Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Michaela P.

DECISION

v.

DHA Case No. DPI-21-0011
DPI Case No. LEA-21-0011

Menomonie Area School District

The Parties to this proceeding

are: Michaela P., by

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Menomonie Area School District, by

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PROCEDURAL HISTORY

On October 1, 2021, the Wisconsin Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Act (IDEA) from Attorney Jeffrey Spitzer-Resnick on behalf of Thomas P. and Tiffani T. (the "Parents") and Michaela P. (the "Student") against the Menomonie Area School District (the "District"). DPI referred the matter to the Wisconsin Division of Hearings and Appeals for hearing, and Administrative Law Judge (ALJ) Sally Pederson was duly appointed.

The due process hearing was held at the Menomonie Area School District, with the ALJ appearing by videoconference, on January 10, 11, and 12, 2022. The record closed on February 17, 2022. The decision is due by March 1, 2022.

ISSUE

During the 2021-2022 school year, has the District failed to provide the Student with a free, appropriate public education by not implementing COVID-19 mitigation measures in her school building, including requiring all students and staff to wear masks, requiring all staff to be vaccinated (excluding medical exceptions), requiring quarantining and notice of COVID-19 positive students and staff, and requiring social distancing of three feet minimum whenever possible?

FINDINGS OF FACT

1. The Student is a seven-year-old (d.o.b. 02/26/15) child in first grade who attends Oaklawn Elementary in the District.

2. The Student was diagnosed with Down syndrome within days of her birth. (Tr. 692) As a result of Down syndrome, the Student has problems with her eyes and skin, delays in her fine and gross motor skills and speech, and what her pediatrician describes as "mild mental insufficiencies." (Tr. 34-35)

3. The Student is a child with an educational disability, specifically an intellectual disability, and receives special education and related services from the District. (Student Ex. (hereinafter "S. Ex.") 5, p. 4)

4. During the 2020-2021 school year, when the Student was in kindergarten, the District implemented COVID-19 mitigation measures in its schools, including but not limited to: requiring all students and staff to wear masks, cohorting students in smaller groups to reduce transmission of the virus, keeping students in one classroom for all classes, changes to lunch procedures, and quarantining students who were sick or exposed to COVID-19. (Tr. 283-294)

5. The District's school board voted to end mandatory masking for students and staff in its schools at the end of the 2020-2021 school year, making mask-wearing by students and staff recommended but optional during summer school. (Tr. 299, 394)

6. The Student attended school in person throughout the 2020-2021 school year, including summer school. (Tr. 697, 700)

7. The Parents chose to send the Student to summer school, despite the lack of a mask mandate, because they needed to work full-time, the Student and her teacher and paraprofessional aide wore masks, the Student's class size was small with only five or six students, and they believed many activities would be held outside. (Tr. 700-701)

8. In 2021, the federal Centers for Disease Control and Prevention (CDC) listed Down syndrome as one of the medical conditions that increases a person's risk of becoming severely ill from COVID-19. (S. Exs. 44, 45, 46)

9. Beginning in the summer of 2021, the Student's father began contacting the District's school board members and the district administrator expressing the Parents' concerns that the District was not following the recommendations of federal, state, and local public health officials with regard to universal masking in schools and other COVID-19 mitigation strategies and noting that they had a child with Down syndrome who was "medically vulnerable" to COVID-19 and too young to be vaccinated. The father contacted school board members and/or the district administrator on July 27, August 5, August 11, August 23, August 25, August 26, September 13, September 12, and September 15, 2021. (S. Exs. 6, 7, 9, 12, 13, 15, 18, 19, 20)

10. On August 12, 2021, the Student's father emailed the Student's case manager asking that her individualized education program (IEP) be revised to state that the Student will wear a mask while at school, that all school staff who interact with the Student indoors will wear a mask during such interaction, and that all school staff who interact with the student will be fully vaccinated for COVID-19. (S. Ex. 11)

11. On August 22, 2021, the Student's father sent another email to the case manager, the District's director of student services, and the elementary school principal asking for the Student's IEP to be revised to include the following: all students, teachers, and staff who share indoor spaces with the Student will wear a mask; the Student will wear a mask throughout the school day except when outdoors or eating; and all school staff who interact with the Student indoors will be fully vaccinated for COVID-19. *Id.*

