IOWA DEPARTMENT OF EDUCATION
(Cite as 26 D.o.E. App. Dec. 259)

In re H.S., a child,	)	
	)	Dept. Ed. Docket No. SE-370
Jeff & Becky S.,	)	(DIA No. 11DOESE008)
	)	
Complainants,	)	
	)	
vs.	)	
	)	**Decision**
Western Dubuque Community	)	(redacted version)
School District and Keystone	)	
Area Education Agency,	)	
	)	
Respondents.	)	
	)	

Statement of the Case

Course of Proceedings: This proceeding began when Jeff and Becky S. filed a Due Process Complaint on October 12, 2011, on behalf of their daughter H.S. They were not represented by counsel. Representatives of all parties participated in an initial conference call held on October 24, 2011. After a discussion of the allegations in the Complaint, Ms. S. agreed to file an amendment to clarify the family's concerns. Hearing was then scheduled for December 19 and 20, 2011. The Department received a letter from Ms. S., restating the basis of the Complaint, on October 24, 2011.

Attorney Curt Systma appeared as counsel for the Complainants on November 23, 2011, by filing a Request to Amend Due Process Complaint and Amended and Substituted Due Process Complaint. The Respondents filed no resistance and an Order granting the amendment issued on December 9, 2011. Counsel for the parties participated in a status conference call on December 13th and reported that a mediation session was scheduled for December 19th. As a result of the mediation the Complainants consented to a new evaluation of H.S.'s disabilities and educational needs and filed a request to continue the matter until March 30, 2012. The continuance request was not resisted and was granted.

Counsel for the parties and the mediator participated in another status conference call on March 15, 2012. Attorney Beth Hansen, counsel for both Respondents, reported that the evaluation had been completed and a draft individualized education program (IEP) had been prepared and distributed, but an IEP meeting had not been convened. The parties remained hopeful that the issues could be narrowed prior to hearing.

Order issued on March 28, 2012, granting a joint Request for Continuance and extending the deadline for completion of the case to June 30, 2012. Through e-mail correspondence, the parties agreed to hold the dates of June 26 through June 29, 2011 for hearing, if needed. During a prehearing conference call on May 17, 2012, counsel for the parties explained that they were unable to significantly narrow the dispute and were prepared to proceed to hearing at the end of June. Prehearing deadlines were agreed upon and confirmed by Order issued May 18, 2012. The parties exchanged witness and exhibit lists as required and filed prehearing briefs as allowed by the prehearing Order.

Hearing was conducted in Dubuque, Iowa on June 26, 27, and 28, 2012, before Administrative Law Judge Christie Scase. Complainants Jeff and Becky S. participated in the hearing and were represented by attorney Curt Sytsma. Superintendent Jeffory Corkery and Director of student services Tina Brestrup were present throughout the proceeding as a representative for the Western Dubuque Community School District. Director of Special Education Doug Penno was present representing Keystone Area Education Agency 11. Attorney Beth Hansen appeared as counsel for the school district and AEA.

Five witnesses testified in the Complainants case in chief: Becky S., Megan B., Jane B., Melissa O., and Mary S.. The Respondents offered testimony from Dianne Brimeyer, Sara Kluesner, Larry Davig, Gretchen Conway, Randolph Allison, Jeffory Corkery, Tina Brestrup, and Douglas Penno.

H.S.'s school records and other documents related to this proceeding were compiled in binders and submitted without objection as Respondents' exhibits A through D. Ms. S.'s October 24, 2011 letter regarding the Complaint was admitted as Respondents' exhibit E. Complainants' exhibits 1 through 10 were offered into evidence. All of the exhibits, except exhibit 8 were admitted without objection. Respondents objected to exhibit 8 – an email communication – on the basis that it was duplicative of exhibit 9 – the response to the email. This objection was overruled and exhibit 8 was admitted into the record. The evidentiary record closed at the end of hearing on June 28, 2012.

The parties agreed to a continuance of the proceeding through July 20, 2012, to allow time for drafting of the decision. On July 20th, the parties agreed to an additional one-week continuance through July 27, 2012.

Findings of Fact

H.S. is 7 years old. She was born in the fall of 2004 and was diagnosed with Down syndrome at birth. H.S. lives with her parents, Jeff and Becky S., and three siblings in [], Iowa. The family residence is within the boundaries of the Keystone Area Education Agency (AEA) and the Western Dubuque Community School District. The school district operates six elementary attendance centers – in Bernard, Cascade, Dyersville, Epworth, Farley, and Peosta. H.S. and her family live in the attendance area of the Epworth elementary school.

The Amended and Substituted Due Process Complaint includes procedural and substantive challenges to the IEP developed for H.S. on or about March 23, 2011. The Complaint also asserts that the school district and AEA violated Iowa Code section 256.12(2)(a) by inactivating H.S.'s IEP and discontinuing special education services after H.S. was enrolled in [the Neighborhood] Catholic School in the fall of 2011. The school district and AEA generally deny each issue.

The Department has jurisdiction over this matter pursuant to section 1415 of the Individuals with Disabilities Education Act [IDEA], 20 U.S.C. § 1415, and Iowa Code section 256B. The governing rules of procedure are set forth in 34 Code of Federal Regulations [CFR] Part 300 and 281 Iowa Administrative Code [IAC], ch. 41.

Early ACCESS and Early Childhood Special Education: H.S. received special education services through the AEA and school district for a number of years prior to the fall of 2011. Although not directly relevant to the outcome of this proceeding, a brief review of these services is useful to understanding the context of the current Complaint.

H.S.'s parents applied for education and health services through the Early ACCESS Program in January of 2005, soon after H.S. was born. An initial Individualized Family Service Plan was developed through Keystone AEA soon thereafter. Occupational therapy and speech therapy services were provided under Early ACCESS. H.S. received one or both of these Early ACCESS services at home from 2005 through the fall of 2007, when she became eligible for Early Childhood Special Education (ECSE). H.S. underwent surgery in 2006 to correct problems with her heart. With the exception of that procedure, her health was generally stable.

During the 2007-2008 school year Hanna attended a pre-school ECSE program operated by the Western Dubuque CSD at Epworth Elementary four full days per week. H.S. was almost 3 when her initial IEP was developed on August 31, 2007. An educational evaluation completed prior to the IEP meeting found that she had educational discrepancies of 11 months in the area of positive social and emotional skills, 20 months in the area of acquisition and use of knowledge and skills, and 12 months in the area of appropriate behaviors to meet needs. The resulting IEP called for her to participate in an Early Childhood special education curriculum, with interaction with nondisabled peers during recess and free play. The IEP indicated 94% removal from general education.

H.S. was assigned to the district's Peosta Early Childhood Center for the 2008-2009 and 2009-2010 school years. During both years of the Peosta program, H.S.'s IEP called for her to attend four full days per week, receiving a specially designed pre-school program. When the IEP team met on May 2, 2008 to develop the IEP for 2008 – 2009, H.S. was functioning in the general curriculum with a 36% delay and was functioning at 15 months below her peers. At the time of the next IEP meeting on April 16, 2009, she was functioning in the general education curriculum at approximately 24 months below same-age peers. The Peosta program was designed to provide integration with typically

developing peers for at least 20% of the school day.[1]

A functional evaluation of the need for a paraprofessional was completed in May of 2008. The evaluation cited safety concerns, mobility concerns, communication limitations, assistance needs with regard to basic functional skills (toileting, feeding, dressing, and following safety rules), health concerns, a short attention span affecting the ability to learn independently, and a need for extraordinary supervision as the basis for use of a paraprofessional. (AEA Rec. at pp. 138-41) The 2008-2009 IEP called for 330 minutes per day of "additional assistance," presumably from an adult attendant or paraprofessional, in addition to the instruction provided by her ECSE teacher. (AEA Rec. at p. 131)

The IEP for 2009-2010 – H.S.'s last year of pre-kindergarten ECSE – indicated a possibility of increased integration in Pre-K classroom through the school year. Support service of paraprofessional assistance was increased to 400 minutes per day for the 2009-2010 school year. (AEA Rec. at p. 96)

In early September of 2009 H.S. underwent surgery to correct a hip displacement. Her parent chose hold her out of school until after the surgery. She experienced post-surgery complications and was not able to return to school until January of 2010.

