APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1269

INDEPENDENT SCHOOL DISTRICT NO. 283,

Plaintiff-Appellant,

v.

E.M.D.H., a minor, by and through her parents and next friends, L.H. and S.D.,

Defendant-Appellee.

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; MID-MINNESOTA LEGAL AID; MINNESOTA DISABILITY LAW CENTER; NATIONAL ALLIANCE ON MENTAL ILLNESS MINNESOTA,

Amici on Behalf of Appellee(s).

No. 19-1336

INDEPENDENT SCHOOL DISTRICT NO. 283,

Plaintiff-Appellee,

v.

E.M.D.H., a minor, by and through her parents and next friends, L.H. and S.D.,

Defendant-Appellant.

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; MID-MINNESOTA LEGAL AID; MINNESOTA DISABILITY LAW CENTER; NATIONAL ALLIANCE ON MENTAL ILLNESS MINNESOTA,

Amici on Behalf of Appellant(s).

Appeals from United States District Court for the District of Minnesota

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Submitted: March 10, 2020

Filed: June 3, 2020

Before ERICKSON, GRASZ, and KOBES, Circuit Judges.

ERICKSON, Circuit Judge.

E.M.D.H., a student in St. Louis Park, Minnesota, Independent School District No. 283 (the "District"), is plagued with various psychological disorders. E.M.D.H. and her parents, L.H. and S.D., filed a complaint with the Minnesota Department of Education, asserting the District's failure to classify E.M.D.H. as disabled denied her the right to a "free appropriate public education ("FAPE") under the

Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. After a seven-day evidentiary hearing, a state administrative law judge ("ALJ") concluded that the District's treatment of E.M.D.H. violated the IDEA and related state special-education laws. The District filed this action in federal court for judicial review of the ALJ's decision, as the IDEA authorizes. See 20 U.S.C. § 1415(i)(2). The district court denied the District's motion for judgment on the administrative record and granted, in part, E.M.D.H.'s motion for judgment on the record, modifying the award of compensatory education. We affirm, in part, and reverse, in part, reinstating the ALJ's award for compensatory education.

I. Background

E.M.D.H. ("Student") carries a plethora of diagnoses: generalized anxiety disorder, school phobia, autism spectrum disorder (with unspecified obsessive-compulsive disorder traits), panic disorder with associated agoraphobia, attention deficit hyperactivity disorder ("ADHD"), and severe recurrent major depressive disorder. The Student's problems became manifest early in her life. By age four she was prone to tantrums and outbursts. By the second grade she was in therapy. Even though the Student had some attendance issues, she progressed through and excelled in elementary school.

Middle school proved more challenging. By the fall of her eighth-grade year, in 2014, the Student began to be more frequently absent from school, telling her mother that she was afraid to go. By the last quarter of eighth grade, the Student was consistently absent from school and was placed in a psychiatric day-treatment facility. The Student's teachers were aware

that her absences were due to her mental-health issues and noted her schoolwork as incomplete rather than entering failing grades. The District dis-enrolled the Student in the spring of her eighth grade year.

Before the Student entered the ninth grade in the fall of 2015, her parents alerted the ninth-grade guidance counselor that the Student had not been present for the latter part of eighth grade due to anxiety and school phobia. Notwithstanding these past difficulties, the Student was enrolled in the ninth grade. The Student's attendance was inconsistent and then she quit going to school altogether and was admitted to a psychiatric facility for treatment. By November the District dis-enrolled her again.

In the spring of 2016, the District discussed evaluating the Student as a candidate for special education. The ninth-grade guidance counselor spoke to the Student's parents about an evaluation, leaving them with the impression that decisions related to special education were theirs to make, but noting that if the Student availed herself of special-education opportunities she would not be allowed to remain in her honors classes. The parents did not request the evaluation and one was not undertaken by the District. The student was once again dis-enrolled that spring.

The Student spent most of the summer in 2016 at a treatment facility receiving therapy for her anxiety, depression, and ADHD. The staff at the facility noticed that while the Student struggled with increased sensory awareness she was able to manage her symptoms with assistance well enough to be gradually reintroduced to her academic work and daily routine. When the Student entered her tenth-

grade year, the District developed a plan that allowed her extra time on assignments, adjustments in workload, breaks from class to visit the counseling office, and the use of a fidget spinner. However, even with these accommodations, the Student was unable to maintain consistent attendance. After the first six weeks, the Student attended almost no classes, resulting in another dis-enrollment by the District.

In January 2017 school staff met with the parents to reexamine the possibility of providing special education. Once again, the parents were told that if the Student was placed in special education, she would be removed from her honors classes, effectively placing her in course work that would not challenge or stimulate her intellectually. At the end of the first semester, the District had yet to perform a special-education evaluation. The Student attended only one day during the second semester. The District dis-enrolled her again in February.

In April 2017, the parents requested that the District evaluate the Student's eligibility for special education. The request came three days after the Student had been readmitted to a psychiatric facility. While at the facility, Dr. Denise K. Reese performed a comprehensive psychological evaluation of the Student, diagnosing her with major depressive disorder, autism spectrum disorder, ADHD, generalized anxiety disorder with panic and obsessive-compulsive-disorder features, and symptoms of borderline-personality disorder. Dr. Reese concluded that the Student's spate of mental illnesses had "resulted in an inability to attend school, increasing social isolation, and continued need for intensive therapeutic treatment."

The Student's problems continued unabated into her junior year. She attended three partial days of the eleventh grade in the District's PAUSE program, which is designed for students with emotional and behavioral disorders. She ceased attending school after September 11, 2017. At this point, the Student had earned far less than half of the 46 credits necessary to graduate. Most of the Student's credits were from instruction she received at treatment facilities, with only two credits coming from regular District coursework.

It was not until November 2017 that the District provided the parents with a report evaluating the Student's eligibility for special education. The report concluded that the Student did not qualify. The District's conclusion prompted the parents to hire a team of doctors and other professionals to conduct an independent educational evaluation of the Student. The evaluation confirmed the Student's diagnoses and included a recommendation that she receive special education that would allow her to complete rigorous coursework while managing the symptoms that had made doing so difficult, if not impossible, in the past. The District rejected the recommendations, persisting in its initial assessment, which led to the parents filing a due-process complaint with the Minnesota Department of Education.

The complaint alleged that the District violated the IDEA and state law when it failed to identify the Student as eligible for special education services and did not provide her with such services. During the due-process hearing, testimony was taken from 20 witnesses, and almost 80 exhibits were received. The ALJ concluded the District acted unlawfully when it

failed to: (1) identify the student as a child with a disability, (2) conduct an appropriate special-education evaluation, (3) find the Student qualified for special education, and (4) provide the Student a FAPE. The ALJ ordered:

(1) the Student eligible for special education and related services;

(2) the District to develop an Individualized Education Plan ("IEP") providing the Student with a FAPE;

(3) the District to conduct quarterly meetings to consider changes to the IEP;

(4) the District to reimburse the parents in an amount over $25,000 for past diagnostic and educational expenses they incurred; and

(5) the District to pay for compensatory services in the form of private tutoring and the cost of attendance of the Student's psychiatrist and private tutor at IEP meetings.

In its appeal to the district court, the District requested leave to supplement the administrative record. The court denied the motion to supplement and affirmed the ALJ's decision, except for the order to pay for future private-tutoring services, which the district court reversed. The parties cross-appeal.

II. Discussion

This case raises issues under both the IDEA and related state laws, which exist "to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.

§ 1400(d)(1)(A). On appeal, the District asserts that the court abused its discretion by denying its request to supplement the administrative record. The District also asserts that the court and ALJ erred when they concluded that the District's special-education evaluation, eligibility determination, and child-find activities were flawed and inadequate. Both the District and the Student contest the court's remedial award. The District, on the one side, contends the Student is owed neither reimbursement of her expenses nor compensatory services while, on the other side, the Student contends that the court erred when it reversed the ALJ's award of compensatory private tutoring.

A. Record Supplementation

The District sought to supplement the administrative record by including two declarations from District staff about the progress the Student had made since the ALJ's original order. Although the IDEA allows a party to supplement the administrative record in the district court, 20 U.S.C. § 1415(i)(2)(C)(ii), "[r]endering a decision on the record compiled before the administrative agency . . . is the norm," W. Platte R-II Sch. Dist. v. Wilson ex rel. L.W., 439 F.3d 782, 785 (8th Cir. 2006). A party seeking to supplement the administrative record is required to demonstrate a "solid justification" to deviate from this norm. Indep. Sch. Dist. No. 283 v. S.D. ex rel. J.D., 88 F.3d 556, 560 (8th Cir. 1996) (quotation marks omitted). We review the district court's denial of the motion to supplement for an abuse of discretion. Indep. Sch. Dist. No. 283, 88 F.3d at 561.

The proposed supplementation elucidating how the Student was performing after the ALJ had entered his order and the District had implemented the Student's IEP is immaterial to the merits of the Student's due process complaint. The complaint alleged that the services the District offered the Student prior to the initiation of an administrative proceeding were insufficient. Evidence tending to show that the Student was making progress with the educational support she claims she was due all along would not have aided the determination of whether the ALJ properly found in favor of the Student. See W. Platte R-II Sch. Dist., 439 F.3d at 785 (affirming denial of supplementation where "additional evidence that the District attempted to provide related to the progress and status of [student] subsequent to the administrative hearing"); Indep. Sch. Dist. No. 283, 88 F.3d at 560–61 (same). The district court's decision denying supplementation was not an abuse of discretion. But even if it were, the abuse would have amounted to harmless error. See Fed. R. Civ. P. 61; Stringer v. St. James R-1 Sch. Dist., 446 F.3d 799, 805 (8th Cir. 2006).

