

BEFORE THE IOWA DEPARTMENT OF EDUCATION
(Cite as 29 D.O.E. App. Dec. 259)

<i>In re</i>)	
████████████████████,)	
██████████ and)	Dep't Ed. Docket No. SE-504
████████████████████,)	DIA No. 20DOESE0001
Complainants,)	
v.)	
██████████ COMMUNITY)	DECISION
SCHOOL DISTRICT and ██████████)	
AREA EDUCATION AGENCY,)	
Respondents.)	

STATEMENT OF THE CASE

██████████ and ██████████ (Complainants/parents) filed the above-captioned due process complaint on July 24, 2019. The complaint alleges the ██████████ Community School District (the District) and the ██████████ Area Education Agency (the AEA) violated the rights of their son, ██████████ or ██████████ under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.*, as implemented by 281 Iowa Administrative Code chapter 41.

A three-day evidentiary hearing was conducted before the undersigned at the AEA offices in ██████████ Iowa beginning September 30, 2019. The Complainants were present throughout the hearing, and were represented by attorneys Curt Sytsma and Edie Bogaczyk. Attorneys Katherine Beenken and Carrie Weber appeared as counsel for the Respondents.

Testimony was received from both Complainants/parents; neuropsychologist Preetika Mukherjee, Ph.D.; ██████████ middle school principal for the District; ██████████ an eighth grade math teacher for the District; ██████████ director of special education for the District; ██████████ a school psychologist for the AEA; and ██████████ (formerly ██████████ a special education teacher for the District. Complainants' Exhibits A – Z; AA – ZZ and AAA; and District/AEA (Respondents) Exhibits 1 – 11 (pp 1- 330) along with additional exhibits at pp. 331-518 were admitted

into the record without objection.¹

The evidentiary record was closed at the end of the hearing on October 2, 2019. The parties prepared written briefs in lieu of closing statements. The case was submitted upon filing of the Complainants' Reply Brief on December 23, 2019.

Pursuant to 34 C.F.R. § 300.515(a), a final decision must be reached no later than 45 days after the expiration of the 30-day resolution period. This timeline was extended at the request of the parties through January 31, 2020, to accommodate the post-hearing briefing schedule and the drafting of this decision.

ISSUES PRESENTED

Pursuant to 34 C.F.R. 300.511(d) and 281 Iowa Administrative Code 41.511(4), the issues in this hearing are limited to those issues raised in the complaint or upon agreement of the parties. Following a pre-hearing conference held on September 25, 2019, the relevant issues were found to be as follows:

1. Following the student's re-enrollment in the district on March 28, 2019, whether the Respondents made a free appropriate public education available to the student in a timely manner prior to his enrollment in the out-of-district school for the 2019-2020 academic year;
2. If FAPE was *not* made available, whether the private enrollment is proper under the IDEA.
3. If the private enrollment is found to be proper under the IDEA, whether tuition reimbursement should be reduced or denied based on an alleged lack of timely notice from the parents and lack of good faith participation in the IEP process;
4. If the parents failed to provide timely notice of private enrollment, whether the complainants have satisfied the exception to the timely notice requirement under the statute by showing the student would have faced serious emotional harm.

FINDINGS OF FACT

Background Facts, Fall of 2018

██████ is a █████ year-old boy who resides with his parents in ████████ Iowa. His home lies within the boundaries of the District and the AEA. ████████ attended school in the District through eighth grade, during the 2017-18 school year. (Resp. 286-87; Tr. 031).

¹ Complainants' exhibits are labeled "Compl." and District/AEA exhibits are labeled "Resp." throughout the decision. All exhibits are identified by page number, as opposed to general exhibit number.

██████ verbal intellectual abilities fall within the “very superior” range. He also has tested well above grade level in several areas of academic achievement, including sentence reading and writing fluency and math facts fluency. In addition to these intellectual and academic strengths, ██████ has several challenges. Specifically, he has been diagnosed with an autism spectrum disorder, generalized anxiety disorder and specific learning disabilities in written expression and mathematics.² ██████ has had an individualized education program (IEP) and has received special education services under the IDEA in some form since preschool. (Compl. 24, 101, 108; Resp. 263, 270, 283, 287).

██████ anxiety intensified in the fall of 2017, during his eighth grade year. ██████ parents attributed the changes to issues with school, due to the fact they often struggled to convince him to get ready in the mornings. ██████ would then occasionally return home and sleep for several hours and/or isolate himself in make-shift “tents” in his bed. (Tr. 031-032).