Kindergarten year (2010-2011): The IEP team met on April 7, 2010 to develop an IEP for H.S.'s kindergarten year, 2010-2011. A three year re-evaluation review was prepared and used by the team. Although she had shown progress during her ECSE years, the evaluation team found a continued need for special education and related services. H.S. required a high level of support to be successful. The evaluators saw a need for: "an adult in close proximity for visual verbal and physical prompts, use of routine, use of visuals for routine and communication, small groups to practice acceptable behaviors, repetition of curriculum, same concept skills presented in a variety of ways and close proximity of an adult." They observed that "[t]his level of support cannot be provided in general education setting without special education services." (AEA Rec. at p. 76)

The IEP developed in April of 2010 addressed both the remainder of the current school year and the plan for H.S.'s kindergarten year. The short term educational instruction plan remained unchanged. For the remainder her last pre-K year she was to spend 80% of each day removed from general education in the ECSE classes.[2] (AEA Rec. at p. 68)

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[1] The IEP forms include a calculation of the percentage of time the student will be removed from the general education environment and the percentage of time in general education (GE). H.S.'s IEPs report 64% removal from GE and 36% in GE for 2008-2009 and 63% removal from GE and 33% in GE for 2009-2010. These percentages were apparently calculated based upon a five day per week attendance with 420 minutes in each school day. H.S. was only attending pre-school four days each week. Based on the minutes she was assigned to each setting, the correct percentages for each year are 80% removal from GE and 20% in GE.

[2] The IEP form incorrectly states removal from GE was 63%. (AEA Rec. at p. 68) This error was again attributable to the use of the total hours based on a 5 day week, rather

H.S. was reassigned to the district's Drexler Elementary school located in Farley for her kindergarten year. At that time the district's only life skills program for elementary age students was at the Drexler facility. Members of the IEP team representing the district believed that this program would be the best fit for H.S.'s needs. Although H.S.'s parents initially resisted, they eventually consented to this move. (Tr. pp. 156-57, 696-99)

For kindergarten, beginning August 19, 2010, specially designed instruction was to be provided 4800 minutes per month (240 minutes per day) in general education and 3600 minutes per month (180 minutes per day) in special education. (AEA Rec. at p. 69) This plan amounted to 44% removal from GE and 56% in GE. The narrative description of H.S.'s placement stated that she would "receive special education services both in the classroom and on a pullout basis as determined by the general education classroom teacher and special education teacher." (AEA Rec. at p. 70)

An updated functional evaluation, also completed in April of 2010, supported the ongoing need for H.S. to receive assistance from a paraprofessional due to ongoing concerns about safety, mobility, limited communication skills, her need for help with basic functional skills, and strong-willed behavior that interfered with independent learning. (AEA Rec. at pp. 77 – 80) Her kindergarten IEP called for a paraprofessional to be provided 375 minutes per day as a support or related service. The function of paraprofessional was to provide:

> Adult assistance to:
> - direct/instruct during free play to teach/model appropriate social skills and assist with remaining engaged in activities
> - removal from group to re-teach expectations during center time and circle time if teacher redirection is unsuccessful
> - supervision for mobility within school building and playground to ensure safety of self and arrival to appropriate play (walking the hallway, errands to the office, lunch time, recess, etc.)
> - close proximity of adult during recess to ensure safety of self and to stay within assigned area of school grounds

(AEA Rec. at p. 68)

H.S.'s parents contacted the school district in November of 2010 to request additional speech language services for H.S. because her speech was not developing at the rate they expected. (Tr. at pp. 158-59) The IEP Team met on December 9, 2010 to discuss this request. An amended IEP was issued, increasing H.S.'s speech language therapy from 90 minutes per month to 2 to 4 hours per month. (Compare AEA Rec. p. 45 with AEA Rec. p. 68) ECSE services that were discontinued at the end of the previous school year were deleted from the IEP. The remaining special education instruction and support services were not revised from the IEP developed in April of 2010. H.S. was to spend 240 minutes or 56% of her day in the general education setting and 180 minutes or 44%

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than a 4 day week in calculating the percentage. *See* footnote 1.

of her day in special education classes. A one-to-one paraprofessional was to continue at 375 minutes each day. (AEA Rec. at pp. 45-47)

First grade year (2011-2012): The IEP Team convened on March 23, 2011 to prepare the IEP for 2011 – 2012, H.S.'s first grade year. The IEP gave the following description of H.S.'s program:

> H.S. is a 6 year old girl who attends Kindergarten at Drexler Elementary. She receive[s] academics and vocational programming through the special education highly modified classroom. Currently she is integrated with her Kindergarten peers for free play, calendar, singalong, lunch, recess, specials, and any other social activities her Kindergarten peers participate in.

(AEA Rec. at p. 10) Information regarding H.S.'s achievement and functional performance was based upon classroom assessments and observations. H.S. was functioning in the general education curriculum as approximately 24 months below peers, with substantial modifications to the general curriculum to allow for extensive social skills instruction. (AEA Rec. at pp. 11-14) Mrs. Harris, the kindergarten teacher, provided the following written report:

> H.S. has made good progress in the kindergarten room. She follows our routine, sits appropriately for calendar and if she has a job for the day she is able to do it. She loves to be calendar helper and be the teacher.
>
> Every morning we work on matching letters for her name, naming and signing the colors and writing her name. She can hand you the color you ask for but does not name them all yet.
>
> Her language is developing nicely. She uses two and three word phrases. She will say where book?, help me, I want more, sit by chair and much much more.
>
> She still tends to want to be independent and might refuse to do something, but some of her independence is good.
>
> I have really enjoyed working with H.S. and she loves her friends.

(AEA Rec. at p. 40)

The IEP goals for H.S.'s first grade year included: (1) improved performance on the alphabet rubric (addressing matching and naming upper and lower case letters); (2) improved performance on the math rubric (addressing rote counting, number recognition, and counting objects); (3) improved performance on the language rubric (responding accurately to "what" questions, using 3 and 4 word sentences – with and without a model); (4) improved writing performance (learning to write her full first and last name independently; and (5) improved performance on the articulation rubric (accurately articulating modeled multi-syllable words and works with final t, k, n, p, m, and f sounds). (AEA Rec. at pp. 15-34)

The special education services section of the IEP for 2011-2012 lists specially designed instruction delivered for academics and vocational programming in the special education highly modified classroom for 360 minutes each day and participation with general education peers 90 minutes a day for specials (art, P.E., and music), lunch, recess, extra recesses, incentives, and parties.[3] (AEA Rec. at pp. 35-36) The amount of removal from general education was justified as follows:

> H.S. needs small group or one-on-one instruction with additional adult assistance in the classroom. A general education classroom would not give her the small group and individual teaching that she needs. H.S. requires extra time and attention which would take away from the general education peers.

(AEA Rec. at p. 38) Paraprofessional support services were included in the special education services and were classified as support or related services, as they had been the year before. The description of the function of the paraprofessional was unchanged from the 2010-2011 description, set forth above, but the time allotted for paraprofessional services was reduced from 375 minutes per day to 90 minutes per day. (AEA Rec. at p. 36) No explanation for reduction of paraprofessional support is included on the IEP.

The Prior Written Notice issued on March 11, 2011, included the following general description of and justification for the proposed change to H.S.'s IEP.

1. *A description of the action proposed or refused.*
   Continue services in areas of math and reading. More time added for academics and vocational programming through a special education highly modified alternative classroom. Adjustments are also being made to health services and paraprofessional minutes.

2. *An explanation of why the school proposes or refuses to take action.*
   IEP team discussed students [sic] needs and feel continuing services is necessary.

3. *A description of any other options the school considered and the reasons why those options were rejected.*
   Educational programming in the general education classroom with no additional support for academic deficits was rejected. H.S. requires

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[3] There are 420 minutes in the school day, so this breakout cannot be correct. The 90% figure for removal from general education also appears to be incorrect – assuming H.S. was to spend 90 minutes with nondisabled peers and the remaining 330 minutes in the special education classroom, she would be removed from GE 79% of the day and included in GE 21% of the day. If she was actually to spend 360 minutes in special education and the remaining 60 minutes with nondisabled peers, she would be removed from GE 86% of the day and included in GE 14%.

additional support. With no support provided, academic progress would be limited.

4. *A description of each evaluation procedure, test, record, or report the school used as a basis for the proposed or refused action.*
None

5. *A description of any other factors that are relevant to the school's proposal or refusal.*
None.

6. □ Yes √ No *Is the proposed action a change in identification, evaluation, or placement?*

(AEA Rec. at p. 41)[4] H.S. finished kindergarten at Drexler Elementary.

