

BEFORE THE IOWA DEPARTMENT OF EDUCATION
(Cite as 28 D.o.E. App. Dec. 419)

In re ██████████ ██████████ a child:)	
)	
██████████ ██████████)	Dept. Ed. Docket No. SE-461
)	DIA No. 18DOESE0006
Complainant,)	
)	
v.)	
)	
██████████ COMMUNITY SCHOOL)	
DISTRICT and ██████████ AREA)	DECISION
EDUCATION AGENCY,)	
)	
Respondents.)	
)	

Background

On or about September 26, 2017, ██████████ ██████████ filed a Due Process Complaint on behalf of her daughter, ██████████ ██████████ against the ██████████ Community School District and the ██████████ Area Education Agency (Respondents) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., as implemented by 441 Iowa Administrative Code chapter 41. The Complaint generally alleged that the child was entitled to an IEP based on medical and educational diagnoses made by physicians and educational professionals. Respondents filed an Answer on October 9, 2017, denying all liability under the IDEA.

Hearing in this matter was held before Administrative Law Judge David Lindgren on June 13 and 14, 2018, at the ██████████ Area Education Agency building in ██████████ Iowa. Present for that hearing were Complainant ██████████ ██████████ the child's father ██████████ ██████████ their advocate, Natalie Berkowitz, and their attorney, Nathan Mundy. Also present were attorneys Katherine Beenken and Carrie Weber, who represented the ██████████ Community School District and the ██████████ AEA. Pursuant to the Complainant's request, the hearing was held open to the public and it was reported by Certified Shorthand Reporter Edie Spriggs Daniels.

The following persons testified at the hearing: ██████████ ██████████ Natalie Berkowitz, ██████████ ██████████ Dr. ██████████ ██████████ ██████████ ██████████ and ██████████ ██████████ Complainant's Exhibits A through G were admitted into the record by stipulation, and Exhibit K later

came in under Respondents' objection. Respondents Exhibits A through J were admitted without objection.¹

The evidentiary record was closed at the end of the hearing on June 14, 2018, and the parties agreed to a post-hearing briefing schedule in lieu of closing arguments. The case was considered fully submitted upon filing of the Complainant's Brief on July 6, 2018 and Respondent's Reply brief on July 28, 2018. The parties agreed to a continuance of the applicable timeframes in order to allow time for briefing and the drafting of this decision. *See* 34 C.F.R. § 300.515(a). The undersigned now issues the following decision.

Issues Presented

As dictated by 34 CFR § 300.511(d) and 281 IAC 41.511(4), the issues considered in this matter are limited to those raised in the due process complaint. In addition, in this case, Respondents consented to the inclusion certain additional issues. They include issues relevant to the July 26, 2017, disability suspect meeting, the second eligibility meeting of February 28, 2018, and the IEP dated March 21, 2018.

As articulated by the Complainants in post-hearing briefing, the following issues have been raised: First, whether the September 20, 2017, determination that [REDACTED] was ineligible for special education was correct, and second, whether the IEP which was formed in February of 2018 provides [REDACTED] a free and appropriate public education (FAPE). Complainants believe [REDACTED] current IEP is not satisfactory and deprives her of FAPE because it is limited to math and does not provide her with ongoing supplemental instruction in the area of language arts.

Findings of Fact

[REDACTED] and [REDACTED] are the parents of [REDACTED] who was born in 2005. [REDACTED] was born with two holes in her heart and had congestive heart failure. She had open heart surgery at the age of six months to fix those defects. Perhaps as a result of a complication that occurred during that surgery, at around the age of nine months [REDACTED] started having seizures. Suffering from a seizure approximately every two weeks, [REDACTED] eventually had around 40 of them over the course of a couple years. Most of those seizures were of the grand mal variety, which is the most severe type. Before she reached the age of one, [REDACTED] was diagnosed with epilepsy. Those seizures have caused developmental delays and brain damage that cannot be fixed.