12. On August 23, 2021, the elementary school principal emailed a response to the Parents stating that the school board would be discussing and voting on mandatory masking at an upcoming meeting, "the outcome [of which] will very much determine how we can serve [the Student] in an in-person learning setting," and that she, the case manager, and the director of student services would follow up on his email on August 24, 2021 and then be in contact with the Parents. *Id.*

13. On August 26, 2021, the Student's case manager emailed the Parents to schedule an IEP meeting in response to the father's request to revise the IEP. The IEP team meeting was scheduled for August 31, 2021. (S. Ex. 14)

14. On August 31, 2021, the Parents, the Student, and the Student's younger sister attended back-to-school orientation at the elementary school. After the orientation, and shortly before the IEP team meeting, the Parents emailed the case manager and IEP team stating that they decided the Student would not attend school in-person that fall in light of her "increased risk of complications as it relates to COVID." They said they decided to "err on the side of caution from a health perspective" and that they "recognize and acknowledge that different folks might have different personal definitions of 'safe' in these current circumstances." They further stated that they wanted to use the IEP team meeting to discuss virtual, non-in-person learning related to the Student's academics and IEP. In addition, they noted that their goal was for the Student to return to the school in-

person as soon as they deemed it safe for her to do so, stating that, while other circumstances might adjust the timeline, at the top of their list for her to return to school would be: (1) she gets and recovers from COVID-19, or (2) she receives a COVID-19 vaccination. (S. Ex. 16)

15. At the August 31 IEP meeting, the IEP team developed a two-hour per day online learning program for the Student. (S. Ex. 2) The Student's mother took an extended unpaid leave of absence from her full-time job at UW-Stout in order to stay home with the Student to supervise and assist with her online learning. (Tr. 716)

16. On September 27, 2021, the school board adopted a policy mandating that students in kindergarten through sixth grade wear masks in District schools. (S. Ex. 34, Tr. 403)

17. On September 30, 2021, the Parents emailed the Student's case manager, the director of student services, and other IEP team members stating that, with the elementary school mask mandate in effect, they would like the Student to return to school provided that the District assure them that various COVID-19 mitigation protocols they were requesting for the Student would be put in place no later than October 11, 2021. The Parents' requests included masking of all individuals (not just students) when within three feet of the Student indoors at school, masking in art, music, and gym unless more than six feet apart in gym or outdoors, confirmation that the Student's speech and occupational therapists had been vaccinated for COVID-19, and safe physical distancing during lunch. (S. Ex. 22)

18. Along with the September 30 email, the Parents provided the director of student services with a letter from the Student's pediatrician Sarajean Herrmann, M.D., dated September 29, 2021. The letter stated, in its entirety, as follows:

> [The Student] has Down Syndrome *[sic]* and is high risk for Covid 19 complications. Please follow the CDC guidelines for schools including masking of students/teachers that she may be in contact with, at least 3 feet of physical distance between students and other prevention strategies.
> (S. Ex. 23)

19. The Parents did not provide the District with any of the Student's medical records or other information from her pediatrician related to the Student's COVID-19 health risks or medical needs. (Tr. 910, 928)

20. Later on September 30, 2021, the Parents again emailed District staff stating that they had learned the school board might be reconsidering its recently imposed elementary school mask mandate, that "this changes the situation," and that they would be consulting with their attorney. (S. Ex. 22)

21. On October 1, 2021, the Parents, by counsel, filed a request with DPI for a due process hearing. (District Ex. "hereinafter D. Ex." 23)

22. The school board did note vote to remove the District's elementary school mask mandate in October 2021. However, after the CDC approved COVID-19 vaccinations for children ages 5 to 11, the school board voted on November 8, 2021 to adopt a mask-optional policy for grades kindergarten through sixth, effective December 13, 2021. (S. Exs. 36 and 40)

23. The District and Parents, along with their attorneys, engaged in mediation on December 3, 2021. On that date, the Parents informed the District that the Student had gotten vaccinated for COVID-19 and that they had decided to return her to school on December 13, 2021. (Tr. 723, 922)