Enrollment in [Neighborhood] Catholic School: As the 2011-2012 school year began, Jeff and Becky S. decided that they wanted to enroll all three of their school-age daughters in the [Neighborhood] Catholic School – an accredited nonpublic school operating within the boundaries of the Western Dubuque public school district. Although the decision to move the girls was not based on dissatisfaction with H.S.'s March 2011 IEP, they were concerned that H.S. was not progressing at school. They wanted a religious school, which they thought would be more structured, for all of the children. (Tr. pp. 161, 210)

H.S.'s parents contacted [the Neighborhood Catholic] in late August about the girls' enrollment and met with [the Neighborhood Catholic] elementary school administrators – Principal Mary S. and Assistant Principal Melissa O. – to discuss H.S.'s limitations and the ability of [Neighborhood Catholic] to accommodate H.S. needs. They provided the administrators with a copy of the IEP for H.S.'s kindergarten year, 2010-2011, developed in April of 2010. (Tr. pp. 288-89) H.S.'s sisters were enrolled immediately and began attending [Neighborhood Catholic] soon thereafter. [Neighborhood Catholic] did not agree to enroll H.S. until they further explored the ability to serve her.

On August 31st, the day after she met with H.S.'s parents, Principal S. sent an email to Sara Kluesner, the AEA Special Education Consultant assigned to [Neighborhood Catholic] Elementary, asking her to call to discuss H.S.'s needs. (LEA Rec. at p. 632) Principal S. talked with the Superintendent for [Neighborhood Catholic], Jeff Henderson, and staff in her building about their ability to provide needed services to H.S.. Principal S. also spoke with Superintendent of the Western Dubuque school

[4] The copy of the Prior Written Notice within the school district records includes a different response to question #1, which does not include the final sentence regarding adjustment health services and paraprofessional hours. (See LEA Rec. at p. 12) None of the witnesses were asked about this variation and the record is silent about the discrepancy. My presumption is that one of versions – most likely the less detailed version in the school district records, is a draft form of the notice.

district, Jeff Corkery, to ask whether it was possible to come up with a shared time arrangement or some other way for the school district to fund the associate for H.S. if she was enrolled at [Neighborhood Catholic]. She also contacted Western Dubuque Director of Student Services, Tina Brestup, to inquire about the services H.S. was receiving. Ms. Brestrup requested a meeting to discuss the extent of H.S.'s disabilities and services. (Tr. pp. 312-12, 329-30,692-93, 713-14)

On the afternoon of September 1st, Principal S. sent an email to representatives of Western Dubuque and the AEA, telling them that H.S.'s parents had decided they wanted their children to attend [Neighborhood Catholic] and noting that they were trying to determine exactly what services H.S. would be entitled to receive when she transfers to [Neighborhood Catholic]. The email asked the recipients if they could meet on September 12th to discuss H.S.. (LEA Rec. at p. 633)

The Western Dubuque and AEA representatives were also focused on this question. On September 1st, Art Miller – a Sector Coordinator for the AEA spoke with the Director of Special Education for the AEA – Doug Penno, and [Neighborhood Catholic] Superintendent Jeff Henderson about the situation. Miller also called the state Department of Education seeking clarification on what services, if any, could be provide to H.S. at an accredited non-public school. (LEA Rec at p. 634) Ultimately, the Western Dubuque and the AEA decided enrollment at [Neighborhood Catholic] would "inactivate" H.S.'s IEP. Speech therapy through the AEA would continue, but the local school would not provide special education services if the parents chose to move H.S. to [Neighborhood Catholic]. (Tr. pp. 717-18; also LEA Rec. at pp. 655)

Western Dubuque issued notice of an IEP meeting to be held on September 12, 2011. Becky S. and [Neighborhood Catholic] school administrators Mary S. and Melissa O. were invited to attend, along with representatives of the school district and AEA. An amended IEP and Prior Written Notice were prepared for the meeting. The IEP removed all special education services from H.S.'s program except 120 minutes per month of speech-language therapy or instruction. The Prior Written Notice explained the school district's position as follows:

1. *A description of the action proposed or refused.*
   Parents have decided to enroll H.S. at [Neighborhood] Catholic School. H.S. continues to be eligible for special education specially designed instruction which is offered by the Western Dubuque County CSD at a public school site. The specially designed instruction and other LEA services on the current IEP will be considered inactivated because of the enrollment of the student in an accredited non-public school, but may be reactivated upon enrollment back at the public school. H.S. will continue to receive Speech and Language services through the AEA.

2. *An explanation of why the school proposes or refuses to take action.*
   Parents have decided to enroll H.S. at [Neighborhood] Catholic School.

3. *A description of any other options the school considered and the reasons why those options were rejected.*
   Remaining at Farley [Drexler] Elementary – parents want H.S. to attend [Neighborhood Catholic].

4. *A description of each evaluation procedure, test, record, or report the school used as a basis for the proposed or refused action.*
   IEP team discussion

5. *A description of any other factors that are relevant to the school's proposal or refusal.* NA.

6. √ Yes □ No *Is the proposed action a change in identification, evaluation, or placement?*
   If 'yes,' when will this proposed action be implemented? __09/12/2011__

(AEA Rec. at p. 5) The school district representatives made it clear to all in attendance at the September 12th meeting that Western Dubuque would not provide or fund a paraprofessional or the specialized instruction and other support service called for in the IEP from March of 2011 unless H.S. continued to attend the public school. (Tr. at pp. 207, 226-27, 273-75, 771-72 & LEA Rec. at p. 659) H.S. was withdrawn from the Western Dubuque district on September 13th and began attending [Neighborhood Catholic]. She attended 12 days of first grade at the public school before the move.

Due Process Complaint and mediation: Jeff and Becky S. filed their Due Process Complaint with the state Department of Education on October 12, 2011. The Complaint asserted that while attending the Western Dubuque district Hanna had received an associate for 375 minutes per day as indicated in her IEP. The proposed resolution was for special education funds to be used to pay for H.S.'s associate while continuing to attend a non-public school. (AEA Rec. at pp. 1-2)

During an initial conference call held on October 28, 2011, representatives for the school district and AEA pointed out that the IEP for the 2011-12 school year only included 90 minutes of associate time. After this call Ms. S. filed a clarification of the Complaint, contending that – based on the functional evaluation and IEP prepared in April of 2010 – H.S. needs a paraprofessional for at least 375 minutes each day. H.S.'s parents understood that this service remained in place up through the time H.S. left the public school. They proposed that she should receive no less than 375 minutes per day of paraprofessional time in the non-public school setting. (Exhibit E)

A request to file an Amended and Substituted Complaint was filed by attorney Curt Sytsma, for the parents, on November 23, 2011. The school district and AEA did not resist the request and the Amended and Substituted Complaint was filed pursuant to Order issued on December 9, 2011. Representatives of all parties participated in a mediation session on December 19, 2011. As a result of mediation, the school district

and AEA proposed a new evaluation of H.S. – to determine her current programming needs – and her parents consented. (AEA Supp. Rec. at pp. 34-35, Tr. p. 164)

Re-evaluation and April 2012 IEP: During late January and early February of 2012, a variety of assessments were completed by AEA staff. Douglas Penno, the Director of Special Education for the AEA, assigned AEA staff for the reevaluation. He directed the evaluation team to conduct a thorough and comprehensive reevaluation that addressed all domains – including behavior issues. (Tr. pp. 813-15) The IEPs developed for H.S.'s kindergarten and first grade school years note that she is independent and at times strong willed, but neither IEP notes that behavior is a concern or includes a behavior-related goal. (AEA Rec. at pp. 10, 52) But after reviewing the IEPs and attending the mediation, Dr. Penno was concerned that some of H.S.'s behaviors might be interfering with her learning. (Tr. p. 813)

Between September of 2011 and February of 2012 H.S. made progress toward the goals listed in the March 2011 IEP, but the gap between her performance and that of same-age peers was found to be wider than estimated in prior years.

> H.S. is performing at a level significantly lower than her same-age peers in the academic, adaptive behavior, communication, and behavior domains. H.S.'s functioning in non-language areas is estimated to fall in the three and one half to four year range. H.S.'s language functioning is below this level. H.S. and her peers are six and seven-years old, documenting a three to four year gap between proficient peers and H.S..

