

**DELAWARE DEPARTMENT OF EDUCATION**

**SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

In the Matter of: )  
)  
*REDACTED* (“*Student*”), )  
)  
Complainant, )  
)  
v. )  
)  
*REDACTED School District*, )  
)  
Respondent. )

**HEARING DECISION AND ORDER**

DE DP #22-12

Hearing Dates: April 7 and 14, 2022

Hearing Panel:  
Melissa L. Rhoads, Esq., Panel Chairperson  
Joe-Anne H. Corwin, Educator Panelist  
Paul King, Layperson Panelist

Representatives:  
Alexander T. Corbin, Esq., counsel for the Complainant  
Jennifer Kinkus, Esq., counsel for the Respondent

**CORRECTED DECISION AND ORDER**

**Case Background/Procedural History**

The Complainant, REDACTED (hereinafter referred to as “Student”) through REDACTED parents S.K. (hereinafter singularly referred to as “Mother”) and REDACTED (hereinafter jointly referred to as “Parents”) filed a Due Process Complaint on February 3, 2022.

A Pre-Hearing Conference was held in this matter on February 22, 2022. As a result of said conference, a Pre-Hearing Conference Order was entered.<sup>1</sup> Said Order is incorporated herein by reference.

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<sup>1</sup> The Pre-Hearing Conference Order was Amended on March 16, 2022 and Corrected on April 5, 2022.

Prior to the Hearing, the Parties filed a Motion to Extend the hearing panel's decision deadline. The Motion was granted. As a result, the deadline for the hearing panel's decision was extended to May 11, 2022.

The Hearing was conducted via Zoom over the course of two nonconsecutive days: April 7, 2022 and April 14, 2022. The Complainants called 9 witnesses. The Respondent called 3 witnesses. The hearing panel finds all witnesses credible, although the testimony of each witness has been given different weight.

Subsequent to the conclusion of the Hearing, both Parties filed written closing arguments.

### **Issues Presented**

The issues presented in the Due Process Hearing as identified by the Parties at the Pre-Hearing Conference are:

1. Whether the Student is entitled to full days of compensatory education for alleged FAPE violations in SY2018-2019 until the Student's placement in a private institution in February 2020?
2. Whether the Student is entitled to reimbursement for the Student's time in private placement?
3. Whether the Student is entitled to reasonable attorney fees and costs?

### **Findings of Fact**

Prior to the Hearing, the Parties stipulated to the following facts<sup>2</sup>:

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<sup>2</sup> Citation references to the Parties' "Joint Stipulation of Facts" will be noted as "JS" followed by the paragraph number.

1. REDACTED (“Student”) is the REDACTED of REDACTED and REDACTED (“Parents”).
2. Student was born on REDACTED and is currently REDACTED years old.
3. Student attended REDACTED School in the REDACTED School District (the “District”) beginning with the 2016-2017 school year (REDACTED grade) until February 2020 (REDACTED grade).
4. Student graduated with a standard high school diploma from the District in spring of 2021.
5. Student was found eligible for a Section 504 Student Accommodation Plan and such a Plan was developed and put in place on or around April 11, 2018.
6. Student was found to meet the eligibility requirements to receive special education and related services under the IDEA, 20 U.S.C. § 1400, *et seq.*, in the category of Other Health Impairment on March 8, 2019.
7. A Social-Emotional and Behavioral Evaluation was completed by REDACTED, District School Psychologist on April 4, 2019.
8. Student’s eligibility classification was changed to Emotional Disability (Primary) and Other Health Impairment (Secondary) on May 1, 2019.
9. Invitations for Meetings for the following dates were sent by the District and received by Parents in accordance with all applicable laws:
  - a. March 8, 2019
  - b. March 19, 2019
  - c. April 5, 2019
  - d. May 1, 2019

- e. May 22, 2019
- f. August 27, 2019
- g. October 18, 2019
- h. November 19, 2019
- i. December 5, 2019
- j. February 5, 2020
- k. May 13, 2020
- l. September 3, 2020
- m. December 16, 2020
- n. March 31, 2021

In reaching the decision below, all of the two days of testimony<sup>3</sup>, including all witnesses and approximately 640 pages of admissible exhibits were considered. Rather than recite all of the same, for the sake of brevity only the relevant portions are set forth in the following section.