24. On December 7, 2021, the District held an IEP meeting for the annual review and revision of the Student's IEP, and the Parents attended and participated in the meeting. The IEP team and Parents discussed various COVID-19 mitigation protocols to be added to the Student's IEP, including the following measures: requiring teachers and staff who interact with the Student to wear masks; requiring all teachers and staff in the building or all those who interact with the Student to be vaccinated for COVID-19; delegating direct provision of occupational therapy services to a vaccinated para-professional working under the direction of the occupational therapist who has not disclosed her vaccination status and, therefore, is considered unvaccinated per District policy; utilizing social distancing in the Student's classroom; and having the Student wear a mask while indoors at school, but with some breaks. (St. E. 5; Tr. 465-466, 475, 485, 767-769, 905, 923-925, 932)

25. On December 13, 2021, the Student returned to school in-person at Oaklawn Elementary. (Tr. 724)

26. Although the mediation on December 3 was unsuccessful, the Parents, District staff, and their attorneys met again on December 17, 2021 to discuss compensatory education for the Student. They reached agreement and fully executed a written "Agreement Regarding Compensatory Education; Case No. LEA-21-0011" on January 3, 2022. The agreement noted that it was not an admission of liability or fault by any party and that it fully and finally settled and resolved all compensatory education claims alleged by the Parents in the due process hearing request from September 1, 2021 through the date of the Agreement.[1] Per the Agreement, the District will provide the Student with two hours of instruction Monday through Thursday of each week, as well as 30 minutes per week of occupational therapy services via a para-educator working under the direction of an occupational therapist, throughout the remainder of the 2021-2022 school year and the 2022 summer school session. (D. Ex. 31, pp. 367-369)

[1] The Agreement was signed by the parties on January 3, 2022 but was appended to an I-10 IEP form, which stated that the Agreement resolved compensatory education for the Student through January 10, 2022. (D. Ex. 31, p. 366)

27. At the December 17 meeting, the Parents and District staff (not the full IEP team) continued discussing COVID-19 mitigation measures to be implemented for the Student in school. (Tr. 485, 591, 931-933) The Parents and District agreed to revise the Student's IEP via an I-10 form, which allows changes to be made to the IEP without a full IEP team meeting. (District Ex. 31, p. 366; Tr. 771, 930) The Student's IEP was revised to include the compensatory education that the parties agreed upon and also several COVID-19 mitigation measures, both of which were added to the Program Summary section of the IEP as supplementary aids and services and related services, which was the appropriate section of the IEP for the information. (District Ex. 30, pp. 358-359) The director of student services also added the language about the COVID-19 mitigation measures and the compensatory education to the Current Academic Achievement and Functional Performance section of the IEP, which was unnecessary and confusing. (D. Ex. 30, p. 349; Tr. pp. 930-931)

28. The COVID-19 mitigation measures that were added to the Student's IEP as supplementary aids and services are as follows:

    - The District will make reasonable efforts to ensure all staff that work in close proximity will be masked.
    - The District will make reasonable efforts to ensure, to the maximum extent possible, social distancing at a minimum of three feet in [the Student's] classroom.
    - The District will make reasonable efforts to ensure, to the maximum extent possible, that the family is notified of a positive COVID-19 case in [the Student's] classroom.
    - The District will make reasonable efforts to ensure, to the maximum extent possible, that District staff who provide direct services to [the Student] pursuant to her IEP will be vaccinated or if vaccination status is not known, will provide only delegated services through another vaccinated staff member.

    (D. Ex. 30, p. 358)

29. The Parents and District staff had not specifically discussed the "District will make reasonable efforts to ensure, to the maximum extent possible . . ." language used in the COVID-19 mitigation measures at either of the December 2021 meetings. (Tr. 765, 897-898) The Director of Student Services drafted that language and added it to the COVID-19 mitigation measures upon consultation with the District's lawyer. (Tr. 934-935)

30. On January 24 and 25, 2022, the Student tested positive for COVID-19. According to her father, the Student exhibited symptoms including fever, chills, congestion, and fatigue. The Parents kept the Student home from school for six days, from January 24-31, 2022, and she returned to school on February 1, 2022. (Stipulated Facts Regarding the Student Contracting COVID-19)

DISCUSSION

Jurisdiction

The undersigned ALJ has authority to preside over this due process proceeding pursuant to Wis. Stat. § 115.80(2).

Burden of proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainants in this matter, the burden of proof is on the Parents. The Parents must "cite credible evidence that the choice[s] the school district made cannot be justified." *Sch. Dist. v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff'd* 295 F.3d 671 (7th Cir. 2002).