(AEA Supp. Rec. at p. 36)

The Weschler Preschool and Primary Scale of Intelligence (WPPSI-III) assessment was administered to H.S. during the re-evaluation. Her Verbal Composite Score was estimated at 46, the Performance Composite Score was estimated at 47, and the Full Scale Composite score was estimated at 41. The full scale IQ score of 41 places H.S.'s cognitive impairment in the range of moderate mental retardation on the DSM-IV-TR diagnostic scale.[5] This result confirms that H.S. has significantly delayed intellectual functioning and a skill level approximately three standard deviations below that of her same-aged peers. (AEA Supp. Rec. at pp. 42-44, Tr. pp. 469-72)

The school district and AEA drafted a proposed IEP based upon results of the re-evaluation. The goals and proposed services set out in the April 2012 IEP included significant revisions from the IEP developed in March of 2011. The new IEP no longer contained a written language goal, largely because the evaluators had determined that her progress on the prior goal of writing her name (learning to write five letters of her name at a rate of one letter per month) showed insufficient growth to warrant continued

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5 The *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV)*, published by the American Psychiatric Association in 1994) and subsequent text revision (*DSM-IV-TR)*, published in 2000, are widely viewed as the leading diagnostic reference tool for mental health professionals in the United States.

intensive instruction on a skill of this nature. (AEA Supp. Rec. at pp. 36, 38, Tr. pp. 601-03) Instead, written language demands were built into the reading and mathematics goals. (AEA Supp. Rec. at p. 4)

H.S. met the articulation goal of her prior IEP. She also made significant progress with language skills – an assessment of phonological patterns showed her deficiency in this area improving from a high severe to high moderate. (AEA Supp. Rec. at p. 36) She was still significantly delayed in these areas and two updated speaking and listening goals were included in the new IEP. (AEA Supp. Rec. at pp. 4, 6-3) H.S. also learned to recognize letters and name the corresponding sounds, progressing from a score of 0 on this task in September of 2011 to a score of 26 in February 2012 – a rate of growth comparable to kindergarten peers, but significantly discrepant from first grade peers. The February testing showed that when "Jolly Phonics" visual cues were removed, H.S.'s ability to identify letter sounds dropped dramatically, showing a lack of generalization of this skill. (AEA Supp. Rec. at p. 36) She was still in need of intensive phonetic instruction, concepts of print, word recognition, and comprehension as addressed in the new reading goal. (AEA Supp. Rec. at pp. 14-17) H.S. remained far behind peers in basic number concepts, counting and computation skills and the new IEP included an updated mathematics goal. (AEA Supp. Rec. at pp. 18-21)

The April 2012 IEP also included a behavior goal and incorporated a behavior intervention plan to address her refusal behavior. (AEA Supp. Rec. at pp. 22-25) A Functional Behavioral Assessment completed during the evaluation found that H.S. exhibited many refusals and escape behaviors, most likely serving the function of avoiding an undesired activity or obtaining a desired activity. Although all of H.S.'s behaviors were of a low intensity, the evaluators were concerned that the behavior could intensify if not correctly addressed to the point of affecting both her learning and other children in her classroom. (AEA Supp. Rec. at pp. 61-65) In the evaluators' view, H.S.'s behaviors were already occasionally distracting the class and interfering with her learning because she missed things when not engaged. (Tr. at pp. 383, 388, 458-49)

In regard to special education services, the April 2012 IEP proposed : program modification daily, as needed; 120 minutes per day of specialized instruction one-on-one or in a small group setting with a special education teacher – 60 minutes per day to work on her literacy goal and 60 minutes per day for the math goal; 120 minutes per month with the special education teacher addressing the area of behavior; speech language instruction with a speech-language pathologist 150 minutes per month; and support of a paraprofessional for 5400 minutes per month (270 minutes per day). (AEA Supp. Rec. at pp. 26-28)

Each prior IEP classified H.S.'s paraprofessional assistance as a "support or related service." The April 2012 IEP re-classified the paraprofessional support as "specially designed instruction." The IEP described the function of the paraprofessional as follows:

> H.S. requires the support of a paraprofessional under the support of a special education teacher in the general education setting for the following: 1) assistance with dressing/undressing and toileting,

> 2) transitioning, 3) to address safety needs, 4) to monitor social and academic needs, 5) to provide reassurance, redirection, and positive feedback as needed, 6) to utilize modified materials, 7) to communicate with the special education and regular education teachers daily.

(AEA Supp. Rec. at pp. 26-27)

The response to the LRE questions on the IEP form indicated that H.S. would be removed from general education 31% and included in general education 69% of the school day. (AEA Supp. Rec. at p. 28) The removal from general education was justified on a finding that the intensive drill and feedback, paired with the individual specialized instruction necessary for H.S. to make progress, should be provided in a quiet environment with minimal distractions. Instruction of the nature H.S. needs was viewed as too distracting for Hanna and her peers if provided in the classroom. (AEA Supp. Rec. at pp. 29-30)

The draft IEP, re-evaluation report, assessment results, and a proposed Behavior Intervention Plan were sent to H.S.'s mother via e-mail on February 22, 2012. (Exhibit 10) Western Dubuque and the AEA then scheduled an IEP team meeting to discuss the proposed program for H.S.. Jeff and Becky S. were contacted about scheduling the meeting and Becky S. told Principal Mary S. about the meeting. Principal S. emailed Dr. Penno at the AEA and expressed concern that no one from the private school where H.S. had been in attendance since September of 2011 had been contacted about the meeting. (Exhibit 8) Dr. Penno responded that H.S.'s parents were informed that they were welcome to invite whomever they wanted to the meeting. (Exhibit 9)

The meeting, held on April 5, 2012, was initially scheduled to be held at Drexler Elementary and was moved to the [Neighborhood Catholic] School Peosta building at the parents' request. (Tr. pp. 165-66) No [Neighborhood Catholic] School administrators or teachers were included on the list of requested attendees on the formal meeting notice. (AEA Supp. Rec. at p. 74-75) Ms. S. was hesitant to attend, but she decided to go to the meeting, primarily to learn more about the re-evaluation results. (Tr. p. 166) Principal S. attended the meeting at Ms. S.'s invitation.

Cindy Ehrlich, a school psychologist/consultant with the AEA, who was involved in the assessment and development of the IEP, facilitated theApril 5th meeting. Upon advice of counsel, Ms. S. told the team that she would not agree to sign anything until she had a chance for review with her attorney. (Tr. pp. 167, 303, 777) The team reviewed the IEP and evaluation reports with a focus on two issues: what are H.S.'s needs and services and, based on the service needs, where will the school district provide the services. (Tr. pp. 167-68, 735) The school district and AEA understood that H.S.'s parents were happy with her attendance at the [Neighborhood] Catholic School, but the school district continued its refusal to provide paraeducator support or other special education services on-site at the non-public school.

The Prior Written Notice prepared for the April 5, 2012 IEP meeting emphasized the district's obligation to provide H.S. with a free, appropriate public education by meeting

legal requirements and best practices, including among other things: instruction by a fully certified Strategist II teacher, teacher training and expertise in working with students with similar instructional needs, supervision of the paraprofessional by a certified special education teacher, a staff trained in the state alternative assessment with access to state and national conferences and professional development, a properly equipped classroom, student interaction with peers with similar needs.

The district gave the following explanation for refusing to provide special education services – other than speech/language services of the AEA – outside of the public school setting:

> Based on the district's discretion, providing the extensive, comprehensive services outlined in H.S.'s IEP, or select services, in the nonpublic school setting is not in H.S.'s best interest educationally and would be a substantial reallocation of resources in order to provide services in a manner that meets the State Education Agency's standards and the requirements of Chapter 41 [Iowa Administrative Code 281, chapter 41]. This discretion is exercised on an individual student basis, and is exercised with all students who attend public schools as well (e.g., all special education services are not provided in all public school attendance centers). Additional reasons for providing these services in the public school include opportunities for H.S. to interact with peers with similar needs and be instructed by staff with experience and certification working with students with similar needs. Lastly, the comprehensive services as outlined are recommended based on the entirety of the services. The selection or removal of services outlined may be considered a denial of Free Appropriate Public Education (FAPE) and not in H.S.'s best interest.