██████ increasing anxiety was not necessarily exhibited at school, however. Nor did the parents alert school administrators or staff of their concerns during this time period.³ Ms. ██████ ██████ eighth grade special education teacher, described ██████ as “funny, quick witted,” and “always cheerful” in her class.⁴ Ms. ██████ the AEA psychologist assigned to the middle school, also observed ██████ laughing and joking with other students both in the special education and general education setting. (Tr. 451; 597-600).

Ms. ██████ met with ██████ and one or two other similarly-advanced students for 45 minutes every other day, instructing them in self-advocacy, identifying irrational thinking patterns, and re-framing negative self-talk. Ms. ██████ noted that several of these students were friends to ██████—not simply acquaintances. She based this determination on the fact the students would talk outside of class and share videos with each other in the hallways. (Tr. 276-277, 597-600).

Moreover, in addition to time spent in special education, these same students shared general education classes with ██████ including advanced language arts. Ms. ██████ testified that the general education classes typically contained 25 or so students. When she observed ██████ in a general education class, he did not appear overwhelmed. Ms. ██████ recounted an incident during which another student in the class caused a

² In the Spring of 2018, ██████ also was diagnosed with major depressive disorder.

³ ██████ testified that ██████ “reported to his grandpa that he was being bullied by the rednecks.” (Tr. 034). There is no indication the parents shared this information with the District, however.

⁴ Ms. ██████ recently has married. She was known as Miss. ██████ or “██████” throughout the relevant time period.

disruption and the teachers cleared the room. [REDACTED] was able to return and focus without significant redirection. Ms. [REDACTED] echoed Ms. [REDACTED] statements that [REDACTED] engaged both with students receiving special education and those exclusively in general education. (Tr. 601-602).

Facts Leading up to Private Placement

Meanwhile, [REDACTED] had joined a group of parents with children identified as “twice exceptional.” Twice-exceptional students are gifted intellectually and/or academically, but must learn differently due to diagnoses such as autism and/or mood disorders. As early as August 2017, [REDACTED] began researching and contacting out-of-state schools that specialize in teaching twice-exceptional students. She did not inform District personnel of her inquiries, other than to briefly mention in a November 2017 email to Ms. [REDACTED] that she was considering a “part-time private school . . . that we would coordinate with [the District] for 9th grade.” (Resp. 208, 334. Tr. 040-042).

In December 2017, the Complainants requested an updated psychological evaluation from Dr. Hill. This evaluation clearly was obtained in conjunction with the parents’ search for out-of-state schools, as Dr. Hill indicated in her report that the purpose of the evaluation was to “assess [REDACTED] cognitive and achievement functioning in order to determine appropriate academic placement for [REDACTED].” Email correspondence also confirms [REDACTED] was beginning to submit applications for [REDACTED] to private schools in [REDACTED] during this time period. (Compl. 023; Resp. 282, 350-493).

Dr. Hill listed [REDACTED] diagnoses as autism spectrum disorder and generalized anxiety disorder. Testing showed [REDACTED] cognitive functioning varied markedly, measuring in the “very superior” range in verbal comprehension, with all other categories in the normal range. His achievement levels showed a similar variance. At the conclusion of her report, Dr. Hill recommended a list of accommodations she believed would help with [REDACTED] learning process: 1) a quiet room in which to complete quizzes and testing; 2) an emphasis on verbal teaching modalities, with more allowed time and repetition of subject matter; 3) consistent reinforcement of his efforts and work completion; and 4) “some academic flexibility in being allowed choices as applicable in readings, projects, papers, etc. that match his interests.” Dr. Hill’s report does not mention a residential placement. (Compl. 023-025; Resp. 282-284).

The parents ultimately informed the District they were exploring alternative schools after [REDACTED] annual IEP meeting in February 2018. Following the meeting, the parents emailed the IEP team and expressed concern that the IEP “treats our son as a behavior problem” and did not “identify, much less address, the reasons why his anxiety about school is so severe.” The email closed by stating: “[P]lease be advised that, not only are

we exploring other options for his future education, but we have placed the exploration as our highest priority.” (Tr. 034-035; Compl. 28-48; Resp. 201-202).

District personnel responded to these concerns by scheduling an additional IEP meeting for March 2018. This meeting ultimately was held on April 3, 2018, to enable the Complainants’ attorney to attend. As a result of this meeting, the team incorporated Dr. Hill’s recommendations into ██████ IEP. In addition:

[T]he team determined it was appropriate to drop ██████ ‘behavior’ goal and create a new goal in the ‘adaptive behavior’ domain area The new Adaptive Behavior goal will address mental health needs (i.e. Anxiety). The IEP team also determined it was appropriate to document the parent reported diagnosis of General Anxiety Disorder on ██████ IEP.

