

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 Hearing Officer Final
Decision and Order**

CLOSED HEARING

ODR File Number:

24658-20-21

Child's Name:

[A.P.]

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

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Hearing Officer:

James Gerl, CHO

Date of Decision:

September 7, 2021

BACKGROUND

The parent filed a due process complaint alleging that virtual instruction by the school district denied the student a free and appropriate public education. The school district denied the allegation. I find in favor of the school district on all issues presented by the due process complaint.

PROCEDURAL HISTORY

The hearing was conducted in one virtual session. The parties were unable to agree to any stipulations of fact prior to the hearing, which unnecessarily prolonged the hearing.

Five witnesses testified at the hearing, and two of said witnesses were recalled for additional testimony. Counsel submitted joint exhibits, which shortened the amount of time necessary for the hearing. Joint Exhibits 1 through 11 were admitted into evidence. Because of a discrepancy concerning testimony with respect to who paid for nursing services for the student, the hearing officer left the record open for a period of five days for each party to submit documentary evidence as to that question and an additional two days was provided for either party to object to any such additional documentary evidence. Counsel for the school district submitted S-1, which consisted of documentary evidence with regard to the issue of payment for the nurse. No objection was filed by counsel for the parent. Exhibit S-1 is hereby admitted into evidence. Counsel for the parent did not submit any documentary evidence concerning the issue of payment for the nurse.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the

arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

Although the propriety of the second issue is contested, counsel for the parties submitted arguments on the following two issues:

1. Whether the parent has proven that the school district denied a free appropriate public education to the student from November 24, 2020, through February 16, 2021, and on four additional specific dates: March 12, 2021, March 19, 2021, April 26, 2021, and April 27, 2021?
2. Whether the parent has proven that the school district discriminated against the student on the basis of a disability?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, I make the following findings of fact.¹

1. The student enjoys [redacted] and having fun. The student is a sweet child who likes music and dancing. (J-4; NT 152 - 153)

2. The student's date of birth is [redacted]. (J-4)

3. The student has been diagnosed with autism spectrum disorder, global developmental delay and a seizure disorder. The student is generally nonverbal, exhibits severe sensory sensitivities, is irritable, and exhibits self-injurious and aggressive behaviors. (J-2; J-4)

4. An independent neuropsychological evaluation of the student was conducted on January 3 and February 3, 2020. A report of the evaluation was issued on March 10, 2020. The report notes that the student... "does well and has a preference for learning on devices/iPads." The report makes a number of recommendations, many of which were implemented by the school district in the student's IEPs. (J-2; NT 77 - 78)

5. On May 28, 2020, an IEP was developed for the student. The IEP was in effect for the student from May 28, 2020, until December 22, 2020. The IEP includes goals for number and letter matching, a social/emotional goal and two behavioral goals. In addition, the IEP provides for a

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; and "J-1," etc. for joint exhibits; references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as "NT___").

number of modifications and specially designed instruction. The IEP also provides for the related services of speech/language therapy, occupational therapy, physical therapy and adaptive physical education. (J-4; NT 98)

6. The school district began providing all virtual instruction on Wednesday, November 25, 2020, and it was closed from November 26 through November 30, 2020, for the Thanksgiving holiday. The school district resumed virtual instruction from December 1 through December 23, 2020. (NT 24)

7. The school district employed virtual instruction because of guidance from the Pennsylvania Departments of Health and Education in light of unprecedented safety concerns with respect to substantial transmission of COVID-19 in the surrounding area. (NT 33, 37, 57 – 59; J-6)

8. The school district observed the Christmas holiday from December 24, 2020, through January 3, 2021, and resumed virtual instruction on January 4, 2021. Virtual instruction continued through February 16, 2021, with the exception of the Martin Luther King holiday. (NT 24)

9. The school district was also closed on March 12 and March 19, 2021, and April 26 – 27, 2021 because of COVID cases and the school buildings were deep cleaned pursuant to Department of Health orders. Virtual instruction was implemented on such days. (NT 13, 72 – 73)

10. In-person learning is better for most children. It is difficult to educate a child through a computer. (NT 108-109, 121-122, 140-141.)