Because her parents were employed outside of the home, [REDACTED] started at an in-home daycare and she then attended [REDACTED] Preschool when she was three and four years old. As a four-year old she was first diagnosed with attention deficit hyperactivity disorder (ADHD). [REDACTED] then attended kindergarten and first grade at [REDACTED] Elementary in the [REDACTED] School District. However, during the summer

¹ Because both parties labeled their Exhibits with letters, Respondents' Exhibits were referred to during the hearing by their page number (pages 1 through 277).

between her first and second grade years, [REDACTED] family moved to the [REDACTED] School District, where [REDACTED] was still attending school at the time of this hearing. While in the fourth grade, [REDACTED] parents began to notice that she was falling behind in class. [REDACTED] is currently at the [REDACTED] Middle School and recently finished sixth grade.

[REDACTED] has since been diagnosed with ADHD, seizure disorder, neurodevelopmental disorder, and she was found to be on the autism spectrum. These diagnoses have caused her significant issues in her daily life. Generally speaking, autism can cause struggles in school, frustration, lack of attention, and socializing issues. It can also be the cause of bullying at school and discipline issues at home. Children with neurodevelopmental disorders also have many challenges, including differently processing things, inability to pay attention, and a lack of confidence. Children with seizure disorders generally have a higher rate of learning disabilities, anxiety, and medication side effects. Low self-esteem and a poor attitude toward learning can also result from all these issues.

When [REDACTED] was in the fourth grade, Dr. Amy Cantazaro completed a psychological evaluation of her at the request of [REDACTED] and [REDACTED] who had wished to determine what factors might be underlying the emotional, behavioral and social concerns they had been seeing in [REDACTED]. Dr. Cantazaro administered several tests, including the Weschler Intelligence Scale for Children, 5th ed., (WISC-V), in which [REDACTED] full scale IQ fell in the low average range, above 19% of her peers. In the Woodcock-Johnson test of academic achievement (WJ-III), it was noted that in most core area skills [REDACTED] was slightly behind her peers, but that they were in the in an expected range given her grade and intellectual level.

While Dr. Cantazaro found that a full diagnosis of autism spectrum disorder was not appropriate, she did find a pattern indicative of nonverbal learning disorder (NVLD). She also diagnosed [REDACTED] with generalized anxiety disorder with depressive features. Finally, she recommended that although [REDACTED] does not qualify for a diagnosis of a specific learning disability in reading, writing, or math, she would benefit from a 504 Plan to address her needs related to ADHD, anxiety and NVLD. In particular, she recommended such accommodations as extra time for tests and assignments and shortening of assignments.

As a result of this psychological evaluation, [REDACTED] received a 504 Accommodation Plan at her school, which described her areas of concern as her lack of focus and attention, easy frustration and anxiety along with her diagnoses of ADHD, nonverbal learning disorder, and generalized anxiety disorder with depressive features. For distractibility, [REDACTED] was entitled to have all time restraints lifted for classroom activities and standardized tests, be allowed to take assessments in an individual or small group setting, and to sit in close proximity to the teacher. For her anxiety, [REDACTED] was to be given notice of changes to her regular school routine, be given access to a school counselor upon request, and have her counselor and therapist create coping strategies for her to use at school.

Prior to the end of the fifth grade, ██████ parents paid for another psycho-educational evaluation. This evaluation, which was performed by Dr. LeAnn Waterhouse on March 24, 2017, confirmed the previous diagnoses, but also added a diagnosis of sensory processing disorder. Dr. Waterhouse found ██████ full scale IQ to be in the fifth percentile, which was described as in the "borderline" range. She also found ██████ overall academic abilities to be in the low average range (21st percentile). Dr. Waterhouse opined that ██████ appeared to qualify for both accommodations and interventions, and she set forth many suggestions for those.

In July of 2017, ██████ parents asked that she be provided special education by the school district. On July 26, 2017, a team including ██████ parents, her principal, certain AEA representatives, her advocate, a school psychologist, a speech pathologist, and others held a Disability Suspected meeting. As a result of this meeting, disability was suspected and the district asked the parents to consent to a Full and Individual Evaluation (FIE) for ██████ in the domains for academic, behavior, physical, health, communication, and adaptive behavior.

