STATE OF IOWA

TERRY BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF EDUCATION
BRAD A. BUCK, DIRECTOR

December 20, 2013

CITE THIS DECISION AS

IDEA State Complaint Decision 14-01,
26 D.o.E. App. Dec. 390 (2013)

Nathan Kirstein, Esq.
Cyndy Miller, Esq.
Beth Rydberg, Advocate
Disability Rights Iowa
400 East Court Avenue, Suite 300
Des Moines, IA 50309

Beth E. Hansen, Esq.
Swisher & Cohrt, PLC
PO Box 1200
Waterloo, IA 50704-1200

Diane M. Stahle, Esq.
Gretchen Witte Kraemer, Esq.
Assistant Attorneys General
Regents and Human Services Division
Hoover Building, Second Floor
Des Moines, IA 50319

Complaint 14-01: State Complaint Concerning Iowa Department of Human Services (Iowa Juvenile Home and Girls State Training School) & Area Education Agency 267

Decision

Dear Colleagues:

On August 15, 2013, Disability Rights Iowa filed a special education state complaint under the Individuals with Disabilities Education Act ("IDEA") concerning the Iowa Juvenile Home and Girls State Training School (collectively "IJH"), operated by the Iowa Department of Human Services ("DHS"), and Area

Education Agency 267 ("AEA 267"). DHS operates an educational component at IJH referred to as Herbert Hoover High School ("HHHS"). Disability Rights Iowa, a federally funded protection and advocacy system for persons with disabilities, filed this complaint after a series of monitoring visits to IJH. While Disability Rights Iowa and the respondents were able to resolve many concerns voluntarily, several issues remained unresolved. Those issues and concerns are the basis of this complaint. The Iowa Department of Education ("Department") assigned investigation of the complaint to me.

The complainant and the respondents have submitted additional information and legal argument. I have considered that information and argument, as well as matter developed during the Department's previously scheduled site visit to IJH and matter that I reviewed during my November 1, 2013, visit to IJH. I have also taken notice of IJH's special education procedures, and of matters publicly available concerning the specific interventions provided by IJH at HHHS. I have consulted with my Department colleagues who have specialized technical knowledge in the alleged areas of violation. I have also reviewed and considered technical, professional, and scientific publications concerning special education and the education of children in state care. Those publications are cited where appropriate in this decision. I am also aware of the

announced closing of IJH. The record consists of these matters, and is now closed.

For the most part, the facts are not in dispute. The respondents do not appear to take issue with the factual allegations concerning the seven individuals in the state complaint. The primary dispute is the legal conclusion to be drawn from the facts that are not in dispute. After considering the record presented and the legal arguments presented, the complaint is CONFIRMED IN PART and NOT CONFIRMED IN PART.

Because the complaint is partially confirmed, corrective action is ordered, as described in part VI of this decision.

I. Jurisdiction and Timeliness

The Department has jurisdiction of this state complaint's subject matter. Iowa Admin. Code r. 281—41.153(2). The Department has jurisdiction over respondent AEA 267. *Id.* r. 281—41.2(1)"b". The Department has jurisdiction over the educational component of IJH, as operated by respondent DHS. Iowa Code § 256.1(e); Iowa Admin. Code r. 281—41.2(1)"c". The Department has no jurisdiction over the non-educational component of IJH, the decisions to place children at IJH, or the policy decision to close IJH.

The allegations presented are properly resolved through a state complaint. Iowa Admin. Code r. 281—41.153(2). The complaint is timely filed. *Id.* r. 281—41.153(3).

The Department previously overruled respondents' objection to Disability Rights Iowa's standing in this matter. That ruling, which is dated September 19, 2013, is incorporated into this decision by this reference.

Exceptional circumstances justify a delay in filing this decision. First, a delay was appropriate to allow collateral proceedings to go forward without interference. Second, the allegations present novel questions of law that required close consideration. Third, the allegations presented involved systemic allegations, concerned multiple issues and children and resulted in a voluminous record. Fourth, IJH's announced closing required review of potential remedial action. For these reasons, the Department previously extended its timeline to make a decision in this matter, and hereby again extends such timeline until the date listed above. *Id.* r. 281—41.152(2)"a".

II. General Findings of Fact

IJH is located in Toledo, Iowa, and is operated by DHS. It serves a small population of significantly troubled youth. According to DHS's web page:

> The Iowa Juvenile Home/Girls State Training School (IJH/GSTS), recognizing its role in the continuum of statewide delivery, will provide effective intervention for the most troubled youth in the state of Iowa. Staff acts as a positive change agent, providing

> therapeutic programming, to assist youth in successfully moving to a less structured environment. Building on the strength of families, in collaboration with the support of communities, staff strives to make a difference in the lives of the youth served.

The DHS web page contains the following additional description:

> The IJH/GSTS at Toledo provides a specialized structured setting to evaluate and treat youth between 12 and 18 years of age, who have been determined by the juvenile justice system to require specialized structured program care, evaluation, and/or treatment due to numerous out-of-home placements, disruptive behavior, and extensive involvement in the system. Males and females who have been adjudicated Children in Need of Assistance by the Iowa court system are admitted to the Iowa Juvenile Home. Females who have been adjudicated Delinquent are admitted to the State Training School for Girls.

A "child in need of assistance" and a child "adjudicated delinquent" are defined by Iowa Code chapter 232 (2013). Court action is required to adjudicate a child as either in need of assistance or delinquent, and court action is required to place a child at IJH. Parents or schools may not unilaterally place a child at IJH.

Several children at IJH do not have a biological or adoptive parent with the authority to make educational decisions for them, including instances involving terminations of parental rights. In many instances, DHS is a child's court-appointed guardian. In some of those circumstances, DHS made special education decisions as the child's "parent" or "guardian."

Children at IJH have experienced significant trauma and loss, and many have behaviors that are maladaptive and dangerous. Many have disabilities,

including mental illness. Children at IJH have had multiple out-of-home placements and range in age from 12 to 18 years old. At age 18, an IJH resident is no longer a "child" under Iowa Code chapter 232 and is discharged. IJH states it has a therapeutic approach to the children at IJH.

IJH operates HHHS as an educational program and on the IJH campus. HHHS has the responsibility to provide appropriate educational services to children residing at IJH, including children with disabilities. All HHHS instructional staff members are DHS employees. AEA 267 has the responsibility of providing special education support services to children with disabilities. AEA 267 provides a school social worker to IJH, on a half-time basis, and a full-time school psychologist. One-half of the school psychologist's salary is paid by DHS and one-half is paid by AEA 267. Some, but not all, of the children at IJH are eligible for special education under the IDEA.

All children at IJH attend HHHS, which is an on-campus school. HHHS is described in IJH's special education procedures as "a modified general education program." This appeared to be the only educational environment available to children at IJH. There was no mechanism to address educational needs that could only be addressed in more typical settings, such as off-campus comprehensive schools, or in more restrictive settings, such as environments available only to children with disabilities.

In at least one instance, IJH used school attendance as a reward to attain compliance. This was corrected by IJH for one particular student. In another IEP, a student needed to meet behavioral expectations in order to use an IEP-listed accommodation. Withholding rights, such as a right to an education or accommodations, in order to obtain compliance with adult demands or earning enough behavior "points" is considered an inappropriate practice in treatment centers and facilities for children in state care. *See, e.g.*, Bernard P. Perlmutter, *Advocacy for Foster Youth in Mental Health Commitment Proceedings*, in *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* § 21.6 (Donald N. Duquette & Ann M. Haralambie, eds., 2d ed. 2010) (examples: access to attorneys, access to guardians ad litem, ability to contact child abuse registry). These findings align with the concern expressed during site visit interviews that school is not a priority for IJH non-education staff.

IJH reported it uses a program based on the Circle of Courage, a model developed by Reclaiming Youth International. *See generally* Larry K. Brendtro, Martin Brokenleg, Steve Van Bockern, *Reclaiming Youth at Risk: Our Hope for the Future* (Rev. ed. 2001). The model is based on

> meeting basic growth needs of *belonging* (healthy adult/child and peer attachments), *mastery* (physical, academic, and social-emotional competence), *independence* (autonomy and appropriate

> risk-taking), and *generosity* (altruistic purpose and service to others).

Ron Rubin, *Independence, Disengagement, and Discipline*, Reclaiming Children and Youth, Spring 2012, at 42, 44 (emphasis in original). The model is supported by evidence, and focuses on trust, empowerment, and resilience. Circle of Courage is used by IJH as a core strategy for all children.

The developers of the model specifically state that it is not an "obedience model of discipline." Every indication is that IJH is using the Circle of Courage, at least in part, as a tool to attain student compliance. IJH has an assessment form for use at HHHS that tracks attainment of Circle of Courage "points," which gathers data on five fields: the four shared values and an additional field of "daily work" (on task and assignment completion). The point sheet focuses heavily on gaining compliance with adult demands. Nearly every IEP with a goal related to behavior has a goal of earning eighty percent of a week's Circle of Courage "points." None of the literature reviewed concerning the Circle of Courage suggests that the evidence supports assigning points based on compliance with the four shared values.

HHHS staff members, whether employed by DHS or AEA 267, appear to have the interests of their students in mind. It would appear that HHHS staff members believe they are acting in accordance with the law and want what is best for the children in their charge. Current IJH and AEA 267 leadership appear

committed to making necessary improvements to attain compliance and improve performance, a viewpoint that is reflected in statements made by respondents' counsel. As noted above, I am aware that the IJH will be closing.

More specific findings of fact are made in connection with discussion of the particular legal claims made by Disability Rights Iowa, below.

III. General Conclusions of Law

IDEA regulations and state rules require the Department to investigate any complaint alleging a public agency violated a provision of the IDEA. 34 C.F.R. § 300.153(b)(2006); Iowa Admin. Code r. 281—41.153(2). The Department is to make an independent assessment of the complaint. Iowa Admin. Code r. 281—41.152(1). The complainant bears the burden of proof. *See, e.g.*, *Shaffer v. Weast*, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) ("We should presume that public school officials are properly performing their difficult responsibilities under this important statute."). The IDEA state complaint process is part of the Department's general supervision obligation under the IDEA. *See* 20 U.S.C. § 1412(a)(11).