The Parties submitted a Joint Exhibit binder, which was introduced into evidence as a whole during the course of the Hearing.<sup>4</sup>

Based upon the testimony and evidence in the record, the hearing panel makes the following findings of fact:

1. In April 2018, Student was found eligible for a Section 504 Plan based upon diagnoses of Unspecified Mood Disorder and Attention Deficit Disorder.<sup>5</sup> Parents requested a

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<sup>3</sup> Citation references to testimony in the transcript of Hearing Day 1 will be noted as "T1" followed by the page number. Citation references to testimony in the transcript of Hearing Day 2 will be noted as "T2" followed by the page number.

<sup>4</sup> Citation references to the Parties' "Joint Exhibit Binder" will be noted with "J" followed by the page number.

<sup>5</sup> T1 77-78.

Section 504 Plan for Student while REDACTED was a patient in MeadowWood Behavior Hospital, receiving treatment for mental health issues relating to two students having completed suicide at Student’s REDACTED school.<sup>6</sup> The Section 504 Plan indicated that “[d]uring times of intense emotional anxiety/depression [Student’s] thought processes can be highly disorganized and impulsive.”<sup>7</sup> The Section 504 Plan was in place the remainder of the 2017-2018 school year and the start of the 2018-2019 school year.<sup>8</sup> District and Parents agreed that the accommodations in the Section 504 Plan were the appropriate step to help Student at the time because based on Student’s intellectual abilities, REDACTED did not need specialized instruction.<sup>9</sup> Student’s teachers were aware of the Plan and implemented the accommodations set out.<sup>10</sup> The 504 Plan provided for the following accommodations: a) When anxious or depressed, Student could have access to the Wellness Center or Counseling Center; b) Student may take a break when needed to decompress/gather thoughts/refocus; c) Larger assignments may be broken down into smaller/more manageable parts; d) Student may have 50% extra time on assignments as needed; and e) Use of daily progress sheet to help with organization and completion of assignments.<sup>11</sup> Student utilized the accommodations in REDACTED Section 504 Plan when REDACTED was struggling emotionally.<sup>12</sup> Student made progress.<sup>13</sup>

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<sup>6</sup> T2 182.

<sup>7</sup> J1-01, T1 39.

<sup>8</sup> T1 43-44.

<sup>9</sup> T1 68-69; T2 75-78; T2 210.

<sup>10</sup> T1 43-44.

<sup>11</sup> J1-02.

<sup>12</sup> T1 44-45.

<sup>13</sup> J66.

2. In February 2019, while the Student was again a patient at MeadowWood for mental health issues, Parents requested Student be evaluated for special education services because REDACTED needs had changed, and Parents believed REDACTED was going to require significantly more supports than was set out in REDACTED 504 Plan.<sup>14</sup> Parents provided the District for the first time, an April 25, 2018 independent evaluation by Nemours Children’s Hospital.<sup>15</sup> Utilizing that evaluation, the District found Student eligible for special education services under the classification of Other Health Impairment on March 8, 2019.<sup>16</sup> The Nemours Evaluation showed Student’s cognitive and academic functioning were solidly in the average range.<sup>17</sup> Parents and Teachers were concerned about Student’s social emotional functioning.<sup>18</sup> Student felt challenges with anxiety and depression.<sup>19</sup>
3. The District instituted an interim plan for Student’s return pending development of REDACTED IEP and to allow data to be collected for the IEP.<sup>20</sup> The interim plan included: (a) Student would do daily check ins and check outs to set a goal for the day and to touch base on how REDACTED was feeling; (b) Student could request to visit Guidance, the Wellness Center or REDACTED, psychologist at Student’s school, throughout the school day; (c) District would track how frequently REDACTED requested a visit and how long the visits lasted for development of Student’s IEP; (d)

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<sup>14</sup> J3; T2 183.

<sup>15</sup> J3-03; J6; T2 183.

<sup>16</sup> J8-J9; T1 85-86; T1 88; JS6.

<sup>17</sup> J6-04-05; T1 86.

<sup>18</sup> J6; T1 88-89.

<sup>19</sup> J6; T1 87.

<sup>20</sup> J11; T1 90.