B. IDEA Issues

We review the IDEA issues *de novo*, bearing in mind that under the Act the courts "render an independent decision based on a preponderance of the evidence in the administrative record." C.B. ex rel. B.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 988 (8th Cir. 2011). We give "'due weight' to the results of the administrative proceedings and [do] not substitute [our] 'own notions of sound educational policy for those of the school authorities which [we] review.'" Id. at 989 (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v.

Rowley, 458 U.S. 176, 205–06, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982)); Indep. Sch. Dist. No. 284 v. A.C. ex rel. C.C., 258 F.3d 769, 773–74 (8th Cir. 2001).

1. Eligibility Evaluation

Notably, Minnesota regulations require school districts to provide the student regular and special-education services, whether or not the student is disabled, when a student spends extended time at home or in a medical facility being treated for illness. Minn. Stat. § 125A.515; see also id. §§ 125A.15 and 125A.51. Nevertheless, once the parents requested the District evaluate the Student for a disability, the applicable regulations under the IDEA required the District to "conduct a full and individual evaluation . . . to determine if [she] is a child with a disability." 34 C.F.R. § 300.301(a)–(b). The District was also required to "ensure that . . . the evaluation [was] sufficiently comprehensive to identify all of the child's special education and related services needs." Id. § 300.304(c)(6).

Although the District contends that its evaluation met the regulation's requirements, its position cannot be squared with the requirement for a "full" and "sufficiently comprehensive" evaluation under the IDEA or Minnesota law. Id. §§ 300.301(a), 300.304(c)(6). Minnesota's special-education regulations require that when a student is evaluated for "emotional or behavioral disorders" and the "other health disabilities" categories of disability, the evaluation "must be supported by current or existing data from," among other sources, a "functional behavioral assessment" and "systematic observations in the classroom or other learning environment by a licensed special education teacher." Minn. R.

3525.1329 subp. 1, 3 (emotional or behavioral disorders), id. 3525.1335 subp. 1, 3 (other health disabilities).

The District admits that it did not conduct either a functional behavioral assessment or make systematic observations of the Student. The District argues that it should be absolved of this duty because the Student was chronically absent, especially in the eleventh grade when the District's evaluation took place. We acknowledge that while the Student's absences might have made a comprehensive evaluation more difficult, the evidence does not support the conclusion that task was impossible to undertake. A functional behavioral assessment, which "identifies the antecedents, consequences, and reinforcers that maintain the behavior," does not depend on the Student's presence in the classroom. Minn. R. 3525.0210 subp. 22. And Minnesota's regulations make plain that "systematic observations" can be made both "in the classroom," and in "other learning environment[s]" as well. Id. at 3525.1329 subp. 3.

The record reflects that the District made no effort to assess the Student in her virtual classroom, at home, or in any one of the psychiatric facilities from which she earned school credits. The District's failure to avail itself of these possibilities or develop another way of gathering the necessary data is virtually conclusive evidence that the District's evaluation of the Student was insufficiently informed and legally deficient.

2. Eligibility Determination

The District's evaluation, resting as it did on incomplete data, concluded that the Student is not eligible for special education. On appeal, the District

stands by that conclusion and asserts that the determinations of the ALJ and district court to the contrary are erroneous. To be eligible for a FAPE that includes special education and related services, a student must be a "child with a disability." 20 U.S.C. §§ 1401(3), (9), 1414(d), 34 C.F.R. § 300.500(a), (c); see Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, —— U.S. ——, 137 S. Ct. 988, 993–94, 197 L.Ed.2d 335 (2017). The IDEA defines a child with a disability as "a child . . . with," among other ailments, a "serious emotional disturbance" or "other health impairments . . . who, by reason thereof, needs special education and related services."[1] 20 U.S.C. § 1401(3).

A "serious emotional disturbance" is:

> [A] condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

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[1] "Serious emotional disturbance" and "other health impairments" are the federal analogs of Minnesota regulations denominating "emotional or behavioral disorders" and "other health disabilities," respectively. Compare 34 C.F.R. § 300.8(c)(4)(i) (serious emotional disturbance), and id. § 300.8(c)(9) (other health impairment), with Minn. R. 3525.1329 (emotional behavioral disorders), and id. Minn. R. 3525.1335 (other health disabilities).

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i). An "other health impairment" means:

> having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
>
> (ii) Adversely affects a child's educational performance.

Id. § 300.8(c)(9).

Under the District's analysis the Student's symptoms are simply insufficient to constitute a "serious emotional disturbance" or "other health impairments." However, the preponderance of the evidence in the administrative record indicates the Student has both conditions. For years the Student has suffered from a panoply of mental-health issues that have kept her in her bedroom, socially isolated,

and terrified to attend school. Cf. Indep. Sch. Dist. No. 284, 258 F.3d at 776 (discussing eligibility for special education where the facts "show[ed] that [student's] truancy and defiance of authority result[ed] from a genuine emotional disturbance rather than from a purely moral failing"). The Student was absent from the classroom not as a result of "bad choices" causing her "to fail in school," for which the IDEA would provide no remedy, but rather as a consequence of her compromised mental health, a situation to which the IDEA applies. Id. at 775.

The administrative record demonstrates the Student has a serious emotional disturbance as she is unable "to build or maintain satisfactory interpersonal relationships with peers and teachers." 34 C.F.R. § 300.8(c)(4)(i)(B). The Student also displayed "[i]nappropriate types of behavior or feelings under normal circumstances" and has been living with a "general pervasive mood of unhappiness or depression." Id. § 300.8(c)(4)(i)(C), (D). The evidence in the record also shows that the Student suffers from "limited . . . vitality" and "a heightened alertness to environmental stimuli" that are "due to chronic or acute health problems," including ADHD, all of which are symptoms of "other health impairments." Id. § 300.8(c)(9). The Student's absences from the classroom has put her well behind her peers in, among other things, earning the number of credits needed to graduate, and has therefore adversely affect[ed] her educational performance." Id. at 300.08(c)(9)(ii); see id. § 300.320(a)(2)(i)(A) (requiring special education be "designed to . . . enable the child to be involved in and make progress in the general education curriculum").

Despite this evidence, the District maintains that the Student is simply too intellectually gifted to qualify for special education. The District suggests the Student's high standardized test scores and her exceptional performance on the rare occasions she made it to class are strong indicators that there are no services it can provide that would improve her educational situation. The District confuses intellect for an education. See Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 13, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993) ("IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free."). The IDEA guarantees disabled students access to the latter, no matter their innate intelligence. More practically, the positive results of the private tutoring and online learning indicate that the nearly three years where the Student foundered were not inevitable but the direct result of insufficient individualized attention under an appropriate IEP. The record demonstrates that the Student's intellect alone was insufficient for her to progress academically and that she was in need of special education and related services.

This Student may not present the paradigmatic case of a special-education student, but her situation does not vitiate the District's duty under the IDEA to provide her with a FAPE. "The IDEA requires public school districts to educate 'a wide spectrum of handicapped children,'" C.B. ex rel. B.B, 636 F.3d at 989 (quoting Rowley, 458 U.S. at 202, 102 S. Ct. 3034), including those whose handicap is not cognitive. See Indep. Sch. Dist. No. 284, 258 F.3d at 777 ("If the problem prevents a disabled child from receiving

educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it."). In Independent School District No. 284, for example, the court held that an educational placement in a residential facility pursuant to the IDEA was necessary for a student whose psychological infirmities contributed to her truancy and consequent lack of academic credit, even though she "ha[d] no learning disability" and "tests reveal[ed] [her] to be a shrewd problem solver." 258 F.3d at 777–78.

The Student is eligible for special education and a state-funded FAPE like every other "child with a disability." 20 U.S.C. § 1401(3). This "specially designed instruction," whether "conducted in the classroom, in the home, in hospitals and institutions, [or] in other settings," id. § 1401(29), must be "reasonably calculated to enable [her] to make progress" and "appropriately ambitious in light of [her] circumstances," Endrew F. ex rel. Joseph F., 137 S. Ct. at 999–1000.

3. Child-Find Obligation

The ALJ and district court determined that the District breached its obligation to identify the Student by the spring of her eighth-grade year as a child eligible for special education. In addition to a FAPE, an essential aspect of the IDEA is the requirement that "children with disabilities . . . who are in need of special education and related services, are identified, located, and evaluated" by states. 20 U.S.C. § 1412(a)(3)(A); see Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245, 129 S. Ct. 2484, 174 L.Ed.2d 168 (2009) (describing this requirement as one of

"paramount importance"). The District contends it had no duty to identify the Student as eligible for special education, at least not until the parents requested an evaluation in the spring of the Student's junior year. The District also contends that if such a duty existed the Student's claim is barred by the IDEA's two-year statute of limitations. We are not persuaded by the District's arguments.