(AEA Supp. Rec. at p. 77)

Ms. S. does not challenge the evaluation results, although she believes that H.S.'s behavior is not typically as extreme as observed during the behavioral assessment. She believes that the educational program proposed in the April 2012 IEP is satisfactory, except for the location of the services. She wants H.S. to be taught in a general education class at the school her siblings attend – [the Neighborhood Catholic]. (Tr. at pp. 169-70, 202)

First grade year at [Neighborhood] Catholic School: H.S. attended first grade at [Neighborhood Catholic] from September 13, 2011 through the end of the school year. When H.S. first arrived at Seaton, several members of the school staff formed an informal team to assess resources and determine how the school could best meet her needs. Principal Mary S., Assistant Principal Melissa O., special needs teacher Lisa B., first grade teacher Megan B., and associate Jane B., met regularly to collaborate on the approach used to teach H.S.. Consultants from the AEA were also available to assist the school in addressing H.S.'s needs. (Tr. pp. 279-84; AEA Rec. at pp. 670-71)

H.S. spent the majority of each day in a first grade general education classroom taught by Megan B. and received assistance from associate Jane B. throughout the school day. Megan B. is certified as an elementary teacher and as an Instructional Strategist I for grades K through 8 – a special education designation authorizing her to teach students with mild and moderate mental disabilities. (Tr. p. 27) Special needs teacher Lise B. worked directly with H.S. in the general education classroom for approximately 15 to 20 minutes each day and assisted Megan B. with lesson plans, curriculum modification, and the development of teaching aids. Megan B. worked directly with H.S. for approximately 5 to 10 minutes each day and supervised associate Jane B. (Tr. at p. 78-80)

Teaching associate Jane B. was with H.S. the vast majority of the school day. Jane B. began working as a teaching associate at [Neighborhood Catholic] in the fall of 2010. She has a Bachelor of Arts degree in communication/public relations and is not a certified teacher and has not had training regarding working with students with mental disabilities. (Tr. pp. 97-98, 126) Jane B. provided day care out of her home for 11 years as registered child care home before joining the [Neighborhood Catholic] staff. Jane B. began working with H.S. soon after she came to [Neighborhood Catholic]. She assisted H.S. with toileting, supervised her behavior, and reinforced instruction as assigned by Megan B. (Tr. at pp. 81, 101-03)

Principal Mary S., Assistant Principal Melissa O., Megan B., and Jane B. all believe that H.S. had a successful first grade year and made significant progress on her academic goals. (Tr. at pp. 28, 99, 229-30, 281-82) Jeff and Becky S. are pleased with the progress H.S. made during first grade at the [Neighborhood Catholic] School. In Ms. S.'s view H.S. has benefited from interaction with nondisabled peers in the general education classroom and has flourished. She and her husband are unwilling to reenroll H.S. in the public school. (Tr. at pp. 163, 169, 201)

Conclusions of Law

The IDEA and FAPE: The overriding purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see Bd. of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (examining history and purpose of the Education for All Handicapped Children Act of 1975, the first comprehensive federal statute addressing special education from which the IDEA has evolved).

In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction. 20 U.S.C. § 1412(a)(1). The local education agency must develop an IEP for each qualifying child, must comply with the Act's procedural safeguards, and must provide services to each child in the least restrictive environment appropriate for the child. 20 U.S.C. § 1412(a)(4)-(6).

Standard of Review: "Parents and guardians of a disabled child may challenge the procedural and substantive reasonableness of an IEP by requesting an administrative due process hearing, …" *Fort Osage R-1 Sch. Dist. v. Sims,* 641 F.3d 268, 1002 (8th Cir. 2011) . "Procedurally, the school district must follow the procedures set forth in the IDEA to formulate an IEP tailored to meet the disabled child's unique needs." *Sch. Bd. of Ind. Sch. Dist. No. 11 v. Renollett,* 440 F.3d 1007, 1011 (8th Cir. 2006). Procedural error provides a basis to set aside an IEP, only if "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Fort Osage R-1 Sch. Dist.,* 641 F.3d at 1002-03, quoting *Lanthrop R-II Sch. Dist. v. Gray,* 611 F.3d 419, 424 (8th Cir. 2010); 34 CFR §300.513(2).

The substantive requirement to offer a free appropriate public education is generally satisfied when "a school district provided individualized education and services sufficient to provide disabled children with some educational benefit." *Fort Osage R-1 Sch. Dist.,* 641 F.3d at 1003, quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). "The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed. '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 School Dist. v. Dass,* 655 F.3d 762, 765-66 (8th Cir. 2011), quoting *Lanthrop R-II Sch. Dist. v. Gray*, 611 F.3d at 427, and *Gill v. Columbia 93 Sch. Dist.,* 217 F.3d 1027, 1035 (8th Cir. 2000).

Burden of persuasion: "[T]he burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district." *Sch. Bd. of Ind. School Dist. No. 11 v. Renollett,* 440 F.3d 1007, 1010 at fn. 3 (8th Cir. 2006), *citing Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 62 (2005). Here, this burden rests with the Complainants.

Least Restrictive Environment (LRE): State plans for implementation of the IDEA must ensure that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). In determining the educational placement, the school must ensure that "a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.118(e).

The IDEA may be violated, despite the offer of an educational program sufficient to provide FAPE, if the educational placement proposed for the student is overly restrictive. The individualized instruction and support services that are identified in an IEP must be delivered to the student in the least restrictive appropriate environment. The free appropriate public education requirement can only be met if a child is provided

with personalized instruction with sufficient supports and services for the child to benefit educationally from instruction. *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1986) citing *Rowley,* 458 U.S. at 203. Placement decisions must be made on an individual basis depending on the child's unique educational needs and circumstances, rather than by the child's category of disability. *Deal ex rel. Deal v. Hamilton Co. Dept. of Educ.,* 392 F.3d 840, 859 (6th Cir. 2004), cert. denied 546 U.S. 936 (2005) (placement decision must be based upon the child's IEP.

Minor variations are found in the analytical approach used by the various federal circuit courts to determine if a placement comports with the LRE requirement.[6] The Eighth Circuit applies the following analysis:

> The IDEA creates a preference for mainstream education, and a disabled student should be separated from [his] peers only if the services that make segregated placement superior cannot "be feasibly provided in a non-segregated setting." *Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983). Nevertheless, while endorsing *Roncker*, we have emphasized that the statutory language "significantly qualifies the mainstreaming requirement by stating that it should be implemented 'to the maximum extent *appropriate*.' 20 U.S.C. § 1412(a)(5) (emphasis added), and that it is inapplicable where education in a mainstream environment 'cannot be achieved *satisfactorily*.' *Id.* (emphasis added)." *A.W. v. Northwest R-1 Sch. Dist.,* 813 F.2d 158, 163 (8th Cir. 1987). Thus removing a child from the mainstream setting is permissible when "the handicapped child would not benefit from mainstreaming," when "any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting," and when "the handicapped child is a disruptive force in the non-segregated setting." *Roncker,* 700 F.2d at 1063.

Pachl v. Seagren, 453 F.3d 1064, 1067-68 (8th Cir. 2006). Simply put, "children who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; . . ." *Barron v. South Dakota Bd. of Regents,* 655 F.3d 787, 793 (8th Cir. 2011), quoting *Evans v. Dist. No. 17,* 841 F.2d 824, 832 (8th Cir. 1988).

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6 *Compare Daniel R. R. v. State Bd. of Education,* 874 F.2d 1036 (5th Cir. 1989) (adopting two-part test – first, can education in the general classroom with the use of supplemental aids and services be achieved satisfactorily; if not, has the district mainstreamed the student to the maximum extent appropriate); *Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983) (when segregated setting has been chosen, the reviewing court must identify what makes that placement superior and whether those services feasibly can be provided in a non-segregated setting); and *Sacramento City Unified Sch. Dist. v. Rachel H.,* 14 F.3d 1398 (9th Cir. 1994) (adopting four-factor test that considers the educational benefits of a full-time general education placement, the nonacademic benefits of a full-time general education placement, the effect the student has on the teacher and other children in the general education placement, and the financial cost of mainstreaming).

IEPs and Prior Written Notice: An individualized educational program or "IEP" is required for each IDEA eligible child, specifying all the special education and related services the child will receive. 20 U.S.C. § 1414(d); 441 IAC 41.22, 41.320. At least once each year the IEP team must review the child's IEP to determine whether annual goals are being achieved and make revisions as appropriate. 20 U.S.C. § 1414(d)(4); 441 IAC 41.324(2)(a).

Parents of a child with a disability must be provided with prior written notice any time the local education agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3). The prior written notice must include:

> (A) a description of the action proposed or refused by the agency;
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
> (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;
> (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
> (F) a description of the factors that are relevant to the agency's proposal or refusal.

20 U.S.C. § 1415(c)(1).

A continuum of alternative educational placement options, ranging from instruction in a regular classroom – with necessary accommodations, modifications, and support services, through the use of special education classrooms or special schools must be available. 34 C.F.R. § 300.115; 441 IAC 41.115. A change in placement, raising prior written notice and LRE concerns, occurs when a child is moved to a different point on the continuum of placement options.

Students attending private schools: Under federal law, an individual student parentally placed in a private school generally has no right to receive publically funded special education services at the private school. The IDEA does not require a public school "to pay for the cost of education … at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." *T.F. v. Special School Dist. of St. Louis County, 449 F.3d 816, 820 (8th Cir. 2006),* quoting 20 U.S. C. § 1412(a)(10)(c)(i). A public school may be ordered to reimburse the cost of private school tuition for a student is unilaterally placed by his parents in a private school only the public school failed to provide a FAPE, the parents gave proper notice of their dissatisfaction with the offered

program or placement, and the private school placement is proper under the IDEA . *C.B. v. Special School Dist. No. 1, Minneapolis,* 636 F.3d 981, 988 (8th Cir. 2011); s*ee also* 20 U.S. C. § 1412(a)(10)(C); 34 CFR § 300.148.