- Student's third marking period grades would be changed to "medical"; and (e) REDACTED placement would be an A setting with no removal for academic support.<sup>21</sup>
4. The District collected data on Student.<sup>22</sup> In order to allow the District adequate time to collect this data, the team, including Parents, agreed at an April 5, 2019 meeting to extend the 30-day period to propose a draft of the initial IEP to 45 days.<sup>23</sup> During this time period, Student continued to attend modified school days with homebound instruction and continued receiving the supports and services described above.<sup>24</sup>
  5. After Student returned to school later in March 2019, a Social-Emotional Behavioral Evaluation was conducted.<sup>25</sup> At a subsequent meeting on May 1, 2019, using the results of the Evaluation, Student's eligibility classification was revised to Emotional Disability as primary and Other Health Impairment as secondary.<sup>26</sup>
  6. The initial IEP was developed at a May 1, 2019 meeting.<sup>27</sup> The IEP recognized Student "has difficulty with emotional regulation."<sup>28</sup> Student had trouble managing feelings of depression and anxiety and coping with those feelings, which impacted Student's ability to remain in the classroom.<sup>29</sup> The IEP had appropriate transition goals.<sup>30</sup> The IEP provided identified a need for "Coping Skills – Replacement Behaviors" and focused on increasing the time Student would spend in class.<sup>31</sup> Student's Present Level of Educational Performance at that time based on the data showed Student was out of

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<sup>21</sup> J11; T1 90-91.

<sup>22</sup> T1 92-94.

<sup>23</sup> T1 97.

<sup>24</sup> J15, T1 97.

<sup>25</sup> J12; T1 94-95; JS7.

<sup>26</sup> J17-11-12; T1 98-99; JS8.

<sup>27</sup> J22.

<sup>28</sup> J22.

<sup>29</sup> J18006; T1 221.

<sup>30</sup> J18 -07-08.

<sup>31</sup> T2 100-101.

class meeting with support staff or early dismissal 26.3% of the time.<sup>32</sup> The IEP provided several accommodations all aimed at increasing Student's instructional time, such as: a) Teachers would encourage the use of coping strategies, the check in/check out process would continue; b) Teachers would redirect and prompt Student to complete assignments; c) Student would have access to the guidance counselor, Wellness Center, or school psychologist; d) Student would receive direct instruction in the area of coping skills; e) 20 minutes per week of counseling services; and f) 20 minutes per week of Cognitive Behavior Therapy (CBT).<sup>33</sup> Student's Least Restrictive Environment (LRE) was determined to be an A setting.<sup>34</sup>

7. At a May 22, 2019 meeting the IEP Team determined Student would receive year-round services which continued through the Summer of 2019 and provided counseling sessions with REDACTED, behavioral specialist at Student's school and a licensed professional counselor of mental health.<sup>35</sup>
8. Parents had conversations with REDACTED during the summer of 2019-2020 about the possibility of a need for residential treatment for Student.<sup>36</sup>
9. In late August prior to the start of the 2019-2020 school year, Student's IEP was revised to include a Safety Plan to address how teachers and staff should respond when Student exhibited agitated behavior or reported suicidal ideations.<sup>37</sup>

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<sup>32</sup> J18-10; T1 100-101.

<sup>33</sup> J18-10; T1 102-106.

<sup>34</sup> J18-10.

<sup>35</sup> J23; T1 132.

<sup>36</sup> T1 207; T2 190, T2 203.

<sup>37</sup> J27; T1 182-184.



10. In the fall of 2019, Student's struggles increased.<sup>38</sup> REDACTED completed a Functional Behavior Assessment, which identified three target behaviors to address: a) emotional distress; b) leaving class and c) work incompleteness.<sup>39</sup> A work completion goal was added to Student's IEP at a revision meeting on October 18, 2019.<sup>40</sup> The goal focused on Student's ability to keep an assignment log, provided accommodations to help Student, including specialized instruction.<sup>41</sup> After the November 19, 2019 meeting and implementation of the Behavioral Support Plan, Student was having more delusions and challenges, despite the supports in place and accommodations provided.<sup>42</sup>
11. During the school winter break, Student was declining with REDACTED mental health.<sup>43</sup> REDACTED was deteriorating quickly at home.<sup>44</sup> REDACTED had attempted suicide.<sup>45</sup> REDACTED took Parent's car without knowledge and ran it into a telephone pole, totaling the car.<sup>46</sup> REDACTED at-risk behaviors were escalating at home.<sup>47</sup>
12. On February 5, 2020, the IEP team agreed that Student needed a Residential Treatment Facility with a focus on therapeutic support.<sup>48</sup> The application process was started as required by the Interagency Collaborative Team (ICT).<sup>49</sup> Student's IEP was

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<sup>38</sup> T49; T1 187; T2 266.