Free, appropriate public education

The IDEA requires that all children with disabilities are offered a free, appropriate public education (FAPE) that meets their individual needs. 20 USC § 1400 (d); 34 CFR § 300.1. A FAPE refers to "special education and related services that are provided at public expense and under public supervision and direction … and are provided in conformity with an individualized education program." Wis. Stat. § 115.76(7).

FAPE from September 1, 2021 to January 10, 2022

In their hearing request, the Parents alleged that the District denied the Student FAPE because it did not implement public health agency-recommended COVID-19 mitigation measures in the Student's elementary school, and they requested compensatory education to remedy the alleged denial of FAPE. They argued that the District ignored their concerns about the health risks COVID-19 posed for the Student who has Down syndrome, that the IEP team refused to discuss their request for COVID-19 mitigation measures, and that the school board limited the IEP team's decision-making authority regarding masks and vaccinations. (Student's post-hearing brief, pp. 5 and 9 and Student's post-hearing response brief, p. 9)

However, the record shows that the District scheduled an IEP team meeting for August 31, 2021 in response to the Parent's request that the Student's IEP be revised to include COVID-19 mitigation protocols. Then, prior to the meeting being held, the Parents informed the IEP team that they would not be sending the Student to school in-person. The Parents asked that the IEP meeting focus on an online learning program for the Student which is why the IEP team did not discuss COVID-19 mitigation protocols for the Student. Contrary to the Parents' assertions, the IEP team did not refuse to meet and did not refuse to discuss COVID-19 mitigation measures.

The elementary school principal and the Student's case manager testified that they believed the school board and/or District management, not the IEP team, governed COVID-19 mitigation measures. (Tr. 526, 545) However, the director of student services, who supervised

the case manager and was also a member of the Student's IEP team, testified that it would be the IEP team's determination regarding what COVID-19 mitigation measures to include in the Student's IEP. (Tr. 912) In addition, the school board president testified that he believed the Student's IEP team could require school staff who worked with the Student to be masked and vaccinated if necessary for her needs. (Tr. 437, 442, 444) Similarly, the district administrator testified that he had the authority to institute a mask mandate and a quarantine policy in the Student's school if her IEP team concluded it was necessary in her IEP. (Tr. 596-597)

In December 2021, the IEP team did, in fact, meet to review the Student's IEP and discuss COVID-19 mitigation measures. As a result, COVID-19 mitigation protocols were added to the Student's revised IEP, effective January 10, 2022. (D. Ex. 30) The Parents continued the hearing request because they do not agree with the COVID-19 mitigation measures in the revised IEP and believe the measures are insufficient to provide the Student with FAPE. (Tr. 765) On January 7, 2022, this tribunal denied the District's motion for summary judgment, finding that a genuine issue of material fact remains in dispute, based upon the Parents' claim that the COVID-19 measures in the revised IEP deny FAPE to the Student.

However, with regard to the alleged denial of FAPE from September 1, 2021 to January 10, 2022, the written settlement agreement executed by the parties on January 3, 2022 does "fully and finally" resolve the claim for compensatory education for that period of time. (D. Ex. 31) The Parents acknowledge that the compensatory education agreement resolved their claim for the time that the Student was out of school learning through an online program. (Tr. 709, 720, 894; Student's post-hearing brief, p. 8)

Therefore, even if this tribunal determined that the District had denied the Student FAPE while she was out of school and that the Student was thusly entitled to compensatory education as a remedy, the decision would have no practical legal effect. An issue is moot when a judgment on the matter would have no practical legal effect upon the controversy. *Ziemann v. Village of Hudson*, 102 Wis. 2d 705, 712, 307 N.W.2d 236 (1981). Accordingly, because it is moot whether the District denied the Student FAPE from September 1, 2021 to January 10, 2022, it is unnecessary for this tribunal to issue a ruling regarding the provision of FAPE to the Student during that portion of the 2021-2022 school year.

January 10, 2022 IEP

The U.S. Supreme Court has ruled that the IDEA requires a school district to offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's unique circumstances. *Endrew F. v. Douglas Co. Sch. Dist. RE-1,* 137 S.Ct. 988 (2017). The related services that may be required in an IEP to provide a child with FAPE include, but are not limited to, "supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34(a); *See also* 20 U.S.C. § 1401(26)(A).