Each public agency has the obligation to locate children who might be children with disabilities and evaluate them for special education eligibility. Iowa Admin. Code r. 281—41.111. This includes children who are wards of the state. *Id.* r. 281—41.111(1). An evaluation is required whenever the child's

performance "might be explained" by the child's eligibility for special education and support and related services. *Id.* r. 281—41.111(6). An evaluation for special education eligibility, which is the responsibility of the AEA to conduct, *see id.* r. 281—41.407, must meet the requirements of state and federal law, *see id.* rr. 281—41.300 through 281—41.314.

Each child with a disability is entitled to a "free appropriate public education" (FAPE). *Id.* r. 281—41.101. FAPE is defined as:

> special education and related services that are provided at public expense, under public supervision and direction, and without charge; that meet the standards of the SEA, including the requirements of this chapter; that include an appropriate preschool, elementary school, or secondary school education; and that are provided in conformity with an individualized education program (IEP) that meets the requirements of rules 281—41.320(256B,34CFR300) to 281—41.324(256B,34CFR300).

Id. r. 281—41.17.

The respondents are obligated to provide a FAPE to children with disabilities at IJH who attend HHHS. *Id.* r. 281—41.101. FAPE is an eligible individual's right under state and federal law, *see* 20 U.S.C. § 1415(f)(3)(E)(ii)(I), and is not contingent on other priorities or to be used as a reward or incentive for the attainment of non-educational goals.

To determine whether a child's IEP meets the requirements of the law, the Department follows the standard articulated in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Department will inquire (1) whether the respondents

followed the IDEA's procedural requirements, and (2) whether the IEP drafted was "reasonably calculated" to confer educational benefit to the child at issue. "'Some educational benefit' is sufficient; a school need not 'maximize a student's potential or provide the best possible education at public expense.'" *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2012) (quoting *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010)). "Reasonably calculated" will vary based on the needs of each individual child. A service that might be benefit-maximizing for one child, and therefore not required, might be absolutely necessary for another child to receive a FAPE. In investigating this state complaint, I have viewed the allegations with the *Rowley* standard in mind. The standard applied is not "optimal," "preferred," "best practice," or "recommended." The standard applied is compliance with the law's basic requirements.

An IEP must contain statements of the specially designed instruction and support and related services required by each particular child. Iowa Admin. Code rr. 281—41.22, 281—41.320. The specially designed instruction described in the IEP must "address the unique needs of the child that result from the child's disability." *Id.* r. 281—41.39(3)"c". Cut-and-paste, one-size-fits-all IEP goals or services do not meet this definition. Services provided to, or available to, all children, such as universal instruction or universal interventions, are the general

curriculum, *see id.* r. 281—41.51(7), are not special education, *see id*. r. 281—41.39(3)"c", and are, as a general rule, not appropriate uses of special education funds, *see* Iowa Code § 256B.9(1).

Each child with a disability's IEP must be developed by an IEP team. Iowa Admin. Code r. 281—41.23. Unless a child has attained the age of majority, *see id.* r. 281—41.520, the child's parents are required members of the IEP team, *see id.* rr. 281—41.321(1)"a", 281--41.322. The IDEA and state law provide a definition of "parent," and that definition prohibits employees of DHS from serving as "parent" for children under its guardianship. *Id.* r. 281—41.30(1)"c". Parents have many important rights under the IDEA, including the right to IEP participation, *see id.* rr. 281—41.321(1)"a", 281--41.322, 281—41.501(3), and the right to exercise procedural safeguards, *see id.* r. 281—41.504.

The services described in a child's IEP must "be based on peer-reviewed research, to the extent practicable." *Id.* r. 281—41.320(1)"e". While this clause does not require the best methodology for the child, and does not hamstring public agencies where peer-reviewed research is not available or practical, it embodies the requirement that IEP teams attempt do things with a reasonable likelihood of working. *See, e.g.*, *Ridley School Dist. v. M.R.*, 680 F.3d 260, 275-80 (3rd Cir. 2012). An individual child's team has flexibility in determining which methods to adopt, given the child's specific needs. *Id.* The practicality of

services to the child will depend on the individual child's data and what is required to provide the child with a reasonable opportunity for educational benefit under *Rowley*. *Id.*

Each eligible individual is to receive their education in the least restrictive environment ("LRE"). Iowa Admin. Code r. 281—41.114. The child's placement is to be based on the child's unique educational needs and based on the child's IEP. *Id.* r. 281—41.116. Each public agency is required to maintain a "continuum of alternative services and placements" to meet the varied needs of eligible individuals. *Id.* r. 281—41.115.

Eligible individuals of secondary school age are entitled to transition services. *Id.* rr. 281—41.43, 281—41.320(2). Transition services are a coordinated set of activities to prepare eligible individuals for life after secondary school, *id.* r. 281—41.43, and must include measurable postsecondary goals based on age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills," *id.* r. 281—41.320(2). An eligible individual's IEP must contain transition services no later than the first IEP to be in effect when the child turns fourteen years old. *Id.*

Children whose placements are changed because of removals from their typical educational setting for violations of a student code of conduct, including in-school suspensions and other removals, are entitled to protections of the law.

Those additional protections may include a determination of whether the behavior was a manifestation of the child's disability. *Id.* rr. 281—41.530 through 281—41.536. Regardless of whether an in-school suspension counts as a removal for determining whether an eligible individual's placement has been changed, all public agencies must report rates of suspension and expulsion to the Department, *id.* r. 281—41.170, including suspensions and expulsions during which students received IEP services.

An eligible individual whose placement has been changed because of removals for violating student codes of conduct, when such removals are based on behavior that is a manifestation of the child's disability, is entitled to a behavior intervention plan ("BIP") based on a functional assessment of the child's behavior ("FBA"). *Id.* r. 281—41.530(6). A BIP is to be implemented by the child's IEP team. *Id.* A BIP based on an FBA also might be required to provide a child with a FAPE. *See generally Dass*, 655 F.3d at 766. BIPs and FBAs must be individualized and evidence-based. Regardless of whether a child has a BIP, if a child's "behavior impedes the child's learning or the learning of others," the child's IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." Iowa Admin. Code r. 281—41.324(1)"b"(1).

The Department assesses the actions taken by the public agencies from the vantage point of when the public agencies acted. The Department evaluates IEPs in light of information available to IEP teams at the time; they are not judged with the benefit of hindsight. *K.E. v. Independent Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011). An IEP "is a snapshot, not a retrospective." *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993)). An IEP must be evaluated in terms of what was objectively reasonable when it was developed. *Id.*

The United States Department of Education's Office of Special Education Programs ("OSEP") has issued several technical assistance documents on special education law, including but not limited to documents addressing IEPs, behavior, data quality, and procedural safeguards. Additionally, OSEP-funded technical assistance centers have produced documents on similar subjects. In providing meaning to legislative and regulatory text that might be unclear, I have given those documents the great weight they deserve. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I have also given, when appropriate, weight to legislative and regulatory history.

In considering whether a violation occurred and what remedy to recommend, if any, the Department must consider the needs of all children with disabilities in the public agency. Iowa Admin. Code r. 281—41.151(2).

IJH's planned closure relates to the particular remedy ordered, not to the availability of remedies. IJH's planned closure does not divest the Department from its ability to order "corrective action appropriate to address the needs of" each particular child. *Id.* r. 281—41.151(2)"a". While IJH's planned closure does make certain potential corrective actions moot (such as "technical assistance activities," *id.* r. 281—41.152(2)"b"(3)), IJH's closure does not relieve DHS or AEA 267 of the responsibility for implementing any ordered corrective action.

More specific findings of fact are made in connection with discussion of the particular legal claims made by Disability Rights Iowa, below.

IV. Specific Allegations Made By Disability Rights Iowa

Complainants alleged the respondents violated provisions of law concerning the following: IEPs; LRE; transition services; child find; parent participation in the special education process; related services; education of students who have been removed for disciplinary purposes; and behavior support plans. I consider these in turn, from the standpoint of "compliance," not "perfection." In each of the subparts that follow, I make specific findings of fact and conclusions of law. These findings of fact and conclusions of law are in addition to those made in parts II and III, and those findings and conclusions contained in those parts are incorporated into this part by reference.

A. Alleged Failure to Follow the IDEA's Requirements for IEPs. Disability Rights Iowa alleged that IJH, in effect, adopted the IEPs written before the children arrived at IJH. While several of the IEPs reviewed contained references to prior educational environments, the IEPs reflected some attempts to describe the child's placement and services at IJH. Those attempts gave rise to a larger and more fundamental problem: lack of individualization.

While some IEPs had thoughtful, individualized goals, primarily in the academic domain, the vast majority of IEPs contained boilerplate descriptions of goals, services, and supports provided, especially in the area of behavior. While one of these IEPs, if viewed in isolation, might appear to be individualized, when they are viewed together, such individualization is merely an illusion. These cut-and-paste descriptions and goals reflect no attempt to individualize programs or services to respond to each child's needs and present levels of performance. For example, nearly all IEPs contain the following text, or some variant on this theme:

> [Student] has been court ordered to the Iowa Juvenile Home and was admitted in [date]. All classes at IJH are taught in a general education setting with additional adult support in every class to allow for a small student-teacher ratio. IJH uses the Circle of Courage program for social skills and behavioral expectations. All students have additional behavioral support through support staff, cottage staff, and an interventionist. All students are assessed using a daily behavioral points sheet based on the Circle of Courage components. All students are expected to follow these

> expectations in both school and cottage settings in order to meet treatment expectations and progress through the treatment levels.

In certain IEPs, this text block is followed with something to this effect:

> Crisis intervention staff and a behavioral control center (infirmary) are available at all times. These are provided to all students and are not typically addressed in a special education student's IEP.

This boilerplate language has several conceptual problems. First, the description of what all students are customarily offered at IJH and HHHS, which might be appropriate background information in an IEP, becomes a constraint on the services offered. IJH and HHHS make the legally impermissible leap from "all students receive these services" to "students only receive these services." Second, if the services are available to all students, then one would not expect them to be described in any IEPs. However, the infirmary and the Circle of Courage are centerpieces of a vast majority of IEPs reviewed.

This is supported by the following boilerplate behavioral goal that appears in numerous IEPs:

> By [possessive pronoun] next annual review, when given instruction in social skills, getting along with peers, seeking attention appropriately, and following adult directions, [Student] will use appropriate social skills and follow classroom expectations as demonstrated by earning 80% or more weekly average on [possessive pronoun] behavior points sheet in four of five trials.