11. Before the pandemic, the student received in-person instruction with four other students in an autistic support classroom operated by the Intermediate Unit. During a usual in-person school day, the students in the

student's class would start with breakfast and then circle time for approximately half an hour. That would be followed by breaking out into individual sessions where students would receive one-on-one reading instruction from a teacher or a paraprofessional. After a break for lunch, the students would receive one-on-one math instruction in the afternoon. (NT 169 – 171, 156, 106, 110)

12. During in-person instruction, the student's teacher observed that the student preferred learning on an iPad and other devices. (NT 100)

13. During virtual instruction, there was a slight decrease in the one-on-one sessions. Boom cards were sent home, as well as matching Velcro activities, dry erase markers, and letters and numbers so that the student could practice. There were four other students in the virtual class. (NT 171 – 172, 110)

14. During virtual instruction, the teacher used the same materials and methodology for math and reading that were used during in-person instruction of the student. (NT 171 – 174)

15. The student used an iPad during virtual instruction. (NT 171)

16. During the student's virtual learning sessions, a nurse who was paid for by the school district was present. (S-1; NT 160 – 163)

17. During the student's virtual learning sessions, a behavioral assistant who was paid for by the parent was also present. (NT 128)

18. In addition to time with the teacher and paraprofessionals, the student received related services during virtual instruction. The student's related service of speech therapy went very well during this period of time. The student also received the related services of occupational therapy and physical therapy during virtual instruction. (NT 136 – 139, 172, 111)

19. The student made progress during virtual instruction. The student made progress on the student's number matching goal during virtual instruction. The student's letter matching goal results were inconsistent during virtual instruction. The student's results regarding the social/emotional goal were inconsistent, but the student made some progress. The student's behavior issues increased during virtual instruction. The student made progress during virtual instruction in speech/language, occupational therapy, physical therapy, and adaptive physical education. (NT 136 – 138, 175-178; J-5)

20. Although virtual instruction presented a number of challenges, the student's teacher was able to provide instruction to the student in the virtual setting. The student can learn virtually, and the student made progress during virtual instruction. (NT 112 – 113, 123, 175 – 178; J-5)

21. On November 23, 2020, the student's mother sent an e-mail to the special education director asking that the student's autistic support class be opened up to in-person instruction. The special education director replied that the Department of Health and the Department of Education Guidance informed the decision to switch to virtual instruction because of the coronavirus pandemic. (J-6)

22. On December 22, 2020, an IEP was developed for the student. This IEP was in effect from December 22, 2020, through the relevant time period. This IEP was identical to the previous IEP, except that changes were made to reflect virtual instruction. The student's parent participated in the IEP team meeting that resulted in this IEP, and the parent agreed with the changes that were made. (NT 98 – 104, 143, 173 – 174; J-5)

23. From January 4, 2021, through February 16, 2021, the school board allowed in-person basketball practices while classes were being conducted in the virtual setting. No basketball or other extracurricular

activity was permitted in school buildings during the period of time when the school buildings were closed by the Department of Health, including March 12, March 19, April 26 and April 27, 2021. (NT 33 – 34)

24. On January 18, 2021, the student’s mother e-mailed the special education director objecting to basketball practices being held at the school and again requesting that the student’s special education classroom be opened to in-person instruction. In response, the special education director offered to hold a meeting to discuss the parent’s concerns. (J-7; NT 27 – 28)

25. A virtual meeting with the parent, the superintendent and school staff was held after the January 18, 2021, e-mail. The superintendent stated at the meeting that the best place for a child is in-person instruction but that the school district was operating under safety guidance from the Department of Health and the Department of Education due to the unprecedented situation concerning the COVID-19 pandemic. As a result of government guidance, the school district had decided to go to virtual instruction. (NT 36 – 37)

26. The student’s parent sent a letter to the school board on January 25, 2021, stating that all special education students should return to in-person instruction. The student’s parent stated that the special education team, in general, and the student’s teacher, in particular, were trying very hard, but that as time passed virtual instruction had become harder for the student. The parent requested an immediate return to in-person instruction for all children on IEPs. The parent’s letter as well as concerns by other parents, both for and against in-person instruction, were reviewed by the school board at a school board meeting. (J-9; NT 44 – 56)

27. On February 1, 2021, the State Department of Education amended guidelines stating that virtual instruction should continue during

substantial transmission, but otherwise allowing school districts to bring elementary and at-risk populations back as of February 1, 2021. (NT 33, 58 – 59)

28. At a meeting of the School Board on January 27, 2021, the school board decided to extend virtual instruction by two extra weeks with a return to in-person instruction on February 16, 2021, because the community's positive transmission rate was high, between 20 and 48 percent. (NT 58 – 59)

29. The school district offered COVID compensatory services to the student to help remediate losses suffered during virtual instruction. The compensatory services were individually designed for each student. During the previous IEP team meeting, the school district made the parent aware that COVID compensatory services would be offered to the student during the summer. The parent declined to have the student receive the COVID compensatory services. The parent chose to send the student to a summer camp instead. (NT 116 – 121)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own independent legal research, I make the following conclusions of law:

1. The U.S. Supreme Court has developed a two-part test for determining whether a school district has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a school district has complied with the procedural safeguards as set forth in the Individuals with Disabilities Education Act (hereafter sometimes referred to

as "IDEA") 20 U.S.C. § 1400, et seq., and (2) an analysis of whether the individualized education program (hereafter sometimes referred to as "IEP") is reasonably calculated to enable the child to make appropriate progress in light of the child's circumstances. Andrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. ____, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F. 3d 248, 72 IDELR 261 (3d Cir. 2018).

2. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, *supra*.

3. The appropriateness of an IEP in terms of whether it has provided a FAPE must be determined at the time that it was made. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; it requires an education program that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F. 3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F. 3d 235, 52 IDELR 211 (3d Cir. 2009).

4. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of a disability be excluded from participation and/or denied benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that the student was otherwise qualified to participate in school activities; (3) that the school district receives federal funds and (4) that the student was excluded from participation in or denied the benefits of or was subjected to

discrimination at the school. Ridley Sch. Dist. v. MR and JR ex rel. ER, 608 F. 3d 260, 58 IDELR 271 (3d Cir. 2012).

5. The IEPs developed by the school district for the student were reasonably calculated to provide meaningful educational benefit in view of the student's unique circumstances.

6. The school district's provision of virtual instruction to the student instead of in-person instruction during the relevant time period did not violate IDEA.

7. The school district has not discriminated against the student on the basis of a disability.

DISCUSSION

1. Whether the parent has proven that the school district denied a free appropriate public education to the student from November 24, 2020, through February 16, 2021, and on four additional specific dates: March 12, 2021, March 19, 2021, April 26, 2021, and April 27, 2021?

The parent contends that the school district denied a free and appropriate public education to the student on the dates in question. The school district contends that the student was provided with a free and appropriate public education during the relevant timeframe.

As the United States Supreme Court has instructed, a parent can prove a denial of FAPE in two ways. First, the parent can prove an actionable procedural violation. Second, the parent can prove that a student's individualized education plan is not appropriate by showing that it

was not reasonably calculated to confer meaningful educational benefit in light of the student's unique individual circumstances at the time that it was written.

In the instant case, the parent has not alleged an actionable procedural violation. Thus, in order to prevail on a FAPE claim, the parent must show that the student's IEP was not appropriate.

At the time that they were written, the student's IEPs were clearly designed to meet the student's needs. The student's IEPs adopted many of the recommendations contained in the independent educational evaluation of the student. The IEPs included academic goals and goals to address the student's behavioral and social/emotional needs. The IEPs included appropriate specially designed instruction and modifications. The IEPs provided the related services of speech/language, physical therapy, occupational therapy and adaptive physical education.

Moreover, even though the appropriateness of an IEP must be judged at the time that it was written, and IDEA does not require any guarantee of success, the student did in fact make progress under the student's IEPs, including during virtual instruction.

The student's IEP was amended on December 22, 2020, to reflect some of the changes that were necessitated because the student was receiving virtual instruction. In view of the fact that the virtual instruction of the student was occurring during an ongoing and deadly global public health crisis, the changes to the student's IEP were clearly made within a reasonable period of time.

To the extent that the testimony of the parent conflicts with the testimony of school district staff, it is concluded that the testimony of the

parent is less credible and persuasive than the testimony of school district staff because of the demeanor of the witnesses, as well as the following: The parent testified that the parent paid for a nurse to be present in the parent's home during the student's virtual instruction. The school district's special education director testified that the school district paid for nursing services for the student during virtual instruction. The parent then doubled down on this testimony when recalled to testify a second time during the hearing. At the request of the parent's counsel, the hearing officer permitted counsel for both parties to submit documentary evidence pertaining to payment for nursing services for the student within five days after the hearing concluded. In addition, counsel for each party was permitted an additional two days to object to any documentary evidence provided on this issue. Counsel for the school district submitted records showing that the school district had in fact paid for the nursing services for the student. Counsel for the parent did not submit any documents showing any contrary facts. The parent did not object to the documentary evidence submitted by the school district showing that the school district had paid for the nursing services. Thus, the documentary evidence concerning this point contradicted the testimony of the parent and corroborated the testimony of school district staff. Clearly the school district and not the parent paid for the student's nurse. The parent's credibility is seriously impaired by this testimony.

The student's IEPs were clearly reasonably calculated to confer meaningful educational benefit in view of the student's unique circumstances. It is concluded that the parent has not proven that the school district denied a free and appropriate public education to the student.