<sup>39</sup> J34; T1 114-115.

<sup>40</sup> J23; T1 225-226.

<sup>41</sup> T1 225-226.

<sup>42</sup> T1 120-121.

<sup>43</sup> T2 189.

<sup>44</sup> T2 191.

<sup>45</sup> T2 191.

<sup>46</sup> T2 191.

<sup>47</sup> T2 191.

<sup>48</sup> J44-08; J46; T1 123-124; T1 188; T1 248.

<sup>49</sup> T1 123-124; T1 188; T1 248.

substantially revised on February 5, 2020.<sup>50</sup> An “Executive Functioning – Organization” goal was added; REDACTED direct instructional time goal increased; Student’s Coping Skills goal was revised to include the accommodations set out in REDACTED BSP; individual counseling time was increased; Student was found eligible for Extended School Year services; and Student’s BSP was revised to include a protocol for response when Student experienced delusions.<sup>51</sup> Student needed an educational placement that could address REDACTED emotional dysregulation and psychosis.<sup>52</sup>

13. Before a placement could be located and approved by ICT, Parents unilaterally placed Student in REDACTED (“Private Placement”), a therapeutic treatment facility located in REDACTED, REDACTED.<sup>53</sup> Student’s private psychiatrist had advised Parents that Student needed more support and had recommended this facility.<sup>54</sup> Parents were concerned for Student’s safety and welfare and felt the situation could not await the ICT process.<sup>55</sup>
14. Student’s Private Placement is behavioral health center that has been open since April 2012.<sup>56</sup> Services are offered at Private Placement under a licensed clinician.<sup>57</sup>
15. The ICT meets on a monthly to review Unique Alternative Placement applications. Student’s ICT application was prepared and submitted in February and March of 2020.<sup>58</sup> Student’s application was approved on April 7, 2020 and Parents were

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<sup>50</sup> J43.

<sup>51</sup> J44.

<sup>52</sup> T1 196.

<sup>53</sup> T2 14.

<sup>54</sup> T2 192.

<sup>55</sup> T2 190-192.

<sup>56</sup> T2 98-100.

<sup>57</sup> T2 144.

<sup>58</sup> J73-01-02.

- provided with two placement options thereafter.<sup>59</sup> Mother emailed on April 14, 2020 seeking additional placement options.<sup>60</sup>
16. Parent's cooperated with the ICT process by attending meetings and exploring placement options provided to them, including a zoom tour of one placement option on July 1, 2020.<sup>61</sup>
17. Mother of Student is a Special Education teacher in the Emotional Support Program at Student's REDACTED school.<sup>62</sup> Through her position, she has knowledge of the placement options that were provided to Student.<sup>63</sup> Parents and Student were not satisfied with the options placement options provided by the ICT process.<sup>64</sup> Additional cause for concern was the fact that one of the students from Student's school who had completed suicide had received treatment at one of the recommended placement options.<sup>65</sup>
18. When Student first arrived at Private Placement, REDACTED was very anxious and presented as pretty fragile.<sup>66</sup> REDACTED was in fight, flee, or freeze mode.<sup>67</sup> Suicide was a concern.<sup>68</sup> Student would have episodes of non-epileptic seizures.<sup>69</sup> REDACTED fabricated stories and did not exhibit a clear sense of self.<sup>70</sup>

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<sup>59</sup> J73-01.

<sup>60</sup> J73-01.

<sup>61</sup> J73-01.

<sup>62</sup> T2 56; T2 185.

<sup>63</sup> T2 194.

<sup>64</sup> T2 194.

<sup>65</sup> T2 194.

<sup>66</sup> T2 147-149.

<sup>67</sup> T2 115.

<sup>68</sup> T2 149.

<sup>69</sup> T2 152.

<sup>70</sup> T2 147-149.

