

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>[Mother] and [Father], Complainants,</p> <p>vs.</p> <p>DOUGLAS COUNTY SCHOOL DISTRICT RE-1, Respondent.</p>	
DECISION	

The evidentiary hearing in this matter was convened before the undersigned Administrative Law Judge (“ALJ”) on February 9, 2021, via videoconference. Complainants [Mother] and [Father] (“Complainants”) appeared through their counsel, Mr. Timothy Turner. Respondent Douglas County School District RE-1 (the “District”) appeared through its counsel, Ms. Wendy Jacobs. The following documentary exhibits were offered and admitted into evidence: Hearing Exhibit A, Hearing Exhibit B, and Hearing Exhibit F.¹ The hearing was digitally and stenographically recorded.

ISSUE PRESENTED

As confirmed in a Prehearing Procedural Order issued in this matter on December 1, 2020, the substantive issue framed by the Amended Due Process Complaint herein is as follows: whether an Individualized Education Program (“IEP”) developed for the Student is procedurally and substantively deficient pursuant to either federal or state law for failure to identify transportation services and/or reimbursement for transportation to the placement where the Student was receiving his education at the time of the due process complaint. Complainants sought reimbursement for past transportation expenses and an order covering such services going forward.²

¹ Exhibit E was offered and admitted by stipulation during the testimony of [Mother]. However, Exhibit E is only one page. The documents that were actually referenced during this part of the hearing are found in Hearing Exhibit F, submitted by the District on February 4, 2021. Accordingly, the ALJ deemed the offer of Exhibit E to be an inadvertent error, and Hearing Exhibit F was admitted in its place.

² Since the filing of the Amended Complaint and confirmation of the issues framed therein, the Student has completed his high school education.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds the following:

1. At all times relevant to this case, the Student resided with Complainants within the jurisdictional boundaries of the District. There is no dispute between the parties that the Student is a child with a disability as specified in the federal Individuals with Disabilities Education Act (“IDEA”) and its Colorado counterpart, the Exceptional Children’s Education Act. At the time of hearing, the Student was eighteen years old.
2. The District and Complainants participated in the development of an IEP that was implemented for the Student on May 8, 2018. Hearing Exhibit A. The Student was attending ninth grade at the time at [High School] within the District; he commenced tenth grade in August, 2018, with the IEP in place. The subject IEP did not identify any related services, including transportation, to facilitate the process of getting the Student to school on a regular basis. Measures were included to foster executive functioning and reduced stress, such as extended time for assignments and projects, breaks as needed, optional ways of making presentations, option for working individually, eliminating requirements for reading aloud or working in front of the class, and avoidance of pressure situations. *Id* at page 12.
3. In testimony at hearing, [Mother] established that the Student began expressing that he did not like school and/or did not want to go to school in the first grade. By the time he was in the fifth grade, the Student started to actually refuse to go to school. At that time he had been diagnosed with celiac disease and would stay on the couch at home, debilitated with pain. He has since been diagnosed with anxiety that psychologists have determined is a cause for the Student’s increasing refusal to attend school.
4. [Mother] established that the Student’s middle school within the District implemented an attendance contract that included rewards and consequences around the Student’s attendance. He was not identified as a child with a disability at that time and was not educated pursuant to an IEP in middle school. His teachers did try to help encourage attendance and implemented accommodations that included breaks during the day. [Mother] characterized the Student’s middle school attendance as “not good,” although it was better than for high school.
5. In August, 2016, the District and Complainants developed and implemented a plan of accommodations and modifications for the Student pursuant to Section 504 of the Rehabilitation Act of 1973 (“504 Plan”). A 504 Plan is distinct from an IEP in that its purpose is to facilitate access to education without including specialized instruction based on a child’s unique educational needs. The Student was still subject to an attendance contract during ninth grade as well.
6. [Mother] estimated that the Student missed six to nine hours of school per week during ninth grade due to noncompliance with the attendance contract. In November,

2017, the Complainants requested that the District evaluate the Student for special education eligibility based on increasing concerns about the Student's anxiety around going to school and poor attendance. [Mother] recalled that the District psychologist, [School Psychologist] asked Complainants, "what would that do for [the Student]?" [Mother] replied, "that's what I expected the District to tell me." Complainants took the Student for testing at National Jewish Hospital in January, 2018, and shared the results with the District. The District initiated its own evaluation that was completed in May, 2018.