The team discussed out-of-state placement, but determined it could revise ██████ IEP and BIP in a manner that would be less restrictive. (Compl. 050A; Resp. 258-60).

Even prior to the meeting, however, Ms. ██████ sent an email to all of ██████ teachers informing them of additional accommodations the team planned to use to ease ██████ anxiety. Included among these accommodations was the option of going into the special education room during independent work times, or whenever ██████ needed a break. Additionally, ██████ would take class assessments in the special education setting, with extended time limits allowed. He would be given rewards for appropriate behaviors, and warned of unusual circumstances that might impact the school day. These and other new accommodations ultimately were incorporated into his IEP in May 2018. The IEP also directed that ██████ receive specially-designed instruction on “asking for help, irrational thinking patterns and re-framing negative self-talk.” Additionally, staff were directed to ensure that ██████ participated in classes with students with similarly-advanced learning needs. (Resp. 195, 222-228, Tr. 375).

The Respondents developed a Likert Scale to monitor the effectiveness of the changes. Each day, ██████ would self-report his anxiety levels to his special education teacher, who would then record this data as well as her own observations until a “trend line” could be developed. Data collection began on April 12, 2018. Due to the fact the data was not collected until late in the semester, however, the team concluded there was “not enough data to show growth in this goal.” (Compl. 58-61; Resp. 228; Tr. 461, 464-65).

██████ *School Performance in the Spring of 2018*

There is evidence ██████ continued to experience periods of increased anxiety during the Spring of 2018. District personnel communicated regularly with ██████ parents, and adjusted his behavioral accommodations when needed. (Resp. 194, 196).

Ms. ██████ acknowledged during the due process hearing that ██████ had occasional bad days, and would “shut down” in class. This behavior was not unlike many other students, however. She also confirmed that ██████ remained capable of completing his school work throughout the semester. (Tr. 599, 607-608).

Ms. ██████ ██████ eighth grade math teacher, testified that nothing about ██████ behavior “stood out” to her during this time period. Notably, ██████ entered her class mid-way through the spring semester, and adjusted without incident. According to Ms. ██████ ██████ socialized regularly with other students, and exhibited generally appropriate behaviors. If Ms. ██████ felt ██████ needed to be “prompted” to refocus his attention on classwork, she would often simply tap on his desk. If this tactic did not work, she would meet with him one-on-one, but not in front of other students. In a typical classroom, Ms. ██████ would have students of all academic abilities, and was nevertheless able to differentiate her instruction accordingly. Ms. ██████ remembered that accommodations for anxiety were included in the new behavior intervention plan (BIP) distributed by Ms. ██████. She noted specifically that ██████ required preferential seating, and that homework for him should be kept to a minimum. (Tr. 344-346; 352).

██████ school records show he was absent 22 days during the spring of 2018—compared with 17 during the fall semester. Only 14 of the 22 spring absences were attributed to “illness,” however, and not all of these absences were due to anxiety. In fact, the Complainants reported ██████ was “ill” on the two days the family traveled to New York for a neuropsychological examination. The number of absences therefore is not determinative of the level of ██████ anxiety during this time period. (Resp. 059-062; Tr. 071-072).

██████ eighth grade transcript shows that he received Bs and Cs in his substantive classes, which included advanced language arts and accelerated science. His math grade improved from a C- during the fall semester to a B in the spring semester, when he switched into Ms. ██████ class. According to Ms. ██████ there was nothing about ██████ grades that would cause particular concern. Notably, although ██████ received more As during seventh grade, he did not take advanced classes during that year. (Resp. 055-056; Tr. 417).

Neuropsychological Examination

The parents continued to pursue options for private placement. As part of this process, ██████ spoke with several New York contacts, and was told that her best option for obtaining financial participation from a public school district was to arrange a neuropsychological examination. On May 10 and 11, 2018, the Complainants traveled with ██████ to New York City so that ██████ could be evaluated by Dr. Mukherjee, whose

name had been given to her by a contact at a private school in New York. The Complainants paid Dr. Mukherjee \$6,000.00 for her services.⁵ (Compl. 100-118; Resp. 262-269, 404-406, 418; Tr. 065; 232).

In addition to a review of records, neuropsychological testing and a personal interview with [REDACTED] Dr. Mukherjee spoke with the parents, Dr. Hill, and Ms. [REDACTED]. She also obtained completed behavioral questionnaires from the parents and [REDACTED] science, math and language arts teachers. (Compl. 100; Resp. 262).