19. Private Placement did not have an onsite school or accreditation.<sup>71</sup> Private Placement would coordinate with an outside provider if education was necessary for a patient.<sup>72</sup> In the past, patients of Private Placement had participated in online school or attended a local community college.<sup>73</sup>
20. In May 2020, at Student's Annual IEP meeting, Student's IEP team decided that Student could receive APEX learning, an online academic program, provided by the District and facilitated by Student's Private Placement.<sup>74</sup> The ICT Team continued to search for a placement for Student during this time.<sup>75</sup> The IEP continued to provide for transition services, ESY and counseling services, and implementation of BSP.<sup>76</sup>
21. Student participated in the APEX learning while at Private Placement.<sup>77</sup> Student made significant progress at Private Placement.<sup>78</sup> Student was in Private Placement from February 2020 – December 2020.<sup>79</sup> During those 10 months, REDACTED learned skills to help REDACTED address and manage REDACTED mental and behavioral health needs, as well as executive functioning.<sup>80</sup> REDACTED participated in individual therapy, family therapy, group therapy, life skills training, vocational assistance and support and educational support.<sup>81</sup>
22. Student improved and progressed to the extent that REDACTED could have returned home sometime in the fall of 2020, but REDACTED wanted to remain that Private

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<sup>71</sup> T2 132.

<sup>72</sup> T2 11.

<sup>73</sup> T2 110; T2 179.

<sup>74</sup> J 52-53; 49; T250-251.

<sup>75</sup> J73.

<sup>76</sup> J 52-03-04; T1 249-250.

<sup>77</sup> T2 132-133; T2 169-170.

<sup>78</sup> T2 37.

<sup>79</sup> T2 122.

<sup>80</sup> T2 162.

<sup>81</sup> T2 105.

- Placement to complete REDACTED program.<sup>82</sup> Additionally, Student's Parents wanted time to plan for REDACTED transition home.<sup>83</sup> Student returned home in December 2020.<sup>84</sup>
23. Upon discharge from the private placement, Student was able to complete REDACTED remaining credits and obtain a regular high school diploma.<sup>85</sup> REDACTED has been able to keep a full-time job and live independently.<sup>86</sup>
24. The monthly cost of Student's Private Placement was \$3,000.<sup>87</sup> The average length of a treatment program at Private Placement is one year.<sup>88</sup>

## **Conclusions of Law**

**Issue 1. Whether the Student is entitled to full days of compensatory education for alleged FAPE violations in SY2018-2019 until the Student's placement in a private institution in February 2020?**

### **School Year 2018 through May 2019**

The hearing panel finds that the District met its child find obligation. The Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. §1400 *et seq.*, places a continuing "child find" obligation on public school districts to "identify and evaluate all students reasonably believed to have a disability." *J.S. v. Green Brook Twp. Pub. Sch. Dist.*, 2020 WL 7028554, at \*1

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<sup>82</sup> T1 40-31; T1172-178.

<sup>83</sup> T2 211-212.

<sup>84</sup> T2 181.

<sup>85</sup> T2 198-202.

<sup>86</sup> T2 199.

<sup>87</sup> J91-02.

<sup>88</sup> T2 109.

(Nov. 30, 2020) (citing *Ridley Sch. Dist. V. M.R.*, 680 F. 3d. 260, 271 (3d Cir. 2012)). “Child find, however, does not require schools to conduct a ‘formal evaluations of every struggling student.’” *Id.* At \*5. Both the District and Parents agreed that Student did not need specialized instruction in the Spring of 2018 when the Section 504 Plan was put in place.<sup>89</sup> The evidence and testimony support that Student was struggling emotionally, but taking breaks from the classroom and/or visiting the Guidance or Wellness Center was sufficient and appropriate at that time to allow the Student to progress academically.<sup>90</sup> These supports were effective.<sup>91</sup> There was no evidence that Student required more support or any specialized instruction at that time.

### **May 2019 through February 2020**

The hearing panel finds that the District provided Student with a FAPE from May 2019 through February 2020 for the reasons set forth below.

When the Nemours evaluation was provided for the first time to the District in February 2019, the District reacted swiftly to convene an eligibility meeting.<sup>92</sup> It was only at this point that the District had data and information to determine that Student now required specifically designed instruction. *See S. v. West Chester Area Sch. Dist.*, 353 F. Supp. 3d 369, 378-379 (E.D. PA 2019, holding that student received a FAPE pursuant to a Section 504 Plan, “based upon what [the district] knew at [that] point in time” until the student was timely found eligible under IDEA at a later date.