Following this meeting, the school issued a Prior Written Notice (PWN) refusing (1) the advocate's request for an "expedited" evaluation, and (2) implementation of a "provisional IEP." The school refused these requests because the evaluation team needed time to evaluate ██████ as she was fairly new to the school district, and because there is no provision in the IDEA for a provisional IEP. Also, the IDEA provides 60 days in which to complete an evaluation once consent is given and this amount of time was needed to complete it. An eligibility meeting was therefore scheduled to be held on September 20, 2017.

The evaluation was later completed and compiled into an Educational Evaluation Report (EER). On September 20, 2017, an eligibility meeting was held, based on data suggesting that ██████ had a diagnosis within the meaning of the IDEA and that the condition had a discernible effect on her educational performance. In particular, the evaluation group looked to her diagnoses of ADHD, conduct disorder, epilepsy, ventricular septal defect, receptive language disorder, anxiety disorder and autism. It also viewed ██████ educational performance showing that five out of eight reading standards were "developing," that she was reading at a level "U" ("V" being considered "secure"), that two of nine writing standards were "developing," and that nine of eleven math standards were developing. However, the group concluded that ██████ was not unique in failing to meet standards when compared to peers and that she was adequately progressing toward meeting standards.

A Prior Written Notice (PWN) was subsequently provided to the parents noting the conclusion that ██████ is not an eligible individual under the IDEA. The PWN identified all of the information considered in making this decision, including report cards, teacher interviews, psychological evaluation reports, and other records.

Specifically, the PWN provided that

[t]he decision that [REDACTED] is not an eligible individual is based on (a) [REDACTED] performance in behavior, adaptive behavior, fine motor, reading, writing and speech being commensurate with standards applicable to all children, and (b) [REDACTED] 5th grade teacher indicated that although [REDACTED] was not secure in all math standards, the teacher was not concerned since she was making great progress toward being secure. Her current 6th grade math teacher indicated [REDACTED] performance is appropriate at this time of the school year.

However, even though [REDACTED] elementary math teachers reported no concerns, the evaluation team still found it difficult to “determine if [REDACTED] has a math disability or a lack of opportunity of instruction.” Consequently, it was proposed that the school would provide to [REDACTED] supplemental math instruction in general education. Progress in that supplemental education was to be monitored to determine if [REDACTED] was progressing toward mastering her deficits, and therefore whether special education is appropriate for her.

Dissatisfied with this decision, on September 27, 2017, [REDACTED] [REDACTED] filed a Due Process Complaint with the Department of Education on behalf [REDACTED]. This Complaint which was drafted by their advocate and [REDACTED] tutor Natalie Berkowitz, it alleged that [REDACTED] educational needs are based upon a disparity noted in her Grade 5 report card, in depth educational testing, and medical reports from physicians. In particular, they sought the following remedies: (1) an IEP that includes resources for reading and writing to be at grade level 6 and secure in all areas within 180 days; (2) unbiased external testing done by grade 7; (3) summer programming; and (4) regular professional testing to monitor her changing conditions.

After the Complaint was filed, the district offered to conduct an Independent Education Evaluation (IEE) at public expense. The parents accepted this offer and requested that Dr. David Beeman conduct the IEE. At this point, the Due Process Complaint was continued and put on hold, pending the results of the IEE. The school thereafter continued to provide [REDACTED] with supplemental math instruction through interventions in general education and it continued to monitor her progress.

The parties received Dr. Beeman’s report on January 30, 2018. Due to the fact that she had so recently undergone testing in her two previous psychological evaluations, Dr. Beeman found it unnecessary to have her take many of those tests again. However, he did re-administer certain portions of the WISC-V test and found her full scale IQ to be 85, or in the “low average” range. He also found that while her intelligence would preclude a diagnosis of intellectual disability, her extremely low adaptive functioning would be consistent with such a diagnosis.

Dr. Beeman’s diagnostic impression was that [REDACTED] had a neurocognitive disorder (including ADHS and NVLD), generalized anxiety disorder, and seizure disorder. In reviewing the totality of the data, he concluded that she required supports at least in mathematics through special education. However, with regard to reading and writing,

he found the assessments to be more mixed. And, he did suggest some supports and accommodations, some of which were already present in her 504 Plan.