With regard to related services, the U.S. Supreme Court has held that school districts are statutorily responsible for offering supportive services that "enable a disabled child to remain in school during the day" noting that such services thereby "provide the student with 'the

meaningful access to education that Congress envisioned.'" *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999) (*quoting Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

The *Tatro* case involved an eight-year-old child with spina bifida who needed catheterization every three or four hours to avoid injury to her kidneys. Her physician prescribed a procedure called clean intermittent catheterization (CIC), which involved the insertion of a catheter to drain her bladder. CIC was a fairly simple procedure that could be performed by an aide or staff person who had been trained in the procedure. The U.S. Supreme Court held that CIC was a related service which the school district was responsible to provide for the student because without the procedure she would not be able to remain in school all day. *Tatro,* 82 L.Ed.2d at 669-673.

In *Cedar Rapids,* the parent of a child who was paralyzed from the neck down requested that the school district provide a one-on-one staff person to deliver supportive services that the student needed at school. The student was dependent on a ventilator to breathe and, therefore, required a responsible individual to attend to various physical needs he had while at school. His needs included catheterization once a day while at school, suctioning of his tracheotomy tube once every six hours or as needed, assistance eating and drinking at lunch time, assistance with his ventilator if electrical or other problems occurred, placing him in a reclining position for five minutes each hour, and manual pumping of an air bag as needed. Similar to *Tatro*, the Supreme Court found that the student clearly could not attend school unless the requested related services were provided to him during the school day. *Cedar Rapids,* 143 L.Ed.2d at 162-166.

In the instant case, the Parents contend that their daughter's situation is analogous to that of the students in *Tatro* and *Cedar Rapids*, arguing that she cannot "safely receive FAPE" at her school if the District does not implement the COVID-19 mitigation protocols they requested, consistent with public health agencies' recommendations. Specifically, the Parent have asked that the District require:

- all students and staff wear masks in the school that the Student attends;
- all staff in the Student's school be vaccinated for COVID-19 (excluding medical exceptions);
- quarantining and providing notice of COVID-19 positive students and staff; and,
- social distancing of three feet minimum whenever possible.

As stated previously, after an IEP team meeting and another meeting with the Parents in December 2021, the District did revise the Student's IEP to include COVID-19 mitigation measures as supplementary aids and services and related services, effective January 10, 2022. Per the revised IEP, the District will make reasonable efforts to ensure that:

- all staff who work in close proximity to the Student will be masked;
- to the maximum extent possible, social distancing at a minimum of three feet occurs in the Student's classroom;

- to the maximum extent possible, the family is notified of a positive COVID-19 case in the Student's classroom;
- to the maximum extent possible, staff who provide direct services to the Student pursuant to her IEP will be vaccinated or if vaccination status is not known, will provide only delegated services through another vaccinated staff member.
(D. Ex. 30, p. 358)

The Parents argue that these COVID-19 mitigation measures are insufficient and that the IEP is not reasonably calculated to provide the Student with FAPE. However, the evidence on the record does not show that the specific COVID-19 mitigation measures requested by the Parents are necessary for the Student to be able to remain in school all day and thereby receive FAPE.

The Parents provided the District with a brief letter from the Student's pediatrician, Dr. Sarajean Herrmann, that said the Student has Down syndrome and is "high risk for Covid 19 complications" and asked the District to "[p]lease follow the CDC guidelines for schools including the masking of students/teachers that she may be in contact with, at least 3 feet of physical distance between students and other prevention strategies." (S. Ex. 23) Dr. Herrmann wrote the letter prior to the Student receiving the COVID-19 vaccination.

Dr. Herrmann testified that, due to the Student having Down syndrome, "there are problems with her immune system and regulation with that, especially respiratory illnesses" and that she is "more vulnerable to all infections, including COVID-19." (Tr. 35) More generally, she stated that "children with Down syndrome have an increased risk of hospitalization and ventilation and increased incidence of fever and respiratory problems." (Tr. 36) She further testified that, even though the Student has now been vaccinated for COVID-19, she remains "at risk" for COVID-19, but Dr. Herrmann does not know how high a risk. (Tr. 37)

Dr. Herrmann acknowledged that she is not an infectious disease specialist and that she consulted with Dr. Jennifer Brumm, a Mayo Clinic Health System colleague who works at a Down syndrome specialty clinic in La Crosse, Wisconsin, about COVID-19 and children with Down syndrome. Dr. Herrmann testified that she based her opinion about the Student being high risk for COVID-19 complications on her consultation with Dr. Brumm and on an article she read in a clinical medical journal about a study of children with Down syndrome who contracted COVID-19. (Tr. 64) Dr. Brumm did not testify at the hearing.