The IDEA also provides for "equitable participation" of private school students in special education programs. Children from the ages of 3 through 21 who are voluntarily placed by their parents in private schools are entitled to participate in public special education programs and receive a proportionate amount of publically funded services, to "the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents" in private schools in each school district. 20 U.S. C. § 1412(a)(10)(A); 34 CFR § 300.132. The equitable participation requirement does not create an enforceable individual right or require public school agencies "to pay the costs of special education services for a particular child." *Foley v. Special School Dist. of St. Louis County,* 153 F.3d 863, 865 (8th Cir. 1998).

Rowley and the IDEA establish minimum educational standards which public education agencies of all participating states must meet. States are free to provide for educational benefits greater than mandated by federal law. FAPE as defined in the IDEA, incorporates "the standards of the State educational agency." 20 U.S.C. § 1401(9)(D). A parent may file a due process complaint on any matter relating to educational placement or the provision of FAPE. 20 U.S.C. § 1415(b)(6)(A). "Thus, 'when a state provides for educational benefits exceeding the minimum federal standards set forth under *Rowley,* the state standards' are enforceable under the IDEA." *Renollett,* 440 F.3d at 1012, quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d at 658.

Here, the Complainants do not seek reimbursement of H.S.'s private school tuition or assert a right to receive federally funded special education services in the private school setting. Rather, they contend that the school district and AEA violated Iowa law by inactivating H.S.'s IEP and simply refusing to provide special education services and supports (other than speech/language therapy) after she was enrolled in the [Neighborhood] Catholic School. This claim is based upon Iowa Code section 256.12(2)(a), as interpreted in *John T. ex rel Robert T. v. Marion Independent School District,* 173 F.3d 684 (8th Cir. 1999). To the degree that this Code section expands the duty of the school district and AEA to provide special education services to a student attending a private school, the state law standard must be applied.

Challenges to the March 23, 2011 IEP: The IEPs in place throughout H.S.'s kindergarten school year called for her to receive 180 minutes of specialized instruction each day, provided by a special education teacher. She was to be in the general education environment for the remaining 240 minutes – the majority of her day. H.S. was to be provided paraprofessional assistance for 375 minutes each day. The modified IEP developed for first grade on March 23, 2011, doubled the amount of removal for special education to 360 minutes per day and reduced H.S.'s paraprofessional support to 90 minutes a day.

The first four issues raised in the Amended and Substituted Complaint allege procedural and substantive defects in the IEP prepared on March 23, 2011, for H.S.'s first grade

year. The Complaint asserts that the IEP process was procedurally flawed because: (a) there was no evaluation or data to support the changes to H.S.'s placement and paraprofessional support services; (b) they were not given adequate notice that these changes were being considered; (c) there was no IEP discussion supporting the changes; and (d) the March 22, 2011 prior written notice falsely stated no change in placement was being proposed and failed to explain either why placement was being changed or why paraprofessional support was being reduced.

The Complaint also asserts that the IEP changes resulted in a substantive denial of LRE and FAPE. They claim that the increase in removal general education violated H.S.'s entitlement to be educated in the least restrictive appropriate environment and that the reduction of paraprofessional support denied H.S. support services necessary for her to receive FAPE. H.S.'s parents request declaratory relief through a ruling that she is entitled to greater integration with her regular education peers and to services of a paraprofessional for more minutes per day than offered by this IEP.

The school district and AEA essentially bypass the merits of these claims in their prehearing brief, arguing instead that the first four issues are moot because: H.S. enrolled in another school without challenging the March 23, 2011 IEP; the Complainants seek no compensatory relief with regard to the March 2011 IEP; and H.S. is now enrolled in the [Neighborhood] Catholic school system. I disagree. The facts of *Board of Educ. of Downers Grove Grade School Dist. No. 58 v. Steven L.*, 89 F.3d 464 (7th Cir. 1996), the sole case cited by the Respondents as authority for this argument, are readily distinguishable.

Andrew L.'s parents commenced an IDEA due process case in to challenge an IEP change made during annual review of the IEP in November of 1992, during Andrew's 5th grade year. Four years passed as the case made its way through the administrative and judicial system to the federal court of appeals. Andrew attended the Downers Grove school district, receiving services under the IDEA stay-put provision, through his eighth grade graduation in the spring of 1996. He was to enter high school in the fall of 1996. Prior to the appellant court ruling, Andrew's parents agreed to a new IEP with a different school district, to take effect in September of 1996. Under these facts the court found that the Downers Grove school district lacked authority to modify any IEP involving Andrew, that there was no continuing controversy between the parties, and that the true objective of the appeal was to obtain attorney fees. The case was dismissed as moot. *Downers Grove v. Steven L.*, 89 F.3d at 467-68.

H.S. has not relocated or entered into an IEP with another public school district. She continues to live in within the boundaries of the Western Dubuque school district and Keystone AEA. Her parents chose to enroll her and her siblings in a local private school in the fall of 2011 and the school district almost immediately "inactivated" her IEP. Within less than a month, [Neighborhood Catholic] notified the school district that H.S.'s parents would be challenging the school district's refusal to provide her with special education services at the private school.

If the Complainants prevail on their state law claim and are found to be entitled to receive any services under Code section 256.12, the state program rules require the school district to annually develop an IEP for H.S., if requested. 281 IAC 41.137(3). H.S. is also entitled to reenter the public school as long as the family resides in the district. Under these circumstances, the Complainants' challenges to March 2011 IEP are not rendered moot by H.S.'s enrollment at [the Neighborhood Catholic school]. *C.f. Lee by and through MacMillan v. Biloxi School Dist.*, 963 F.2d 837 (5th Cir. 1992) (transfer from public school district did not moot IDEA claim); *Daniel R. R. v. State Bd. of Education,* 874 F.2d 1036, 1040 (5th Cir. 1989) (challenge to placement decision not mooted by enrollment of student in private school).

As to the merits of the IEP challenges, the Respondents argue simply that one only has to read the 2011 IEP document and prior written notice to understand the program that was proposed and accepted by the IEP team on March 23, 2011. The IEP states that H.S. will receive academics and vocational programming through the special education highly modified alternative classroom for 360 minutes per day, will be integrated with her general education peers for 90 minutes per day, and will receive 90 minutes per day of paraprofessional assistance. The IEP does not state that the proposed educational program represents a change from the prior year.

The Prior Written Notice describes the proposed actions as follows: "Continue services in the areas of math and reading. More time added for academics and vocational programming through the special education highly modified alternative classroom. Adjustments are also being made to health services and paraprofessional minutes." (AEA Rec. at 41) Neither the IEP nor the Prior Written Notice quantifies the changes. The Prior Written Notice affirmatively states that no change in placement is being proposed. As to the reason for the proposal, the Prior Written Notice explains that the IEP team discussed H.S.'s needs and felt "continuing services" was necessary. The only alternative addressed in the notice was "educational programming in the general education classroom with no additional support for academic deficits." This alternative was rejected because "H.S. requires additional support. With no support provided, academic progress would be limited."

No further rationale for the program changes was offered by the district and no evaluation or testing data from the spring of 2011 is found in the record. None of the school district or AEA representatives from the March 2011 IEP team testified at hearing. The evidence that the record does contain about H.S.'s kindergarten-year progress, gives the impression that she was making adequate progress. She was functioning in the general curriculum approximately 24 months behind same-age peers. This is the same discrepancy noted in April of 2010. Although she was not catching up to her peers, she was also not losing ground. The report from H.S.'s kindergarten general education teacher presented a picture of solid progress in her room.

Ms. S. attended the March 23rd IEP meeting. Going in to the meeting she understood that H.S.'s primary kindergarten placement was in the general education classroom, with a paraprofessional and some pull-out during the day for one-on-one specialized instruction. This seems a reasonable interpretation of the IEP developed in April of

2010 for H.S.'s kindergarten year, which stated H.S. would receive 180 minutes per day of specially designed instruction with special education services provided both in the classroom and on a pullout basis as determined by the general classroom teacher and special education teacher. Neither the kindergarten IEP nor the Prior Written Notice issued on April 7, 2010 mention of use of a highly modified special education classroom. The amount of speech/language service was the only aspect of the IEP amended during the school year.