As early as the spring of 2015 the District knew that the Student was missing significant time at school as a result of her mental-health issues. The dean of students at her middle school knew that the Student was receiving day treatment at a psychiatric facility. Confronted with this situation, the dean of students met with the Student's teachers to discuss the situation, focusing on how to grade her in her classes given her absences. Despite their knowledge that the Student was suffering from mental-health issues that impacted her ability to attend school, District staff did not refer the Student for a special-education evaluation because she had above-average intellectual ability. The District continued to embrace this decision until the parents requested an evaluation near the end of the Student's sophomore year. Even if the District was confronted with an unusual case marked by some confusion, in just the same way that the Student's eligibility for special education was not foreclosed by her intellect, the District's child-find obligation was not suspended because of her innate intelligence. The preponderance of the evidence supports the conclusion that the District breached its child-find obligation.

The District contends that even if it breached its child-find obligation, the breach occurred in the spring

of 2015 and the IDEA's two-year statute of limitations had run by the time the Student's parents requested a due-process hearing on June 27, 2017. See 20 U.S.C. § 1415(f)(3)(C) ("A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . ."). [2] Assuming the parents knew or should have known they had a child-find claim when the Student was an eighth-grader, the District staff responsible for identifying the Student in the ninth and tenth grades likewise failed to fulfill their child-find obligation. In other words, the violation was not a single event like a decision to suspend or expel a student; instead the violation was repeated well into the limitations period. Cf. In re: Mirapex Prods. Liab. Litig., 912 F.3d 1129, 1134 (8th Cir. 2019) (noting that "breaches of continuing or recurring obligations" give rise to new claims with their own limitation periods). Any claim of a breach falling outside of the IDEA's two-year statute of limitations would be untimely. But, because of the District's continued violation of its child-find duty, at least some of the Student's claims of breach of that duty accrued within the applicable period of limitation.

4. Relief

Having found violations of the IDEA, we turn to the parties' dispute regarding the appropriate relief. The

[2] Under these circumstances, we do not need to reach the issue of whether the IDEA's statute of limitations represents an occurrence rule or a discovery rule. See Avila v. Spokane Sch. Dist. 81, 852 F.3d 936, 941–42 (9th Cir. 2017); G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 611–13 (3d Cir. 2015).

IDEA confers "broad discretion" upon hearing officers and courts to order remedies that are "'appropriate' in light of the purpose of the Act." Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985); see also 20 U.S.C. § 1415(i)(2)(C)(3) ("[T]he court . . . basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."). The District asserts the court improperly ordered it to reimburse the parents the amount expended on: (1) Dr. Reese's comprehensive psychological evaluation, (2) the independent educational evaluation, and (3) and private educational services. The District also asserts the court erred when it ordered quarterly IEP meetings to take place until the Student graduates.

A review of the record demonstrates that the costs incurred as a result of Dr. Reese's work and that of other professionals hired by the parents would have been unnecessary but for the District's failure to timely identify and properly evaluate the Student as a child in need of special education. We conclude the award of these costs was within the broad discretion of the ALJ and district court. See Sch. Comm., 471 U.S. at 370, 105 S. Ct. 1996 ("[W]e are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."). Similarly, the parents' retention of a private tutor was the result of the District's inaction in the face of the Student's debilitating mental illness and its adverse effects on her academic progress. Id. (noting that parents who pay for private education rather than suffer a school's insufficient IEP would score an "empty victory" if a court subsequently ruled that they

were right but that the school was not obligated to reimburse them for the expenditures). Lastly, given the difficulties the District had correctly diagnosing the Student's situation, as well as its prolonged mishandling of her education, quarterly IEP meetings are appropriate in order to assure that the Student's education remains on track.

The Student challenges the district court's conclusion that the ALJ's award of compensatory education in the form of private tutoring was inappropriate. Although compensatory damages are unavailable through the IDEA, compensatory education is allowed. J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 593 (8th Cir. 2013); see also Minn. Stat. § 125A.091, subd. 21 (describing compensatory educational services as any "direct and indirect special education and related services designed to address any loss of educational benefit that may have occurred" as the result of a FAPE denial). Here, the court reversed the ALJ's award for compensatory private tutoring because the record was silent as to whether the District could provide comparable services going forward. While we commend the court's impulse to limit the remedy and taxpayer expense, by doing so in this case the court failed to consider the purpose of a compensatory-education award: "imposing liability for compensatory educational services on the defendants merely requires them to belatedly pay expenses that they should have paid all along." Miener ex rel. Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986) (alterations and quotation marks omitted). Whether the District is able to provide the Student a FAPE prospectively is irrelevant to an award of

compensatory education. Because of this backward-looking nature, the purpose of any compensatory-education award is restorative–and the damages are strictly limited to expenses necessarily incurred to put the Student in the education position she would have been had the District appropriately provided a FAPE. See Indep. Sch. Dist. No. 284, 258 F.3d at 774 (explaining that a present or future obligation to develop a new IEP is immaterial to the decision to award compensatory education). The administrative record supports the ALJ's conclusion that the services of a private tutor are appropriate until the Student earns the credits expected of her same-age peers. We therefore reinstate the ALJ's award of these services, to be provided only so long as the Student suffers from a credit deficiency caused from the years she spent without a FAPE.

III. Conclusion

We affirm, in part, and reverse, in part, reinstating the ALJ's award for compensatory education.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

INDEPENDENT SCHOOL DISTRICT NO. 283,

Plaintiff,

v.

E.M.D.H., a minor, by and through her parents and next friends, L.H. and S.D.,

Defendants.

Civil No. 18-935 (DWF/LIB)

January 15, 2019

MEMORANDUM OPINION AND ORDER

INTRODUCTION

In this action, Independent School District No. 283 (the "District") requests judicial review and reversal of a March 16, 2018 decision (the "Decision") issued by an administrative law judge ("ALJ"). (Doc. Nos. 1 ("Compl."), 2 ("Decision").) The Decision ruled in favor of the parents of a high-school the student who lodged a due process complaint under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"). This matter is before the Court on cross

motions for judgment on the administrative record. (Doc. Nos. 85, 89.) For the reasons set forth below, the Court grants Defendants' motion in part, affirming the ALJ's decision but modifying the remedies.

BACKGROUND

Defendants E.M.D.H. (the "Student"), a minor, by and through her parents and next friends, L.H and S.D. (the "Parents") (together "Defendants") assert that the Student, a sixteen-year old junior in high school, has been denied her right to a free and appropriate education under the IDEA. In short, Defendants submit that the Student went years without special education and related services because she was not properly classified as having a disability. The Parents hired a private educational team to design and implement an individualized education program. In June 2017, Defendants initiated an administrative hearing to correct the conditions and restore the Student's education. On March 16, 2018, the ALJ issued a 67-page decision in favor of the Parents. The District now asks the Court to reverse the Decision.

I. Elementary School

The Student began attending school in the District beginning in 2006. During elementary school, the Student performed well academically, socially, and on measures of self-management. In the fourth grade, the Student's teacher stated that she "is a joy to teach," "has a great sense of humor," and "is a delight to be around." (Doc. No. 60-2 at 21.) From elementary school through the time of the Decision, the Student has never had a discipline referral noted in her record. (Docs. No. 60-2 at 45-53, 60-3 at 1.) The Student has

always excelled academically. For example, in the fifth grade, the Student enrolled in an advanced math class at the middle school.

The Student has had attendance problems since elementary school though. During elementary school, the Student averaged around eight absences per school year. (Doc. No. 72-5 at 42-44.) Nevertheless, the Student continued to perform well academically during those years. (*See* Doc. No. 60-2 at 12-13, 17-26, 36-38, 41-44.)

Although the Student performed well in elementary school, she has had behavioral meltdowns since she was four years old. Her behavioral meltdowns were characterized by hitting, biting, pinching, crying, throwing objects, and banging on walls. (Doc. No. 61-7 at 4.) The meltdowns would last from a few minutes to several hours, and would sometimes occur multiple times per day or not at all for multiple weeks. (*Id.*) Beginning in 2008, when the Student was in second grade, the Student's mother took the Student to the Washburn Center for Children, where the Student was diagnosed with adjustment disorder with mixed disturbance of emotion and conduct, and received therapy until discharged on July 23, 2009. Since 2008, the Student has carried several diagnoses from various health care professionals, and she is currently diagnosed with: generalized anxiety disorder, school phobia, unspecified obsessive-compulsive disorder ("OCD") (or autism spectrum disorder ("ASD")), panic disorder with agoraphobia, attention deficit hyperactivity disorder ("ADHD"), primarily inattentive type, and severe recurrent major depressive disorder. (Doc. No. 60-1 at 20.)

II. Middle School

The Student remained enrolled in the District for middle school. In middle school, the Student participated in the Gifted and Talented programming and earned A's and B's in her classes. In sixth grade, teachers commented on the Student's performance: "Gifted writer"; "insightful social studies student"; and "Always prepared, and engaged, great end to the year." (Doc. No. 60-2 at 12-13.) In seventh grade, teachers commented: "Hard worker"; "Great job despite the absences"; "Showed lots of hard work this spring'" and "Great participation." (*Id.* at 17.) The Student excelled on her sixth and seventh grade standardized tests. The Student's attendance issues continued, however, with her missing 18 days of school in sixth grade and 20 days in seventh grade.