On July 16, 2018, the Complainants received a copy of Dr. Mukherjee's evaluation. Dr. Mukherjee diagnosed [REDACTED] with major depressive disorder, with moderate anxious distress, along with autism spectrum disorder. (Compl. 108; Resp. 270).

At the conclusion of her evaluation, Dr. Mukherjee recommended that [REDACTED] not remain in the public school environment, and that he be placed in a therapeutic residential school program. She further recommended that he receive "appropriate behavior management techniques" shown useful for students on the autism spectrum, to help [REDACTED] better understand and detect moods and facial expressions. Dr. Mukherjee also recommended that [REDACTED] continue to receive regular individual therapy, speech language therapy "at least 2 times per week," and specific academic interventions in writing and mathematics. Dr. Mukherjee also suggested parent training to help with "the behavior outbursts at home." (Comp. 109-112; Resp. 270-73).

The [REDACTED] [REDACTED]

Dr. Mukherjee's office provided the Complainants with a list of private schools attended by previous clients. One such school was The [REDACTED] [REDACTED] in [REDACTED] [REDACTED] [REDACTED] ([REDACTED] The Complainants were particularly interested in [REDACTED] due to the fact it offered a summer program to help determine whether a student would be a good fit. (Tr. 042-043).

[REDACTED] describes itself as a fully accredited, co-educational boarding and day school specializing "in educating students with a variety of learning differences." The school offers individualized learning programs with class sizes averaging from six to ten students. [REDACTED] also offers an "executive functioning program" facilitated by a special education teacher to help students who show deficits in this area. The executive functioning program appears to consist primarily of evening programs and activities in areas ranging from personal finance to buying, preparing and consuming food to developing self-confidence. [REDACTED] offers dual enrollment classes, but not advanced placement courses. (Resp. 086; Tr. 089-090).

⁵ Dr. Mukherjee's fee for the September 2019 evaluation increased to \$6,500. (Tr. 232).

Of particular note, ██████ uses a five point-level system to reward positive behavior and reduce negative behavior. Behaviors monitored include “personal hygiene, room care, academic performance, punctuality and responsibility, appropriate use of technology, respectful and compliant behavior, and adhering to the dress code.” In addition, attendance is mandatory with certain exceptions verified by written documentation.⁶ (Compl. 163; Resp. 022).

█████ had a good experience during his first week in the summer program, and requested to attend a second week. Based on ██████ interest—as well as feedback received from administrators and teachers—█████ parents decided to enroll him in the school for the upcoming 2018-2019 academic year. (Tr. 043-044).

To facilitate the ██████ placement, on August 3, 2018, the parents filed a due process complaint against the District and AEA. The 2018 complaint was dismissed following a successful resolution meeting held by the parties on August 16, 2018. During the meeting, the District and AEA agreed to compensate the parents for a portion of the private school tuition for the 2018-19 school year. Ms. ██████ characterized the agreement during the present due process hearing as a business decision. (Compl. 121, 128; Tr. 381).

Facts Leading up to Present Complaint

The Complainants were pleased overall with their son’s experience at ██████.⁷ On March 14, 2019, ██████ wrote to ██████ staff to indicate her intent to re-enroll ██████ for the following school year. The email stated in relevant part:

█████ has had a great year so far, and we plan to have him return next year. We hired an attorney last year to work with ██████ public school in Iowa to pay for part of the tuition at ██████ due to the fact his needs were not being met at [the public school]. It was not an easy process but they finally agreed.

⁶ Notably, however, ██████ does not administer a separate “special education” program. It does not maintain a formal process for monitoring students’ progress, and did not follow ██████ prior IEP or develop its own during the 2017-2018 school year.

⁷ This is not to say there have not been behavioral issues. There is evidence ██████ occasionally refused to get out of bed at ██████. Moreover, as of the dates of the due process hearing, ██████ was home in Iowa after being placed on “medical leave” by ██████. ██████ alleged he had been noncompliant with school rules, and had engaged in bullying, harassment and aggressive behaviors. ██████ therefore sent him home for a medication review. (Tr. 053; 110; Resp. 417, 518).

We plan to do the same thing this year. He had a formal IEP at [REDACTED] I know he no longer has this at [REDACTED] but I need to have some of the markers from [REDACTED] to show his improvement this year.

(Resp. 066; Tr. 050-052).

On March 15, 2019, Ms. Bogaczyk contacted Ms. Beenken and requested an IEP meeting to discuss, among other things, “why it would be appropriate and a benefit for [REDACTED] to continue receiving his educational services and supports” from [REDACTED] Ms. Bogaczyk indicated that [REDACTED] was requesting a commitment from the parents by April 5, 2019. Accordingly, the parents hoped that the IEP meeting would be held prior to that date. (Compl. 0134).