Becky S. testified that she did not recall a discussion of any significant changes to H.S.'s program during the March 2011 IEP meeting. The school district offered no testimony to contradict this recollection. Ms. S. came away from the meeting with an understanding that H.S.'s program for 1st grade would be essentially the same as her kindergarten program. It was not until she sat down with [Neighborhood Catholic school] Principal Mary S. to review H.S.'s IEPs in the fall of 2011 that she recognized the that the March 2011 IEP called for H.S. to spend most of her day and receive all of her academic instruction in a special education classroom without individual paraprofessional support. (See Tr. pp. 160-61, 178-84, 204-06)

There is a significant discrepancy between H.S.'s kindergarten program as described on the April 2010 IEP and the kindergarten program apparently implemented by the district. The IEP called for H.S. to receive 180 minutes of specialized instruction, both in the classroom and on a pullout basis, and to spend more than half of her school day in the regular education classroom. The March 23, 2011 IEP stated that H.S. was receiving all of her kindergarten academics and vocational programming through the special education highly modified classroom at Drexler and that she was integrated with kindergarten peers for free play, calendar, singalong, lunch, recess, special, and other social activities. This may explain why the school district did not view the proposal for first grade as a change in placement and why the changes to services were not emphasized in discussions at the IEP meeting or on the Prior Written Notice.

The Complainants raise legitimate concerns about the adequacy of the notice provided to H.S.'s parents regarding the changes to her special education program and services. Neither the March 2011 IEP nor the Prior Written Notice explained that the proposal for first grade doubled H.S.'s removal from the general education and cut her paraprofessional assistance from 375 minutes to 90 minutes a day – a reduction of more than 75%. Although the IEP listed the amount of the proposed services, the Prior Written Notice merely stated "more time added for academics and vocational programming through the special education highly modified alternative classroom" and an "adjustment" was being made to paraprofessional minutes. The amount of change was not quantified and cannot be discerned without a side-by-side comparison of the IEPs developed in 2010 and 2011.

The LRE requirement demands that children with disabilities must be educated with children who are not disabled "to the maximum extent appropriate." Special classes removing a child with disabilities from the regular education environment are not justified unless the nature or severity of the child's disability "is such that education in regular classes with the use of supplementary aids and services cannot be achieved

satisfactorily." 20 U.S.C. § 1412(a)(5)(A). Removal of a child from the general education - "mainstream" – setting is permissible when "the handicapped child would not benefit from mainstreaming, when any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, and when the handicapped child is a disruptive force in the non-segregated setting." *Pachl v. Seagren,* 453 F.3d at 1067-68, quoting *Roncker,* 700 F.2d at 1063.

It is a fundamental principle of the IDEA and LRE that the needs of the child must drive the placement decision. *See* 34 CFR §§ 300.114 – 300.116 (LRE, the continuum, and placements). The IEP team must identify the specialized instruction, supports, and related services that the student needs before making a placement decision. If adequate educational progress cannot be made in the regular education setting with feasible supports and services, then a change of placement to a more restrictive setting may be justified. But a proposed change in setting must be disclosed through written notice and must be supported by data derived from observations, progress assessments, or evaluations.

The Prior Written Notice issued in March of 2011 did not inform Hanna's parents of the extent of the proposed changes to H.S.'s program. Neither this notice, nor the notices given when H.S.'s kindergarten IEP was developed and revised, told H.S.'s parents that her primary placement would be in a highly modified special education classroom – a more restrictive setting than placement in a regular education classroom with specialized instruction from a special education teacher in the classroom and on a pullout basis, as needed. In my view, these omissions were not minor or technical procedural errors, because without this information H.S.'s mother could not meaningfully participate in the placement decision for first grade.

Further, the hearing record does not contain support for the March 2011 decisions to reduce H.S.'s regular education classroom time and paraprofessional support. She was made progress on her goals during the kindergarten year and was not falling farther behind her same-age peers and her behavior was not identified as an issue at that time. It appears that she was able to obtain an adequate education in the previous placement – which, according to the kindergarten IEP, was largely in the regular education classroom. Nor is there evidence to show that her need for paraprofessional assistance had changed. The functional assessment completed in April of 2010 concluded that she needed an adult in close proximity throughout the school day. The kindergarten IEP, developed immediately after this evaluation, provided her with paraprofessional support for 375 minutes per day. The record simply does not support the drastic reduction of paraprofessional time in the IEP for first grade.

Iowa Code § 256.12(2) claim: Finally, the Complainants seek a ruling stating that H.S. is entitled to the benefit of publically funded paraprofessional services while attending the [Neighborhood] Catholic School. As noted above, this claim is based upon Iowa Code section 256.12(2)(a), as interpreted and applied in *John T. ex rel. Robert T. v. Marion Independent School District,* 173 F.3d 684 (8th Cir. 1999).

Robert T. was a child suffering from cerebral palsy, which severely affected his physical mobility and communication skills. He appeared to have normal cognitive abilities and exhibited no emotional or behavioral difficulties. The parties agreed that Robert was eligible for special education services under both federal and state law. The IEP developed for Robert concluded that he needed the aid of "a full-time, student-specific assistant to meet the demands of his school routine." Robert's parents voluntarily enrolled him in St. Joseph Catholic School, a nearby private school. The school district was prepared to provide him with necessary services in the public school setting, but refused to provide a full-time assistant to Robert on private school property. *John T.*, 173 F.3d at pp. 686-87.

Robert's parents brought suit, asserting that the failure to provide a full-time assistant for him in the private school setting violated both Iowa law and the IDEA. The federal district court and Eighth's Circuit court of appeals each found a violation of Iowa Code section 256.12(2), which at that time provided in relevant part:

> . . . School districts and area education agency boards shall make public school services, which shall include special education programs and services and may include health services, services for remedial education programs, guidance services, and school testing services, available to children attending nonpublic schools in the same manner and to the same extent that they are provided to public school students. However, services that are made available shall be provided on neutral sites, or in mobile units located off the nonpublic school premises as determined by the boards of the school districts and area education agencies providing the services, and not on nonpublic school property, except for health services, diagnostic services for speech, hearing, and psychological purposes, and assistance with physical and communication needs of students with physical disabilities, and services of an educational interpreter, which may be provided on nonpublic school premises, with the permission of the lawful custodian.

Iowa Code §256.12(2) (1997) (emphasis added). The school district asserted that the word "may" in the final sentence of the subsection vested the district with discretion to provide or not to provide special education services on nonpublic school premises.

The federal district court rejected this reading of the statute and ordered the school district to provide an assistant for Robert. The school district appealed to the Eighth Circuit, which affirmed. The appellate court found that the statutory interpretation urged by the school district would negate the obligation the statute imposed on the school district to provide special education services to private school students.

> It would be nonsensical for the Iowa legislature to require school districts to provide services to a student "attending" nonpublic schools and, in the next breath, to allow school districts to refuse such services solely on the basis of such attendance. The statute clearly mandates provision of these services to students who attend nonpublic schools. Were we to accept the

> School District's reading, Robert would not receive public school services in the same manner or to the same extent that they are provided to public school students. In fact, he would not receive them at all. The School District cannot consistent with the plain text of § 256.12(2), be allowed to condition receipt of the services to a student's ceasing to attend nonpublic schools because doing so would render that sections requirements impotent.

John T., 173 F.3d at p. 688. The court noted that the logical contextual interpretation of the "may" in the final sentence was as a condition of the provision of special education services like communications assistance on nonpublic school grounds upon the "permission of the lawful custodian." *Id.* at p. 689, fn2.

There has been one substantive post-*John T.* amendment to subsection 256.12(2). In 2006 the Iowa legislature amended the subsection as follows:

> . . . School districts and area education agency boards shall make public school services, which shall include special education programs and services and may include health services, services for remedial education programs, guidance services, and school testing services, available to children attending nonpublic schools in the same manner and to the same extent that they are provided to public school students. ~~However, services that are made available shall be provided on neutral sites, or in mobile units located off the nonpublic school premises as determined by the boards of the school districts and area education agencies providing the services, diagnostic services for speech, hearing, and psychological purposes, and assistance with physical and communication needs of students with physical disabilities, and services of an educational interpreter, which may be provided on nonpublic school premises, with the permission of the lawful custodian.~~ Service activities shall be similar to those undertaken for public school students. Health services, special education support, and related services provided by area education agencies for the purpose of identifying children with disabilities, assistance with physical and communications needs of students with physical disabilities, and services of an educational interpreter may be provided on nonpublic school premises with the permission of the lawful custodian of the property. Other special education services may be provided on nonpublic school premises at the discretion of the school district or area education agency provider of the service and with the permission of the lawful custodian of the property.

2006 Iowa Acts (81 G.A) ch. 1152, §19. Whether the Respondents must provide H.S. with paraprofessional services while she is attending the [Neighborhood Catholic] school hinges upon the effect of this amendment and proper characterization of the paraprofessional services to be provided under H.S.'s IEP.