When the Student began eighth grade in the fall of 2014, she told her mother that she was afraid to go to school. From the beginning of the school year through February 2015, she missed 18 days of school. (*Id.* at 12; Doc. No. 72-5 at 45.) In March 2015, the Student stopped attending school altogether. (Doc. Nos. 60-1 at 26, 62 at 13.) On May 6, 2015, the Student completed a psychiatric evaluation at Prairie Care Medical Group in Edina, Minnesota. (Doc. No. 56-9 at 9.) The Student was diagnosed with depression not otherwise specified and generalized anxiety disorder. (*Id.*) On May 18, 2015, the Student was admitted to the Prairie Care day treatment program; she was discharged on June 12, 2015. (*Id.* at 17.)

When the Student stopped attending school, one of her teachers brought her concern to a group of teachers called the Orange Academy, which consisted of ten people, including the Student's teachers and

Gina Magnuson, the Dean of Students. (Doc. No. 60-4 at 13.) The teachers discussed what to do about the Student's grades given she was not attending school. (*Id.*) It was decided to give her "incompletes" as opposed to failing grades. (*Id.*) The group also decided not to refer the Student to the District's Student Intervention Teacher Team ("SITT"), which is one of the District's child-find activities. (*See, e.g.*, *id.* at 32.) The group decided not to refer the Student because her grades were excellent when she attended school. Staff at the middle school were aware of the Student's mental health issues and that the Student had been admitted to the Prairie Care day treatment program.

As a result of her absences, the Student received no fourth quarter credit or grades in eighth grade, and the District dis-enrolled the Student that spring. (Doc. No. 54-3 at 16; Doc. No. 54 at 5.)

III. High School

When the Student began high school, her ninth-grade guidance counselor, Barb Nelson, offered to meet the Parents to re-enroll the Student, and to meet the Student to get to know her, but did not address the issue of special education or evaluation. (Doc. No. 72-5 at 59.) Then, shortly after beginning ninth grade, the Student's attendance became irregular. Eventually in November 2015, she was admitted again to the Prairie Care day treatment program, and the District again dis-enrolled her. (Doc. No. 55-6 at 36.)

The Student re-enrolled on December 15, 2015. On April 26, 2016, the District discussed referring the Student for a special education evaluation. (Doc. No. 60-4 at 7.) The District did not make a referral, but instead Nelson called the Student's mother to explain

various options for special education placement for the Student. According to the Parents, however, Nelson did not inform the Student's mother that special education services would allow the Student to continue taking honors courses. (Doc. No. 54 at 21.)

On June 6, 2016, near the end of the Student's freshman year, she was admitted to the Rogers Memorial Hospital ("Rogers") in-patient program in Oconomowoc, Wisconsin. (Doc. No. 62-4 at 5.) At Rogers, the Student took some education-related assessments, including the WRAT-3, on which she scored in the post-high school level for reading, spelling, and math. (Doc. Nos. 62-9 at 21, 62-6 at 2, 75 at 9-10.) Also while at Rogers, the Student was diagnosed with ADHD – Inattentive type, and was prescribed Adderall XR. (Doc. No. 62-7 at 27.)

When the Student began her sophomore year, the District created a Section 504 plan for the Student, even though it had never conducted an evaluation of her. The 504 plan involved providing the Student extra time on assignments, adjustments to workload to prevent falling behind, regular check-ins with teachers, breaks from the classroom and a pass to the counseling office, and the use of a fidget. (*See* Doc. Nos. 60-5 at 72, 60-6 at 21.) Despite having a 504 plan, the Student's English teacher denied her extra time to complete an assignment with which she was having difficulty. (Tr. at 1025-27.) As a result of the Student's frustration with the English class, Defendants agree with the Student's tenth-grade counselor, Heidi Cosgrove, and the school social worker, Marlee Nirenstein, to switch the Student to an online English course. (Doc. No. 60-5 at 69; Tr. at 1032-33, 1200.) By December 5, 2016, however, the Student was again

dis-enrolled by the District because she had missed 15 or more days of school in the semester. (Doc. No. 60-6 at 1.)

The Student and the Student's mother met with Cosgrove and Nirenstein in January 2017 to discuss the possibility of special education services. Cosgrove explained that if the Student were eligible for special education, then she would need to be instructed in academic and organizational skills in a structured study hall setting. (Tr. at 1050-51, 1212.) Cosgrove and Nirenstein also indicated that the Student would be assigned a new social worker along with a case manager. (Tr. at 1050-51.) Although Cosgrove and Nirenstein did not expressly say it, the Student's mother understood them to be suggesting that special education would not be an appropriate placement for the Student because she is talented and gifted. (Tr. at 1448-49.) The District did not propose a special education evaluation at the time; the Parents did not request one. (Tr. at 1449.) Then, after attending only the first day of the semester, the Student was eventually dis-enrolled again on February 16, 2017. On April 25, 2017, the Student was again admitted to Rogers.

On April 28, 2017, the Parents requested that the District evaluate the Student's eligibility for special education. On May 23 and 24, 2017, while still at Rogers, Dr. Denise K. Reese conducted a comprehensive psychological evaluation of the Student. Dr. Reese diagnosed the Student with: major depressive disorder, recurrent, in partial remission; ASD; ADHD, predominantly inattentive presentation; and generalized anxiety disorder with panic and OCD features, features of borderline personality disorder.

(*See* Doc. No. 59-6 at 10.) Dr. Reese also made several educational recommendations to accommodate the Student's anxiety and ASD, including an individualized curriculum, providing the Student a resource room to go to when she is feeling anxious or upset, and reducing requirements for the Student to socialize in large groups during the academic day. (*Id.*) The Student's mother paid $ 2,430 for Dr. Reese's evaluation. (Doc. No. 56-1 at 4.)

In June 2017, the Student re-enrolled in the District as a junior. On June 14, 2017, the District held an evaluation planning meeting. (Doc. Nos. 60-6 at 57-61, 60-7 at 1-10.) The Student's mother was provided a notice of her parent rights under special education law. (Doc. No. 54-6 at 22-39.) Meeting attendees determined that the Student should be evaluated under the categories of ASD, EBD, and other health disability ("OHD"). The Parents' counsel also informed the District of Dr. Reese's evaluation and requested that the District rely upon the information rather than have the Student retested in the same areas. The District agreed to do so. The evaluation plan also included three classroom observations of the Student. (Doc. Nos. 60-6 at 57-61, 60-7 at 1-10.) The District conveyed the plan to the Parents on June 20, 2017. (*Id.*) The Parents consented to proceed with the evaluation. The District had 30 school days, or until October 16, 2017, to complete the evaluation. (*Id.*)

On August 31, 2017, The Parents met with school officials to discuss the Student's junior year. School officials presented four options for the Student: (1) full days with advanced level classes; (2) full days with no advanced level classes; (3) partial school days; and (4) participation in the PAUSE program, which is an

alternative learning environment supported by a teacher and social worker. The District also proposed the Student having access to PLATO, an online learning platform through which the Student could progress at her own pace and earn class credits. (Doc. No. 61-6 at 5-7.) The Student and the Parents chose to pursue the PAUSE and PLATO route.

On September 6, 2017, the Student began her junior year attending PAUSE. Her teacher, Bob Logan, indicated that the Student worked steadily on PLATO from 10:00 a.m. to 11:30 a.m. without a break. (Doc. No. 61-6 at 27-35.) The Student was organized, focused, taking notes, but was also receptive, made eye contact, and was pleasant and affirming with Logan. (*Id.*) She sat with Logan and the social worker over lunch, during which time she was conversational, polite, and social. (Tr. at 162.) The Student worked diligently that afternoon, but the next morning, she went home sick after working for only an hour and a half. (*Id.* at 163, 167-68, 174.) The Student returned to PAUSE only one more time—the next day—during which time she worked consistently on PLATO assignments. (*Id.* at 169-170.) After the third day, the Student did not return to PAUSE. At the Student's mother's suggestion, Logan left voicemails on the Student's cell phone encouraging her to return to PAUSE.

IV. Special Education Evaluation

On October 16 and 24, 2017, District presented the results of its evaluation to the Parents. (Doc. No. 61-6 at 8-11.) The District never completed a functional behavioral assessment ("FBA") of the Student. (Tr. at 899.) The District concluded that the Student did not qualify for special education in the ASD, EBD, or OHD

categories. (Doc. No. 61-6 at 8-11.) The Parents disagreed. The Parents then requested that the District consider applying the override criteria to the District's eligibility determination. Because the District viewed the results as valid, the District determined that the override criteria were not applicable and that the Student did not need special education. (Tr. at 807, 842-45, 849.)

The District determined the Student did not meet the definition of EBD because she does not exhibit a specific emotional or behavioral response that adversely affects educational performance. (Doc. No. at 55-7 at 22.) The District further concluded that the Student's intrapersonal impairment does not severely interfere with her educational performance because, in part, it has not manifested in the classroom. (*Id.*) The District also determined that the Student did not meet the definition of OHD because neither her ADHD nor her anxiety adversely affects her ability to complete educational tasks within routine timelines, and that her ADHD and anxiety have not resulted in a pattern of unsatisfactory educational progress. (*Id.* at 26, 28.) On November 21, 2017, the District provided the Parents with a final report, concluding that the Student was not eligible for special education. (Doc. No. 55-6 at 32.)