The Circle of Courage program and point sheet that is used for all children has become the specially designed instruction and progress monitoring instrument

for children with disabilities. Generously assuming that the behavioral point sheet is an appropriate measurement instrument of attainment of the Circle of Courage values it purports to measure, the IEPs containing this boilerplate text or similar language show a lack of individualization. A portion of the general education curriculum has become the IEP services, the IEP goal, and the IEP progress monitoring instrument for nearly all children with disabilities.

Nearly all of the IEPs reviewed set a goal of eighty percent on the weekly point sheet, whether the student's present levels of performance would indicate an area of need. Apparently, only one student has a goal of less than eighty percent, and the student's goal is seventy percent. Some of the students with goals of eighty percent have present levels in the goal area ranging from fifty-five percent to seventy-eight percent. At least one student with a goal of eighty percent has a present level of twenty percent on a different assessment instrument. One student has a goal of eighty percent on the Circle of Courage point sheet when the student's present level of performance is eighty percent: this student's IEP called for absolutely no growth. The specially designed instruction described for the student with a present level of twenty percent was not noticeably different for the student whose present level was eighty percent. These IEPs are not individualized. Iowa Admin. Code r. 281—41.39(3)"c". There is no evidence in the record that would support a conclusion that the IEP

discussed above that calls for no growth would meet the *Rowley* standard for some "educational benefit." *Dass*, 655 F.3d at 766.

The point sheet used at IJH could conceivably allow for some level of individualization; however, it is not used that way. If data were examined, it could be possible to determine the domain (purportedly measured by the point sheet) of greatest need for each student, and then design instruction and interventions accordingly. This was not done.

Additionally, nearly all of the IEPs contained the following boilerplate language about classroom removal, in addition to the language discussed in the second block quote in this subpart:

> If [Student] should be removed from the school and placed in the Infirmary (Behavior Control Center) by either school or cottage staff, this IEP will be continued by AEA 267 personnel or IJH staff assigned to the Infirmary.

If this language describes a policy common to all IJH students, it has no place in an IEP. It does not function as an individualized intervention, because its variations between IEPs are merely changes in vocabulary or location (e.g., removal to cottage), not in individualized approaches based on unique student needs. This language does not function as a behavior intervention, because it is not attached to any goal or any specially designed instruction. In at least two instances, students whose IEPs indicated behavior was not an area of concern

had the quoted text included in their IEPs (although one of the students was being reevaluated due to behavior concerns).

While some of the goals and services appeared individualized, especially concerning goals and services in core academic subjects, the matter quoted above supports only the conclusion that IEPs were written based on what IJH would offer, rather than based on what each child needed. "All students in setting X get goal Y and service Z" is not special education, and an IEP for a student in setting X that calls for goal Y and service Z is fitting the child into the services, rather than ensuring the services match the child. If an entity develops look-a-like goals for all children with disabilities that it serves because that is how it conducts business, that entity is not providing special education. *See generally Gagliardo v. Arlington C. Sch. Dist.*, 489 F.3d 105 (2nd Cir. 2007).

In contrast, other IEPs set the goal in terms of a certain number of "walkouts" or "removals" from the classroom per month, typically less than two per month. A problem with this type of goal is that the time intervals would not allow for timely and meaningful instructional decisions. IEP goals are required to comply with AEA-established standards for progress monitoring. *See* Iowa Admin. Code r. 281—41.314(3). If four data points above or below a line are necessary to make a sound instructional decision about the appropriateness of the goal or intervention, these goals would allow only three instructional

changes, at most, a year. For children with significant behavioral needs, monthly behavioral goals are not nimble enough to provide a reasonable framework for responding to those needs. At best, they are strategies to respond to infrequent crises, rather than plans for measurable progress toward sustainable change. These goals do not satisfy the *Rowley* standard.

Additionally, uncontested allegations in the state complaint show that some children did not receive services called for in their IEPs. If an IEP calls for a service, it must be provided. *Id.* r. 281—41.17.

As final concern, the last sentence in the first block quote of this subpart reveals an additional problem of a systemic nature. The sentence reads, in full: "All students are expected to follow these expectations in both school and cottage settings in order to meet treatment expectations and progress through the treatment levels." The reference to treatment reinforces the conclusion that IJH prioritizes "treatment" over education, and coheres with the findings in Part II, as well as the concerns expressed in the site visit report. This is borne out by the instances where students' education was suspended pending treatment needs or used as an outcome to reward attaining treatment objectives. The relationship between treatment and education is complex and requires careful and prudent thought. *See, e.g.*, *Independent Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769 (8th Cir. 2001). Treatment can be a required element of a program of special education if

the treatment is necessary for a child to benefit from education. That being said, it is a fundamental error to confuse treatment needs and educational needs or to prioritize treatment needs over educational needs. In this quoted matter, the child's IEP needs are dictated by set-in-stone treatment objectives for all needs.

Because IEPs reviewed conclusively demonstrate a systematic failure to provide specially designed instruction, when viewed using the snapshot rule, *see K.E.*, 647 F.3d 795, and a compliance lens, including in the areas noted in this subpart, this allegation is confirmed. Corrective action will be ordered.

B. Alleged Failure to Provide Education in the Least Restrictive Environment. The complainant alleges that IJH provides all services in a certain setting and, in doing so, violates the IDEA's LRE mandate. The undisputed facts in this record support this allegation.

I specifically find and conclude that the IDEA's LRE and continuum requirements apply to IJH. There are narrow exceptions for placement changes for children who are convicted as adults under state law and incarcerated in adult prisons, *see* Iowa Admin. Code r. 281—41.324(4)"b"; however, these provisions do not apply to children who are adjudicated delinquent or placed by a court in a facility because the child has been adjudicated in need of assistance. The specific inclusion of this exception only for adult prisoners with disabilities necessarily compels a conclusion that no similar exception applies to juveniles.

In addition to the language from IEPs quoted in the prior subpart, the IJH policies and procedures contain the following statement: "All residents entering IJH/GSTS shall be expected to attend the on-grounds school, Herbert Hoover High School, which is a modified general education program." While IJH policies would appear to allow for the possibility of participation of HHHS students in programs and services at the South Tama Community School District, including students with disabilities, these policies are not embodied in the boilerplate found in all IEPs and would appear to be a dead letter. Information gathered in the site visit demonstrates that community access requires a certain number of behavioral points. The policy decision to restrict community access only to children who have obtained a certain amount of points (such as for work experience) without an IEP team considering alternative ways to address community-based needs inappropriately subordinates educational needs of IJH children. The public agencies' responses to the state complaint express a commitment to provide these services in the future; however, some additional correction is required for the failure to do so up to the filing of this state complaint.

This policy, as spelled out in IEP boilerplate language, makes no allowance for students whose needs are not met by the modified general education program that has been described. In at least one instance, a child who

had been in a special education environment for one hundred percent of his school day in his prior placement was placed in the IJH modified general education environment, with no evidence that his team considered whether that placement would be educationally appropriate. What if a particular student needed more intensive educational services and supports than HHHS could provide? What if a particular student needed more enriched academic content than HHHS could provide? The policy and the boilerplate IEP language are based on the flawed assumption that one educational environment is appropriate for all children with disabilities. *See generally A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158 (8th Cir. 1987). The general education environment is usually, but not always, the LRE. For that reason, IJH is obligated to make available a continuum of alternative placements and services, *see* Iowa Admin. Code r. 281—41.115. Its policies and procedures do not provide a realistic avenue for a child's IEP team to make alternative arrangements if education at HHHS does not provide that child with a FAPE, either by changing the location (which may require seeking court approval) or changing the services HHHS offers. (In one instance, IJH sought an alternative placement, which was rejected by the court, but the record reflects that the change in placement was not sought based on education need.)

For these reasons, IJH's policies and procedures violate the IDEA. Corrective action will be ordered. This allegation is confirmed.

C. Alleged Lack of Appropriate Transition Services. The complainant alleges that IJH failed to provide appropriate transition services. The record compels a finding and conclusion that this allegation is confirmed.

The law's requirements for transition services are clear and cited above. They are designed to advance the congressional purpose of preparing children with disabilities for "further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also* Iowa Admin. Code r. 281—41.1(1). The only exception to the law's transition requirements applies to children who are convicted of adult crimes and confined to adult prisons when IDEA entitlement will end before the earliest possible end of their term of incarceration. *See* Iowa Admin. Code r. 281—41.324(4)"a"(2). These requirements are embodied in "Indicator 13," a component of the state's performance plan and annual performance report required by IDEA regulations. *See* 34 C.F.R. §§ 300.601-.602. The federal measurement required for Indicator 13 is as follows:

> Percent of youth with IEPs aged 16 and above with an IEP that includes appropriate measurable postsecondary goals that are annually updated and based upon an age appropriate transition assessment, transition services, including courses of study, that will reasonably enable the student to meet those postsecondary goals, and annual IEP goals related to the student's transition services needs. There must also be evidence that the student was invited to the IEP Team meeting where transition services are to be discussed and evidence that, if appropriate, a representative of any participating agency was invited to the IEP Team meeting with the prior consent of the parent or student who has reached the age of majority.

The required target for this indicator is 100 percent. Iowa has divided this block quote into six critical elements, which are as follows:

> *Critical Element 1: Interests and Preferences.* Interests and preferences as they relate to post-secondary areas and student invitation to the meeting.
>
> *Critical Element 2: Transition Assessments.* Assessment information listing specific data and the source of the data for each post-secondary area of living, learning and working is sufficient to determine that the post-secondary area was assessed.
>
> *Critical Element 3: Post-secondary Expectations.* A statement for each post-secondary area of living, learning, and working is observable, based on assessment information and projects beyond high school.
>
> *Critical Element 4: Course of Study.* The course of study must project to the student's anticipated end of high school, be based on needs and include: 1) a targeted graduation date; 2) the student's graduation criteria; and 3) any courses or activities the student needs to pursue his/her post-secondary expectations.
>
> *Critical Element 5: Annual Goals.* All goals must support pursuit of the student's post-secondary expectations, be well-written and all areas of post-secondary expectations must have a goal or service/activity or the assessment information must clearly indicate there is no need for services in that post-secondary area.
>
> *Critical Element 6: Services, supports, and activities.* Statements must specifically describe the services, supports and activities necessary to meet the needs identified through the transition assessment. Evidence that adult agencies and community organizations were involved as appropriate must also be present.