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<sup>89</sup> T1 68-69; T2 75-78; T2 210.

<sup>90</sup> J1-01; T1 40-41.

<sup>91</sup> J66.

<sup>92</sup> J3-03; J6; T1 94.

The District must prove by a preponderance of the evidence that it has provided the Student with a free and appropriate education. *Kruelle v. New Castle County Board of Education*, 642 F. 2d 687, 692 (3<sup>rd</sup> Cir. 1981); 20 USC §1451(e)(2). FAPE is defined as: “[S]pecial education that is specifically designed instruction including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions, and related services as defined by the Department of Education rules and regulations approved by the State Board of Education and as may be required to assist a handicapped person to benefit from education that:

1. Is provided at public expense, under public supervision and direction and without charge in the public school system;
2. Meets the standards of the Department of Education as set forth in this title or in the rules and regulations of the Department as approved by the State Board;
3. Includes elementary, secondary or vocational education in the State; and
4. Is individualized to meet the unique needs of the handicapped person.” 14 Del C. §3010(3).

In determining if FAPE was provided, the first inquiry is if the IEP is appropriate and enables a child to make progress in light of the child’s circumstances. The IEP need not provide the maximum or optimal services but must be tailored to provide appropriate goals and supports to allow the child to make reasonable progress. *C.F. v. Radnor Twp. Sch. Dist.* No. 17-4765, 2019 U.S. Dist. LEXIS 41264 at 24-24 (E.D. Pa. Mar. 14, 2019) citing *Parker C. through Todd v. W. Chester Area Sch Dist.*, No. CV 16-4836, 2017 U.S. Dist. LEXIS 104068, 2017 WL 2888573 at \*7 (E.D. Pa. July 6, 2017).

The initial May 1, 2019 IEP was developed based on recent and comprehensive evaluations, data collected, as well as input by Student, Parents, and the District.<sup>93</sup> The IEP contained measurable goals and objectives and appropriate accommodations and supports to address the Student's emotional needs.

Student's IEP provided identified a need for "Coping Skills – Replacement Behaviors" and focused on increasing the time Student would spend in class.<sup>94</sup> Student's Present Level of Educational Performance at that time based on the data showed Student was out of class meeting with support staff or early dismissal 26.3% of the time.<sup>95</sup> The IEP provided several accommodations all aimed at increasing Student's instructional time, such as: a) Teachers would encourage the use of coping strategies, the check in/check out process would continue; b) Teachers would redirect and prompt Student to complete assignments; c) Student would have access to the guidance counselor, Wellness Center, or school psychologist; d) Student would receive direct instruction in the area of coping skills; e) 20 minutes per week of counseling services; and f) 20 minutes per week of Cognitive Behavior Therapy (CBT).<sup>96</sup> Student's Least Restrictive Environment (LRE) was determined to be an A setting.<sup>97</sup>

Student's IEP was continuously evaluated and revised to accommodate Student's needs and was appropriate and reasonably designed for Student to make meaningful educational progress.

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<sup>93</sup> J18-04-06.

<sup>94</sup> T2 100-101.

<sup>95</sup> J18-10; T1 100-101.

<sup>96</sup> J18-10; T2 102-106.

<sup>97</sup> J18-10.



Based upon the above, as to the issue of whether the District provided Student with a FAPE for the 2018-2019 and the beginning of the 2019-2020 school year (up until the point of Student's Private Placement); we find that Student's Section 504 Plan was appropriate until Student was timely found eligible under IDEA. As described above, this hearing panel finds that the District met its Child Find obligation. Furthermore, Student's IEP was appropriate and provided a FAPE to the Student from May 2019 through February 2020 and therefore we find for the Respondent on this issue.

**Issue 2. Whether the Student is entitled to reimbursement for the Student's time in private placement?**

Parents, acting on behalf of Student, have the right to reimbursement of tuition at a unilateral placement if Student's IEP is not appropriate and does not provide a FAPE, and if they demonstrate the unilateral placement is appropriate. *H.L. v. Downtown Area Sch. Dist.*, 624 Fed. App. 64 (2nd Cir. 2015).