██████████ is a math interventionist with the ██████████ School District. ██████████ provided the supplemental math instruction for ██████████ that came as a result of the September 20, 2017 eligibility meeting. ██████████ saw ██████████ every other day for a 41-minute period. Her goal was to bring ██████████ up to grade level and to do so she found some targeted areas to work on. Due to this supplemental instruction, ██████████ showed substantial progress in all areas. Instruction focused on her deficit areas, such as counting money, story problems, and fact fluency.

The eligibility team thereafter reconvened on February 28, 2018 and considered information from the math intervention and from Dr. Beeman's IEE report. After a review of this information and data, and after receiving parent and teacher reports, the district agreed to provide ██████████ with an Individualized Education Plan (IEP) in math for the remainder of the school year. The IEP was drafted following the February 28, 2018, meeting and it was to include all the accommodations previously provided for in ██████████ Section 504 Plan, as well as some new accommodations proposed as a result of the IEE process.

Specifically, the IEP team concluded that ██████████

has difficulty retaining math skills in the general curriculum and keeping up with the classroom's instructional pace. She needs re-teaching of some skills. ██████████ needs more small group assistance with more opportunities for reteaching and practice of the skills that are taught. ██████████ disability in math could affect her in the community with shopping and solving real life math problems.

In light of this, ██████████ was to be provided 41 minutes per day of specially designed math instruction in the general education setting, which was to be co-taught by the special education teacher and the general education teacher. She was also to be provided 410 minutes per month of supplemental math instruction in the special education setting, to be provided by her special education teacher. But, the team continued in the previous determination that ██████████ did not require special education with regard to reading and writing.

The accommodations that continued to be provided in the IEP included, among other things, a lifting of time constraints, seating in proximity to the teacher, a breakdown of instructions, access to school personnel, advanced notice of changes to her school routine, and a take-home folder with all completed math work.

Natalie Berkowitz is a professional self-employed tutor and self-styled 504/IEP advocate for children with perceived needs. Berkowitz has tutored in Iowa for eight years and at the time of hearing was tutoring 25 students of all ages and capabilities, including many with disabilities. She began working with ██████████ in July of 2017 and tutored her through the sixth grade in the areas of language arts, reading, science, math,

and social studies. In the summer they met twice per week, but during the school year they were on more of a "hit or miss" basis. Berkowitz and [REDACTED] did not meet from about November of 2017 through the Spring of 2018.

After reviewing [REDACTED] psychological evaluation and other notes, as well as meeting with [REDACTED] Berkowitz advised [REDACTED] parents that they needed to push for a "more robust" 504 Plan and that they should work toward an IEP for [REDACTED]. In the end, Berkowitz drafted the Due Process Complaint that led to this proceeding. She felt [REDACTED] cause was worth pursuing because she was white and female and because she claims to have seen many similar children in Iowa misdiagnosed and treated inappropriately.

In general, based on her interactions with [REDACTED] Berkowitz believed that [REDACTED] could not organize her thoughts or ask appropriate questions. She described [REDACTED] as having some irrational behavior, and saw her as usually glum, a loner, and as someone that stays in her room and does not like to interact with others. Berkowitz also took issue with many of the standards based grades that [REDACTED] had received in her [REDACTED] school. In particular, she did not believe that [REDACTED] was secure in many of the areas that had been reflected as being secure on her report card. Berkowitz posed [REDACTED] many standards-based questions and found that she did not recall many of the standards. Her view of [REDACTED] seemed pessimistic, dire, and gloomy.

Several of [REDACTED] teachers at the [REDACTED] Middle School testified at the hearing. Their observations of [REDACTED] which were based on a full year of interaction and work with her, were in almost direct contradiction to the opinions of Berkowitz. They unanimously found [REDACTED] to be enthusiastic, happy, excited to learn, and willing to participate. [REDACTED] English teacher, [REDACTED] [REDACTED] also described her as organized, prepared, and "ready to go." [REDACTED] was always the first person to arrive in her classroom and [REDACTED] believe she "never had a bad day." [REDACTED] social studies teacher, [REDACTED] [REDACTED] described her as a "smart cookie" who works very hard, is able to answer questions in class, and is interested in learning. He saw no evidence of hyperactivity or other manifestations of ADHD in his class. [REDACTED] math interventionist, [REDACTED] [REDACTED] found [REDACTED] to be energetic, punctual, fun-loving, and excited to learn. She saw [REDACTED] competence grow over time.