These six elements are "critical" not only because they are educationally meaningful and relevant but because each critical element directly corresponds with a legal requirement or requirements imposed by the IDEA. Attainment of each critical element for every child is a requirement of the law, *see* Iowa Admin.

Code rr. 281—41.43, 281—41.320(2), 281—41.321(2), and a component of FAPE, *see id.* r. 281—41.17. Since transition requirements are primarily housed in the law's provisions on IEPs, noncompliance with these requirements strikes directly and deeply at the IDEA's core entitlement. They are manifestly more than "compliance hoops" or "paperwork." The law is uncompromising, and compels the following conclusion: failure to do transition well enough to satisfy the Indicator 13 standard is a failure to do special education at all.

A review of IEPs for Indicator 13 follows a standard protocol, which is aligned to the six critical elements and has a high degree of inter-rater reliability. Individuals trained in that standard protocol reviewed IEPs using that standard protocol. Those results are summarized on page fourteen of the site visit report, and are incorporated by this reference. In summary, while compliance with each of the six critical elements ranged from 42.42 percent (Critical Element 1) to 90.91 percent (Critical Element 6), only 39.40 percent of IEPs reviewed met all six critical elements of Indicator 13 and, by necessary implication, the requirements of the IDEA. This compares with 66.31 percent of transition-age IEPs reviewed in AEA 267, according to data from the state's most recent annual performance report.

The other information gathered during the site visit, as well as the uncontested allegations in the state complaint, add concrete details to IJH's

Indicator 13 data. For these reasons, as well as the uncontested allegations contained in the state complaint, this allegation is confirmed, using a compliance standard. The high level of noncompliance with these legal requirements by AEA 267 and IJH prove the need for corrective action.

D. Alleged Failure to Engage in Child Find Activities. The complainant alleges that IJH failed to provide appropriate child find activities. Based on AEA 267's voluntary offer of corrective action, the Department exercises its discretion to make a limited, tailored finding.

The law requires all public agencies to find children who might be children with disabilities, *see* Iowa Admin. Code r. 281—41.111, and seek to evaluate them. This includes children who are wards of the state, *see id.* r. 281—41.111(1), which would include children at IJH, *see id.* r. 281—41.45 (defining "ward of the state").

In its response to the state complaint, AEA 267 reports that thirteen children at IJH did not have IEPs and one was currently being evaluated for special education. AEA 267 committed to ensuring that the law concerning child find be applied to IJH residents. Given the challenging and dangerous behaviors displayed by most IJH residents, such behavior resulting in their court placement at IJH, as well as the significant trauma the vast majority of IJH residents have experienced, it would be expected that IJH and AEA 267 would pose the

suspicion question upon each child's admission to IJH. Even if that would not be required as a matter of legal compliance, the law would require more than assuming that a child without an IEP on admission does not need special education. Even though the IJH written policies and procedures make a brief reference to special education evaluations for children who are not yet eligible for special education (Policy 6.11), the evidence supports a conclusion that, at least until this complaint was filed, the public agencies impermissibly indulged in that assumption.

AEA 267's response to the state complaint, submitted through counsel, offered a comprehensive proposal to resolve this allegation in the state complaint. Its proposal is fully warranted in the circumstances and, if implemented, would completely resolve this allegation. In this unique circumstance, the Department accepts this voluntary corrective action. This circumstance is one in which the United States Department of Education has recognized that states have the discretion not to make a finding of noncompliance. *See* United States Dep't of Educ., *Frequently Asked Questions Regarding Identification and Correction of Noncompliance and Reporting on Correction in the State Performance Plan (SPP)/Annual Performance Report (APR), September 3, 2008*, at 2 (hereinafter "*OSEP FAQ*"). Given the proactive nature of the response of AEA 267 and counsel, exercising that discretion is warranted here. Although no finding is made at this time, the latitude exercised by the Department in this

circumstance will not be exercised by the Department in future child find violations by either of the respondents.

I find and conclude that the corrective action as proposed is appropriate. It is accepted. No further finding or conclusion is made.

E. Alleged Failure to Identify a "Parent" for IEP Team Participation. The complainant alleges that IJH had individuals who were DHS employees act as parent for IDEA purposes. This allegation is confirmed. DHS has an obligation to ensure its employees do not act as parents under the IDEA, and AEA 267 has an obligation to appoint surrogate parents when necessary.

In several instances, DHS employees were listed on a child's IEP as either the child's parent or guardian. This must not be, and shall not continue. The law specifically provides that a child's guardian may act as a child's parent, but not DHS if the child is a ward of the state. Iowa Admin. Code r. 281—41.30(1)"c". Although DHS may be appointed as a guardian or custodian for a child in need of assistance under state statute, *see* Iowa Code §§ 232.2, 232.102, this state statutory authority must yield to the prohibition contained in federal law, *see* 34 C.F.R. § 300.30(a)(3), and codified in state law, *see* Iowa Admin. Code r. 281—41.30(1)"c". The Departments have confirmed their joint understanding of this legal conclusion in numerous interagency agreements, as well as a joint policy statement issued by Directors Jason Glass and Charles Palmer in August 2011

(available on-line at https://www.educateiowa.gov/documents/learner-supports/2013/04/decision-making-children-disabilities-foster-care). It appears that the leadership position taken by Directors Palmer and Glass has not yet fully translated to day-to-day practice in each of the respective fields of practice. The Department also previously confirmed a state complaint decision where a DHS child protective worker inappropriately assumed the role of "parent" in an IEP meeting. This principle of law is settled beyond question. DHS employees, even those designated by the juvenile court as guardian or custodian, may not act as a parent for IDEA purposes. AEA 267 and DHS have the joint responsibility to ensure this does not occur.

If DHS cannot act as a child's "parent," and no parent is identified, AEA 267 shall ensure that a surrogate parent is appointed. Iowa Admin. Code r. 281—41.519.

Disability Rights Iowa also alleged that IJH violated the rights of parents by, in effect, defining parents off of the IEP team through its policies. The plain language of the policy confirms this. Policy 6.08 contains these two sentences.

> The team will consist of at least four (4) people (AEA representative, consulting teacher or special education, education advisor, and principal or designee). It would be *beneficial to have the parents of the student*, cottage counselor, and social worker in attendance.

(Emphasis added.) This policy attempts to rewrite the law. Federal and state law make parents required, not optional or "beneficial," members of IEP teams. 20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.321(a)(1); Iowa Admin. Code r. 281—41.321(1)"a". One may permissibly infer that parents are listed first in the statute, regulations, and rules for a reason: their attendance is crucial and they are critical IEP team members.

State and federal law require IJH and AEA 267 to "ensure" parent participation in IEP team meetings, including scheduling meetings at a mutually agreeable time and place (34 C.F.R. § 300.322(a); Iowa Admin. Code r. 281—41.322(1)), and must use other methods of ensuring parent participation in the case parents are unable to attend in person (34 C.F.R. §§ 300.322(c), 300.328; Iowa Admin. Code rr. 281—41.322(3), 281—41.328). Before holding an IEP meeting without a parent present, IJH and AEA 267 must attempt to "convince" a parent to attend, and "must keep a record of its attempts to arrange a mutually agreed on time and place." 34 C.F.R. § 300.322(d); Iowa Admin. Code r. 281—41.322(4). This standard requires more than an affirmative response to "Is it okay if we go ahead with this meeting without you?".

The language in policy 6.08 is in direct contradiction of the requirements imposed by state and federal law. As such, its existence is a structural and systemic violation of the law, which must be corrected. I note that the policy

language appears to make no allowance for another IEP team participant listed in the law: "whenever appropriate, the child with a disability." Iowa Admin. Code r. 281—41.321(1)"g".

Two additional items from IEPs reviewed suggest that IJH and AEA 267 are not appropriately honoring the rights of parents. First, in at least two instances, DHS attempted to use the IEP meeting excusal process to excuse persons purporting to act as "parent" (in both instances, a DHS employee, who did not meet the IDEA's definition of parent at all). The meeting excusal process is not available to excuse parent (or child) attendance, and applies only to excusal of public agency employees. *Id.* r. 281—41.321(5). The excusal provisions must be exercised with care, *see, e.g.*, Susan Etscheidt, *The Excusal Provision of the IDEA 2004: Streamlining Procedural Compliance or Prejudicing Rights of Students with Disabilities*, Preventing School Failure, Summer 2007, at 13, and must only be used according to their specific statutory language.

Second, at least ten IEPs contain language purporting to authorize revision of BIPs without convening IEP meetings. This is not authorized by the IDEA. While the IDEA does not require that an FBA or BIP be incorporated into an IEP, the law does provide a critical role for parents in the FBA/BIP process. When required, a BIP must be implemented by a group that includes the child's parents. *See* Iowa Admin. Code r. 281—41.530(6). Also, consideration of positive

behavior interventions is a matter for the IEP team's consideration. *Id.* r. 281—41.324(1). This is not a situation where the BIP is being amended by agreement with the parent. *Id.* r. 281—41.324(1)"d". This is not a situation where the team (a) agrees to a current goal, (b) agrees to a criterion for changing the goal without a meeting, and (c) agrees to a different goal, which was observed in several IEPs. This situation is entirely proper because the team drafted all three components of this two-level goal. The text allowing the BIP to be re-drafted without an IEP meeting is an attempt to take a shortcut around the IDEA's requirement of team-based decision-making.

Because the record conclusively demonstrates a failure to accord rights to parents, this allegation is confirmed. Corrective action will be ordered.

F. Alleged Failure to Provide Related Services. Disability Rights Iowa alleged that IJH and AEA 267 did not provide related services. That allegation is not confirmed.

Related services are "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." Iowa Admin. Code r. 281—41.34(1). Some of the related services listed in federal law, *see* 34 C.F.R. § 300.34, are support services under Iowa law, *see* Iowa Admin. Code r. 281—41.409. An individual

who requires support services only is an eligible individual under Iowa special education law. *Id.* r. 281—41.326(2).

