

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 No. 27277-22-23

Child's Name

J.L.

Date of Birth

[redacted]

Parent:

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

04/03/2023

Introduction

This special education due process hearing concerns the educational rights of J.L. (“student”), a student who resides in the Philadelphia School District (“District”).¹

The student has been identified as a student with an intellectual disability, autism, and speech/language (“S&L”) impairment. The student also has a significant cardiac health condition.

The parties do not disagree over the student’s eligibility under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”). Instead, the parties disagree over the student’s placement, namely whether the student’s programming should be delivered via full remote learning or fully in person at a District school.² The family also alleges that the student has been denied a free appropriate public education (“FAPE”) since September 2022 for, procedurally, failing to provide prior written notice in the form of a notice of recommended educational placement (“NOREP”) for the District’s recommended placement for the

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

² 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). The family also brings claims of denial of FAPE under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”), 34 C.F.R. §104.33 (*see also* 22 PA Code §§15.1-15.8).

student and, substantively, for the District's failure to develop programming to be delivered in full remote learning.

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

Issues

- Was the student denied FAPE over the course of the current school year (September 2022 through the date of this decision)?
- If so, what compensatory education remedy is owed?
- What should the student's placement be for the delivery of FAPE?

Findings of Fact

Exhibits of record and testimony were considered in their entirety in writing this decision. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue presented.

Background Information & Chronology

1. The student has been identified as a student with intellectual disability, autism, and S&L impairment. (Joint Exhibit ["J"]-14).
2. The student also has a significant cardiac condition. The condition involves [redacted].³ The student also has a lung condition which can [redacted]. (Notes of Testimony ["NT"] at 150-186).⁴
3. The student's treating physician, a pediatrician and critical care specialist, testified credibly that the risk of COVID-19, especially, would be highly dangerous for the student, given the student's cardiac and respiratory conditions, and consequent blood-oxygen risks. (NT at 150-186).
4. In May 2020, near the end of the student's [redacted] grade year, the District was in the midst of the mandated Commonwealth-wide school closure as a result of the COVID-19 pandemic. The student's IEP team met to revise the student's IEP. (J-4; NT at 48-144).
5. The May 2020 IEP was written for implementation in a supplemental autism support classroom for 78% of the student's school day. The NOREP indicated that present educational levels and other aspects of the IEP were impacted by the school closure "and will need to be

³ [redacted] (NT at 157-158).

⁴ The student has a number of other [redacted] conditions, which do not play directly into the placement dispute. (NT at 150-186).

updated when the mandate is lifted and schools are back in session.”
(J-4 at pages 46-50).

6. The May 2020 IEP had eleven goals, one in S&L (inferences), one in behavior (affect with task demand), one in written expression, one in reading fluency, two in math calculation (addition/subtraction), one in reading comprehension, one in social skills (initiating/maintaining), and three in post-secondary transition. (J-4).

[redacted] Grade

7. The May 2020 IEP was in place for the 2020-2021 school year, the student’s [redacted] grade year. (NT at 48-144).
8. The student attended the 2020-2021 school year utilizing remote learning. A S&L therapist provided S&L services through remote therapy. (NT at 48-144).
9. In the 2020-2021 school year, the student’s [redacted] sibling attended the same placement (autism support) utilizing remote learning. (NT at 48-144).
10. In April 2021, the student was re-evaluated. (J-11).
11. In May 2021, the student’s IEP was revised. (J-7).

12. The May 2021 IEP contained parent's concerns for the student, including transition to the high school setting in the upcoming 2021-2022 school year and a potential return to in-person schooling, given the student's medical conditions. (J-7 at page 12).
13. The May 2021 IEP contained eight goals, one in S&L (conversational response), one in behavior (task approach/task completion), one in written expression, one in reading comprehension, one in math calculation (division), and three in post-secondary transition. (J-7).
14. The May 2021 IEP was written for implementation in a supplemental autism support classroom for 78% of the student's school day. (J-7 at pages 42-44).