Ms. Beenken responded to Ms. Bogaczyk via email on March 20, 2019. Ms. Beenken indicated that an IEP meeting had been scheduled for April 5, 2019. (Compl. 0135).

Due to the tight time frame, the Respondents did not receive information from [REDACTED] that was needed to update [REDACTED] IEP by the April 5, 2019, meeting. The team nevertheless determined that a re-evaluation was appropriate. An additional meeting was scheduled for May 10, 2019, to address information learned from [REDACTED] and the results of the re-evaluation. (Resp. 048-049).

May 2019 IEP and District Programming

Ms. [REDACTED] took primary responsibility for drafting the May 2019 IEP, which was provided to the parents on May 22, 2019. In all, Ms. [REDACTED] devoted more than 50 hours toward preparing the document. The IEP summarized parental concerns as follows:

[REDACTED] parents request that the IEP team place their son in a therapeutic residential school program of the type recommended by neuropsychologist Preetika Mukherjee in May of 2018. This request is based on three beliefs: First, they believe that their son’s mental health was deteriorating rapidly during his placement in the [REDACTED] Middle School during the 2017-2018 academic year. Second, they believe that his placement in a therapeutic residential school during the 2018-2019 academic year has proven valuable to his academic and mental health, but that more time is needed before he can be safely returned to the public school environment. Third, they believe that a placement in the [REDACTED] High School for the 2019-2020 academic year will threaten the progress he has made and cause regression in his mental health status and overall ability to function.

(Compl. 145-176; Resp. 003; Tr. 490).

(Compl. 154; Resp. 012).

This goal is consistent with deficit areas identified both by ██████ treating psychologist, Dr. Hill, and by Dr. Mukherjee. Dr. Hill noted in her December 2018 evaluation that ██████ employed “numerous self-deprecating statements,” whereas Dr. Mukherjee believed ██████ suffered from “rigidity” and “difficulty with emotion and behavior regulation.” (Compl. Resp. 270-72; 283).

The IEP also contained a detailed plan for implementing the proposal. ██████ would receive specially-designed instruction “individually or in small group with opportunities to practice the skills through school and community settings.” The IEP also provided for ██████ “to participate in classes with peers with similar accelerated learning needs.” It also recommended that ██████ continue to serve as a “mentor” to other students. (Compl. 155, 158; Resp. 013, 016).

To monitor ██████ progress in the identified area, a “point sheet” would be completed daily by ██████ his special education and general education teachers, and graphed on a regular basis. The IEP recognized that ██████ may show symptoms outside of the school setting, and therefore proposed to incorporate data collected by his parents. Members of the team would evaluate the trendline produced by the collected data after four weeks of instruction “and a minimum of eight data points following the initiation of or change in instruction.” (Compl. 154; Resp. 012).

In addition to the IEP, the accompanying BIP set out multiple accommodations to further ease ██████ anxiety, including reminders to take “thought breaks” before known stressful situations; to employ breathing exercises, with or without a telephone application known as “Headspace;” and the directive that teachers break down long-term projects into more manageable units. (Compl. 177-181; Resp. 035-038).

The IEP also contained information, albeit somewhat minimal, regarding an Iowa legislative directive to include 21st Century Skills as part of the Iowa Core standards. In 2007, the Iowa Legislature established a framework of five broad skill areas it believed should be woven into core subject matter: 1) civic literacy; 2) employability skills; 3) financial literacy; 4) health literacy; and 5) technology literacy. To help ██████ achieve these skills and transition into the workplace, the IEP provided:

A referral to Vocational Rehabilitation Services of Iowa will be made once ██████ turns 16. It is also recommended ██████ participate in Money Management, Financial Literacy, School to Work, or the Experienced Based Community Education program to build needed skills.

(Compl. 007, 149; Resp. 006).

After attempts to resolve the complaint informally failed, the parents sought an updated neuropsychological examination from Dr. Mukherjee. At the conclusion of her evaluation, Dr. Mukherjee diagnosed [REDACTED] with anxiety disorder, autism spectrum disorder without language or intellectual impairment, and specific learning disorder with impairments in written expression and mathematics. (Compl. 194).

In her evaluation report, Dr. Mukherjee concluded:

It is clear that [REDACTED] has made progress in academic, emotional, and behavioral functioning in the last year. His engagement in school improved over the year [and] his emotional outbursts reduced. However, [REDACTED] continues to exhibit difficulty with social skills rigidity, adaptive functioning, executive functioning, and academic skills.