Applying the 3-part test referred to as the *Burlington/Carter* Test:

1. Has the District failed to provide a FAPE to the Student;
2. Whether parental placement in a private setting is appropriate; and
3. Whether the equities warrant reimbursement, be it partial or in full. *Burlington School Committee v. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

**Prong 1- FAPE**

In this case, while the hearing panel found that the Student was provided a FAPE in School Year 2018-2019 and the beginning of the 2019-2020 School Year, we find that the Student was not provided a FAPE as of February 5, 2020.

By February 5, 2020, Student's situation had deteriorated to the extent that all Parties agreed therapeutic residential treatment was necessary in order to provide a FAPE to Student.<sup>98</sup> The accommodations and support previously put in place for the Student by the District which had been working to allow REDACTED education to progress, were no longer sufficient to meet REDACTED needs. Student's IEP was revised at that time to change Student's LRE and make the referral to ICT.<sup>99</sup> There was no dispute amongst the Parties that therapeutic residential treatment was required for the Student.<sup>100</sup> The only dispute was whether Student and Parents must await the lengthy ICT placement process when Student and Parents were not satisfied with the private placement options initially provided. The hearing panel finds that the Complainant met the first prong of the test in that the District agreed it could not provide a FAPE to the Student and the emergent nature of Student's mental health deterioration required placement in a therapeutic residential treatment facility more swiftly than the ICT process could accommodate. Parents cooperated with the ICT process by attending meetings and touring a recommended facility.<sup>101</sup> This hearing panel does not find Parents and Student's rejection of the limited number of recommended placement options provided through the ICT process to be unreasonable given the circumstances.

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<sup>98</sup> J44-08; J46; T1 123-124; T1 188; T1 248.

<sup>99</sup> T1 196.

<sup>100</sup> J44-08; T1 123-124; T1 188; T1 248.

<sup>101</sup> J73-01.

The testimony and evidence presented has demonstrated that Student’s mental and behavioral deterioration had worsened to the point where the only way for Student to receive a FAPE was via a private residential placement. In February 2020, Student’s mental and behavioral health interfered with his ability to make progress with academic and vocational goals, as well as socialization development, peer interaction, and executive functioning.

### **Prong 2- Appropriateness of the Private Placement**

Student’s Private Placement did not have an onsite school and was not approved by the REDACTED Department of Education.<sup>102</sup> Student’s Private Placement did not have educational accreditation or employ any Special Education teachers.<sup>103</sup> This panel relies on the Court’s finding in *Kruelle* that “basic self-help and social skills such as training, dressing, feeding, and communication” can be part of the process of education. *Kruelle v. New Castle County Board of Education*, 642 F. 2d 687, 692 (3<sup>rd</sup> Cir. 1981); 20 USC §1451(e)(2). Student’s Private Placement is behavioral health center that has been open since April 2012.<sup>104</sup> Services are offered under a licensed clinician.<sup>105</sup> Private Placement provided Student with individual therapy, group therapy, life skills training, executive functioning coaching, vocational support and academic support.<sup>106</sup> “Where medical, social, or emotional problems are intertwined with educational problems, courts recognize that the local education agency must fund residential programs.” *McKenzie v. Smith*, 771 F.2d 1527, 1533 (D.C. Cir. 1985). The testimony from employees of Private Placement has demonstrated that Student’s seizure like panic attacks, disassociating from reality, and suicidal

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<sup>102</sup> T2 132.

<sup>103</sup> T2 132.

<sup>104</sup> T2 98-100.

<sup>105</sup> T2 144.

<sup>106</sup> T1 105.

ideations needed to be addressed and resolved, in order for the Student to make progress academically. Student's educational ability was directly impaired by REDACTED problems with social and emotional functioning.

Student received APEX learning, an online academic program, provided by the District.<sup>107</sup> The additional support services provided at Student's Private Placement positioned Student to be able to make educational gains through the online academic program. The various therapies and support services provided by Private Placement allowed Student to accomplish REDACTED online educational coursework.

There was significant testimony as to the progress Student made while at Private Placement and following REDACTED return to Delaware thereafter. Private Placement turned out to be an appropriate fit for Student. Private Placement's residential treatment program facilitated vocational training, social skills training, cognitive behavior therapy, and life skills support. These services helped Student. Student learned replacement behaviors, appropriate social skills, and was able to hold a part time job while completing the treatment program.<sup>108</sup>

Tuition can be granted for nontraditional private placements if the "full time placement may be considered necessary for educational purposes as opposed to be a response to a medical, social or emotional problem that is segregable from the learning process." *North v. Dist. of Columbia Board of Education*, 471 F. Supp. 136, 141 (D.D.C. 1979) In the present matter, Student's mental health was directly affecting his access to the curriculum.<sup>109</sup>

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<sup>107</sup> J52-53; T1 250-251.