7. As a result of the testing and evaluation, the Student's IEP team identified him as having a disability characterized by severe anxiety and depressive disorder. The IEP team convened in May, 2018, including Complainants, District [School Psychologist], the assistant principal, and a speech therapist, among others. [Mother] expressed her biggest concern was getting the Student to school. She did not know how to persuade him to go to school and on some mornings could not even get him out of bed. The IEP team discussed how to make things easier for him at school such that he would be more willing to go. Complainants also took steps to reduce the Student's "screen time" on connected devices to reduce his anxiety and as an incentive to comply with going to school. [Mother] could not recall if Complainants ever mentioned "transportation" specifically in the course of the IEP development. She said they just wanted any help they could get with the problem.

8. [Special Education Teacher] testified in her capacity as a special education teacher for the District at [High School]. [Special Education Teacher] served as the case manager on the Student's IEP team. She established that the IEP team considered data brought by Complainants and that Complainants were provided with documents explaining their procedural rights under special education law. [Special Education Teacher] described the Student as having been identified with serious social and emotional disabilities. She recalled the IEP team having discussed problems with absences and the academic effects of the Student's limited work completion. She understood refusal to attend school to be a behavioral issue. [Special Education Teacher] established that the IEP team attempted to maximize the Student's opportunities to interact with peers and provide incentives that would result in better attendance. Hearing Exhibit F at page 24.

9. [Mother] testified that the Student's IEP was a good first step. Although there was not much time to implement it at the end of the 2017-18 school year, it was in place for the start of his tenth grade year (2018-19). The IEP featured goals around completion of work and managing the stress of being at school, but not specifically addressing the Student's reluctance to leave home and actually go to school. The IEP team had discussed how private therapy for the Student might help with getting him to school, but nothing was included in the actual written plan about such discussions or measures.

10. [Special Education Teacher] established that transportation can be provided in an IEP as a related service if an IEP team determines that a child with a disability needs physical, cognitive, or behavioral support(s) with accessing transportation. An example of a behavioral issue that could lead to transportation as a related service would be where a child with a disability represented a safety concern for the child or others on a bus. In such

a case, [Special Education Teacher] stated that transportation services would be considered to ensure safe and appropriate access to education. She clarified that transportation as a related service would not involve getting a child out of bed and onto a bus. [Special Education Teacher] noted that transportation was not mentioned in the Student's evaluation (Hearing Exhibit B) or the IEP development process as an area of need. She established that the Student's behavior did not represent a safety concern that would prevent him from safely riding a bus. She could not recall any aspect of the Student's IEP that the Complainants disagreed with.

11. [Mother] confirmed that the Student was always able to sit appropriately to ride in a car, but was simply unwilling to get in to go to school. He would yell or cry or occasionally curl up on the floor of the car as a manifestation of his extreme anxiety. He sometimes refused to get out of bed on a school day and could seem delirious. [Mother] established that she would have been fine with someone entering their home to help get him out of bed for school.

12. [Mother] established that the Student fared slightly better with school attendance at the very beginning of tenth grade, but was still not willing to go every day. He wanted to be at school and enjoyed a sculpture class he was taking, but this was not enough to effect significant change. Attendance issues manifested quickly and on August 20, 2018, [School Psychologist] proposed a meeting to discuss the matter. Hearing Exhibit F at page 31. On August 23, 2018, Complainants specifically raised concerns about a suspected sleep disorder. *Id* at pages 27 and 28. On August 27, 2018, [Mother] communicated with [School Psychologist] about the Complainants' decision to place the Student in a Partial Hospitalization Program ("PHP") at the [Hospital] in lieu of attending school. *Id* at page 26. The PHP was a course of intensive therapy in response to the school refusal behavior with the purpose of helping the Student re-integrate into the school environment. The District worked with Complainants and supported the PHP.

13. As part of the PHP, the Student underwent a sleep study and measures to correct his circadian rhythms such that he could sleep consistently during regular night time hours. *Id* at page 38. On October 4, 2018, a treating psychiatrist at the [Hospital] noted that the Student's sleep problems were also attributable to poor sleep habits, avoidance of non-preferred activities, and mental health issues. *Id* at page 73. It was noted that the Student had somewhat successfully transitioned to a standard sleep pattern at that point that typically allowed him to be awake by 8:30 a.m. Complainants were advised to reinforce this pattern and to continue with light therapy and melatonin in order to foster better sleep. No mention was made of a need for transportation as a related service to address problems with getting to school.