[redacted] Grade

15. The May 2021 IEP was in place when the student attended the 2021-2022 school year, the student's [redacted] grade year, at a District high school. (J-7; NT at 48-144, 199-262).
16. In the 2021-2022 school year, the District returned to in-person schooling. Due to the student's medical conditions, the student was qualified by the District for medical homebound instruction. The

student's sibling was also qualified for medical homebound instruction. (NT at 48-144, 199-262).

17. On homebound instruction, the student received three hours of remote instruction weekly (approximately 30-40 minutes per day), delivered by an autism support teacher. The student did not receive any S&L services. (NT at 48-144, 199-262).
18. In May 2022, the student's IEP team met to revise the student's IEP. (J-9).
19. The May 2022 IEP contained a large degree of content from the May 2021 IEP that was not updated. The present-levels and goal information in the May 2022 IEP were entirely duplicated from the May 2021 IEP. (J-7, J-9).
20. The May 2022 IEP contained five goals, all related to post-secondary transition. Academic and S&L goals were removed from the student's IEP. (J-9).
21. The May 2022 IEP was written for implementation in a supplemental autism support classroom for 74% of the student's school day. (J-9 at pages 31-33).
22. The District issued a NOREP in with the May 2022 IEP, recommending in-person instruction at a District high school, while

noting that the student had engaged in medical homebound instruction over the 2021-2022 school year. (J-9 at pages 35-37).

23. The student completed the entire 2021-2022 school year on homebound instruction. At times, the autism support class which the student would have attended engaged in remote instruction, where the student and the student's sibling would join the entire class remotely. The student enjoyed the experience of joining peers in an educational context. (NT at 48-144, 199-262).

[redacted] Grade

24. In July 2022, following consultation with the student's physician, the student's mother contacted the District about the process for renewing homebound instruction for the student and the student's sibling. (J-17; NT at 48-144, 150-186).

25. In August 2022, the student was approved for medical homebound instruction. The student's sibling was not approved. (J-17, J-19, J-20, J-21, J-23, J-24; NT at 48-144, 150-186).

26. The student began the current 2022-2023 school year on medical homebound instruction. The student's sibling began the school year attending the autism support class in person; this is the

classroom which the student would have attended during in person instruction. (J-20; NT at 48-144, 199-262).

27. As the school year began, the autism support teacher continued to provide homebound instruction to the student at least three hours per week, although the teacher dedicated more time to the student than required. (NT at 199-262).
28. In October 2022, the student's IEP team met to revise the student's IEP. (J-10).
29. The October 2022 IEP includes ten goals, three in S&L (expressive language, conversational turn-taking, social awareness), one in written expression, one in reading comprehension, two in math calculation (addition and subtraction), and three for post-secondary transition (money-changing and community-based skills). (J-10).
30. The October 2022 IEP was written for implementation in a supplemental autism support classroom for 79% of the student's school day. (J-10 at pages 47-49).⁵
31. A NOREP did not accompany the October 2022 IEP. (J-10).

⁵ The placement calculation yielded a result of 79% of the student's day being spent in special education setting, a supplemental level of support. 80% and above indicates a full-time level of support. The placement in the October 2022 IEP, therefore, is strictly supplemental autism support. (J-10 at pages 37-39).

32. The autism support teacher testified credibly that the student needs more daily instruction than homebound instruction can supply. (NT at 199-262).
33. The autism support teacher testified credibly that where the autism support class has not been able to meet in person (as in November 2022 when a COVID-19 exposure led the entire class to engage in remote instruction for 10 days), the student joined the class when the student's sibling was engaged in remote instruction. The student was overjoyed at being included within the classroom dynamic. (NT at 199-262).
34. The autism support teacher testified credibly that the student could be educated via remote instruction while being a member of the autism support class. (NT at 199-262).
35. The autism support teacher and the S&L therapist testified credibly that the student's S&L needs require interaction and conversational exchange with others (novel utterances, expressing wants and needs, engaging with a communication partner). (NT at 199-262, 322-348).
36. As with the 2021-2022 school year, the student does not receive S&L services as part of homebound instruction in the current school year. (NT at 48-144).