[REDACTED] Middle School Principal [REDACTED] [REDACTED] first met [REDACTED] during the 2017-2018 school year and got to know her quite well through their regular interaction. [REDACTED] was able to see [REDACTED] gain much confidence through the year, witnessed her interact with friends, and noted that had no discipline problems. He did not see evidence of anxiety, social withdrawal, or other negative emotions. [REDACTED] also explained [REDACTED] standards based grading system, which does not award grades, but rather assesses students as either "developing" or "secure" for a particular standard. The standards are drawn from the content of the Iowa Core Curriculum. During the 2017-2018 school year, [REDACTED] was secure in in all areas save for one. While generally not all students are secure on all standards, that is the goal for all by the end of the school year. According to [REDACTED] [REDACTED] was progressing from grade to grade with her age group

peers, and she was performing “very well” with regard to her standards. This observation was consistent with the assessments from all of [REDACTED] teachers.

English teacher [REDACTED] [REDACTED] assessed [REDACTED] every two or three weeks on writing or written language. According to [REDACTED] [REDACTED] was average for a sixth grader in spelling, normal in sentence writing fluency, and on grade level with her letter-word identification. Also, [REDACTED] was on grade level for passive comprehension and oral reading. In reading recall, [REDACTED] was assessed as between developing and secure, which equates to being on grade level. In total, [REDACTED] did not have any concerns about [REDACTED] understanding of writings, she did not feel that [REDACTED] could not succeed in her classroom, and she discerned no need to refer [REDACTED] for extra reading work.

According to sixth grade social studies teacher, [REDACTED] [REDACTED] [REDACTED] at first struggled with “getting the main idea,” but she got better with this through the year, and it ended up being one of her strengths. At the end of the first semester, [REDACTED] had one developing skill, but by the end of semester two, [REDACTED] was secure in all categories of [REDACTED] social studies class.

[REDACTED] [REDACTED] is a regional AEA director who serves as a liaison to the schools for special education support. He has a PhD in school psychology and has done extensive work and research in autism and ADHD. He stressed that although there is clear evidence to support that [REDACTED] has a disability and may be an IDEA eligible child, one must still look at the *need* for such services. He believed that following the February 28, 2018 eligibility meeting, the team correctly found needs in math, but not reading, because *accommodations* (as opposed to specialized instruction) could adequately meet those reading needs. Those accommodations adequately served to “level the playing field” across all content areas for [REDACTED]. The newly submitted report from Dr. Beeman and the results from her supports influenced and informed the decision at that point that an IEP in math was appropriate.

[REDACTED] [REDACTED] testified that she does not believe that [REDACTED] teachers area necessarily giving her grades that reflect her true state and might not be accurate. She requests an order finding that [REDACTED] learning disabilities have caused deficiencies that necessitate an IEP.

Conclusions of Law

This case presents an issue of eligibility for benefits under the Individuals with Disabilities Education Act (IDEA). The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education, or FAPE. *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016). Iowa has adopted rules to implement the Federal IDEA at 281 Iowa Administrative Code (IAC) chapter 41.

Free appropriate public education (FAPE), as defined by the IDEA, means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9); 281 IAC 41.17.

Each state that receives federal special education funding must ensure that local educational agencies (“LEA”) are in compliance with the IDEA. Honig v. Doe, 484 U.S. 305, 309, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The IDEA imposes upon school districts the duty to seek out children with a disability and ensure that they receive the special education services they need. 20 USC § 1412(a)(3); 34 C.F.R. § 300.111 (a)(1)(i); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245 (2009).

To receive special education and related services under the IDEA, a child must first qualify as a “child with a disability.” 20 U.S.C. 1401(3)(A). The term “child with a disability” means a child

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

Id.; 281 IAC 41.8.

Respondents here have never challenged the fact that [REDACTED] has a qualifying disability. They have conceded that point. Rather, they question the second prong: her *need* for special education and related services. This is the reason she was initially found ineligible for services and then later found eligible only in the areas of math.