The complainant's allegation is that several IEPs should have contained related services but did not. The record reflects that IEPs contained required support and related services. Many of the related services listed in state and federal law concern student behavior, such as counseling services, school psychology services, and school social work services. *Id.* r. 281—41.326(3). For the reasons stated below, the Department confirms the allegations concerning the lack of appropriate behavior interventions. That failure to provide appropriate behavioral interventions is not a failure to provide "related services" as such; rather, it is a lack of appropriate behavioral supports and services, of which related services may be a component. The respondents provided related services when required, but not appropriate services. That lack of appropriate services will be addressed below. The failure to provide related services at all cannot be confirmed.

No student's IEP reviewed had data demonstrating that all reasonable educators would conclude a related service should have been provided but was not. Furthermore, some of the IEPs reviewed would suggest that related services are not required because of the nature of IJH and HHHS. For example, one child had special transportation deleted from the child's IEP because special

transportation to an off-campus school was no longer required. The record does not reflect a failure of either the IJH or AEA 267 to provide required related services. The complainant failed to satisfy its burden of proof. This allegation is not confirmed.

G. Alleged Failure to Provide IDEA services during Periods of Disciplinary Removal. Disability Rights Iowa alleged that IJH and AEA 267 did not provide required services during periods of disciplinary removal. This particular allegation generated a great deal of discussion among counsel during the investigation. Because IJH and AEA 267 have not engaged in the analysis to determine whether, when, and what type of services are required, the allegation is confirmed.

As noted above, the IDEA requires two types of data collection and maintenance for two different purposes: collection of suspension and expulsion data for a public agency as a whole, to determine whether the public agency is overusing exclusionary discipline (34 C.F.R. § 300.170), and collection of removal data for each particular child with a disability who has been removed for violating a student code of conduct, to determine whether the particular child's placement has been changed and to determine appropriate services for that particular child (*Id.* §§ 300.530 *et seq.*). Those two purposes, as well as IJH's responsibilities, will be discussed in turn.

Program-Wide Discipline Data. IJH and AEA 267 are required to collect and maintain data on disciplinary removals, and report it to the Department. These data are part of the state's annual performance report, as well as its required annual report to Congress. OSEP requires reporting on in-school suspensions, out-of-school suspensions, and expulsions.

"In-school suspension" is defined as:

> Instances in which a child is temporarily removed from his/her regular classroom(s) for disciplinary purposes but remains under the direct supervision of school personnel, including but not limited to children who are receiving the services in their IEP, appropriately participate in the general curriculum, and participate with children without disabilities to the extent they would have in their regular placement. Direct supervision means school personnel are physically in the same location as students under their supervision.

Data Accountability Center, *IDEA Part B Data Dictionary* 49 (Rev. 2013). "Out-of-school" suspension is defined as:

> Instances in which a child is temporarily removed from his/her regular school for disciplinary purposes to another setting (e.g., home, behavior center). This includes both removals in which no IEP services are provided because the removal is 10 school days or less as well as removals in which the child continues to receive educational services according to his/her IEP, a functional behavioral assessment, and behavioral intervention services and modifications.

Id. at 67. Finally, "expulsion" is defined as:

> An action taken by the LEA that removes a child from his/her regular school for disciplinary purposes for the remainder of the school year or longer in accordance with LEA policy. Includes

> removals resulting from violations of the Gun Free Schools Act that are modified to fewer than 365 days.

Id. at 37.

Based on these definitions, any student removal from the regular classroom by IJH personnel is a disciplinary removal for this purpose. This would include situations where the student was sent to the infirmary or back to the cottage, and those circumstances would be considered out-of-school suspensions if the student is not under the supervision of HHHS personnel. Several points deserve note.

First, it matters not what IJH/HHHS personnel call the action if the student was removed for disciplinary purposes. A technical assistance document concerning this data collection makes this clear. A student who is removed by school personnel at a juvenile correction facility and sent to quarters for "cooling off" or "time out" is still removed for purposes of this data collection. Data Accountability Center, *Part B Discipline Data Collection (Table 5): Questions and Answers*, at 7 (Rev. 2012). No similar attempt to avoid the gathering of these data by clever use of words is permitted. Reviewed IEPs contained statements about students being "programmed to" or "offered" alternative settings, such as the infirmary. Those are still removals. Likewise, a student who has "chosen" to go to the infirmary when that choice is illusory has still been removed (hypothetical example: "Since you threw that book and lost all

your points, you have 'chosen' to go to the infirmary."). (The possibility exists that a voluntary student choice to go to the Support Unit is not a removal; this then requires a discussion of how the student's choice to avoid school will be addressed.)

Second, removals for this data collection are counted even if the child receives IEP services during the period of removal. The technical assistance document explains why.

> An in-school suspension represents a removal from the student's IEP-determined placement, regardless of whether a student has access to the regular curriculum during the in-school suspension. OSEP is interested in collecting data on the extent to which students are removed from their IEP placements for disciplinary reasons.

Id. at 6.

Third, removals for this data collection include disciplinary actions that are part of a student's behavior intervention plan. According to the technical assistance document, "all in-school suspensions, including those administered as part of a BIP, should be reported to OSEP." *Id.*

Fourth, removal to the infirmary, control center, or cottage counts as an in-school suspension only if the student remains under the supervision of HHHS personnel. If a student, subject to such a removal, is under the supervision of an IJH employee who is not an HHHS staff member, that removal must be recorded as an out-of-school suspension. *Id.* at 7.

The evidence is that IJH did not maintain these data according to these federal definitions and instructions.

Child-Specific Discipline Data. The law requires IJH to follow the procedural protections for children with disabilities who have been removed from their current placement for violations of a student code of conduct. *See* Iowa Admin. Code r. 281—41.530(1). This child-specific inquiry includes counting many, but not all, of the days reported under the program-wide data collection discussed above. Note the term used in the law is "removal." *Id.* As noted above, the function, not the vocabulary or euphemism employed, is dispositive.

During the first ten school days of a school year that a child with a disability is removed for violating a student code of conduct, the child is not entitled to educational services (unless similarly situated general education students receive those service). *Id.* rr. 281—41.530(2)"a", (4)"c". For all subsequent days of removal during the school year, when such removals do not constitute a change in placement, the child is entitled to services as determined by *school personnel* "in consultation with at least one of the child's teachers" that are necessary for the child to "enable the child to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." *Id.* r. 281—41.530(4)"d."

If the removal constitutes a change in placement, the child's *IEP team* determines services necessary to receive a FAPE, "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." *Id.* r. 281—41.530(4) "a"(1), "e". Additionally, if a child's placement has been changed because of disciplinary removals, the child is entitled to, "as appropriate," an FBA and "behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." *Id.* r. 281—41.530(4)"a"(2). If a child's placement has been changed because of disciplinary removals, a team composed of IJH, AEA 267, the parent, and relevant members of the child's IEP team must determine whether the child's behavior was a manifestation of the child's disability. *Id.* r. 281—41.530(5). A child's placement is changed by a disciplinary removal that is more than ten consecutive school days, *see id.* r. 281—41.536(1)"a", or a series of removals that are more than ten cumulative days and constitute a "pattern" of removals, *see id.* r. 281—41.536(1)"b".

Iowa law, based on long-standing guidance from OSEP, *see Analysis of Comments and Changes*, 71 Fed. Reg. 46,539, at 46,715 (Aug. 14, 2006), provides the following rule for determining whether an in-school suspension counts as a removal. Iowa Admin. Code r. 281—41.536(3). In-school suspension

> will not be considered a removal if all three of the following questions are answered in the affirmative:
>
> a. Will the child be able to appropriately participate in the general education curriculum?
>
> b. Will the child be able to receive the services specified in the child's IEP?
>
> c. Will the child be able to participate with children without disabilities to the extent provided in the child's current placement?

Id. Several observations are important about this rule. First, the default rule is that in-school suspension is a removal. It is only not counted if all three questions are answered "yes." Any "no" answer, and the in-school suspension counts as a removal. The fact that the law requires the question to be asked and answered in a certain way establishes a presumption in favor of in-school suspension being considered a removal. If in-school suspension were not counted as a removal unless the contrary was shown, the structure and grammar of the questions would have been entirely different.

Second, it is determined based on a case-by-case basis, based on actual facts. A public agency cannot avoid counting an in-school suspension as a removal simply by writing into the student's IEP that "IEP services will continue" in the infirmary during a removal. The protections of rule 41.536 cannot be so easily avoided, especially when the text at issue appears in the vast majority of IEPs reviewed. Writing it is insufficient. Doing it and proving it are what matters.

Third, each of the questions has important nuances. Regarding the first question, the student must appropriately participate in the general curriculum. While this does not require the student's schedule to be reconstructed in the alternate setting, it does require a judgment that the services allow the particular child to access the general curriculum. A particular service (such as a teacher-assembled packet of work) might provide appropriate access to one child but no access at all to another, based on the nature of each child's disability. Regarding the second question, the question is answered in the affirmative if, and only if, the child receives the services called for in the child's IEP. It is not enough to provide "services." Unless the child receives the services *required by the child's IEP*, the in-school suspension is counted as a day of removal. If the child's IEP requires a particular instructional strategy, a particular intervention, or a particularly intense service, and the child receives a teacher-prepared packet instead, when such packet does not incorporate the identified strategy, intervention, or service, the second question is answered in the negative. I note that DHS has ensured that appropriately licensed teachers are available to students in the support unit since March 2013. Regarding the third question, the essential inquiry is whether the alternative setting is available to all students or solely to students with disabilities. If the setting is available to all students, the question is most likely answered in the affirmative.

The evidence available demonstrates that IJH did not keep data required to answer the questions about placements in the infirmary, presumably because it felt the boilerplate IEP language at issue relieved it of that responsibility. For each disciplinary placement in the infirmary (however IJH labels it), IJH must provide evidence that all three questions are answered in the affirmative. If no evidence is available, or if any of the questions are answered in the negative, IJH must consider the disciplinary action as a "removal" for purposes of determining whether the child's placement has been changed for purposes of rule 41.530.