37. The S&L therapist testified that S&L services which the student requires have been, and can be, provided through remote instruction. (NT at 322-348).
38. When the student's sibling returns home from in-person schooling each day, the sibling undergoes an elaborate ritual to minimize potential COVID-19 exposures. (NT at 48-144).
39. The student's mother testified credibly that the family would prefer that the student return to in-person schooling, but that this desire is outweighed by the potential risks for the student of COVID-19 infection. In this, the family is following medical advice. (J-21, J-34; NT at 48-144, 150-186).
40. The student's treating physician testified that a return to in-person schooling is also desirable. Conditions that would permit this, where the treating physician feels the risk of potential COVID-19 infection are diminished and no longer outweigh a potential return to in-person schooling, include a "sterilizing vaccine", or a readily accessible and effective monoclonal treatment, or a mutation of the COVID-19 virus to the point that it has a common virus profile. (NT at 171-173).
41. The District has a virtual learning academy. Upon inquiry by the student's mother, she was informed that the academy was not

available to the student as a result of the student's disability profile.
(NT at 48-144).

42. A District special education administrator testified that the District employs a policy that remote learning is no longer available to students in the District. The S&L therapist testified that she was able to provide remote services to students but was instructed to provide only in-person services to students. The autism support teacher was directed that synchronous remote instruction was not available for any student. (NT at 199-262, 267-311, 322-348).

43. In November 2022, parent filed the complaint which led to these proceedings.

Discussion ***IDEIA / Denial of FAPE***

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, or 'some' education progress. (Endrew 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)).

A necessary aspect of the provision of FAPE requires that the placement of a student with a disability take into account the least restrictive environment ("LRE") for a student. Educating a student in the LRE requires that the placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting as close as possible to regular education, especially affording exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §14.102(a)(2)(xii); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

Finally, a procedural violation of IDEIA is not, in and of itself, grounds for a finding of a denial-of-FAPE. A procedural violation of IDEIA may be grounds for a finding of denial-of-FAPE only where the procedural violation impeded the student's right to FAPE, or significantly impeded a parent's right to participate in educational decision-making, or caused a deprivation of educational benefit. (34 C.F.R. §300.513(a)(2)).

Here, there is no doubt that the District can provide the student with remote learning. During the 2020-2021 school year, instruction at the District was largely, if not wholly, delivered remotely. Indeed, the autism

support teacher was featured by the District in professional development videos for District staff training in approaches to effective remote learning. Both the teacher and the S&L therapist testified credibly that their instruction/services had been delivered remotely, and both testified that they could engage in appropriate instruction and therapy with students utilizing remote instruction. There is little doubt that the student could receive remote instruction under the terms of the October 2022 IEP.

The heart of the dispute is whether the placement through which remote instruction would unfold—with the student at home, utilizing technology to be part of the autism support class during the instructional day—is appropriate for the student. The record in its entirety supports a conclusion that such a placement is appropriate for this student in light of the student’s unique, individual circumstances.

LRE considerations, of course, come to the forefront of this finding. The student would not be in the physical environment of the classroom. This is true. The autism support teacher, however, testified credibly that the student could be made part of the dynamic of the class even when joining the class remotely. And it is clear that the student reacts to, and feels the engagement with, peers, even where the student is not sharing the same physical space with peers.

The student's mother and treating physician both voice a distinct preference for in-person schooling. But given this student's unique, individual circumstances—where COVID-19 infection, especially, would present significant, almost singular, risks to the student's health given the student's cardiac and respiratory conditions—it is a situation almost tailor-made for remote instruction. And, as indicated, there is no impediment for the design and delivery of that instruction (and of remote S&L therapy).

Therefore, as of October 2022, the District was in a position to know, through District-based members of the IEP team and the District's own experience during the school closure, that remote instruction could have been employed to deliver the October 2022 IEP. Compensatory education will be awarded.

Parent also claims that by not issuing a NOREP to accompany the October 2022 IEP, the District engaged in a prejudicial procedural violation which denied the student FAPE. Here, the lack of NOREP did not deny the student FAPE.