Under the IDEA, the eligibility determination process has two essential stages: (1) the evaluations and written reports, and (2) the eligibility determination meeting. The IDEA requires local education agencies (typically, school boards) to conduct “full and individual evaluation[s]” consisting of procedures “to determine whether a child is a

10
18DOESE0006

child with a disability.” 20 U.S.C. § 1414(a)(1)-(2); 281 IAC 41.301. These should include reevaluations as changing circumstances warrant. *Id.*

“In conducting the evaluation, the local educational agency shall . . . use a variety of assessment tools and strategies to gather relevant functional, development, and academic information, including information provided by the parent, that may assist in determining . . . whether the child is a child with a disability,” and shall “not use any single measure of assessment as the sole criterion for determining whether a child is a child with a disability. *Id.* at § 1414(b)(2); 34 C.F.R. 300.304(b)(1)-(2). In other words, IDEA requires that evaluation be multi-faceted and multi-disciplinary, and the process must include input from the parents.

A state “may fashion its own procedures” for evaluating disability, so long as it satisfies IDEA's requirements. Shore Regional H.S. Bd. of Ed. Vs. P.S., 381 F.3d 194, 198 (3rd Cir. 2004). As noted, Iowa has developed and issued its own procedures by rule at 281 Iowa Administrative Code chapter 41. Once the evaluation of the student is complete, the school district is to convene a meeting to determine whether the student is eligible for special education.

In determining eligibility and educational need, the school district's interpretation of evaluation data “must . . . draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior,” and must “ensure that information obtained from all of these sources is documented and carefully considered.” 34 C.F.R. § 300.306(c). Thus, federal regulations require school districts to draw upon a wide range of the data collected in its evaluation, documenting and carefully considering the data in arriving at its eligibility determination. V.M. v. Sparta Twp. Bd. Of Educ., 2014 WL 3020189 (D.N.J. July 3, 2014).

On the issue of *need* for services, a student needs special education and related services when the student requires those services in order to receive an educational benefit from the educational program. Marshall Joint Sch. Dist. No. 2 v. C.D., 54 IDELR 307 (7th Cir. 2010). If a child has a qualifying disability but only needs related services and not special education, the child is not a child with a disability under the IDEA. 34 CFR 300.8 (a)(2)(i).

An IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. However, the question is whether the IEP is reasonable, not whether it is ideal. Andrew F. v. Douglas County Sch. Dist. RE-1, 137 S.Ct. 988 (2017).

Under the IDEA, a parent or public agency may file a due process complaint relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. 34 C.F.R. § 300.507(a); 281 IAC 41.507(1). The burden of proof in an administrative hearing under the IDEA is properly placed upon the party seeking relief.” Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). Complainants here have filed such an action and consequently hold the burden of proof.

Again, in this case, the Complainants do not purport to challenge any of the process by which the Respondents evaluated or considered ██████ situation. They do not bring any sort of procedural challenge and there is no allegation that any of the procedural safeguards from the Act were ignored. Rather, the Complainants dispute the conclusion that ██████ “is not in need of specialized instruction in her current IEP for English, Social Studies, Science, or Writing.” They filed this Due Process Complaint concerning the matters of her placement and the provision of FAPE to her, and they characterize this case as “an IDEA eligibility dispute.”

In particular, Complainants request an order finding that “the original determination of eligibility from the September 20th meeting be improper, and the subsequent remedial measure of the IEP granted on February 28th to be inadequate, as it does not contain specialized instruction for reading, writing, or science.”

Therefore, the issues can effectively be broken down as follows: First, whether the September 20, 2017, determination that ██████ was altogether ineligible for special education was correct, and second, whether the IEP, which was adopted in February of 2018, provides ██████ a free and appropriate public education (FAPE). Complainants believe ██████ current IEP is not satisfactory and deprives her of FAPE because it does not provide her with ongoing supplemental instruction in the general area of language arts.