Dr. Mukherjee opined that [REDACTED] continued to require a placement “in a residential program in a small class and small school.” (Compl. 194-195).

During the due process hearing, Dr. Mukherjee justified this recommendation by asserting: “In a bigger setting, in a bigger classroom, a bigger school, that anxiety and emotional dysregulation will come up again. He will have, you know—start showing the transition difficulty and his rigidity will come up. He will struggle more in a bigger setting.” (Tr. 225).

Notably, Dr. Mukherjee had recommended a “therapeutic” placement in her 2018 evaluation. The term “therapeutic” was eliminated from her 2019 recommendation. When asked during the hearing for clarification of the term “therapeutic” in an educational context, Dr. Mukherjee stated: “It was really important that a school or a program that he went to provided the support and monitoring so that, you know, he was—he will be able to transition, he will be able to engage in the tasks.” (Tr. 221).

Another significant change from Dr. Mukherjee’s 2018 evaluation was the elimination of the diagnosis of depression. Dr. Mukherjee explained during the hearing that she removed this diagnosis based on her findings that [REDACTED] did not seem to exhibit as much irritability or dysregulation. When asked during the hearing what may have caused this improvement, Dr. Mukherjee replied:

When I spoke with [the [REDACTED] [REDACTED] and in talking with [REDACTED] it was clear that, you know, the supports that were being provided to regulate his emotions in school, when the demands were put, when he did not want to engage in tasks and wanted to remove himself, and then there was somebody who helped him with talking through it, talking through the supports, and what needs to be done in the moment.

(Tr. 223-224). Additionally, Respondents' counsel asked Dr. Mukherjee later in the hearing what services or accommodations she believed [REDACTED] needed that were not contained in the May 2019 IEP. The only accommodation she listed was a smaller class size. (Tr. 248).

CONCLUSIONS OF LAW

Law Governing Private Enrollment under the IDEA

Congress enacted the IDEA to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). Under the IDEA, the duty to provide FAPE is placed upon the State in which the child—defined as between ages 3 and 21—resides. *Id.*, § 1412(a)(1); *see also* 34 C.F.R. § 300.201 (requiring the local education agency (LEA) to provide FAPE to children with disabilities “within its jurisdiction”). Under the corresponding Iowa statute, a school district is responsible for providing FAPE to “children who *reside* in that district” Iowa Code § 256B.2(4) (emphasis added).

If the parents of a child eligible for services under the IDEA believe the local district has not made FAPE available in a timely manner, they may request a due process hearing to determine whether the district must reimburse them for the cost of private school placement. 20 U.S.C. § 1412(a)(10)(C)); 34 C.F.R. § 300.148. In order for reimbursement to be appropriate, a court or hearing officer must find:

1. That the public agency did not make FAPE available in a timely manner before the private school placement; and
2. That the private placement is appropriate.

34 C.F.R. § 300.148; *School Comm. of Town of Burlington. v. Department of Educ.*, 471 U.S. 359 (1985) (where court determines public school district's IEP is inappropriate and private placement is proper, child should be placed in private school at public expense); *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (reimbursement for unilateral private placement available “only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”). The burden of proof for alleged IDEA violations rests with the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61-62 (2005); *see also Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 765 (8th Cir. 2011) (in tuition reimbursement case, “[p]arents have the burden of persuasion as to the inadequacy of the IEPs.”).

Whether Respondents Offered FAPE in a Timely Manner

As set forth above, to succeed on their request for tuition reimbursement, the Complainants first must show the Respondents failed to offer FAPE in a timely manner. 34 C.F.R. § 300.148. FAPE is defined in the IDEA to include “special education and related services that: 1) are provided at public expense; 2) meet the standards of the State educational agency; 3) include the appropriate preschool, elementary school, or secondary school education; and 4) conform with the student’s IEP. 20 U.S.C. § 1401. At issue in the present case is whether the IEP offered to the parents following the May 10, 2019, meeting substantially complies with the IDEA and State educational standards.

The statute defines an IEP as “the means by which special education and related services are tailored to the unique needs of a particular child.” *Id.* at § 1414(d)(1)(A)(i)(I-IV). In *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (U.S. 2017), the United States Supreme Court clarified that: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Significantly, a review of an IEP must focus on “whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Id.* (emphasis in orig. citations omitted); *see also Sneytzer v. Iowa Dep’t of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015) (“The school is not required to provide an optimal experience for a student with a disability, but instead must simply provide the student with a FAPE consistent with the IEP.”).