The Parents had three other medical or public health professionals testify at the hearing: Dr. Paul Horvath, an emergency medicine doctor employed at the Mayo Clinic Health System in Menomonie who served as the District's medical advisor from the summer of 2020 to December 2021; Dr. Alexandra Hall, a family practice physician who lives in the Menomonie area and works at UW-Stout, previously as clinical care doctor in Student Health Services and currently as a senior lecturer in biology; and Kathryn Gallagher, the director and health officer of the Dunn County Health Department in Menomonie. The testimony of these three witnesses primarily focused on their opinions that, for the health and safety of students, staff, and the community, the District should implement COVID-19 mitigation protocols in its schools that are consistent with

the recommendations of the CDC, the Wisconsin Department of Health (DHS), and the Dunn County Health Department.

Although neither Dr. Hall or Dr. Horvath is a pediatrician or infectious disease specialist, they both testified that children with Down syndrome have an increased risk of COVID-19 complications. (Tr. 112, 187, 207) Both physicians acknowledged that they were not personally familiar with the Student and her specific health history or situation. (Tr. 121, 138, 141, 176) In addition, they both opined that getting vaccinated reduces but does eliminate COVID-19 health risks, and they did not know the Student's level of risk of potential COVID-19 complications. (Tr. 138, 176)

Dr. Daniel Benjamin testified on behalf of the District. He is a distinguished professor of pediatrics-infectious disease at Duke University School of Medicine in Durham, North Carolina. He also has a joint appointment with the School of Public Health and School of Medicine and Pharmacy at the University North Carolina-Chapel Hill. In addition to a medical degree, he has a Ph.D. in epidemiology and is board-certified in general pediatrics and pediatric infectious disease. (Tr. 775-776) Dr. Benjamin teaches in a hospital setting, with a pediatric infectious disease caseload, treating children hospitalized with severe infections that include one or two children with Down syndrome each week. (Tr. 814-815) Since the COVID-19 pandemic began, he has been providing pro bono medical and epidemiology advice to school boards. In addition, he has been involved in various federal and state-funded research studies involving COVID-19, including COVID-19 in schools, and has had articles published related to COVID-19. (D. Ex. 25)

In their post-hearing briefs, the Parents, by counsel, argue that the testimony of Dr. Benjamin should be excluded in its entirety because he does not meet the requirements of an expert witness under the Federal Rules of Evidence Rule 702, per the framework established by the U.S. Supreme Court in *Daubert v. Merell Dow Pharms., Inc*., 509 U.S. 579 (1993). Specifically, the Parents argue that Dr. Benjamin's testimony should be excluded because he was not personally familiar with the Student or her medical records, was retained by the District just prior to the hearing, had not consulted with local public health officials about the community or the school, was unable to make conclusions about the Student's risk of contracting and becoming very sick from the Omicron variant, and did not know if the Student has an autoimmune disorder. Their argument fails for several reasons.

First, Parent's counsel did not raise a timely objection at the hearing to Dr. Benjamin testifying as an expert. The Wisconsin Court of Appeals has held that, in order to exclude unreliable evidence, a party must object to the evidence before trial or when the evidence is offered. *State v. Cameron,* 370 Wis. 2d 661 (2016) (*citing Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998)). Second, it is irrelevant when he was retained by the District, and he was not obligated to contact local health officials for information prior to testifying. Third, many of the alleged deficiencies with Dr. Benjamin's testimony also apply to the Student's witnesses. Like Dr. Benjamin, Drs. Hall and Horvath and Ms. Gallagher were not familiar with the Student or her medical records. The Parents did not provide or enter any of the Student's medical records into evidence, other than Dr. Herrmann's letter to the District. In addition, the

Student's three witnesses were not able to make conclusions about the level of the Student's risk from COVID-19 after being vaccinated.