<sup>108</sup> T2 166-167; T2 157.

<sup>109</sup> T2 122.

The hearing panel finds that Private Placement was appropriate for this specific Student's needs. The IEP Team agreed that Student needed a consistent structured environment in order to benefit from educational services.<sup>110</sup> The evidence of Student's success since completing the program demonstrate to the hearing panel what significant gains REDACTED has made as a result of the services provided during the time in Private Placement.

### **Prong 3- Balancing the Equities**

There is a broad scope of relief available under the IDEA. Under the IDEA, when a state or local government agency fails to provide adequate services for a child, the court "shall grant such relief as the court determines is appropriate." U.S.C. §1400 *et seq.*

As stated above, Parents did cooperate with the ICT process; however, it was a lengthy process. Despite the application being prepared, submitted, and approved throughout February and March 2020, the first tour of a private placement facility recommended to the Parents did not take place until July 2020. Parents had made the determination in February that Student could not wait.<sup>111</sup> REDACTED emotional and mental decline was precluding REDACTED for making academic progress and everyone agreed that REDACTED required a residential placement. By July 2020, Student had stabilized and was making progress at Private Placement. REDACTED had even started the APEX coursework provided by the District at that time. REDACTED was benefiting from the consistent environment at Private Placement and receiving therapies enabling REDACTED to work on life skills leading to a functional adult life. It would not have made

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<sup>110</sup> J46; J53.

<sup>111</sup> T2 191.

sense to uproot Student in July to attempt another placement, especially one that Student expressed an opposition to attending.<sup>112</sup>

There is no dispute that had the Parents awaited the ICT process and selected a placement recommended through that process, that Student would have received treatment at the ICT approved private placement at no cost to the Parents. In balancing the equities, it is reasonable to reimburse Parents for Student's Private Placement.

Student's Mother testified that the cost of private placement for which reimbursement was sought totaled \$48,500.<sup>113</sup> There was no testimony or evidence presented to the hearing panel to explain the calculation of that figure. According to a letter dated May 13, 2020, from Private Placement to Student's Parents, the monthly cost for tuition at the placement was \$3,000.<sup>114</sup>

There is a question as to whether Student could have come home from Private Placement before early December. REDACTED, co-owner of Student's Private Placement testified that the average length of treatment at Private Placement is one year.<sup>115</sup> We find the 10-month course of treatment for Student was appropriate.

As to whether Student is entitled to reimbursement for Student's time in Private Placement, we have determined that \$30,000 should be awarded to Student. This is based on the monthly tuition of Private Placement of \$3,000 multiplied by a period of ten (10) months.

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<sup>112</sup> J54-16; T2 25.

<sup>113</sup> T2 181.

<sup>114</sup> J91-02.

<sup>115</sup> T2 109.

**Issue 3. Whether the Student is entitled to reasonable attorney fees and costs?**

This hearing panel does not have jurisdiction to determine attorney fee awards and therefore, decline to address that issue.

**Orders**

Based upon the findings and conclusions of law stated above, IT IS HEREBY ORDERED THAT:

1. Student is **not** entitled to compensatory education for SY2018-2019 until the Student's placement in a private institution in February 2020.
2. Student **is** entitled to reimbursement in the amount of **\$30,000** for Student's time in private placement.
3. This hearing panel **does not** have jurisdiction to determine attorney fee awards and therefore decline to address this issue.

**Notice of Right to Appeal**

The decision of the hearing panel is a final order unless a party seeks judicial review. Any party aggrieved by the decision of the hearing panel has the right to seek judicial review in the U.S. District Court or the Delaware Family Court within ninety (90) days of the date of this written decision, as provided in 20 U.S.C. § 1415(i)(2) and 14 *Del. C.* § 3142.

/s/ Melissa L. Rhoads, Esq.  
**PANEL CHAIRPERSON**

Joe-Anne H. Corwin

**Joe-Anne H. Corwin, Educator Panelist**

/s/ Paul King

**Paul King, Layperson Panelist**

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