whether or not the student should be identified as a student with an intellectual disability. (NT at 4-54; Hearing Officer Exhibit – 3).
32. In June 2021, as a result of that order, the student was assessed in the classroom where the student had attended school in the 2019-2020 school year. (NT at 77-196, 211-378, 514-568, 660-713).

33. The student had a positive recollection and reaction to the classroom and the assessment sessions yielded re-evaluation results. (S-39; NT at 211-378, 514-568).
34. The school visit by the guardian, accompanied by others, was contentious, leading to abrupt behavior by, and coarse language from, the guardian. (NT at 211-378, 514-568, 660-713).
35. In August 2021, the District issued its re-evaluation report, identifying the student with an intellectual disability, health impairments, and a speech-language impairment. (S-39).
36. For the 2021-2022, at the time the record closed, all District students were returning to school-based instruction without the ability for any student to receive online instruction and services. Students, staff, and visitors were required to wear masks, and staff are required to be vaccinated against COVID-19 or undergo regular COVID-19 testing. (NT at 1153-1156).
37. The guardians' primary concern is that having the student attend school-based programming will potentially harm the student, and potentially themselves, due to the ongoing COVID-19 pandemic.
38. The District has been consistent that it is aware of the student's needs and is cognizant of the health and safety of all students, as well

as staff and visitors, and has taken appropriate measure through its health and safety plan. Where the student is particularly concerned, the District is aware of the student's unique needs (most especially a condition where, over time, the student's mask becomes saturated with saliva, necessitating multiple mask changes throughout the day), and feels it can meet those needs in a school-based setting.

39. The District has been consistent, as well, that school-based programming has been, and continues to be, the appropriate placement for the student. (S-18, S-24, S-26, S-32, S-35).

40. There is a concrete tension between the parties, with the guardians not trusting many, if not most, positions asserted by the District vis a vis the student's educational programming. The District is frustrated by its interactions with the guardians and, at times, District staff have been the recipients of inappropriate remarks by one of the guardians.

### **Witness Credibility**

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. The testimony of the student's special education

teacher and the board-certified behavior analyst for the 2019-2020 school year were accorded heavy weight.

## **Discussion**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, the parties' positions are stark. The District feels that the appropriate placement for delivery of the student's instruction and services is a school-based program. The guardians feel that having the student attend a school-based program exposes the student, and potentially themselves, to infection from COVID-19 and that the student's instruction

and services should be delivered in-person in the student's home. The record clearly supports the conclusion, and neither party would disagree, that remote delivery of instruction and services through an online environment is ineffective.

The District has met its obligation to propose instruction and services that are reasonably calculated to yield meaningful education benefit given this student's unique strengths and needs. Indeed, prior to the statewide pandemic-related school closure in March 2020, this was happening—the student was making progress in a program which addressed the student's needs.

The period March – June 2020 is difficult to assess in terms of the District's obligations under IDEIA, indeed difficult to assess for any school district providing educational services to students over that period. One can merely gauge the speed and precision with which a school district assessed the world-changing circumstances related to the COVID-19 pandemic and moved to address the needs of students, and in terms of IDEIA, the needs of students with IEPs.

In the instant case, the District took two weeks to establish a plan by which it would deliver instruction and services in an online learning environment, working collaboratively with families in that regard, and an additional two weeks to gauge each student's experience within that environment. Thereafter, the individualized instruction began with

intentionality (in approximately May 2020) and continued through the end of the 2019-2020 school year (through approximately June 2020). This course of events described what was happening with the student and, on balance, the District's response to this student provided FAPE. It was not perfect, but in approximately 4-6 weeks from the time that schools in the Commonwealth were closed statewide in March 2020, the District was working individually with the family and the student on the delivery of special education and related services for the remainder of the school year. Under the circumstances, and that period taken as a whole as reflected in this record, the District provided FAPE to the student in the period from March – June 2020.

The guardians claimed that the student was denied FAPE through the ESY programming for the student in the summer of 2020. Aside from the explanation of the summer services, to be delivered through the online environment, as outlined in the May 2020 notice of recommended educational placement, the record is devoid of evidence about ESY 2020 programming. Therefore, the guardians failed to carry their burden to show that the District denied the student FAPE in the summer of 2020.