As a final matter, the Department does not consider planned behavioral interventions in an IEP to be a removal for discipline purposes. The rationale is that the child subject to a planned intervention is still receiving IEP services, but different in kind and for a different identified need. That being said, I see no evidence that any of the removals to the infirmary were planned interventions listed in a child's IEP or BIP. The boilerplate language at issue is not a planned intervention for several reasons. First, the quoted language and IJH policy (policies 6.01, 6.15) demonstrate that this procedure is available to and used for all students, not just students with disabilities. That being the case, it is not special education. Iowa Admin. Code r. 281—41.51(7). Second, it is not individualized, because nearly every IEP has it (even IEPs where behavior is not identified as an area of concern). *Id.* r. 281—41.320. Third, the boilerplate

language is not an intervention, in that it is not designed to address the problem behavior so that it does not recur. *Id.* r. 281—41.530(4)"a"(2). Nothing contained in the boilerplate language about placement in the infirmary suggests prevention or providing a replacement behavior. Removal to the infirmary, standing alone and as described in the IEPs reviewed and IJH policy, is not an individualized intervention. As such, it is not a "not countable" removal pursuant to an individualized intervention.

Because the evidence demonstrates IJH has not answered critical questions about disciplinary removals, corrective action is ordered. The corrective action will be to review each child's circumstances, as noted below. The Department does not have the information to conclude, and is not willing to presume, that every disciplinary removal violated the IDEA or resulted in educational harm.

H. Alleged Failure to Provide Appropriate Behavioral Interventions. Disability Rights Iowa alleged that IJH and AEA 267 did not provide necessary positive behavior interventions and supports. Because the behavioral supports had a cookie-cutter nature and lacked individualization, and because the FBAs and BIPs lacked minimum technical adequacy, this allegation is confirmed.

Lack of Individualization. The behavioral interventions contained in the IEPs and BIPs reviewed are not individualized. This was demonstrated based on

the findings and conclusions in subpart A (IEPs not individualized). This is also supported based on a review of the BIPs prepared for IJH students. The vast majority of BIPs contained the following answers to the questions on "prevention strategies":

- [Student] receives all instruction at [student's] instructional level.
- [Student] is placed in a highly structured environment. Rules and expectations are clearly defined and implemented consistently.
- [Student] is placed in a small classroom setting with a low student-to-teacher ratio (8:1).
- [Student] will carry a behavior rubric (COC sheet) to each class. [Student] is assessed by teachers each period and provided immediate feedback.

While other answers to the prevention strategies questions show some variability, the BIPs reviewed have universal strategies in place of student-specific interventions. The questions on "prevention strategies" are designed to describe what about the student's instructional strategies and educational environment will be changed from the norm, not what will be the same.

Similarly, nearly all BIPs reviewed have "instruction in 21st century skills" and "modeling of appropriate behavior and specific praise when demonstrating appropriate behavior by classroom and school staff" as the "alternative or replacement behavior or skills." Nearly all BIPs have the following text describing the child's safety plan:

> If [Student] becomes a danger to [self] or others [student] will be removed from the classroom setting. If the behavior is significant enough to warrant being removed from the classroom and a safety concern, [student] will be placed in an alternative setting. If this placement is longer than 1 day in duration [student's] IEP will be continued and specially designed instruction (at a decreased duration than stated on the 'F' page) and work provided.

Notably, this safety plan boilerplate language is used in BIPs where the behavior of concern would not indicate a need for it, such as "arguing" or not following teacher directives. Finally, BIP progress monitoring, including monitoring of pro-social replacement behavior, relies heavily on the Circle of Courage point sheet and classroom removal data.

The cut-and-paste nature of these BIPs is further proven by the common error in student names and gender-specific pronouns. This lack of individualization is concerning. The listed behaviors of concern range from "rudeness" and "trying to have the last word" to physical aggression, harassment, and self-injury. The fact that a largely cut-and-paste BIP is used to address such varied types of behavior suggests that it is not being used to address specific student needs and targeted behaviors of concern. BIPs that are not individualized are, as a matter of law, not BIPs at all. *See, e.g.*, *Millersburg Area Sch. Dist. v. Lynda T.*, 707 A.2d 572, 577-78 & n.11 (Pa. Commw. Ct. 1998) (BIPs "were not individualized for [student] but were universal to all students").

A boilerplate BIP that attempts to be all things to all students, in the end, will do nothing of consequence for any student.

Lack of Technical Adequacy. The FBAs and BIPs reviewed did not meet minimum standards of technical adequacy. To the question of whether technical adequacy is required for a FBA or BIP to be legally compliant, the answer is "yes."

The law does not define FBAs, BIPs, and "positive behavioral interventions and supports" ("PBIS"). This lack of definition has led to confusion about what suffices as an FBA or a BIP. *See* Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process without Procedure*, 2000 B.Y.U. Educ. & L.J. 209; Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle U. L. Rev. 175 (2011). As one commentary noted,

> In the absence of clear guidelines for the use of FBA in educational settings, schools have implemented a variety of inexact practices and procedures that have been loosely labeled as FBA, the majority of which are not tied to any solid evidence base. Unfortunately, as many researchers have pointed out, the use of such *inconsistent and diluted* methods is not likely to result in valid assessments or effective intervention plans.

Terrance M. Scott, Cynthia M. Anderson & Scott A. Spaulding, *Strategies for Developing and Carrying Out Functional Assessment and Behavior Intervention Planning*, Preventing Sch. Failure, Spring 2008, at 39, 40 (emphasis added) (citing

Gary M. Sasso, Maureen A. Conroy, Janine Peck Stichter & James J. Fox, *Slowing Down the Bandwagon: The Misapplication of Functional Assessment for Students with Emotional or Behavioral Disorders*, 26 Behav. Disorders 282 (2001)). This observation is telling, because one site visit interview participant described the BIPs at IJH as intentionally "watered down."

The fact that the law does not provide a definition of these terms does not mean that any definition or use of them is legally acceptable. These are terms of art of a particular discipline, with established meanings and a substantial research base behind them. *See id.*; *see also* Robert E. O'Neill, Robert H. Horner, Richard W. Albin, Keith Storey & Jeffrey R. Sprague, *Functional Assessment of Problem Behavior: A Practical Assessment Guide* (1st ed. 1990); Mark W. Steege & T. Steuart Watson, *Best Practice in Functional Behavioral Assessment*, in 2 Best Practices in School Psychology V 337 (Alex Thomas & Jeff Grimes, eds. 2008); George Sugai et al., *Applying Positive Behavioral Support and Functional Behavioral Assessment in Schools*, 2 J. Positive Behav. Interventions 131 (2000); George Sugai & Robert H. Horner, *Responsiveness-to-Intervention and School-Wide Positive Behavior Supports: Integration of Multi-Tiered Approaches*, 17 Exceptionality 223 (2009); Hill M. Walker et al., *Integrated Approaches to Preventing Antisocial Behavior Patterns Among School-Age Children and Youth*, 4 J. Emotional & Behav. Disorders 194 (1996). As one commentator stated,

> In the area of functional behavioral assessment, we are not dealing with a technology lacking a historical base [citation omitted]. Rather, the problem continues to be one of implementing practices that are fairly well known within the professional community.

Carl R. Smith, *Behavioral and Discipline Provisions of IDEA '97: Implicit Competencies Yet to Be Confirmed*, 66 Exceptional Child. 403 (2000).

Congress was aware of this body of evidence when it revised the IDEA in 2004. *See, e.g.*, 20 U.S.C. § 1400(c)(5)(noting research and experience supporting the efficacy of PBIS). Since Congress used these terms of art in drafting the IDEA, they have their commonly recognized technical meaning. *See, e.g.*, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1990); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 372 (1986).

Giving these terms their ordinary technical meaning, IJH's FBAs and BIPs do not reach a threshold of adequacy. In so finding and concluding, the Department is not substituting its judgment for each child's team. It is merely concluding that the judgments, when taken has a whole and at the time when they were made, do not meet minimum industry standards and cannot therefore be considered reasonable.

Technical Adequacy of FBAs. At a minimum, a FBA requires attaining these three outcomes:

1. Description of the undesirable behavior(s) operationally.

2. Prediction of the times and situations when the undesirable behavior(s) will and will not be performed across a full range of typical daily routines.
3. Definition of the function(s) (maintaining reinforcers) that the undesirable behavior(s) produces for the individual.

O'Neill et al., *supra*, at 3. The information required to arrive at those three outcomes may vary based on the nature of the challenging behavior. A behavior that is more "durable" and "complex" will require a more wide-ranging and time-consuming FBA. *Id.* Severe challenging behaviors such as aggression or self-injury, "often do not respond to simple support strategies and require more than casual observation to understand." *Id.* at 2. DHS notes that placement at IJH is often a placement of last resort, and children have "nowhere to go and nothing to lose, which reduces the efficacy of natural reinforcers (e.g., follow the program and you can go home more quickly)." That fact, which is certainly true, would weigh heavily in favor of more robust, probing FBAs than those which were provided.

The ultimate goal of a FBA is "not to define and eliminate an undesirable behavior, but to understand the structure and function of the behavior in order to teach and develop effective alternatives." *Id.* at 6. As stated by Steege and Watson,

> The real purpose of conducting an FBA is not merely the accumulation of documentation to fulfill regulatory requirements. Rather, it is to identify the variables that are functionally related to

> the interfering behavior so that an effective intervention can be developed.

Steege & Watson, *supra*, at 341.

The FBAs prepared at IJH do not operationally define the behaviors of concern. Some of the FBAs do not describe behaviors of concern, but adult response to student behaviors ("removals"). Additionally, many FBAs describe behaviors of concern in ways that are not operational: they are not described in a way that all observers would agree on whether the behavior of concern occurred. Many of these behaviors of concern focus not on what the student did but how the adult felt. Examples of this include the following behaviors of concern: "rudeness," "disrespect," hostility, and impulsivity. Other descriptions of behaviors of concern are observable, but poorly defined ("aggression"). Hitting and kicking would be operationally defined behaviors, as these are behaviors that are defined "in concrete terms using clear and unambiguous descriptions." Steege & Watson, *supra*, at 340. Without more description than provided, these descriptions are what O'Neill and colleagues would call "poor fuzzy" descriptions. O'Neill et al., *supra*, at 7-9. "An operational definition should provide a description of the behavior in objective and observable terms. Everyone concerned with the problem should agree on the definition." Scott et al., *supra*, at 40. Insufficiently described behaviors lead to less reliable hypothesis generation and testing about what function the behaviors of concern serve.