V. Independent Educational Evaluation

On November 8, 2017, the Parents hired Dr. Richard Ziegler, Dr. L. Read Sulik, and Wendy Selnes to conduct various components of an independent educational evaluation ("IEE"). On or about November 29, 2017, the Parents hired Heather Lindstrom from Beyond Risk Youth, LLC, to conduct another component of the IEE.

Dr. Ziegler conducted a neuropsychological exam. (Doc. No. 56-2 at 14.) He diagnosed the Student with generalized anxiety disorder, school phobia, unspecified OCD, and severe recurrent major depressive disorder. (Doc. No. 56-3 at 17.) Selnes conducted a partial FBA after reviewing the Student's school records, treatment history, and observations of the Student. (*Id.* at 36.) Selnes concluded that the Student exhibited behaviors that "provide automatic reinforcement relative to regulation of her internal status as well as to escape aversive social or other situations." (Doc. No. 56-4 at 4.) Lindstrom assessed the Student to design and implement an instructional program for the Student. (*Id.* at 15.) Lindstrom also began providing the Student with private academic tutoring. (*Id.* at 28.) Lindstrom recommended that the Student be exposed to more rigorous academic work, gain access to post-secondary resources, and learn how to filter and manage sensory input, among other things. (Doc. No. 56-5 at 8.) Dr. Sulik conducted a psychiatric assessment of the Student. As part of his assessment, he identified several categories of treatment objectives for the Student, including: (1) reduce depression, anxiety, ADHD, and sleep and fatigue symptoms; and (2) improve internal, physical, external, and spiritual world wellness practices. (Doc. No. 60-1 at 21.) Dr. Sulik also found that residential treatment was not necessary at the time because the Student was having success with her then-current programming.

The Parents incurred fees for the IEE components in the amounts of: $8,776.80 for Dr. Ziegler, (Tr. at 1137-38); $6,707 for Selnes (*Id.* at 1159); $2,250 for

Dr. Sulik (Doc. No. at 60-1 at 37); and $3,475 for Lindstrom, (Doc. No. 56-5 at 41).

Following the IEE, the District hired Dr. William Dikel to assist the District staff "in clarifying the nature and extent of [the Student's] mental health difficulties, especially as they related to her educational issues." (Doc. No. 63-9 at 13.) Dr. Dikel described the Student's history of diagnosis and treatment as "complex, confusing and at times contradictory," but noted that there are a number of pertinent issues. (*Id.* at 51.) Dr. Dikel noted that the various mental health professionals treating the Student appear to be doing so without communicating with each other or referencing each other's files. Dr. Dikel also observed that the medications that the Student has been prescribed may be contributing to her symptoms of anxiety, mood abnormalities, and chronic sleep problems. (*Id.* at 52.) In reviewing the Student's family situation, Dr. Dikel found that the Student's "dysfunctional family dynamics are not the primary causal factor in [the Student's] school refusal, but may very well be contributing factors." (Doc. No. 64 at 1.) Dr. Dikel ultimately recommended that the Parents play a pivotal role in overseeing services provided by medical, mental health, education, and county services providers. (*Id.* at 3.) He also recommended a more thorough assessment to assess other potential diagnoses. (*Id.* at 5.)

VI. Procedural History

On June 27, 2017, the Parents requested a special education due process hearing with the Minnesota Department of Education ("Department" or "MDE"). (Decision at 1.) During a prehearing conference, the ALJ and parties identified four issues pending for the

hearing: (1) whether the District conducted an appropriate evaluation of the Student, consistent with 34 C.F.R. §§ 300.304-.306 and Minn. R. 3525.2710; (2) whether the Student is eligible for special education and related services; (3) whether the District timely identified the Student as a possible child with a disability under the IDEA; and (4) whether the District failed to provide the Student a free appropriate public education ("FAPE") because it did not timely and appropriately identify and evaluate the Student, determine her eligible, and provide her with special education and related services designed to enable her to make progress appropriate in light of her circumstances. (*Id.*)

The parties agreed to continue the hearing to allow the District time to complete its evaluation of the Student, present a proposed individualized education plan ("IEP") to the Parents, and hold an IEP team meeting. (*Id.*) After subsequent prehearing conferences, the hearing began on January 16, 2018 and lasted seven days. (*Id.* at 4.) The ALJ heard testimony from 20 witnesses—five called by the Parents, and 15 called by the District. (*Id.*) The Parents entered 38 exhibits into the record; District entered 39 exhibits. (*Id.*)

On March 16, 2018, the ALJ issued the Decision, requiring Plaintiff to immediately change the Student's educational placement by providing her a FAPE consisting of special education and related services, at public expense, until her graduation. As part of the Decision, the ALJ reached the following conclusions:

> 1. The School District failed to conduct an appropriate evaluation of Student when it did

> not complete required assessments and failed to reach appropriate conclusions about Student's eligibility. Parents are entitled to reimbursement for their IEE as a matter of law.
>
> 2. Student is eligible for special education and related services under the IDEA because her condition meets the definition of serious emotional disturbance/emotional behavioral disorder ("EBD") and other health impairment ("OHI")/other health disabilities ("OHD").
>
> 3. The School District failed to timely identify Student as a possible child with a disability when Student refused to consistently attend school during eighth grade as a result of her deteriorating mental health.
>
> 4. The School District denied Student a FAPE when it did not timely and appropriately identify and evaluate her, determine her eligible, and provide her with special education and related services designed to enable her to make educational progress appropriate in light of her circumstances. Student is entitled to services appropriate to address her loss of educational benefit, including her lack of credits toward graduating, and teaching her skills to cope effectively with her disabilities.

(*Id.* at 4-5.) The District then initiated the present action seeking judicial review of the Decision and to reverse the findings therein. Both parties now move for judgment on the administrative record. (Doc. Nos. 85, 89.)

ANALYSIS

I. Standard of Review

"A Motion for Judgment on the Record, in the context of the IDEA, is a request that the Court enter a final Judgment in what is essentially a bench trial on a stipulated record." *Slama v. Indep. Sch. Dist. No. 258*, 259 F. Supp. 2d 880, 882 (D. Minn. 2003). The IDEA provides that a court reviewing a state administrative decision "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C); *see also Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015) (noting that when reviewing administrative decisions, "[t]he district court must make its decision independently, based on a preponderance of the evidence, as to whether the IDEA was violated"). Thus, "the district court must 'independently determine whether the child [in question] has received a FAPE.'" *K.E. ex rel. K.E. v. Inep. Sch. Dist. No. 15*, 647 F.3d 795, 803 (quoting *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 636 (8th Cir. 2003)). At the same time, courts should give the ALJ's decision "due weight." *Id.* (quoting *Indep. Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 561 (8th Cir. 1996)). The Eighth Circuit has emphasized that the court's "review is not necessarily de novo," and that a court "should not substitute its judgment for that of the school officials." *Sneitzer*, 796 F.3d at 948.

The "limited grant of deference" under this standard "is appropriate in IDEA cases because the ALJ 'had an opportunity to observe the demeanor of the witnesses and because a [district] court should not substitute its own notions of sound educational policy for those of the school authorities that [it] review[s].'" *K.E. ex rel. K.E.*, 647 F.3d at 803 (quoting *CJN*, 323 F.3d at 636). The Eighth Circuit has noted that "[t]his somewhat 'unusual' standard of review is less deferential than the substantial-evidence standard commonly applied in federal administrative law." *Id.* (quoting *Indep. Sch. Dist. No. 283*, 88 F.3d at 561). "Whether a child has received a FAPE is a mixed question of law and fact." *Id.* at 804. A court may render a decision on the administrative record even where "disputed issues of material fact" are present. *Indep. Sch. Dist. No. 283*, 88 F.3d at 561. Here, the burden is on the Plaintiffs as they are "challenging the IEP" and "the outcome of the administrative . . . decision." *Lathrop R-II Sch. Dist. v. Gray ex rel. D.G.*, 611 F.3d 419, 423 (8th Cir. 2010); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999).

II. IDEA

States that accept federal funding under the IDEA must make a FAPE available to every child with a disability in their state. 20 U.S.C. § 1412(a)(1)(A). The IDEA defines a FAPE as "special education and related services that" meet specific statutory requirements, including being implemented consistent with the student's IEP. 20 U.S.C. § 1401(9). As the Supreme Court recently reiterated, "[t]he IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel.*

Joseph F. v. Douglas Cty. Sch. Dist. RE-1, —— U.S. ——, 137 S. Ct. 988, 994, 197 L.Ed.2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988)). An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the IDEA's requirements. 20 U.S.C. § 1414(d)(1)(A)(i). The IDEA's procedural requirements for developing a student's IEP "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances." *Endrew F.*, 137 S. Ct. at 994. In addition, "the IDEA requires that children with disabilities receive education in the regular classroom 'whenever possible.'" *Id.* at 999 (citation omitted); *see also* 20 U.S.C. § 1412(a)(5)(A) (providing for education of children with disabilities in the mainstream alongside children without disabilities "[t]o the maximum extent appropriate").

The District argues the ALJ erred in six respects: (1) concluding that the Student is eligible for special education; (2) concluding that the District failed to meet its child-find obligations; (3) concluding that Defendants are entitled to reimbursement of IEE fees; (4) concluding that Defendants are entitled to reimbursement of Dr. Reese's fees; (5) ordering, as compensatory education, the District to pay for private consultation and services for the Student until she graduates; and (6) ordering the Student's IEP team to meet quarterly until she graduates.