As for the 2020-2021 school year, the District did not re-open for in-person instruction in the fall of 2020, except for students similarly situated to this student, namely special needs learners with particular profiles where school-based programming would be appropriate. While it was unclear in

June 2020 what the landscape of return-to-schooling would look like in the fall of 2020, the District's programming—in the June 2020 IEP (S-17)—was designed for in-person instruction and services in a school-based placement. This was at that time, and remains, wholly appropriate for the student. Later events proved the futility of attempting to deliver instruction and services to the student through the online learning environment, but at the outset of the 2020-2021 school year, the proposed program and placement were reasonably calculated to yield meaningful education benefit to the student, given the student's unique strengths and needs.

The guardians chose to keep the student at home and continue the home-based online learning environment. This was their prerogative, but the District had designed, and was prepared to offer, appropriate school-based programming. Unfortunately, the difficulties encountered in the spring of 2020 persisted, and multiplied, and the student's instruction in the 2020-2021 school year was deeply flawed. But the District's consistent offer of school-based programming in the District was reasonably calculated to yield meaningful education benefit, given the student's unique strengths and needs. There was no denial of FAPE in the 2020-2021 school year.

And, again, given the paucity of evidence about ESY programming in the summer of 2021, the guardians have not carried their burden to show that the student was denied FAPE regarding that programming. What scant evidence exists shows that the District proposed school-based ESY



programming, communicated to the guardians in the form they requested, with the District not hearing anything in response. Therefore, there is no finding of denial-of-FAPE for ESY-2021 programming.

None of this is to diminish the guardians' views. Certainly, the health of the student, and their own health, is at the forefront of their considerations and ultimate position in the matter. These concerns are real for everyone in a post-pandemic world where COVID-19 infection continues to be a concern. Having said that, the legal standard by which the District must abide—designing and offering programming, supports, and services that are reasonably calculated to yield meaning education benefit to a student, in light of that student's unique strengths and needs—is clearly reflected in the consistent offer of school-based programming for the 2020-2021 school year.

Too, the District has met through its offers of programming the least restrictive environment mandate in IDEIA and Chapter 14. By proposing a program in a District school where the student would engage with non-disabled peers for 50% of the school day, the student's ability to engage with those peers, build relationships, and experience a social and academic life outside of the guardians' home cannot be underestimated. This is especially the case where multiple witnesses who worked with the student prior to March 2020 testified to the student's affability and socialization with staff and peers in in-person interaction. Weighed against a deeply restrictive

environment—solely home-based instruction with no access to peers—this factor weighs heavily in a further determination that, where school-based instruction and services are available in an environment with peers, the District’s offer of programming is appropriate.

Along this line, and beyond the fact that the District has met its obligations to the student in its proposed programming, is the fact that home-based instruction as envisioned by the guardians is not only overly restrictive, and ineffective, but untenable. As guardians would envision that programming, the student would be at home with each of them, and a community-based mental health aide, and a District instructional aide, and a teacher (or related services provider, depending on the activity at hand). With far fewer adults during the spring of 2020 and the 2020-2021 school year, the student’s at-home environment was crowded and chaotic. Adding more adults into that mix, each with different demands on the student (and, as happened during the online instruction, sometimes simultaneous demands from different individuals) is a recipe that simply will not work. The guardians’ proposed program is not reasonably calculated to yield meaningful education benefit to the student.<sup>5</sup>

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<sup>5</sup> Here, too, the record supports a conclusion that the guardians would be deeply involved, and at times intrusively involved, in in-person instruction and services taking place in their home. Again, this would originate out of love and concern for the student, but it would short-circuit instruction and services, as it sometimes did during online instruction.

Accordingly, the District's proposed programming, as reflected in the May 2021 IEP is reasonably calculated to yield meaningful education benefit to the student, given the student's unique strengths and challenges. The District has met its obligation to provide FAPE to the student over the entirety of this record.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Upper Merion Area School District met its obligations to the student in the spring of 2020 after the statewide school closure in March 2020.

The guardians did not carry their burden that the Upper Merion Area School District denied the student a free appropriate public education for ESY programming in the summer of 2020 or the summer of 2021.

The June 2020 proposed programming and placement of the student in school-based programming for the 2020-2021 school year was reasonably calculated to yield meaningful education benefit to the student, as is the May 2021 proposed programming and placement.

Within five school days of the date of this order, to the extent that it has not already done so, the student's IEP team shall meet to revise the

student's IEP in light of the parties' meeting of the minds on the student's identification status and updated understanding of the student's programming needs. Within the same timeframe, or at the same meeting, the student's IEP team shall meet to devise a health and safety plan for any particular needs of the student to attend school-based programming in the 2021-2022 school year and to devise a transition plan to help the student transition back to school-based programming for the remainder of the school year.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ *Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

09/20/2021