The FBAs prepared at IJH also do not attempt to predict the times and situations in which the behavior of concern will or will not occur. While some do (such as mentioning specific periods of the school day or, in one instance, where the student had not taken medication), many of the FBAs contain vague statements. For example, the reviewed FBAs will typically state that "conflict with peers and staff" cause the behavior of concern, without providing more information. As another example, when asked about the frequency and intensity of the behaviors of concern, the FBAs, rather than describing how often, how long, or how severe the behavior of concern is, will merely state that the behavior's frequency and intensity are "concerning."

The FBAs also fail, as a group, to define the function that the challenging behavior produces for the child. Many FBAs reviewed defined "escape" or "attention" as the function of the challenging behavior at issue. These are recognized functions of behavior; however, the conclusions are questionable based on the cumulative effect of the errors made in arriving at these conclusions. Other FBAs list "control" as a function. This is not function of a behavior, but an instrument to achieve a function. *See, e.g.*, O'Neill at al., *supra*, at 12-14. Every person wants control of her environment. The term "control" gives no useful information about the function of the child's behavior: control to achieve what end?

Finally, several FBAs make the statement that an FBA is inappropriate to a specific child, or the conclusions reached from an FBA are less valid, due to a child's mental illness. This view is incompatible with a key value assumption underlying FBAs.

> Functional analysis is appropriate because it acknowledges that a person's behavior is reasonable from that person's perspective. People do not engage in self-injury, aggression, or severe property damage solely because they have mental retardation or other developmental disabilities. There is a logic to their behavior, and functional analysis is an attempt to understand that logic.

O'Neill et al., *supra*, at 4. The same logic applies to conducting FBAs for children with mental illness. If mental illness is a concern, or there are questions about the validity of the hypothesis generated by an FBA, that is a cue that more information is required and a more thorough FBA is in order.

When taken as a whole, the FBAs prepared for IJH students do not meet professional standards of minimal technical adequacy. As such, they are not legally compliant when taken as a whole.

Technical Adequacy of BIPs and IEP-Based Behavioral Goals. When the function of the challenging behavior has been defined, an intervention is developed. An intervention is designed to provide the child with a substitute behavior that achieves the function more efficiently than the behavior of concern. *See, e.g.*, O'Neill et al., *supra*, at 57. That may be a behavior that the child already knows, *see id.* at 14, or it may need to be taught to the child. The replacement

behavior is both "incompatible" with the behavior of concern "so that both cannot occur simultaneously" and "stated as a positive behavior (walk in the hall) rather than the absence of a negative behavior (do not run)." Scott et al., *supra*, at 44. When reviewing the BIPs and behavioral goals prepared by the IJH and AEA 267, it is clear that they do not meet minimum technical standards.

First, the behaviors of concern, similar to FBAs, are not stated in an observable way. While some are (self-injury, eloping from school campus), others are not (disrespect). The BIPs and IEP goals reviewed reflect an overriding concern with emotions accompanying adult-child or peer interactions ("power struggles," drama, and "disrespect") rather than observable, behavioral characteristics of those interactions. An ill-defined behavior of concern makes a plan to intervene to prevent that behavior inefficient and unlikely to succeed.

Second, identified alternative or replacement behaviors, when needed, are often not defined. When the question is posed about what replacement behavior will be taught, the answer is almost always as follows: "Student will receive instruction in Twenty-First Century Skills." This is technically inadequate, and therefore legally insufficient, for two reasons. First, the response focuses not on what the child will do but on what the teachers will teach. Second, the vague notion of Twenty-First Century Skills is an inadequate description of a target replacement behavior. What, precisely, does Twenty-First Century Skills mean

to a particular child? Imagine a parent providing instruction to the parent's child as follows: "Instead of hitting your brother, we want you to use your Twenty-First Century Skills." The child would be justifiably confused about what was expected instead of hitting his brother. The term is an aggregate of global expectations for appropriate behavior for all children at all times, rather than a discrete and concrete alternative or replacement behavior selected for a particular child based on FBA data. It is a curricular area, rather than a replacement behavior.

Third, it appears that many BIPs have interventions selected that would reinforce the function of the behavior of concern. Several of the BIPs list removal under IJH policy as an intervention for the behavior of concern when the functions for the behaviors of concern listed in the FBAs were "escape" or "task avoidance." A BIP or IEP goal that contains an intervention which actually enforces the behavior of concern will amplify the behavioral problem it purports to solve.

When taken as a whole, the BIPs and behavioral goals in IEPs prepared for IJH students do not meet professional standards of minimal technical adequacy. As such, they are not legally compliant when taken as a whole.

Corrective action will be ordered, as described below.

V. Other Arguments of Counsel

Two arguments made by IJH in its response deserve some brief note. To the extent that IJH asserts it improved on the IEPs it received, that may be true (and the files reviewed support this assertion in some cases); however, improvement is not sufficient if the improvement does not meet the threshold imposed by the IDEA. IJH also asserts that its personnel had the interests of children at heart and the complaints made by Disability Rights Iowa "originated from well-intentioned attempts to serve very difficult youth." I have no trouble finding this to be true; however, the Eighth Circuit has counseled that intentions are not a substitute for compliance with the IDEA's requirements. *C.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 990 (8th Cir. 2011).

I wish to reiterate the concrete and positive changes made by IJH and AEA 267 in response to the involvement of Disability Rights Iowa.

VI. Corrective Action

Because the Department found violations of the IDEA, it must order corrective action. Iowa Admin. Code r. 281—41.151(2). This includes "corrective action appropriate to address the needs of the child, such as compensatory services or monetary reimbursement." *Id.* Corrective action may also include technical assistance activities and negotiations. *Id.* r. 281—41.152(2).

What is required corrective action depends on the facts of each case. Since this state complaint identified systemic areas of noncompliance, the ordered

corrective action must be simultaneously broader (must provided systemic remedies) and narrower (must allow for child-specific correction). A blanket approach to child-specific corrective action would not be supported by the law, which requires that child-specific remedies be child-tailored. *Id.* r. 281—41.151(2). When considering the nature of corrective action to order for confirmed findings of noncompliance, OSEP provides the following considerations:

> In determining the steps that the LEA or EIS program must take to correct the noncompliance and to document such correction, the State may consider a variety of factors, including: (1) whether the noncompliance was extensive or found only in a small percentage of files; (2) whether the noncompliance showed a denial of a basic right under the IDEA (e.g., a long delay in initial evaluation beyond applicable timelines with a corresponding delay in the child's receipt of FAPE or EI services; and (3) whether the noncompliance represented an isolated incident in the LEA or EIS program, or reflects a long-standing failure to meet IDEA requirements.

OSEP FAQ, *supra*, at 2. When those factors are considered, substantial corrective action is required. Not all of the IEPs reviewed have each of the confirmed violations; however, the confirmed violations are broad and deep, and relate to basic elements of the IDEA entitlement.

A. Item 1: Accepted Corrective Action Related to Child Find. The corrective action proposed by AEA 267 is accepted. For all students who were at IJH from August 16, 2012, to the present date, AEA 267 will determine whether the student needed an initial evaluation for special education. AEA 267 will work

with IJH staff to determine whether an initial evaluation is necessary for students without IEPs who are or were at IJH at any time between August 16, 2012, and the present date.

B. Item 2: Review of Policies, Practices, and Procedures. AEA 267 shall review its policies, practices, and procedures relating to its services to students at IJH. This review shall include policies, practices, and procedures related to IEP development, LRE, transition planning, parent participation in IEP teams (including appointment of surrogate parents), protections for students who have been removed for violations of student codes of conduct, and programming to address challenging behaviors. Since this state complaint decision must consider the rights of other children served by AEA 267, *see* Iowa Admin. Code r. 281—41.151(2)"b", this review by AEA 267 shall also include a review of the policies, practices, and procedures concerning its services at the other state-operated programs in its boundaries. I specifically find and conclude that this additional review is required under the present circumstances.

This review as well as any required revisions shall be completed no later than one year from the date of this decision, with reports provided to the Department, DHS, and Disability Rights Iowa.

DHS shall review its policies, practices, and procedures related to the educational services provided at IJH. This review shall include policies,

practices, and procedures related to IEP development, LRE, transition planning, parent participation in IEP teams (including the prohibition of DHS employees acting as "parents" under the IDEA), protections for students who have been removed for violations of student codes of conduct, and programming to address challenging behaviors. Since this state complaint decision must consider the rights of other children served by DHS, *see id.*, this review by DHS shall also include a review of the policies, practices, and procedures concerning its educational services at the other programs it operates. I specifically find and conclude that this additional review is required under the present circumstances.

This review as well as any required revisions shall be completed no later than one year from the date of this decision, with reports provided to the Department, AEA 267, and Disability Rights Iowa.

C. Item 3: Reconvening IEP Team Meetings. The IEPs of all IJH residents with disabilities shall be reviewed within 30 days of the date of this decision. For any current IEP where the parent or guardian listed was a DHS employee, DHS and AEA 267 shall ensure that the IEP team is reconvened with a person who meets the IDEA definition serving as the child's "parent." These reconvened IEP team meetings shall be concluded within sixty days of the date of this decision.

If a surrogate parent is required, AEA 267 shall appoint one within thirty days of the date of this decision, unless a surrogate parent is appointed by the juvenile court judge presiding over the child's juvenile court case.

D. Item 4: Calculation of Student Removals for Discipline Purposes. AEA 267 and IJH shall provide to the Department within thirty days of the date of this decision with a count of each disciplinary removal by school personnel for violating student codes of conduct, including any removals to the infirmary/support unit or to the Cottage. Students under the supervision of HHHS staff will be reported as in in-school suspensions. Students under the supervision of IJH staff who are not HHHS staff will be reported as in out-of-school suspensions. This is regardless of whether a student received services during the period of the child's removal.

If DHS and AEA 267 do not have that information, they shall provide a plan for collecting valid and reliable disciplinary information in the future. That plan, if necessary, shall be provided within sixty days of the date of this decision.

E. Item 5: Compensatory Education. The Department orders compensatory education for the confirmed systemic violations identified in part IV, subparts A (IEP development and content), B (LRE), C (transition services), G (services during disciplinary removals), and H (behavioral interventions and supports).

Compensatory education will be awarded by applying the following common framework to the facts of each individual student's case.