A. Eligibility

The District argues that the Decision erroneously faults the District's eligibility evaluation for (1) failing to conduct systematic observations of the Student in a

classroom and (2) failing to conduct an FBA. The ALJ reached the conclusion that the "District did not conduct all of the state-required assessments required for examining whether a child is eligible under the category of EBD and OHD. The School District did not conduct any systematic observations in the classroom or other learning environments and an FBA. The School District failed to alternatively use the team override provision." (Decision at 22.)

Federal and state law establish standards for evaluations for determining eligibility under the IDEA. Under Minnesota law, school districts must "use technically sound instruments that are designed to assess the relative contribution of . . . behavioral factors." Minn. R. 3525.2710, subp. 3(B)(3). With respect to EBD, evaluators must include data from:

> (1) clinically significant scores on standardized, nationally normed behavior rating scales; (2) individual administered, standardized, nationally normed tests of intellectual ability and academic achievement; (3) three systematic observations in the classroom or other learning environment; (4) record review; (5) interviews with parent, pupil, and teacher; (6) health history review procedures; (7) a mental health screening; and (8) functional behavioral assessment.

Minn. R. 3525.1329, subp. 3. With respect to OHD, evaluators must include data from:

> (A) an individually administered, nationally normed standardized evaluation of the pupil's academic performance; (B) documented, systematic interviews conducted by a licensed special education teacher with classroom

> teachers and the pupil's parent or guardian; (C) one or more documents, systematic observations in the classroom or other learning environment by a licensed special education teacher; (D) a review of the pupil's health history, including the verification of a medical diagnosis of a health condition; and (E) records review.

Minn. R. 3525.1335, subp. 3. The law also provides a team-override provision, by which evaluators may override a determination that a student does not meet specific requirements for eligibility. Minn. R. 3525.1354, subp. 1. Schools districts use the team override to avoid situations where a student may not meet specific eligibility requirements under state law, but meets requirements under federal law.

The Court concludes, as did the ALJ, that the District's evaluations of the Student in the fall of 2017 were deficient under Minnesota law. The District concedes that it did not conduct any systematic observations of the Student in the classroom or an FBA. Although the Student's absenteeism was the primary barrier to conducting systematic observations, it has also been one of the most visible symptoms of the Student's disability.

Recognizing the issue of eligibility as central to this case, the ALJ and both parties have undertaken thorough analysis of the question. Federal law provides that a "child with a disability" is one who is evaluated as meeting at least one disability category listed in the IDEA and who, by reason of disability, needs special education and related services. 34 C.F.R. § 300.8(a)(1). One category of disability under federal law is emotional disturbance, which

> means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

Id. § 300.8(c)(4)(i). Another category of disability under federal law is other health impairment ("OHI"), which

> means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child's educational performance.

Id. § 300.8(c)(9). "Special education" is defined as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—(i) Instruction conducted in the

classroom, in the home, in hospitals and institutions, and in other settings. . . ." *Id.* § 300.39(a)(1). "Specially designed instruction" is defined as

> adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction—(i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

Id. § 300.39(b)(3). Such specially designed instruction results in an "education program [that is] appropriately ambitious in light of [the child's] circumstances," helps a child "[p]rogress through this [education] system," and allows the child "the chance to meet challenging objectives." *Endrew F.*, 137 S. Ct. at 999-1000.

The Court concludes, as did the ALJ, that the Student is eligible for special education and related services under both federal and state eligibility guidelines. Specifically, the Student meets the federal and state definitions of both EBD and OHD. The Students' mental health issues—her several diagnoses as of May 2017—appear to have directly impacted her attendance at school. As the ALJ noted, there is no evidence in the record that anything but her mental health issues caused her absenteeism. (Decision at 49.) The District contends that the Student's mental health issues and absenteeism did not adversely impact her educational performance because she excelled academically when she attended school. For the same reasons the ALJ provided, the

Court also rejects this argument. (*See id.* at 50.) Specifically, special education is designed to help students with disabilities progress in the general curriculum. *See* 34 C.F.R. § 300.320. No one disputes that the Student excelled on standardized tests; neither can anyone dispute that her absenteeism inhibited her progress in the general curriculum.

Accordingly, giving due weigh to the ALJ's treatment of this issue, the Court affirms the ALJ's conclusions regarding eligibility.

B. Child-Find Obligations

The District next challenges the ALJ's conclusion that the District did not fulfill its child-find obligations, arguing that Defendants' child-find claim is time-barred and that, nevertheless, the District complied with child-find requirements.

In order that all children with disabilities may receive a FAPE, the IDEA imposes a "child find" obligation on school districts. *See* 20 U.S.C. § 1412(a)(3). Pursuant to this obligation, districts have a duty to ensure that:

> All children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3)(A); *see also* Minn. R. § 3525.0750. The IDEA defines children with disabilities in part as those children who "need[ ] special education and related services." 20 U.S.C.

§ 1401(3)(A)(ii). The Supreme Court has recognized the child find obligation as being of "paramount importance." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245, 129 S. Ct. 2484, 174 L.Ed.2d 168 (2009). And "[c]ourts around the country, including this one, have recognized that the IDEA's child find requirement imposes an 'affirmative duty' on school districts." *R.M.M. ex rel. T.M. v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, Civ. Nos. 15-1627, 16-3085, 2017 WL 2787606, at *5 (D. Minn. June 27, 2017) (collecting cases).

The IDEA statute of limitations requires a parent to request a due process hearing within two years of "the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint . . . ." 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e). The same two years are allotted to the parent to file an administrative complaint alleging a violation of the IDEA. 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); *see also D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012). Under this framework, it is undisputed that because the Parents first requested a due process hearing on June 27, 2017, Defendants' claims would normally be limited to the District's conduct after June 27, 2015. *See D.K.*, 696 F.3d at 244.

The IDEA provides, however, that the statute of limitations "shall not apply to a parent" in two situations: (1) where the parent was prevented from requesting a hearing due to "specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint"; or (2) where the local educational agency withheld information from the parent that the law

requires be provided to the parent. 20 U.S.C. § 1415(f)(3)(D). Before the ALJ, Defendants argued that at least the second of these exceptions applied here, noting that the Parents were not provided with notice of their procedural safeguards, as required by the IDEA, until June 2017. *See* 20 U.S.C. § 1415(d) (requiring a copy of the procedural safeguards be made available to the parents of a child with a disability).

On review of the record, the Court finds that the statute of limitations should not apply here because the District failed to provide an adequate and complete notice of procedural safeguards as required by the IDEA and by applicable regulations. Although the District discussed special education with the Parents prior to June 2017, the evidence shows that the Parents did not first receive a notice until that time. By withholding this critical information from the Parents, the District "denied [the Parents] the knowledge necessary to request a due process hearing." *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008); *see also D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 492 (D.N.J. 2008) (applying the withholding exception because the school district failed to provide a proper notice of procedural safeguards).

The District argues that even if the child-find claims are viable, the District fulfilled its obligations. As previously noted, the ALJ determined that the District's efforts were insufficient to discharge its child-find duties. The record shows that the District was aware, no later than the spring of 2015, that the Student had stopped attending school because of her anxiety. The District admirably and appropriately

engaged with the Parents concerning the Student's absences in eighth grade, including seeking information from the Student's therapists and other mental health providers. This involvement, however, is precisely what gave the District the reason to identify the Student as a possible child with a disability. By not acting on that information, the Court concludes, as did the ALJ, that the District failed to fulfill its child-find obligations with respect to the Student.

Based on the foregoing, and giving due weight to the ALJ's analysis, the Court affirms the ALJ's conclusions regarding the District's child-find obligations.

C. Remedies

In reviewing an ALJ's decision, the Court has broad discretion to "grant such relief as the Court deems appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii); *see also C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 987 (8th Cir. 2011) (reviewing challenge to award of reimbursement of private school tuition). The Supreme Court has held that a district court's authority to grant "appropriate" relief includes "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the [IDEA]." *Sch. Comm. of Burlington v. Dep't of Ed.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985).

1. IEE and Dr. Reese Costs

The District argues that the ALJ erred in ordering reimbursement of outside professionals hired by the

Parents to complete the Student's IEE because the underlying conclusions supporting the ALJ's order on reimbursement were erroneous. (*See, e.g.*, Doc. No. 88 at 57.) For example, the District explains that it did not conduct required classroom observations because the Student was at home nearly every day and rarely attended school, and that the absence of classroom observations and a functional behavior assessment were harmless because the Student did not meet the other eligibility criteria.[1]

The Court disagrees. As the ALJ concluded, the Parents are entitled to reimbursement for IEE fees because the District's evaluation was deficient under Minnesota law. *See* 34 C.F.R. § 300.502(b).

The District also challenges the ALJ's conclusion that the Parents would not have incurred the cost of Dr. Reese's evaluation if the District had timely complied with its child-find obligations. (*Id.* at 59.) The District instead contends that Dr. Reese's evaluation was optional, that the Parents agreed to have it done, and that an outside psychological evaluation is not a required "related service" even if the District had earlier identified the Student as entitled to special education. (*Id.*) Had the District evaluated the Student for special education at an earlier date, it says, a qualified school psychologist on staff could have administered all of the assessments that Dr. Reese conducted. (*Id.*)

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[1] The District evaluated the Student, but found no eligibility, for possible special eligibility in ASD, EBD, and OHD, and within the OHD category, evaluated the Student for ADHD and Generalized Anxiety Disorder.