September 20, 2017 Ineligibility Determination

As noted previously, the eligibility team issued a PWN on September 20, 2017, in which it determined that ██████ is not an eligible individual under the IDEA. In particular, the PWN provided that

The decision that ██████ is not an eligible individual is based on (a) ██████ performance in behavior, adaptive behavior, fine motor, reading, writing and speech being commensurate with standards applicable to all children, and (b) ██████ 5th grade teacher indicated that although ██████ was not secure in all math standards, the teacher was not concerned since she was making great progress toward being secure. Her current 6th grade math

teacher indicated [REDACTED] performance is appropriate at this time of the school year.

However, even though [REDACTED] elementary math teachers reported no concerns, the evaluation team still found it difficult to “determine if [REDACTED] has a math disability or a lack of opportunity of instruction.” Consequently, it was proposed that the school would provide supplemental math instruction in general education. Progress in that supplemental education was to be monitored to later determine if she is progressing toward mastering her deficits.

It is the general conclusion that [REDACTED] did not need specialized instruction in either math or language arts as of September 20, 2017, that Complainants now question. The Complainants’ primary witness on this claim was tutor/advocate Natalie Berkowitz. As an initial matter, [REDACTED] teachers are found to be more credible and to have more insight into [REDACTED] need for services and specialized instruction than Ms. Berkowitz, who appears to have been an animating force behind the due process complaint. While most of those teachers spent a considerable amount of time teaching and observing [REDACTED] in the education setting, Berkowitz spent relatively little time in the presence of, working with, and learning of [REDACTED] needs. Her teachers, conversely, were able to work with [REDACTED] on a near daily basis for a full year and to see her progress and response to instruction. Those teachers also regularly assessed [REDACTED] for progress and knowledge. Their observations and conclusions are deserving of more weight in analyzing this question.

The manner in which Berkowitz described [REDACTED]—as sullen, depressed, pessimistic, and a loner—is at complete odds with the near unanimous estimation of [REDACTED] by her teachers. To a person, they each described her as enthusiastic, happy, excited to learn, and willing to participate. They also regularly assessed her as part of the school’s standards based grading, and they did so with an eye toward the district’s standards. These consistent assessments of these people, who only saw [REDACTED] in an educational environment, carries greater weight than that of Ms. Berkowitz.

At the time of the September 2017 determination, [REDACTED] teachers did not see a need for formal math intervention. However, in third grade, she had had three secure and ten developing math standards. In fourth grade, she had four secure and seven developing math standards. In fifth grade, she had two secure and nine developing math standards. Her performance, therefore was not at the expected levels for math and compared to her instructional group, her performance was in the low range. Accordingly, there were valid concerns about [REDACTED] need for specialized instruction in math at this time.

The team, though, also noted that [REDACTED] rate of progress was hard to determine. She was new to the [REDACTED] district and therefore little was known about her. Because of

this lack of information about rate of progress, it could not be determined whether she had a disability in math that required specialized instruction. This data was necessary to distinguish between a math disability and perhaps either just a lack of educational opportunity or that she has the skills but has chosen not to use them. Because of this uncertainty, the district reasonably chose to continue with math interventions.

It was reasonable for the team to conclude that [REDACTED] was then making adequate progress toward being secure in math and that according to her teachers, [REDACTED] performance was appropriate for the beginning of her sixth grade year. And, historically, [REDACTED] had responded positively to such interventions. Consequently, it was also reasonable to conclude her instructional needs could be met in math within the general education continuum, along with accommodations, intervention, and math labs to review deficiencies. In sum, the evidence supports that based on information before the team at the time, [REDACTED] did not meet criteria for eligibility in math.

With regard to reading and writing, while [REDACTED] had finished fifth grade at a reading level of "U" and therefore marked as "developing," she was only one level off the expected level of "V." Her teachers explained that [REDACTED] was not the only peer marked as "developing" and that it was common to have developing standards. [REDACTED] had also showed significant growth in reading during her fifth grade year. Simply put, [REDACTED] teachers were not concerned with this area. Also, on her MAP testing [REDACTED] scored in the expected range and on the Iowa Assessments she was in the proficient range. Thus, her standardized testing scores in reading placed her squarely in the average range. Based on this information, the eligibility team's determination that [REDACTED] did not have a need for specially designed instruction in reading or writing is reasonable and appropriate. Complainants have not met their burden of proof to show that the team's determination was in error.