The common framework is based on an analysis of the child's specific information to answer the following questions: "What would the child's expected performance have been if the child had received legally compliant special education?" and (2) "What was the child's actual performance?" The measure of compensatory education required is the special education and support and related services reasonably required to close the gap between the answers to the first and second questions.

This gap-filling method of calculating compensatory education is "newer, less known, and more complex to calculate" than what has been referred to as the "'cookie cutter' approach" (e.g., "FAPE was denied for 180 days, so you get 180 days of compensatory education."). Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education Under the IDEA*, 257 Educ. L. Rep. 550, 550-51 (West 2010). This but-for-the-violation remedial approach has much to commend it, including that it more closely approximates how the FAPE entitlement is initially calculated: based on a review of the child's needs, as demonstrated by the child's specific data.

In initially calculating compensatory education, each child's IEP team shall consider the factors listed in this decision. If the child's IEP team is in

agreement with the plan for compensatory education, IJH and AEA 267 shall report the plan to the Department for its review and implement it. If the child's IEP team is in disagreement about compensatory education, IJH and AEA 267 shall refer this matter back to the Department, which shall award compensatory education based on the child's specific facts. This approach does not defer ultimate decisions on compensatory education to the IEP team, *see id.* at 553-54, and the Department retains jurisdiction over all determinations of compensatory education.

Any compensatory education awarded shall be reasonably calculated to place the student in the position she would have occupied but for the respondents' violations. This may be a 1:1 approach to days missed (sixty hours of services where FAPE was denied equals sixty hours of compensatory education), or it may differ based on the child's unique needs (one child may require thirty hours of compensatory education to compensate for a sixty hour FAPE denial, and another child might require 120 hours for a similar denial). *Id.* at 553.

If IJH and AEA 267 offer to calculate compensatory education, and a child's parent (or child who is making her own educational decisions) declines the offer, IJH and AEA 267 shall provide documentation of such to the Department. If IJH and AEA 267 offer to implement an award of compensatory

education calculated by a child's IEP team, and that offer is declined, IJH and AEA 267 shall provide documentation of such to the Department.

Method of Calculating Compensatory Education. IJH and AEA 267 shall apply this decision to all children who were placed at IJH and educated at HHHS for more than ten days, beginning on August 16, 2012, to the date of this decision. For any child in that class, including children who have graduated with a regular high school diploma, IJH and AEA 267 shall convene an IEP team meeting within sixty days of the date of this decision. IJH, AEA 267, and the other members of each child's IEP team, shall examine each child's education in light of this decision to determine whether there were FAPE denials, as described in this decision. If there were denials of FAPE, compensatory education shall be calculated by each child's IEP team. Compensatory education shall be supplemental to all present or future educational services required to receive a FAPE, and shall not supplant or displace those required services.

- The relevant period is from August 16, 2012, to the date of this decision.
- The measure of the compensatory education will be the difference in expected performance if each child had received a FAPE during the relevant period and the child's actual performance during the relevant period.
- The compensatory services shall be reasonably to close that "gap" between expected and actual performance.
- A day-for-day approach is one way of calculating the compensatory services, but that approach is not required.
- The services are to be provided in a manner and location determined by the IEP team. The parents or child are not entitled

to require services in a particular location or manner, or to request monetary compensation.

- If the child is no longer at IJH, and in light of the fact that IJH's closure is planned, each child's IEP team shall determine a plan for compensatory education that is reasonable in light of the child's current educational environment, if any. That may include providing compensatory education on a contract basis with another school district, school, AEA, or other type of provider relevant to the child's needs.
- The Department is available to provide technical assistance, including assistance in determining whether a particular item or service was compliant.
- If the parties are unable to establish a plan for compensatory education services within one hundred and twenty days of the date of the Department's order, the Department will establish such a plan for each child.

Compensatory education shall be completed as soon as possible, but no later than one year from the date of this decision.

Matters to Consider in Determining Compensatory Education. The factors to consider in determining whether compensatory education is necessary are set forth in this decision and summarized in list form here for the convenience of the parties. (In case of unintended actual or perceived conflict, the text of the decision above takes precedence over the list presented below.)

- Was each child's IEP services appropriate?
    - Was each IEP reasonably calculated to confer benefit?
    - Were IEP goals and services individualized based on the child's present strengths and needs at the time the IEP was drafted?
    - Did the IEP improperly describe general education strategies and goals as "specially designed instruction" or other special education services?

- Were progress monitoring methods appropriate to the goal or service?

- Did each child receive education in the LRE?
  - Was HHHS an appropriate location for the child's special education and support and related services?
  - Was an alternative placement educationally appropriate to the child?

- Did each child of transition age receive appropriate transition services?
  - Did each IEP comply with each of the six critical elements?

- Did each child receive appropriate procedural protections in cases of removal for violating student codes of conduct?
  - Did the child receive educational services during the first ten days of disciplinary removal during the school year (only applicable if general education students receive services during similar removals)?
  - Did each child receive educational services during all removals beyond ten days in a school year (determined by school officials if not a change in placement and determined by IEP teams if a change in placement)?
  - If a particular in-school suspension is not counted as a day of removal, were all three questions required by subrule 41.536(3) answered in the affirmative?
  - If the child's placement is changed because of disciplinary removals, did the required team take all required actions (manifestation determination, review/revision of FBA, review/implementation of BIP)?

- Did each child receive required behavioral supports and services of minimal technical adequacy?
  - Were the child's behavior supports and services individualized?
  - Was the child's FBA technically adequate?
  - Was the information from any technically adequate FBA used to provide services to address the needs identified by the FBA?

- Was the child's BIP or IEP goal for behavior technically adequate?

Timeline for Completing Compensatory Education. Compensatory education shall be completed within one year of the date of this decision. If there are questions about whether that deadline will be met for a particular child, please contact the Department for further instructions.

F. Item 6: Negotiations. The law specifically names "negotiations" as a corrective action. Iowa Admin. Code r. 281—41.152(2)"b"(2). While the parties had every right to refuse mediation prior to the issuance of the state complaint decision, the Department has the authority to require negotiations as a remedy if the circumstances so warrant it. The Department finds and concludes that the parties would benefit from the assistance of a mediator. This is especially true based on the parties combined efforts to resolve issues of concern prior to the filing of this state complaint.

It is hereby ordered that Patricia Carlson, Ph.D., is appointed as mediator to assist with the implementation of this decision. Dr. Carlson is director of undergraduate education in Iowa State University's school of education, as well as an experienced special education mediator. Dr. Carlson is available to assist in negotiations regarding any issue concerning implementation of this decision, including but not limited to the following: review of policies, practices, and procedures; plans for awarding compensatory education; calculation of

compensatory education for specific students; implementation of compensatory education for specific students; and integration of the corrective action in this decision with the corrective action required by the site visit report. If the parties are unable to reach an agreement regarding a particular issue, the Department retains jurisdiction to resolve the dispute.

The parties shall contact Dr. Carlson through the Department's support staff in charge of arranging mediation dates and locations.

If Dr. Carlson is unable to assist with negotiations in a particular matter, the Department will arrange for the appointment of an alternate mediator.

G. General Rule Regarding Timeline for Corrective Action. Unless the parties agree otherwise and the Department concurs in that agreement, the following general rule shall apply to correction of identified noncompliance within the one-year timeframe required by state and federal law. *OSEP FAQ*, *supra*, at 3; Iowa Admin. Code r. 281—41.600(5).

- If the violation was only identified in the state compliant, the timeline for correction is one year from the date of this decision, or as specified in this decision.
- If the violation was only identified in the site visit report, the timeline is one year from the date of that report, or as specified in that report.
- If the violation was identified in both this decision and the site visit report but no additional findings or factors to be considered in taking required corrective action are contained in this report, the timeline for that corrective action is one year from the date of the site visit report, or as specified in that report.

- If the violation was identified in both this decision and the site visit report, and this decision contains additional findings or factors to be considered in taking required corrective action, the timeline for that corrective action is one year from the date of this decision, or as specified in this decision.

H. Conclusion. Corrective action is ordered, as described in this part. No other corrective action is ordered, and any other request for corrective action is overruled.

VII. Conclusion

For the reasons stated above, this complaint is CONFIRMED IN PART and NOT CONFIRMED IN PART. Corrective action is ordered as described.

Any pending matter or motion is overruled. Any allegation not specifically addressed in this decision is either incorporated into an allegation that is specifically addressed or is overruled. Any legal contention not specifically addressed is either addressed by implication in legal decision contained herein or is deemed to be without merit. Any matter considered a finding of fact that is more appropriately considered a conclusion of law shall be so considered. Any matter considered a conclusion of law that is more appropriately considered a finding of fact shall be so considered. The Department reserves jurisdiction to enter supplemental orders to implement this decision.

There are no fees or costs to be awarded in this matter.

Any party that disagrees with the Department's decision may file a petition for judicial review under section 17A.19 of the Iowa Administrative Procedure Act. That provision gives a party who is "aggrieved or adversely affected by agency action" the right to seek judicial review by filing a petition for judicial review in the Iowa District Court for Polk County (home of state government) or in the district court in which the party lives or has its primary office. Please note that the review available to the Iowa Department of Human Services may be limited by Iowa Code section 679A.19 (2013).

I offer my assurance that every attempt has been made to address this complaint in a neutral manner, and in compliance with state and federal special education law. I sincerely wish the best for all involved.

I would like to compliment counsel for the skill in which they presented their clients' respective positions. Please provide copies of this decision to your clients.

A copy of this decision shall be placed in the Department's appeal book.

Done on the above-stated date in Des Moines, Iowa.

Sincerely,

/S/ ORIGINAL SIGNED
Thomas A. Mayes
Attorney II & Complaint Officer
Division of Learning and Results
Iowa Department of Education
515-242-5614

Concur,

/S/ ORIGINAL SIGNED
Barbara Guy
State Director of Special Education
Learner Strategies & Supports
Division of Learning and Results
Iowa Department of Education
515-281-5265

/S/ ORIGINAL SIGNED
W. David Tilly
Deputy Director
Iowa Department of Education
515-281-3333

CC: Patricia Carlson, Mediator
Brad A. Buck, Director
Amy J. Williamson, Chief, Bureau of School Improvement
Sharon Hawthorne, Consultant
Shelley Ackermann, Consultant
Nicole Proesch, Department of Education Counsel