The parent's primary contention is that virtual instruction is in itself a violation of IDEA. As has been noted above, the parent has not established either of the two ways of proving the denial of a free and appropriate public education established by the United States Supreme Court. The parent's contention is akin to a methodology claim that challenges the manner in which a student is educated rather than the appropriateness of the content of the IEP or failure to comply with procedural safeguards. In such cases, parents cannot dictate the manner in which the student is educated because IDEA accords educators the discretion to select among the various methods for educating a student with a disability. Ridley Sch Dist. v. MR & JR ex rel ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). The parent's argument is rejected. Even assuming *arguendo*, that virtual instruction could in itself somehow be a *per se* violation of IDEA, however, the parent has not proven any such violation in this case.

Concerning the four specific days in the spring of 2021 (March 12 and March 19, 2021, and April 26 and 27, 2021), the record evidence reveals that the school buildings in the district were shut down pursuant to a directive by the Department of Health because of specific cases of COVID-19 and a resulting need to deep clean the school buildings. No reasonable argument can be made that the student should have been permitted into the school building during these days for in-person instruction. The state health department mandated the closure for public safety reasons. The parent's argument concerning the four days in the spring is rejected.

Concerning the period from November 24, 2020, through February 16, 2021, the record evidence reveals that virtual instruction was appropriate for the student. Significantly, the recommendations of the evaluator who conducted the independent educational evaluation for the student included a

conclusion that the student "...does well and has a preference for learning on devices/iPads." That the student does well when learning from iPads and other devices was confirmed by the student's teacher. The school district's special education director testified credibly and persuasively that in-person instruction is best for most children, but this student can learn virtually. The student's teacher testified that although virtual instruction presents a number of challenges, the teacher was able to provide instruction to the student virtually. In addition, the record evidence shows that the student received related services successfully during virtual instruction.

It is important to note that the virtual instruction which is contested by the parent in this case took place during a deadly public health crisis. As a result of the ongoing COVID19 pandemic, the state government issued mandates restricting the availability of in-person instruction. In this context, it is clear that the school district had to be concerned with the health and safety of not only this student but also other students and parents and teachers and staff.

As the brief of the school district correctly points out, IDEA does not require an ideal education. Accordingly, as a Massachusetts hearing officer ruled in a persuasive and well-reasoned decision, even where a special education student struggled with remote instruction during the pandemic, the student was provided with FAPE where the student's IEP was appropriate. Hampshire Regional Educational Agency, 121 LRP 18232 (SEA Mass. 2021).

It should be noted further that the relief sought by the parent, as stated in the parent's e-mails to the school district staff and to the school board, was for all special education students, not just the individual student in this case. The focus of IDEA, however, is the individual; it concentrates

upon the unique circumstances of the individual child, not upon stereotypical conclusions concerning children with disabilities as a group. See, Andrew F., supra; Heather S. v. State of Wisconsin, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997). The parent's argument concerning children with disabilities, as a group, is rejected

The parent's post-hearing brief cites a Pennsylvania hearing officer decision in support of the parent's claims. The decision cited by the parent is distinguishable, however, because in that case, unlike here, the parent was seeking virtual instruction for the student. The parent's reliance upon the Pennsylvania hearing officer decision is misplaced. The school district brief cites two decisions by the Third Circuit that are unpublished decisions. Said decisions have no precedential value and were not considered with respect to this decision. See, DF by AC v. Collingwood Borough Bd. of Educ., 694 F. 3d 488, 59 IDELR 211 (3d Cir. 2012).

It is concluded that the parent has not proven that the school district denied a free and appropriate public education to the student.

2. Whether the parent has proven that the school district discriminated against the student on the basis of a disability in violation of Section 504?

The parent contends that the school district discriminated against the student on the basis of a disability. The school district contends that no such discrimination occurred.

At the outset, it should be noted that there is no mention of basketball or extracurricular activities in the due process complaint. The complaint mentions Section 504 in passing with respect to the request for a due

process hearing, but no specific facts are alleged. Accordingly, the discrimination issue is not properly before the hearing officer and the parent's contentions are rejected. 34 C.F.R. § 300.511(d).

Even assuming, *arguendo*, that the discrimination issue is properly before the hearing officer, however, the record evidence in this case does not support the contention that the student has been discriminated against. Although the school board made a peculiar and highly questionable decision to permit basketball practices and games during the period from January 4, 2021, through February 16, 2021, the extracurricular basketball activities are not comparable to academic instruction. There is no evidence, for example, that the student was not permitted to participate in any extracurricular activity because of the student's disability. Similarly, there is no evidence that the student was selected for virtual instruction because of the student's disability.

The credibility analysis from the previous issue is incorporated by reference herein. The student was not discriminated against on the basis of disability. The parent's Section 504 discrimination argument has no merit and is rejected.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that all relief requested in the due process complaint is hereby denied. The complaint is dismissed.:

IT IS SO ORDERED.

ENTERED: September 7, 2021

James Gerl

James Gerl, CHO
Hearing Officer