Moreover, there is no medical record or other evidence in the hearing record showing that the Student has an autoimmune disorder. Dr. Herrmann did not testify that the Student has an autoimmune or immune disorder that constitutes a comorbidity condition. Rather, she stated that, due to Down syndrome, the Student has "problems with her immune system and regulation with that." (Tr. 35) Finally, this proceeding is governed by Wis. Stat. § 115.80, not the Federal Rules of Evidence. Pursuant to Wis. Stat. § 115.80(5)(a), the administrative law judge is required to admit all testimony having "reasonable probative value, but exclude immaterial, irrelevant or unduly repetitious testimony" and is not bound by common law or statutory rules of evidence. For these reasons, Dr. Benjamin's testimony is not excluded from the hearing record.

Dr. Benjamin testified that children with Down syndrome have a higher risk of acquiring viral infections and respiratory viral infections, including COVID-19, than the general pediatric population. He further testified, however, that he has seen no evidence or reports that a child with Down syndrome who has been vaccinated for COVID-19 has an increased risk of morbidity or mortality from COVID-19.[2] (Tr. 792-793, 798-799) Assuming that the Student – a child with Down syndrome who has received the COVID-19 vaccination – has no comorbidity condition, such as obesity, open heart surgery, bone marrow transplant, or a serious immune disorder, Dr. Benjamin testified that, in his opinion to a reasonable degree of medical certainty, the Student could safely attend school without a universal mask and vaccination mandate or quarantine protocol in effect. (Tr. 793-806) There is no evidence in the hearing record that the Student has any comorbidity condition. Dr. Benjamin further testified that if the Student had a serious immune disorder, by age six she would have had multiple prior admissions to the hospital. (Tr. 800) There is no evidence of such hospitalizations in the record.

Like Dr. Hall and Dr. Horvath, Dr. Benjamin acknowledged that he had not met the Student or reviewed her medical records. (Tr. 810) Also similar to Drs. Hall and Horvath and Ms. Gallagher, Dr. Benjamin testified that, from a public health perspective for the community, there is a "tremendous" benefit in having universal masking, vaccination, and quarantine protocols in schools. (Tr. 802-806) However, it is not for this tribunal to determine what are the most appropriate COVID-19 mitigation measures for the District to implement for the health and safety of the community. The issue here is whether the Student requires the requested COVID-19 mitigation measures in her IEP in order to attend school and receive FAPE.

As the Student's pediatrician, Dr. Herrmann possessed the most personal knowledge of the Student and her medical records. She requested that the District follow the CDC's guidelines for COVID-19 mitigation measures in school but did not prescribe those measures for the Student to attend school. Dr. Herrmann did not know the Student's level of risk from COVID-19 after being vaccinated.

[2] Dr. Benjamin refers to morbidity as admission to an intensive care unit or long-term health consequences and mortality means death. (Tr. 826)

The Student's case is distinguishable from *Tatro* and *Cedar Rapids*. In *Tatro*, the child had a prescription for CIC to be performed every three or four hours to prevent kidney damage. In *Cedar Rapids*, the student was paralyzed from the neck down, was dependent on a ventilator to breath, and required assistance eating, drinking, and being reclined for five minutes each hour. The evidence on the record does not show that the Student would suffer life-threatening or severe health consequences such as organ damage or the inability to breathe, eat, or drink if she attended school without the requested COVID-19 mitigation measures in effect. The Student has an elevated risk of complications if she contracts COVID-19; this does not equate with her being unable to attend and remain in school throughout the day if the specific COVID-19 mitigation measures requested are not provided.

Two weeks after the hearing in this matter, the Student did, in fact, contract COVID-19. Her father reported that she exhibited COVID-19 symptoms, including fever, chills, congestion, and fatigue. (Stipulated Facts Regarding the Student Contracting COVID-19) There is no evidence in the record that she experienced severe respiratory illness or complications requiring hospitalization or ventilation. She missed six days of school. The Parents did not present evidence showing that missing six days of school resulted in a denial of FAPE to the Student.