After reviewing the record as a whole, the undersigned concludes the Complainants failed to meet their burden to show the IEP offered in May 2019 did not offer █████ a FAPE. Rather, the evidence shows the May 2019 IEP contains an adaptive behavior goal designed to reduce █████ anxiety while improving his self-esteem, perseverance and problem-solving abilities. The IEP lists specific accommodations to help █████ achieve this goal that are wholly consistent with the recommendations set forth in Dr. Hill’s December 2018 evaluation. Dr. Hill has provided therapy to █████ since 2013, and is therefore most qualified to suggest educational strategies that would work for his unique strengths and challenges.

In particular, Dr. Hill recommended █████ be allowed to take tests and quizzes in a “quiet room” to minimize distractions and pressure from other students. One of the accommodations listed in the IEP is that █████ take all classroom assessments in the special education setting.

Secondly, Dr. Hill noted that █████ learns best with “verbal teaching modalities,” and may require more time, repetition and alternate instruction. Similarly, she noted that due to his autistic thought processes, he would benefit from greater academic flexibility. The May 2019 IEP encourages teachers to “differentiate instruction, and allow choices in task completion.” It also directs teachers to break down long-term assignments into smaller tasks.

Dr. Hill's evaluation also emphasizes the need for consistent reinforcement of [REDACTED] efforts and work product, to help improve his self-esteem. The May 2019 IEP incorporated this recommendation by requiring staff to model a "growth mindset," while reinforcing [REDACTED] persistence and progress. Additionally, the IEP suggests that [REDACTED] be provided with opportunities to mentor other students, which will further enhance his self-image.

Also significant is the fact the District offers a variety of advanced-placement and dual enrollment courses to enable [REDACTED] to remain challenged in school. If he chooses to do so, [REDACTED] may continue in both archery and swimming through his physical education classes.

Additionally, although not addressed in-depth, the IEP identified the need to develop [REDACTED] 21st Century Skills, suggesting not only that he take courses in money and financial management and school-to-work, but also that he participate in the EBCE program. The District's curriculum offered through the Compass course, described in-depth by Mr. [REDACTED] during the hearing, would then supplement these courses to further develop [REDACTED] general living skills.

Perhaps most importantly, the IEP provides for regular progress monitoring through the use of a Likert scale and trend line analysis. If the trend line does not show progress toward the annual goal, the team would make adjustments in [REDACTED] instructional program. Dr. Mukherjee testified that it was important that any school [REDACTED] attended provide both monitoring and support to ensure he is able to appropriately engage. [REDACTED] not only failed to develop an IEP for [REDACTED] but also—without providing regular therapy sessions—lacked any way to measure [REDACTED] emotional stability at the school.

During the hearing, Ms. [REDACTED] acknowledged the Likert scale is not foolproof in identifying patterns of anxiety, due to the fact a teenaged boy is not always aware of his anxious moods. She testified, however, that [REDACTED] self-reports were not the only data the team would consider. Teachers also would watch for observable indicators of anxiety discussed by the team, such as hair twirling, verbal refusals and other behaviors that may not previously have been present.

When questioned on cross-examination, Ms. [REDACTED] further admitted that the written goal in the 2019 IEP was identical or virtually identical to that contained in the May 2018 IEP. It is noteworthy, however, that the changes made in the May 2018 IEP never were given a chance to work, since [REDACTED] was removed from the District for the following school year. Ms. [REDACTED] further emphasized that the underlying instruction would not necessarily remain "static."

Contrary to the Complainants argument, the fact the IEP team "borrowed" from [REDACTED] *supports* rather than *detracts from* the appropriateness of the IEP. That

several pages of the IEP address [REDACTED] experience at [REDACTED] shows the District was open to new techniques, and willing to make changes in its own practices to help ease [REDACTED] return to the District.

The Respondents also make much of the fact the May 2019 IEP did not expressly mention Dr. Mukherjee's July 2018 evaluation. This omission clearly was an oversight, and does not render the IEP less effective. (See Tr. 518). Notably, the majority of Dr. Mukherjee's recommendations are consistent with those suggested by Dr. Hill, and incorporated as "accommodations" in the IEP.⁸ As set forth above, when asked specifically during the hearing, Dr. Mukherjee listed "a smaller classroom" as the only necessary accommodation or service she believed was missing from the May 2019 IEP. (Tr. 248).

With due respect to Dr. Mukherjee's experience and credentials, her suggestion that [REDACTED] requires a smaller class size and residential program is not supported in the record. Dr. Hill—who has known and worked with [REDACTED] for several years—did not recommend that [REDACTED] leave District schools, even though the stated purpose of her evaluation was to determine appropriate academic placement. Nor did she suggest he would benefit from a residential program.

