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

Although neither [District s Dr. 2] or [District s Dr. 1] are a pediatrician or infectious disease specialist, they both testified that children with [Student's diagnosis] 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 their 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)

[District's Dr. #3] 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) [District's Dr. #3] teaches in a hospital setting, with a pediatric infectious disease caseload, treating children hospitalized with severe infections that include one or two children with [Student s diagnosis] 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 [District's Dr. #3] 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 [District's Dr. #3] testimony should be excluded because he was not personally familiar with the Student or their 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.] 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.]testimony also apply to the Student's witnesses. Like [Dr.], [District's Dr. #2], [District's Dr.#] and [County Director and Health Officer] 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.'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. [Student's Pediatrician] did not testify that the Student has an autoimmune or immune disorder that constitutes a comorbidity condition. Rather, she stated that, due to [Student's diagnosis], 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.'s] testimony is not excluded from the hearing record.

[District's Dr. #3] testified that children with [Student's diagnosis] 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 [Student's diagnosis] 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 [Student's diagnosis] 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, [District's Dr. #3] 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. [District's Dr. #3] further testified that if the Student had a serious immune disorder, by age six they would have had multiple prior admissions to the hospital. (Tr. 800) There is no evidence of such hospitalizations in the record.

Like [District's Dr. #2] and [District's Dr. #1], [District's Dr. #3] acknowledged that he had not met the Student or reviewed their medical records. (Tr. 810) Also similar to [District's Dr. #2] and [District's Dr. #1] and [County Director and Health Officer], [District's Dr. #3] 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, [Student's Pediatrician] 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. [Student's Pediatrician] did not know the Student's level of risk from COVID-19 after being vaccinated.

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[2] [District's Dr. #3] 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 they 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 they 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 them 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 their 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.