The Student's speech therapist and occupational therapist both credibly testified that the Student is making progress in school. (Tr. 452, 476, 508) With regard to the method for providing OT services to the Student in the revised IEP, the occupational therapist testified that she believes that delegating the direct OT services to the Student's para-educator is more effective than her providing the hands-on direct instruction because the para-educator is then being trained in OT methods that she can use throughout the day when she is with the Student. (Tr. 508) Although the Student's pediatrician opined that it would be preferable for the Student to receive OT services directly from the occupational therapist rather than the occupational therapist overseeing delegated direct services by the para-educator, the educator's opinion must be afforded more weight and relevance than the pediatrician's regarding the effectiveness of educational service methodology in school. *See Marshall Joint Sch. Dist. No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632 (7th Cir. 2010). The director of student services also testified that the Student is making progress in the general education curriculum. (Tr. 937) The evidence on the record indicates that the Student's January 10, 2022 IEP is reasonably calculated to enable her to make progress appropriate in light of her unique circumstances.

Finally, the Parents have argued that their procedural rights under the IDEA were violated when the District added the COVID-19 mitigation measures to the Student's IEP because they did not discuss and approve the conditional language drafted by the director of student services. Under Wisconsin law, an ALJ cannot find a procedural violation to constitute a denial of FAPE unless the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. Wis. Stat. § 115.80(5)(c).

The Parents acknowledged during their testimony that they discussed various COVID-19 mitigation measures with the IEP team and District staff at the December 7 and 17, 2021 meetings. (Tr. 767-769, 905) The director of student services testified that she drafted the "will make reasonable efforts to the maximum extent possible" language in consultation with the District's lawyer, believed it was consistent with what had been discussed at the December meetings, but would remove that language from the IEP if the Parents thought it was inaccurate. (Tr. 934-935) The Student's para-educator aide credibly testified that the COVID-19 mitigation measures in the January 10, 2022 IEP are being followed and implemented throughout the school day. (Tr. 844-853)

The IDEA does not afford parents the right of final approval of a child's IEP. Ultimately, it is a school district's responsibility to develop and ensure that an IEP is in effect for a child with a disability. *See* Wis. Stat. § 115.787(1). Even if the conditional language was not specifically discussed with the Parents and the Parents did not agree with the COVID-19 mitigation measures in the January 10 IEP, they have not met their burden of showing that any procedural violation significantly impeded their opportunity to participate in the decision-making process regarding FAPE, resulted in a denial of FAPE, or caused a deprivation of educational benefit. The Parents meaningfully participated in discussions of COVID-19 mitigation measures with the IEP team and District staff at two meetings in December 2021. Obviously, they do not agree with the measures that were added to the Student's IEP, which is why this due process hearing proceeded. However, the evidence on the record does not show that the COVID-19 mitigation measures that are in the Student's IEP are insufficient to enable her to attend school and receive FAPE.

All of the arguments presented by the parties were carefully considered by the undersigned ALJ. The courts have recognized that an administrative decision-maker "is not required to make findings that respond to every issue the [Complainants] raised in its request." *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 33, 246 Wis. 2d 502, 631 N.W.2d 229. Thus, any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

CONCLUSIONS OF LAW

1. The written settlement agreement executed by the parties on January 3, 2022 fully and finally resolved the Parents' claim that the District denied the Student a free, appropriate public education from September 1, 2021 to January 10, 2022.

2. The Student's January 10, 2022 IEP is reasonably calculated to provide her with a free, appropriate public education, and the District has not failed to provide the Student with a free, appropriate public education by not implementing in her school building the specific COVID-19 mitigation measures requested by the Parents.

3. The District did not commit any procedural violations that resulted in or constituted a denial of a free, appropriate public education, as set forth in Wis. Stat. § 115.80(5)(c).

ORDER

It is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on March 1, 2022.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Sally J. Pederson
Senior Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Any party aggrieved by the attached decision of the administrative law judge may file a civil action in the circuit court for the county in which the child resides or in federal district court, pursuant to Wis. Stat. § 115.80(7), 20 USC § 1415, and 34 CFR § 300.512. The court action must be filed within 45 days after service of the decision by the Division of Hearings and Appeals.

It is the responsibility of the appealing party to send a copy of the appeal to the Director of Special Education, Special Education Team, Department of Public Instruction, 125 South Webster Street, Madison, WI 53703. The Department of Public Instruction will prepare and file the record with the court only upon receipt of a copy of the appeal. The record will be filed with the court within 40 days of the date that the Special Education Team at the Department of Public Instruction receives the appeal.