14. The Student exited the PHP in October, 2018 and returned to school. [Mother] established that his attendance was improved for the first few days before he started to refuse to go to school again. *Id* at page 80. The IEP team did not meet during his time in the PHP or after his initial return to school and [Special Education Teacher] could not recall any discussions about transportation. Complainants were implementing individual therapy,

sleep therapy, and a prescribed medication program to try to improve the Student's sleep habits. [Mother] communicated these steps to the District so it would know that Complainants were trying to address the attendance problem.

15. [Special Education Teacher] established that the District attempted to modify the Student's schedule upon his return from the PHP. He was provided more flexibility in the early morning so that any delay in getting to school would have a comparatively minor effect; academic subjects were moved to the afternoons for the same reason. Classes that he preferred like physical education were emphasized to promote attendance and his overall day was shortened. The District's focus at this time was on the Student attending classes, not necessarily on grades, based on input from his private therapist. The Student had [Special Education Teacher]'s cell phone number that he used to check in if he was trying to get to school or was struggling in class after arriving.

16. [Mother] established that she repeatedly asked the District for help with getting the Student to accept going to school. She acknowledged that she probably did not mention "transportation" specifically in those instances. She felt like the District tried to help with many suggestions about what Complainants could do at home and what the District could do at school, but these were never enough to overcome the Student's refusal. [Mother] stopped asking for help after being told repeatedly that the District could not help to physically force the Student to leave home and go to school. On October 30, 2018, [Mother] acknowledged that although the Student felt sick most mornings, he had been making it to school regardless. In response, [School Psychologist] raised the potential for "alternative programming" for the Student with [Mother], but did not explain what was meant by that phrase. *Id* at pages 79 to 80.

17. On December 12, 2018, [School Psychologist] wrote that the District had "lost" the Student in that improved attendance seen in late October and early November, 2018, had dropped off significantly. *Id* at page 92. She noted that the best attendance seen after his return to school from the PHP was in the range of 64 per cent. She also stated that truancy court was the only "consequence" she could implement. [School Psychologist] opined that [High School] as a "brick and mortar" setting was not the best for the Student. She did not suggest any specific alternative, but noted that it was up to Complainants to pursue a different school.

18. On January 9, 2019, [Mother] wrote that Complainants were in the process of evaluating different schools for the Student. *Id* at page 99. Although she addressed continued efforts to deal with the Student's sleep problems and also his diet, no mention was made regarding a need for transportation at that time. Nor did [Mother] signal that Complainants believed that the District was failing to provide an appropriate education to the Student.

19. On January 22, 2019, [Special Education Teacher] transmitted a status report on the Student's IEP progress to Complainants. [Mother] responded that she appreciated [Special Education Teacher]'s commitment to help the Student. *Id* at pages 113 to 114.

[Special Education Teacher] established that Complainants never told her that they were moving the Student to a different school because the District could not implement the IEP. Nor did Complainants advise [Special Education Teacher] that they would be pursuing reimbursement for transportation to a different school.

20. The District anticipated reviewing the Student's IEP in May, 2019. On April 5, 2019, [Mother] advised the special education secretary that Complainants were moving the Student to [High School 2] in the [Another District] and that no further IEP meeting was needed. *Id* at page 119. [Mother] established that Complainants began considering other schools once it was apparent that the District was going to pursue a truancy action against the Student. She felt that action signaled that the District had given up on the Student and was not willing to do anything else to help. [Mother] acknowledged that she did not tell the District that Complainants were rejecting the Student's IEP or that they would be requesting reimbursement for transportation. They felt that they were not getting adequate help from the District and opted to try somewhere else.

21. [High School 2] is approximately seventeen miles from Complainants' home. The Student was not educated pursuant to an IEP at [High School 2]. [Mother] drove the Student to school most days that he attended there. She established that the Student had better attendance at [High School 2], averaging four days a week over the course of nearly one year even though the Student received no transportation or mental health services to facilitate going to school. [Mother] established that the Student was simply more willing to attend school at [High School 2]. In March, 2020, the school implemented procedures in response to the COVID-19 health pandemic that prevented the Student from attending in person. He struggled during the period of at-home learning and ultimately withdrew in October, 2020, upon passing a General Educational Development test. Complainants adduced no evidence of the actual costs of transportation they incurred after the Student's withdrawal from the District.

22. [Special Education Director] testified in her capacity as the District's Director of Special Education. As such, she oversees the District's budgeting, staff allocation, training, and policy development as it relates to special education. Additionally, she is the person with responsibility for assuring that children with disabilities receive a free appropriate public education.

23. [Special Education Director] established that related services are supplemental supports that enable special education students to access their individualized programs. These may include physical therapy and or occupational therapy to assist with accessing the physical environment and/or equipment used at school, speech language therapy, audiology, and/or transportation. Whether a related service is offered to a particular student depends upon the unique needs of the student as determined by the IEP team based on evaluation(s) and/or observation(s) of the child and how his or her disability impacts the ability to access education. In the area of transportation, related services can take the form of specialized vehicles, supervisory staff, or equipment necessary for the child to safely and appropriately reach school.

24. In the case of the Student, [Special Education Director] testified that his disability did not prevent him accessing a bus or a car in a safe and appropriate manner. Instead of specialized equipment or an attendant to facilitate the process of getting to school, [Special Education Director] acknowledged that the Student may have required additional mental health supports to identify and mitigate anxiety triggers that were the cause of his refusal behavior. For its part, the District implemented changes to his start time, breaks in his day, and a class schedule that featured his preferred classes as a way to reduce anxiety once he made it to school. [Special Education Director] believed that these measures were appropriate and that there was no indication that [High School] could not continue to implement the Student's IEP. Because the Student's move to [High School 2] was not the result of an IEP team decision, [Special Education Director] asserted that the District was not obligated to pay for the costs associated with Complainants' decision to enroll him there.

25. On cross-examination, [Special Education Director] agreed that the Student's conduct in the car on the way to school might have been the subject of a functional behavioral analysis that his IEP team might have considered if the matter had been raised with them. The Complainants or the District can request to convene an IEP team meeting at any time. [Special Education Director] noted that the May, 2018 evaluation of the Student did not disclose any information about him being unsafe in a car. For that reason, the IEP team would only be apprised of the situation if raised by Complainants.

CONCLUSIONS OF LAW

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for a FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). To meet its obligations under the IDEA, the school district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District RE-1*, 580 U.S. ___; 137 S.Ct. 988 (2017).

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." See also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) (stating that "[t]he burden of proof . . . rests with the party claiming a

deficiency in the school district's efforts"). Complainants therefore bear the burden of proving by a preponderance of the evidence that the District violated its obligations under the IDEA and was responsible for reimbursing costs incurred by Complainants arising from their placement of the Student at [High School 2].

Reimbursement for Parents' Unilateral Placement

20 U.S.C. § 1412 (a)(10)(C)(ii) states in full:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Limitations are placed on this provision as follows:

The cost of reimbursement described in clause (ii) may be reduced or denied

(I) if (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. § 1412 (a)(10)(C)(iii).

The statute further explains that:

(iv) Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(l) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(l); or

(cc) compliance with clause (iii)(l) would likely result in physical harm to the child; and

(ll) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(l) would likely result in serious emotional harm to the child. 20 U.S.C. § 1412 (a)(10)(C)(iv).

In *Jefferson County School District R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1236-1237 (10th Cir. 2012) the Tenth Circuit explained:

The plain language of the Act thus supplies the appropriate framework through which to determine whether a unilateral private school placement without the consent of or referral by the school district is reimbursable. A court or hearing officer must:

(1) Determine whether the school district provided or made a FAPE available to the disabled child in a timely manner; if it did, the unilateral parental placement is not reimbursable; then

(2) Determine whether the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable; then

(3) Determine whether the private placement provides special education, i.e., “specially designed instruction ... to meet the unique needs of a child with a disability”; if the placement provides no such instruction, it is not reimbursable.

(4) If the private placement provides additional services beyond specially designed instruction to meet the child’s unique needs, determine whether such additional services can be characterized as “related services” under the Act, i.e., “transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education,” excepting medical services which are not for diagnostic and evaluation purposes. If the additional services cannot be so characterized, they are not reimbursable.

Although the previous authorities address a situation where the parents of a child opt for unilateral placement of a child with a disability in a private school, the ALJ will apply the standards stated there for the factual setting of this case: removal of the Student from the District by the Complainants, and unilateral placement at [High School 2] with attendant costs of transportation.

The first element to consider is whether the District had made an offer of free appropriate public education (“FAPE”) prior to the Student’s removal. The only direct evidence that the Student’s IEP did represent FAPE was from [Special Education Director] who testified that the services and supports spelled out in the IEP were appropriate and adequate. At no point in [Mother]’s testimony did she assert that the District’s offer was inadequate to the needs of the Student as revealed in the 2018 evaluation and IEP development process. [Special Education Teacher] and [Special Education Director] both established that a need for transportation as a related service was not indicated at the time when the IEP team met and agreed upon the parameters of the Student’s program. There was no communication from Complainants or the outside therapists and medical personnel that the Student could not safely and appropriately be transported in a standard vehicle. Nor did the Complainants object to the IEP as it was written in May, 2018, and implemented thereafter. [Mother] termed it a good first step in that included goals and objectives tailored to reduce the Student’s stress level at school, and multiple accommodations and modifications for the same purpose. The record did not establish that the subject IEP failed to offer FAPE to the Student between May, 2018, and April, 2019.

As noted above, the IDEA mandates that parents who remove their child from a public school setting and then seek reimbursement for their unilaterally chosen alternative, must provide notice to the school district that they reject the school district’s IEP, unless the parents were not provided with an explanation of their procedural rights, were somehow prevented from giving notice, or to give notice would put the child at risk. The notice is important because it gives a school district the opportunity to cure any defect(s) in the IEP before it becomes liable for the costs of an alternative educational placement. [Special Education Teacher] established that Complainants were provided with a written copy of the special education procedural safeguards at the time of the IEP team meeting in May, 2018. No evidence was adduced that the District prevented Complainants from giving the required notice, or that the Student would have somehow been placed at risk if notice had been given. [Mother] acknowledged that the Complainants did not give the requisite notice to the District of their rejection of the IEP or of their intention to seek reimbursement for the costs of the Student’s attendance at [High School 2].

The next consideration here is whether [High School 2] as an alternative placement met the conditions for reimbursement under the Tenth Circuit authority expressed in *Elizabeth E., supra*. The first element (FAPE) raised by that decision has already been discussed above, and although there was no evidence as to the second element (state accreditation) the ALJ will assume for the sake of argument that [High School 2] was so accredited. The third condition for reimbursement is that the alternative educational setting

provides special education. On this point, there was again no evidence put forth by Complainants. What was clear, was that the Student was not educated pursuant to an IEP at [High School 2]. For all of Complainants' discussion about the need for transportation as a related service and/or services to persuade the Student to attend school, none of these supports were in place after he left the District. While he was enrolled in the District, the Student manifested refusal to attend school regardless of the form of transportation available to him. Nor was his refusal behavior in any way related to the process of being driven to school as there was no indication that he behaved the same way when in the car for another purpose. Rather, the Student felt anxious and disturbed by the idea of being at school to the point where he would not willingly go. For reasons that are not entirely clear, that reluctance largely abated after he started at [High School 2]. The mode of transportation was the same and did not include any additional supports that were specifically tailored to his identified disability. Thus, while the Student's relative success at [High School 2] was certainly a positive development for him, it undercut the notion that the District's IEP was deficient in measures centered on transportation and/or anxiety about attending school. Moreover, the fact that the alternative educational setting did not continue special education services and supports renders the Complainants' costs of transportation unreimbursable.

Lastly, the Complainants did not adduce any evidence of the actual costs of transportation even if it was found that these were reimbursable. [Mother] established that [High School 2] was approximately seventeen miles from their home, and that the Student was willing to go approximately four times per week on average, but nothing else that could form the basis for an accurate award. For example, it is not known from this record how many additional miles the Student had to ride as compared to the distance from home to [High School], how many trips were made during his attendance at [High School 2], or even the first and last dates that he actually attended [High School 2] in person. Accordingly, if any award of reimbursement was found to be appropriate based on the evidence presented, such an award would be purely speculative.

For all of the foregoing reasons, the ALJ finds and concludes that the Complainants did not meet their burden of establishing the procedural and substantive requirements for reimbursement of transportation costs of the unilateral placement of the Student at [High School 2]. No relief is awarded.

DECISION

The ALJ concludes that the Complainants failed to meet their burden of establishing that the May 8, 2018 IEP did not represent an offer of FAPE to the Student as required under the Individuals with Disabilities Education Act. Complainants did not establish that the Student's unilateral placement at [High School 2] satisfied the criteria for transportation reimbursement. Accordingly, Complainants are not entitled to any relief on the issue raised by their Amended Due Process Complaint herein.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

DONE AND SIGNED this 10th day of March, 2021.

A handwritten signature in black ink, appearing to read "Kirchubel". The signature is written in a cursive, flowing style.

KEITH J. KIRCHUBEL
Administrative Law Judge