As noted above, when asked during the hearing to explain her recommendation for a smaller, residential program, Dr. Mukherjee replied only that [REDACTED] had not been sufficiently trained to use his coping mechanisms in a larger setting. Even assuming this were true, the May 2019 IEP provided numerous opportunities for one-to-one support during the school day, either from a counselor, special education teacher or general education teacher. The IEP also gave [REDACTED] the option to take a break between or during his general education classes. The directive that he take class assessments in the smaller special education setting also was designed to reduce pressure.

Moreover, Ms. [REDACTED] and Ms. [REDACTED] testified that [REDACTED] appeared to be fairly well-adjusted in their classrooms, socializing with peers both in the special education and the general education setting. Each teacher emphasized that [REDACTED] occasional bad days did not distinguish him from any other student. Although neither teacher is a medical professional, these teachers knew [REDACTED] well and were able to observe [REDACTED] first-hand over several months during the critical time period leading up to the decision to remove him from the District. See, e.g., *Sneitzer*, 796 F.3d at 950 (finding ALJ appropriately gave more weight to testimony of school personnel than to medical and

⁸ Each of the services recommended by Dr. Mukherjee in her July 2018 evaluation—with the exception, perhaps, of parent training—is available through the District and the AEA. (Compl. 109-110; Tr. 448, 453, 516, 519-524)

psychological experts who were not as familiar with the student).⁹ Ms. [REDACTED] also emphasized that [REDACTED] was able to keep up with his school work—which included two accelerated courses—despite his anxiety and absences. *See Endrew F.*, 137 S. Ct. at 999 (“for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade’”) (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 181 (1982)); *see also CJN v. Minneapolis Public Schools*, 323 F.3d 630 (student’s ability to show more than “*de minimis*” academic progress despite his disability-related struggles is “significant evidence” that his disability was addressed “at least in part” by the school).

The fact that [REDACTED] appeared tired and discouraged during the afternoon and evening is not necessarily reflective of the school size, or his feelings about the District in particular. The Complainants did not produce testimony or records from [REDACTED] treating psychologist, Dr. Hill, and/or his psychiatrist, Gregory Hills, M.D., which may have shed light on why [REDACTED] experienced increased anxiety during this time period.¹⁰ Although Dr. Hill’s report—the only evidence produced from Dr. Hill—referenced “numerous self-deprecating statements,” it did *not* diagnose depression. The report further described [REDACTED] as “attentive, interested, and motivated to do his best” throughout the testing sessions. (Comp. 23; Resp. 282). In short, there is nothing in Dr. Hill’s report to suggest [REDACTED] should not remain in District schools. *See, e.g., Snetizer*, 796 F.3d at 950 (insignificant evidence to support mother’s fear that returning student to district high school “would cause [student] severe and lasting psychological harm”).

⁹ Although Dr. Mukherjee’s 2018 evaluation made note of several concerns identified on the behavior questionnaires completed by three of [REDACTED] teachers, she did not elaborate on these concerns during the hearing. The hearing testimony provided by Ms. [REDACTED] and Ms. [REDACTED] therefore is given greater weight.

¹⁰ There was some suggestion during the hearing that [REDACTED] medication changed at some point during the previous calendar year. This issue was not developed by either party, however.

Conclusion Regarding the Respondents' Ability to Provide FAPE

The record shows [REDACTED] has been largely content at [REDACTED] with fewer absences from class, and slightly improved grades. A smaller class size and residential program may in fact be *ideal* for [REDACTED] circumstances. It therefore is understandable his parents would like him to continue at [REDACTED] throughout the remainder of his high school years.

The issue in this proceeding, however, is not which school and program are *optimal*, but whether the educational experience offered by the Respondents is “reasonably calculated to enable [REDACTED] to make progress appropriate in light of [his] circumstances.” *Endrew F.*, 137 S. Ct. at 999. The Complainants have not met their burden to prove that the Respondents did not offer a FAPE in a timely manner for the 2018-2019 school year.

Remaining Issues

In view of the above findings, it is unnecessary to address the remaining issues regarding the appropriateness of [REDACTED] and tuition reimbursement.

ORDER

The Complainants have not proven that the Respondents violated the IDEA as alleged in the due process complaint. As a result, the Complainants' requested relief is denied, and the due process complaint is dismissed.

Dated this 22nd day of January, 2020.



Carla J. Hamborg
Administrative Law Judge

cc:

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