February 28, 2018 IEP for Math

Following the February 28, 2018 meeting, the district agreed to provide [REDACTED] with an Individualized Education Plan (IEP) in math for the remainder of the school year. In doing so, it found that [REDACTED] has difficulty retaining math skills in the general curriculum and keeping up with the classroom's instructional pace, that she needed re-teaching of some skills and that she needs more small group assistance. However, with regard to reading and language arts, the team concluded that [REDACTED] did not require special education. Complainants question this later decision.

As our Supreme Court has clarified, FAPE must provide " 'special education and related services' tailored to meet the unique needs of a particular child, 20 U.S.C. § 1401[9], and be 'reasonably calculated to enable the child to receive educational benefits,' Rowley, 102 S.Ct. 3034 (1982). The IEP is the centerpiece of the IDEA's education delivery

system for disabled children. Andrew F., 137 S.Ct at 994. An IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. However, the question is whether the IEP is reasonable, not whether it is ideal. *Id.* Complainant's appeal brings into question the substantive adequacy of the IEP provided to [REDACTED]

The IEP team proposed that while [REDACTED] disability may impact her reading comprehension, those needs are appropriately met with accommodations, and that she does not need *specially designed instruction*. Dr. [REDACTED] [REDACTED] explained the important distinction between accommodations and specially designed instruction in his hearing testimony. This decision appears to be supported by the record and is appropriate for her circumstances. The September 20, 2017, FIE results showed that [REDACTED] performance was above at or above benchmark levels. Her reading was in the average range in most subtests, according to the three psychological evaluations. [REDACTED] classroom teachers certainly noted no deficiencies in reading that would require special education.

As Dr. Beeman's concluded, in reviewing the totality of the data, [REDACTED] required supports at least in mathematics through special education. However, with regard to reading and writing, he found the assessments to be more mixed. He therefore did suggest some supports and accommodations, some of which were already present in her 504 Plan. Those 504 accommodations, of course, were then rolled into her IEP.

Moreover, even though [REDACTED] ended her fifth grade reading independently at Guided Reading Level "U" rather than the expected level of "V," this one level deficiency is not significant. She was only one level from being considered secure. Many other students were also assessed as "developing" and due to her significant growth during fifth grade, [REDACTED] teachers were not concerned. Also, in the Spring of her fifth grade, [REDACTED] MAP assessments showed that she was reading in the expected range and her Iowa Assessment scores placed her in the proficient range.

The *accommodations* that were proposed by the team, rather than specially designed instruction can adequately address [REDACTED] needs in this area. Those accommodations were incorporated into the IEP. All of her needs can be adequately served by the accommodations incorporated into [REDACTED] IEP, including:

- Lifting of time constraints
- Sitting in close proximity to the teacher
- Checking to make sure she understands directions
- "Chunking" assignments
- Providing notice of changes to routine
- Taking assessments in individual or small group settings

15
18DOESE0006

With these accommodations which would help with reading comprehension, as opposed to specially designed instruction, [REDACTED] has been able to perform on par with her peers and to progress from grade to grade. Here, while there is no dispute that [REDACTED] possesses a qualifying disability, she does not require special education for her to receive an educational benefit in reading or writing, and she therefore is not a child with a disability under the IDEA. Her IEP is reasonable, and is reasonably calculated to enable her to make progress appropriate in light of her particular circumstances.

Order

Complainants have not proven that Respondents denied [REDACTED] a free appropriate public education as alleged in the due process complaint. Respondents correctly denied [REDACTED] an IEP in September of 2017 and the IEP that was subsequently adopted in February of 2018 provided her with FAPE. Complainants' requested relief is therefore denied and the due process complaint is dismissed.

Dated this 7th day of September, 2018.



David Lindgren
Administrative Law Judge
David.lindgren@dia.iowa.gov
Wallace State Office Building
502 E. 9th Street
Des Moines, Iowa 50319

cc: Katherine Beenken, Attorney for Respondents (via email)
Cheryl Smith, DOE (via email)
Carrie Weber, Attorney for Respondents (via email)
Nathan Mundy, Attorney for Complainant (via email)