The amended statute retains the requirement that school districts and AEAs "shall make public school services, which shall include special education programs and services . . . available to children attending nonpublic schools in the same manner and to the same extent that they are provided to public school students." All potential services are then broken into two groups: (1) those that "may be provided on nonpublic school premises with the permission of the lawful custodian" and (2) those that "may be provided on nonpublic school premises at the discretion of the school district or area education agency and with the permission of the lawful custodian of the property."

In setting out their argument, the Respondents read the qualifying phrase "provided by area education agencies for the purpose of identifying children with disabilities" as applying to all three of the preceding types of services: health services, special education support, and related services. This construction of the statute seems inconsistent with the "doctrine of the last preceding antecedent." *C.f. Oberbilling v. West Grand Towers Condominium Association,* 807 N.W.2d 143, 151 (Iowa 2011) ("qualifying words and phrases ordinarily refer only to the immediately preceding antecedent"). This reading of the statute also ignores the common meaning of the terms "health services" and "special education support" services – both of which are generally provided only after a student has been identified as a child eligible for a special education program under the IDEA (s*ee* 441 IAC 41.405, 41.409) – and "related services" – a broad category that includes both health and other supportive services provided for assessment and identification of children with disabilities as well as to assist children eligible for special education (see 441 IAC 41.34(1.).

The state special education rules acknowledge that Iowa Code section 256.12 expands the duty of schools and AEAs to provide special education services to private school students. 441 IAC 41.139(1) ("Services to parentally placed private school children with disabilities may be provided on the premises of private, including religious, schools to the extent consistent with Iowa Code section 256.12."). The rules do not attempt to define the scope of this duty. *See* 281 IAC 41.132(2), 41.134(4)(d), 41.137, 41.138(2).

As I read the subsection 256.12(2), the first group of services, those that are to be provided on nonpublic school premises if the custodian give permission, includes: (a) health services, (b) special education support, (c) related services provided by area education agencies for the purpose of identifying children with disabilities, (d) assistance with physical and communications needs of students with physical disabilities, and (e) services of an educational interpreter. The second group, which a school district or AEA has discretion not to provide on nonpublic school premises, includes all "other special education services."

Throughout the years that H.S. attended Western Dubuque, she was evaluated as needing paraprofessional assistance. She needed supervision due to safety concerns and needed adult assistance with mobility, communication, basic functions – such as toileting, feeding, and dressing), and had a short attention span affecting her ability to learn independently. H.S.'s 2010 and 2011 IEPs described the tasks of the paraprofessional broadly and classified this services as a "support or related service," rather than a part of her specialized instruction.

In the draft IEP developed in the spring of 2012 and at hearing, the Respondents reclassified the paraprofessional support provided to H.S. as "specially designed instruction." Despite this re-labeling of the service, the essential function of the paraprofessional remained unchanged. This adult will provide assistance with dressing/undressing and toileting and transitioning; address safety needs; monitor social and academic needs; provide reassurance, redirection, and positive feedback; assist with communication; and utilize modified materials.

"Specially designed instruction" is a term of art, defined as "adapting, as appropriate to the needs of an eligible child under this chapter, the content, methodology, or delivery of instruction: (1) to address the unique needs of the child that result from the child's disability; and (2) to ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 281 IAC 41.39(3)(c). As described within H.S.'s IEPs, the primary function of H.S.'s paraprofessional is not to provide instruction, but to assist H.S. overcome her functional limitations throughout the school day.

I believe this paraprofessional service is properly characterized as supplementary aid or service, not as specially designed instruction. *See* 281 IAC 41.42 (defining supplementary aids and services as "aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . ."). Support services – such as H.S.'s paraprofessional services – are within the grouping of special education services that Code section 256.12(2) requires Iowa school districts and AEAs to make available to children attending nonpublic schools "in the same manner and to the same extent that they are provided to public school students."

This conclusion does not end the analysis. The Western Dubuque school district has six elementary attendance centers. The district provides special education services for children with intellectual (or mental) disabilities in only one attendance center – Drexler, in Farley. The Respondents argue that requiring the school district to provide such services for H.S. in the building of her choice, whether public or private, would result in providing her with services in a different manner and to a different extent than they are provided to public school students.

While I respect the school district's authority to assign a student who is attending the district to a specific district-operated attendance center, I believe the terms of section 256.12(2) negate this authority with regard to a student who is enrolled in a private school. Code section 256.12(2) directs school districts to provide services – including special education services – to "children *attending* nonpublic schools" and delineates when the services must be provided on nonpublic school premises. The Respondent's argument here is not functionally any different from the discretion-to-say-no argument that the court rejected in the *John T.* case. The effect would be the same. It would be nonsensical for the Iowa legislature to require school districts to provide services to a student "attending" nonpublic schools and, in the next breath, allow school districts to refuse such services solely on the basis of such attendance. *See John T,* 173 F.3d at 688.

I conclude that the school district violated Code section 256.12(2) when it refused to offer special education support services, including the needed assistance from a paraprofessional, to H.S.. Her enrollment in the [Neighborhood Catholic] school did not provide a legitimate basis for the district to "inactivate" her IEP.

At hearing, the Respondents raised an additional defense, based on the fact that parents are generally not allowed to pick and choose services from an IEP. This is a valid point. The Iowa Department of Education has issued sound guidance, based on long-standing federal and state law, detailing why a parent cannot demand one special education service and reject other services that are necessary to provide FAPE. *See Answers to Questions after 2010 ICN Presentation on Providing Special Education Services in Accredited Nonpublic Schools,* Q & A # 10 (last visited 7/27/2012 at: http://educateiowa.gov/index.php?option=com_content&view=article&id=1417%3Aservices-for-accredited-non-public-schools&catid=674%3Astate-guidance&Itemid=1).

However, much as a parent is not allowed to reject necessary services, the school district cannot adopt a "take it or leave it" approach, as Western Dubuque did in this case. Just as IEP development is a collaborative process, determination of whether the parents are willing to accept and nonpublic school is willing and able to fulfill the terms of the IEP developed for a student attending the nonpublic school should be a collaborative process. *See* 281 IAC 41.134(4) (describing consultation process that must be used to determine what and how federally funded "equitable participation" services will be provided, which may be used to address 256.12 services as well). If a nonpublic school is willing to implement the IEP, with the assistance of services provided under section 256.12(2), the school district should not just say no.

I understand the school district in this case is concerned about the loss of weighted foundation aid funds and the cost of providing a paraprofessional for H.S. if she is not enrolled in the school district. Code section 256.12 does not require the school district to absorb this cost. Rather, subsection 256.12(3), provides that "[s]tudents enrolled in nonpublic schools who receive services pursuant to this subsection shall be weighted at the level provided for in section 256B.9, subsection 1."

Representatives of the school district have also expressed concern about whether the services that H.S. needs can be provided by the [Neighborhood Catholic] school in a general education classroom setting. This is a legitimate concern. H.S. is entitled to receive the services that are included on her IEP. But the school district and AEA representatives need to bear in mind the legal and functional distinctions between public and nonpublic schools. For example, teachers who are hired by private schools to provide special education services are exempt from the highly qualified teacher special education requirements. 281 IAC 41.18(8), 41.138(1). Nonpublic schools also frequently have more flexibility in assigning staff and delivering services than do public schools and the fact that a service is not generally provided in a public school general education classroom does not mean that it cannot be provided in the general education class at the nonpublic school.

Decision & Order

1. The Respondents failed to comply with the prior written notice requirement of the IDEA in March of 2011, when revising H.S.'s IEP and changing her educational placement for the 2011- 2012 school year.

2. Based on the information in the record, the degree of removal from the general education environment included in 2011-2012 IEP did not represent the least restrictive environment for H.S..

3. The Respondent's violated Iowa Code section 256.12(2) by inactivating her IEP and refusing to provide special education services, other than speech/language services, after she enrolled in a nonpublic school.

4. The Complainant's have not requested and are not entitled to reimbursement for the cost of the paraprofessional hired by the nonpublic school to assist H.S. during the 2011-2012 school year. The nonpublic absorbed this cost and is not a party to this proceeding.

5. An IEP team shall meet as soon as practicable to develop an appropriate IEP for H.S. for the upcoming 2012-2013 school year. Representatives from the nonpublic school shall be included in the IEP development process. If the private school agrees to implement the resulting IEP, the Respondents shall provide special education services pursuant to 256.12(2) as interpreted herein.

6. The Complainants are prevailing parties and are entitled to an appropriate award of attorney fees.

Issued on July 27th, 2012.

Christie J. Scase
Administrative Law Judge

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