The District is correct that a qualified school psychologist likely could have administered all of the assessments that Dr. Reese conducted. Simply put, however, the District did not timely evaluate the Student for special education, and the Parents incurred the costs of Dr. Reese's evaluation as a result. The Court concludes, as did ALJ, that Defendants are entitled to reimbursement of the amounts they paid Dr. Reese for the May 2017 assessment.

2. Private Services Costs

The District argues that the ALJ exceeded his authority by ordering, as compensatory education, the District to pay for private consultation and future services because there was no evidence that the District staff are incapable of providing the mandated services. Defendants argue that the ALJ correctly concluded that they are entitled to retrospective and prospective private school expenses and other forms of compensatory education services. (Doc. No. 92 at 40.)

Defendants correctly state that "[r]eimbursement for private school expenses may be an appropriate remedy whenever a school district has failed to provide a FAPE to a student, including when it has failed in its child find obligations, because those primary duties are so important." (*Id.* (citing 20 U.S.C. § 1415(i)(2)(C)(iii); *Sch. Comm. of Burlington*, 471 U.S. at 369-70, 105 S. Ct. 1996; *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66, 112 S. Ct. 1028, 117 L.Ed.2d 208 (1992); *C.B.*, 636 F.3d at 981).) Here, although there is evidence in the record that the District failed to provide the Student a FAPE, there is scant evidence concerning whether the District can

provide a FAPE prospectively. Through the time of the Decision, the parties fundamentally disagreed as to whether the Student was a child with a disability entitled to special education and related services. As a result, there was no evidence in the record as to whether the District can provide the type of specially designed education that Student is entitled to moving forward. In sum, the present record does not support an award of prospective compensatory education in the form of payment for private service providers.

Based on the foregoing, and based on the Court's eligibility and child-find conclusions, the Court orders reimbursement of past private services provided by Heather Lindstrom, consistent with the Decision. (*See* Decision at 28 ¶ 5.) At this time, however, the Court reverses the provision in the Decision that orders "[f]uture payments for Lindstrom's services must be paid directly to Lindstrom, based on invoices provided by Lindstrom to the School District. All payments must be made within 30 calendar days of the School District's receipt of an invoice." (*Id.*)

3. Quarterly Meetings

The District asks the Court to set aside the ALJ's order requiring the Student's IEP team to meet quarterly, arguing that although "IEP Team meetings are important," "[t]he frequency of meetings should be driven by the circumstances at the time, not the rigid application of a quarterly meeting schedule. (Doc. No. 88 at 62.) The District further notes that the IDEA already mandates that IEP Team meetings be held "not less than annually," 34 C.F.R. § 300.324(b)(i), and that special educators' time is limited and valuable. (Doc. No. 88 at 62-63.) Giving due weigh to the ALJ's consideration of this remedy, and noting the ALJ's

first-hand assessment that the District "unreasonably protracted this matter," the Court finds that requiring the Student's IEP team to meet quarterly is an appropriate remedy in light of all of the circumstances.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Plaintiff Independent School District No. 283's Motion for Judgment on the Administrative Record (Doc. No. [85]) is **DENIED**.

2. Defendants E.M.D.H., a minor, by and through her parents and next friends, L.H and S.D.'s Motion for Judgment on the Administrative Record (Doc. No. [89]) is **GRANTED IN PART, AS MODIFIED ABOVE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 15, 2019

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

INDEPENDENT SCHOOL DISTRICT NO. 283,

Plaintiff,

v.

E.M.D.H., a minor, by and through her parents and next friends, L.H. and S.D.,

Defendants.

Civil No. 18-935 (DWF/LIB)

April 25, 2018

MEMORANDUM OPINION AND ORDER

INTRODUCTION

In this action, Independent School District No. 283 (the "District") requests judicial review of a March 16, 2018 decision (the "Decision") issued by an administrative law judge ("ALJ"). (Doc. Nos. 1, 2.) The Decision ruled in favor of the parents of a high-school student who lodged a due process complaint under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"). The District seeks reversal of the ALJ's Decision and presently moves for a

Temporary Restraining Order ("TRO") and Preliminary Injunction Staying Enforcement of Administrative Decision pending resolution of the current litigation. (Doc. Nos. 1, 6.) The District's motion is granted as set forth below.

BACKGROUND

Defendants E.M.D.H. (the "Student"), a minor, by and through her parents and next friends, L.H. and S.D. (the "Parents") (together "Defendants") assert that the Student, a sixteen-year old junior in high school, has been denied her right to a free and appropriate education under the IDEA. In short, Defendants submit that the Student went years without special education and related services because she was not properly classified as having a disability. The Parents hired a private educational team to design and implement an individualized education program. In June 2017, Defendants initiated an administrative hearing to correct the conditions and restore the Student's education.[1]

After a seven-day hearing, the ALJ issued the Decision, requiring Plaintiff to immediately change the Student's educational placement by providing her a free appropriate public education consisting of special education and related services, at public expense, until her graduation. The District then initiated the present action seeking judicial review of the Decision and to reverse the findings therein. The

[1] The facts relevant to the merits of the case are fully recited in the Decision. There does not appear to be a dispute as to the material facts, but rather Plaintiff challenges the legal conclusions reached by the ALJ. The Court will refer to facts as relevant in its discussion below.

District presently seeks to stay the following portions of the Decision pending resolution of this action:[2]

> 1. The requirement that the District reimburse the Parents $21,208.80 for costs associated with independent educational evaluations conducted by privately hired evaluators Dr. Read Sulik (the Student's treating psychiatrist), Dr. Richard Ziegler (a pediatric neuropsychologist), Wendy Selnes (a behavior analyst), and Heather Lindstrom (a special education teacher working for the Minnesota Department of Corrections with a side-business known as "Beyond Risk Youth");[3]
>
> 2. The requirement that the District reimburse the Parents $2,430 for the assessment conducted in May 2017 by Dr. Denise Reese, a private, licensed psychologist;
>
> 3. The requirement that the Student's IEP team meet at least quarterly following the implementation of the Student's initial IEP;
>
> 4. The requirement that Dr. Sulik and Lindstrom be invited to all quarterly IEP meetings and be reimbursed for their time participating in such meetings;
>
> 5. The requirement that the District reimburse the Parents for the cost of a private

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[2] The School District represents that it seeks to stay the hearing officer's award of compensatory education, not the portion of the hearing decision that directly involves the Student's educational placement.

[3] The Court previously stayed portions of the Decision pending a ruling on the present motion. (Doc. No. 19.)

program provided by Lindstrom since January 5, 2018 and for future services;

6. The requirement that the Student's IEP include a placement in a "program identical" to the program currently provided by Lindstrom; and

7. Any alleged requirement that a "program identical" to Lindstrom's program must also include involvement by Dr. Ziegler and Selnes in IEP meetings from now until the Student graduates.

On April 13, 2018, after this action and the present motion were filed, the District sent a proposed individualized education program ("IEP") to the Parents. On April 16, 2018, the Parents consented to the proposed IEP. (Doc. No. 38 ("Second Reynolds Decl.") ¶¶ 12, 15 & Ex. 1("IEP").) The IEP was implemented in response to the Decision, and services under the IEP are anticipated to begin the week of April 23, 2018. (Second Reynolds Decl. ¶ 15.) The IEP outlines the services to be provided the Student by fully-licensed District employees within the boundaries of the District. The District submits that it informed Defendants' outside providers that their contracted services were on hold pending the outcome of this action or that the District would be in contact if a contract for services became necessary. (*Id.* ¶¶ 13-14.)

ANALYSIS

I. The IDEA and the "Stay–Put" Rule

The IDEA codifies the goal 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." 20 U.S.C. § 1400(d). In addition, the IDEA mandates that participating states extend various procedural protections and administrative safeguards to disabled children, parents, teachers, school officials, and educational institutions. 20 U.S.C. § 1415. For example, under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an "impartial due process hearing." *Id.* § 1415(b)(2) & (f). Once the available avenues of administrative review have been exhausted, aggrieved parties may file a civil action in state or federal court. *Id.* § 1415(i)(2).

The IDEA also includes a "stay-put" provision, under which a disabled student "shall remain in the then-current educational placement of the child" during the pendency of any judicial review, unless "the State or local educational agency and the parents otherwise agree." *Id.* § 1415(j). The "stay-put" provision ensures an uninterrupted continuity of education for a disabled child pending any administrative or judicial review. *See Light v. Parkway C–2 Sch. Dist.*, 41 F.3d 1223, 1227 (8th Cir. 1994). Further, the regulations implementing the IDEA provide:

> If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of [the general rule].

C.F.R. § 300.518(d). *See also Lawrence Cty. Sch. Dist. v. McDaniel*, Civ. No. 17-4, 2017 WL 4843229, at *2 (E.D. Ark. Oct. 26, 2017) (explaining that a hearing officer's decision in favor of a student constitutes the student's "then-current" placement).

Defendants argue that the Student's "current educational placement" is that which is set forth in the Decision. The District, however, argues that the injunctive relief sought does not implicate the "stay-put" provision because the District does not seek to change the Student's educational placement, but rather seeks to stay the expenditure of public money to pay private providers for both past and future services. The District points out that the parties have agreed to an IEP and that the portion of the Decision that directly involves the Student's educational placement is not subject to the stay.