No one should read this decision to excuse a school district from issuing a NOREP—Pennsylvania's version of prior written notice for changes in educational placement or other significant changes in a student's special education programming (or a school district's decision not to undertake such changes). On this record, however, the non-issuance of a NOREP did not

impede the student's right to FAPE, or significantly impede the parent's right to participate in educational decision-making, or cause a deprivation of educational benefit. Approximately three-and-a-half weeks after the October 2022 IEP meeting, the parent filed the due process complaint which led to these proceedings, placing the student's placement at issue and, ultimately, resulting in this decision to address the parent's concerns. Further, the compensatory education award below, based on a substantive denial of FAPE, will remedy claims as of October 2022. Thus, there is no basis for awarding remedy based on, admittedly, the District's procedural flaw in not issuing a NOREP.

Section 504/Denial-of-FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504/Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Therefore, the foregoing analysis is adopted here— the District denied the student FAPE by not revising the October 2022 IEP to reflect the delivery of special education and related services through remote learning.

Compensatory Education

Where a school district has denied FAPE to a student under the terms of IDEIA, and by analogy under the terms of Section 504, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)).

The evidentiary scope of claims and the nature of compensatory education awards were addressed in G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015).

In terms of the nature of the compensatory education, the G.L. court recognized two methods by which a compensatory education remedy may be calculated. One method, the more prevalent method to devise compensatory education, is the quantitative/hour-for-hour calculation, where, having proven a denial of FAPE, the compensatory education remedy is calculated based on a quantitative calculation given the period of deprivation. In most cases, it is equitable in nature, but the award is a numeric award of hours as remedy. The second method, a rarer method to devise compensatory education, is the qualitative/make-whole calculation, where, having proven a

denial of FAPE, the compensatory education remedy is calculated based on a qualitative determination where the compensatory education remedy is gauged to place the student in the place where he/she would have been absent the denial of FAPE. It, too, is equitable in nature, but the award is based on services, or some future accomplishment or goal-mastery by the student, rather than being numeric in nature.

Both calculations are a matter of proof. The quantitative/hour-for-hour approach is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven deprivation. The qualitative/make-whole approach normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the proven deprivation, often with a sense of what the make-whole services, or future student accomplishment/goal-mastery, might look like from a remedial perspective.

In this case, parents in their complaint seek an identified quantity of hours of compensatory education hours. (NT at 348-350). Therefore, parents seek a quantitative, hour-for-hour compensatory education award.

A secondary student, such as the student here, is entitled to a minimum of 990 hours of schooling each year. (22 PA Code §11.3(a)). Over the course of a 36-week school year, this amounts to 27.5 hours per week. By early November 2022, then, the student's IEP team should have crafted

and had in place an IEP that delivered the student's instruction and S&L services utilizing remote instruction. This represents 20 school weeks over the period November 2022 through March 2023.

Over this period, the medical homebound instruction accounted for three hours per week. Therefore, the student will be awarded 490 hours of compensatory education (550 hours of instruction over those 20 weeks, less 60 hours for the homebound instruction provided to the student).

Additionally, because the student has gone without S&L services since for the entirety of the 2021-2022 school year and the 2022-2023 school year to this point, in an area of significant need recognized by the autism support teacher and the S&L therapist, the student is awarded, as a matter of equity, an additional 100 hours of compensatory education. In the order below, the amount and schedule of S&L services in the October 2023 IEP will also be addressed.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Philadelphia School District ("District") denied the student a free appropriate public education by not revising the student's October 2023 individualized education program ("IEP") for delivery of special education

through remote instruction, and delivery of speech and language services through remote therapy.

The student is awarded 590 hours of compensatory education.

The District shall, forthwith, begin to implement the October 2022 IEP utilizing remote instruction. Within 20 calendar days of the date of this order, the IEP team shall meet to comprehensively revise the student's IEP to reflect the student's present levels of academic and functional performance, transition goals and programming, goals, modifications/accommodations/specially-designed instruction, related services, supports to District personnel, and extended school year services, all in light of a placement where the student receives remote instruction and therapeutic services.

The placement information in the IEP shall be revised to reflect full-time autism support through remote instruction from the classroom where the student would attend in person, the classroom where the student's sibling attends in person.

Regardless of the exact contours of the IEP as designed by the IEP team, the student's speech and language therapy (in the Related Services portion of the IEP) shall be written for a frequency of 30 minutes weekly.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

04/03/2023