The District has cited to authority that at least calls into question whether a challenge to an award of compensatory education, as opposed to the "then current educational placement," falls within the purview of the "stay-put" provision. *See, e.g.*, *Board of Educ. v. Maez*, Civ. No. 16-1082, 2017 WL 3610546, at *4 (D. N.M. 2017) ("There is some question as to whether the [stay-put] provision applies to compensatory education—or in this case, payment for *future* services."). Regardless of whether the "stay-put" provision applies to the provision of compensatory education, the "stay-put" provision can be overcome at the equitable discretion of a district court. *See Honig v. Doe*, 484 U.S. 305, 327-28 (1988). The "stay-put" rule was not intended to eliminate the availability of traditional injunctive relief. *See Board of Educ. v. Maez*, 2017 WL 3610546, at *3. Therefore

the Court evaluates the District's request for injunctive relief below.

II. The District's Request for Injunctive Relief

A movant must demonstrate circumstances that justify a stay pending judicial review, and as with other temporary injunctive relief, the Court weighs the following factors: (1) the threat of irreparable harm to the moving party; (2) the balance between the alleged irreparable harm and the harm that granting the injunction would inflict on the other party; (3) the public interest; and (4) the likelihood of the moving party's success on the merits. *See Dist. of Columbia v. Masucci*, 13 F. Supp. 3d 33, 39 (D.D.C. 2014); *see also Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). The factors must be balanced to determine whether they tilt toward or away from granting injunctive relief. *See West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986).

The Court has considered the parties' respective arguments made in their papers and during the hearing on this matter. After careful consideration, the Court concludes that the District is entitled to a stay of portions of the Decision pending a final resolution of this lawsuit. First, the Court concludes that the District has demonstrated irreparable harm. Absent a stay, the District will be required to reimburse the Parents roughly $24,000 for past services provided by private evaluators and an assessment conducted by a private licensed psychologist. In addition, the District will be required to reimburse the Parents for future costs for private professionals' participation in quarterly IEP meetings, as well as the cost of the private program

provided by Lindstrom outside of the District. The District has submitted evidence that the costs of these private services could total $175,000 to $200,000 in a single year. (Doc. No. 16 ("Reynolds Decl.") ¶ 13.) While financial harm is ordinarily reparable because it is compensable by monetary damages, the circumstances here support a contrary conclusion. Without a stay, the District could be required to pay over $200,000 to cover both past and prospective private services. Even with a multi-million dollar operating budget, this is not an insignificant amount of money, particularly because the District maintains that it is capable of providing these services using its own licensed and qualified special education staff. (*Id.* ¶ 16.)

The District also argues that even if it ultimately prevails, there is no mechanism to recoup money spent to pay for private services. The District has cited to several cases supporting this contention. *See, e.g.*, *Masucci*, 13 F. Supp. 3d at 41 (holding that school district would be irreparably harmed absent a stay because the district would be unable to recoup costs paid for private tuition and related private services); *Board of Educ. v. Maez*, 2017 WL 3610546, at *6-8 (enjoining an order requiring $5,000 of private speech therapy for student because the district could not recoup the funds and because it would have to pay for duplicate services it could provide). While the Court does not necessarily agree with the notion that it could not order reimbursement of the funds, it concedes that it would be difficult to ask the Parents to reimburse the District for the costs of an ALJ's erroneous decision. *See Masucci*, 13 F. Supp. 3d at 41 (noting circuit court's statement that "[i]t would be absurd to

imagine a trial court ordering parents to reimburse a school system for the costs of a hearing examiner's erroneous placement of their child"). The potential of not being able to recoup the costs, in combination with the fact that the District will be forced to pay a high amount for duplicate services that it can provide, tips this factor in favor of a stay.

Second, the Court concludes that the balance of the harms weighs in favor of a stay. For services already provided and paid for, a stay will delay reimbursement to the Parents for several months. This delay is not irreparable. In addition, the Court finds that any harm the Student will suffer if payment for prospective private services is stayed will be mitigated by the fact that the District can implement the Student's educational placement with their own staff. Importantly, the District points out that the ALJ did not conclude that the District was incapable of providing appropriate services. The potential harm in requiring the District to pay for private services outweighs the potential harm to the Student and her Parents.

Third, the Court agrees with the District that the public interest is served by minimizing unnecessary expenditure of public funds and that any unnecessary expense will affect the District's ability to serve its student population at large. The Court recognizes and acknowledges the public interest promoted by the IDEA. However, it is not in the public interest to spend upwards of $200,000 in past and prospective costs to pay for private services when the District employs specialists who are licensed and qualified to provide those services to the Student.

Finally, Plaintiff argues that it is likely to succeed on the merits of its challenge to the Decision. Defendants disagree and argue that the District is unlikely to prevail because the Decision is well-reasoned, presumptively correct, and entitled to deference. The Court concludes that this particular factor weighs slightly in favor of injunctive relief. The merits of this case are complex and the record is voluminous, making a full analysis of the merits more properly addressed at a later stage of litigation. However, even at this early stage, the District's challenges to the Decision have merit in that they have raised substantial questions regarding the propriety of ALJ's order, and that those questions call for a more deliberate investigation. Specifically, the District argues that the ALJ erred in ordering reimbursement of outside professionals hired by the Parents because the underlying conclusions supporting the ALJ's order on reimbursement were erroneous. For example, the District explains that it did not conduct required classroom observations because the Student was at home nearly every day and rarely attended school, and that the absence of classroom observations and a functional behavior analysis were harmless because the Student did not meet the other eligibility criteria.[4] In addition, the District argues that the ALJ exceeded his authority by ordering, as compensatory education, the District

[4] The District evaluated the Student, but found no eligibility, for possible special eligibility in Autism Spectrum Disorder ("ASD"), Emotional and Behavioral Disorder ("EBD"), and Other Health Disability ("OHD"), and within the OHD category, evaluated the Student for ADHD and Generalized Anxiety Disorder.

to pay for private consultation and future services because there was no evidence that the District staff are incapable of providing the mandated services.

The Court declines to make any definitive finding as to the likelihood of success on the merits, except to note that the District's arguments have significant merit and deserve additional and thorough consideration. Even without a finding of a strong likelihood of success on the merits, the Court concludes that a temporary stay is warranted because the factors of irreparable harm, public interest, and balance of the harms all weigh heavily in favor of a stay.[5] On balance, the Court concludes that equitable considerations favor an injunction.

CONCLUSION

The Court grants the District's motion and temporarily stays the enforcement of the Decision insofar as it imposes any requirement on the District to expend public funds to pay for past or future private services. Of course, the Parents are free to continue to contract with private providers and could seek reimbursement should they prevail in this lawsuit. Hopefully, the implementation of the IEP and the resulting services provided by the District will meet the Student's educational needs. In addition, the

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[5] The Eighth Circuit has explained that the "equitable nature of the proceeding mandates that the court's approach be flexible" and has rejected "an effort to apply the probability [of success] language to all cases with mathematical precision." *Dataphase Sys., Inc.*, 640 F.2d at 113. Thus, "where the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." *Id.* Such is the case here.

Court believes that it is in the bests interests of the parties to resolve this case quickly. Consistent with the Court's remarks at the hearing, the parties are directed to contact Magistrate Judge Brisbois' chambers to set a date for a scheduling conference with priority. The Court also commits to giving this matter calendar priority.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. The District's Motion for a Temporary Restraining Order and Preliminary Injunction Staying Enforcement of Administrative Decision (Doc. No. [6]) is **GRANTED** as to the following provisions:

a. The requirement that the District reimburse the Parents $21,208.80 for costs associated with independent educational evaluations conducted by privately hired evaluators Dr. Read Sulik, Dr. Richard Ziegler, Wendy Selnes, and Heather Lindstrom;

b. The requirement that the District reimburse the Parents $2,430 for the assessment conducted in May 2017 by Dr. Denise Reese;

c. The requirement that Dr. Sulik and Lindstrom be invited to all quarterly IEP meetings and be reimbursed for their time participating in such meetings;

d. The requirement that the District reimburse the Parents for the cost of a private program provided by Lindstrom since January 5, 2018 and for future services;

e. The requirement that the Student's IEP include a placement in a "program identical" to the program currently provided by Lindstrom; and

f. Any alleged requirement that a "program identical" to Lindstrom's program must also include involvement by Dr. Ziegler and Selnes in IEP meetings from now until the Student graduates.

Dated: April 25, 2018 s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1269

INDEPENDENT SCHOOL DISTRICT NO. 283,

Appellant,

v.

E.M.D.H., a minor, by and through her parents and next friends, L.H. and S.D.,

Appellee.

MINNESOTA SCHOOL BOARDS ASSOCIATION

Amicus on Behalf of Appellant(s),

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., ET AL.,

Amici on Behalf of Appellee(s).

No. 19-1336

INDEPENDENT SCHOOL DISTRICT NO. 283,

Appellee,

v.

E.M.D.H., a minor, by and through her parents and next friends, L.H. and S.D.,

Appellant.

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COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., ET AL.,

Amici on Behalf of Appellant(s).

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Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-00935-DWF)
(0:18-cv-00935-DWF)

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August 5, 2020

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ORDER

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The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 05, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans