



STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR

DEPARTMENT OF EDUCATION

KIM REYNOLDS, LT. GOVERNOR

RYAN M. WISE, DIRECTOR

CITE AS

*IDEA Complaint Decision 16-10, [REDACTED] D.o.E. App. Dec. [REDACTED] (2016)*November 29, 2016

Nathan Kirstein, Esq.
Disability Rights Iowa
400 East Court Avenue, Suite 300
Des Moines, IA 50309

Katherine A.B. Beeken, Esq.
Ahlers & Cooney, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231

Sheldon Community School District
1700 East Fourth Street
Sheldon, IA 51201

REDACTED DISTRICT

REDACTED DISTRICT

Jim Gorman, Director of Special Education
Northwest Area Education Agency
1520 Morningside Ave.
Sioux City, IA 51106

*Decision #16-10: IDEA State Complaint Concerning
Sheldon CSD, REDACTED CSD, REDACTED CSD, and Northwest Area
Education Agency*

Dear Parties to this State Complaint and Counsel:

On May 20, 2016, Disability Rights Iowa (DRI) filed a special education state complaint on behalf of Student A (born in the summer of 2005) and Student B (born in the spring of 2005) under the Individuals with Disabilities Education Act (IDEA). DRI, a federally funded protection

Grimes State Office Building - 400 E 14th St - Des Moines IA 50319-0146

PHONE (515) 281-5294 FAX (515) 242-5988

www.educateiowa.gov*Championing Excellence for all Iowa Students through Leadership and Service*

and advocacy system for persons with disabilities, filed this complaint after became involved with the complainants in the spring of 2016. The state complaint concerned REDACTED PRIVATE VENDOR, Sheldon Community School District (Sheldon), REDACTED DISTRICT, REDACTED DISTRICT, and the Northwest Area Education Agency (NWAEA).

The district of residence for Student A is REDACTED, and the district of residence for Student B is REDACTED. However, each student's Individualized Education Program (IEP) special education services and educational placement were provided by PRIVATE VENDOR in the Sheldon elementary building under a contractual agreement with Sheldon. The contractual agreement stated PRIVATE VENDOR was responsible for providing specially designed instruction (SDI) for most or all of the educational program for students eligible for special education in grades K-5 who need extensive redesign of curriculum and substantial modifications of instructional techniques, strategies and materials, specifically in the area of behavioral interventions and supports.

PRIVATE VENDOR and Sheldon each requested to be dismissed from this matter. Having reviewed the argument and allegations of the parties, the Iowa Department of Education (Department) by previous order GRANTED PRIVATE VENDOR's motion and DENIED Sheldon's motion. That ruling, which is dated July 20, 2016, is incorporated into this decision by this reference.

The respondents made timely replies to the state complaint. While the respondents provided the Department with additional information and legal argument, DRI requested the Department proceed with the state complaint procedures based on alleged violations of IDEA and systemic issues relating to the denial of Free Appropriate Public Education (FAPE) that were considered to remain unresolved.

The complaint alleged issues in the following areas:

1. Lack of individualized supports and services for challenging behaviors, lack of complete implementation of the behavioral goal, and lack of a cohesive FBA/BIP;
2. Lack of individualization/implementation of academic IEP goals;
3. Failure to provide education in the LRE;

4. Failure to have required IEP team members at the meetings;
5. Failure to provide related services; and
6. Failure to follow state standards in regards to the use of confinement and detention.

The allegations, documents, and responses have been reviewed in light of the governing laws. Each Individualized Education Program (IEP) and educational documentation for Student A and Student B from May 20, 2015, to May 20, 2016, have been reviewed to determine findings of fact and conclusions of law. Additionally, each student's Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs) have been analyzed by the Department's consultant for challenging behaviors, Dr. Sean Casey, BCBA, who has specialized technical and professional knowledge in the alleged violations regarding lack of cohesive FBAs/BIPs and individualized supports and services for challenging behaviors.

The primary dispute is the legal conclusion to be drawn from the facts and conclusions of law. After considering the records and legal arguments presented on behalf of Student A and Student B, the complaint is **CONFIRMED IN PART**.

Specific findings of fact are made in connection with discussion of the particular legal claims made by DRI. Because the complaint is confirmed, corrective action is ordered, as described in this decision.

I. Jurisdiction and Timeliness

The Iowa Department of Education ("Department") has jurisdiction of the subject matter and of the parties. The allegations 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).

Exceptional circumstances justify a delay in filing this decision. The allegation concerning the physical restraint and physical confinement and detention and implementation of effective behavioral interventions required additional investigation beyond the ordinary course of investigations, including reviewing a large volume of information recently provided by the Complainant. The involvement of multiple

school districts and a private vendor, even after that vendor's dismissal, also substantially added to the complexity of this matter. For that reason, the Department extends its timeline to make a decision in the present state complaint the date of this decision. *Id.* r. 281-41.152(2) "a".

II. Findings of Fact and Conclusions of Law: Scope of Investigative Review

IDEA regulations and state rules require the Iowa Department of Education to investigate any complaint alleging a public agency violated a provision of the IDEA. 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). We make the following findings of fact by a preponderance of the evidence when the record is considered as a whole. *Letter to Reilly*, 64 IDELR 219 (OSEP 2014). Consistent with *Letter to Reilly*, we do not assign the burden of producing evidence to either party.).

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.*

To determine whether a student'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). In investigating this state complaint, the Department will inquire (1) whether the Respondents followed the IDEA's procedural requirements, and (2) whether the IEP implemented was "reasonably calculated" to confer educational benefit to the students at issue. The standard applied in the determination of the decision is based upon the Respondents obligation to provide Student 1 and Student 2 with a Free Appropriate Public Education FAPE as characterized by a "floor of educational opportunity,"

rather than a "ceiling." "'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" to provide some educational benefit during the relevant time period of the complaint will vary based on the needs of each individual student.

III. Findings and Conclusions: Specific Allegations by Disability Rights Iowa

The Complainant alleged the Respondents violated the provisions of IDEA in the areas of providing appropriate special education services to adequately address each student's behavioral and academic needs to confer educational benefit, failure to provide such services in the least restrictive environment, failure to have required IEP team members at IEP meetings, and failure to follow requirements of physical restraint and physical confinement and detention.

Each of the students in this complaint were removed from general education to receive SDI in a special education classroom based on IEP Team meetings held more than one year prior to the date of this complaint. The special education classroom was operated by PRIVATE VENDOR, a nonpublic entity, under a contractual agreement with Sheldon. PRIVATE VENDOR was to provide a small student to staff ratio, designed to provide a comprehensive special education academic program to support students with challenging behaviors. It was important to note that while PRIVATE VENDOR was contracted for such services, it was the responsibility of Sheldon to ensure the nonpublic entity's performance. Iowa Admin. Code. r. 281-41.903. Each of the students served under this arrangement were entitled to the IDEA's "rights and protections". *Id.* r. 281-41.2(2).

In each of the complaint allegations that follow, specific findings of fact and conclusions of law have been considered and reviewed from the standpoint of "compliance," not "perfection." See *Dass*, 655 F.3d at 766.

1. Lack of individualized supports and services for challenging behaviors, lack of complete implementation of the behavioral goal, and lack of a cohesive FBA/BIP

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.*, 647 F.3d 795. An IEP must be evaluated in terms of what was objectively reasonable when it was developed. *Id.*

However, the implementation of the IEP is ongoing with the delivery of special education services, supplemental aids, modifications, implementation of SDI, and monitoring of student achievement toward IEP goals and general education curriculum. The IEP teams for the two students in this complaint documented that each student's behaviors had not improved over the year, with regression in performance on goals, increased behavioral incidents, and increase in the use of punitive strategies, indicating the IEP was failing to provide educational benefit.

Findings: Student A

The IEP team for Student A met six times between May 12, 2015, and June 1, 2016, to review and amend the IEP based on the student's regression in the areas of health, wellness, and behavior. Student A was described as "unresponsive toward staff, presents with a flat affect, engages in sleep-like behaviors, is more aggressive toward staff when they attempt to engage and no longer seems to enjoy preferred items/activities." The student's performance on behavior goals from 5/12/2015 to 1/28/2016 decreased from 31% to 14% in completing directions and 71% to 8% for daily task completion. The Prior Written Notice of a Proposed or Refused Action (PWN) proposed updating the FBA and BIP, stating that behaviors were consistent with manifestations of diagnosed disability. While documentation on the PWN from the IEP Meeting held on January 28, 2016, indicated more intensive supports were required to address the concerns, the SDI remained unchanged, the two behavior goals were revised by decreasing the criterion for acceptable level of performance, and the areas of health and wellness were not addressed. Additionally, the meeting notice did not

request individuals from NWAEA Challenging Behavior Specialist (CBS) Team, the most highly trained state personnel in FBA, to attend the IEP meeting or consider seeking their expertise.

The IEP Team met on February 25, 2016, and the PWN proposed updating the behavioral progress and adding a writing goal. The team determined to add the writing goal and review success of a new BIP intervention in May 2016; however, there was no change to SDI regarding behavior despite continued regression. Additionally, PRIVATE VENDOR staff and NWAEA Special Education Strategist had conducted an FBA and BIP between January and February of 2016. The FBA did not document the use of indirect or direct assessment measures or a functional analysis of target behaviors. The FBA measured behaviors unrelated to the behaviors of concern, and the BIP was a collection of response strategies with multiple options versus a unified and consistent BIP to be implemented across adults, settings, and situations. In April 2016, the IEP Team requested the NWAEA CBS Team to update the FBA and BIP in order to suggest interventions and progress monitoring of the specific listed behaviors of concern on the IEP. The FBA conducted by the NWAEA CBS Team countered the hypotheses of the previous FBA; showing that the student's behaviors were maintained by positive reinforcement (attention and tangibles over escape). The previous BIP had interventions selected that would reinforce the function of the behaviors of concern and increase specified behaviors of concern.

Findings: Student B

The IEP Team for Student B met four times between September 22, 2015, and April 20, 2016, to review and re-evaluate the IEP, conduct an FBA to update the BIP, and revise goals and prepare for transition to student's resident district in the fall 2016. During the time period of these reviews, Student B regressed on his behavioral goal (completion of tasks independently and following through without arguing or whining). While a plan was in place for Student B to participate in general education classroom, an increase in behavioral incidents prevented the implementation of the transition into general education. The student had eleven reported incidents between January and February 2016 of being removed from the classroom to go to the "Time Away" room, due to becoming verbally and physically violent.

While the IEP was reviewed during this period, no change was made to the student's SDI, accommodations, or goals to address behaviors of concern. An FBA was conducted by PRIVATE VENDOR staff and the NWAEA Special Education Strategist in which the BIP was developed; however, there was not alignment between the BIP and IEP. Additionally, aggression was added to the FBA without defining the behaviors of concern or conducting an analysis of the function of the behavior. Therefore, the strategies added (self-calming and sensory strategies) would lead to reinforce the behaviors instead of extinguish as the indicated function (avoidance) would dictate.

Additionally, the PWN and meeting notices did not request individuals from NWAEA CBS Team, the most highly trained state personnel in FBA, attend IEP meetings or consider seeking their expertise to conduct an FBA, for a student with significant behavior concerns that led to numerous school/classroom removals.

Findings and Conclusions Common to Both Students

In regard to both of the students, the adequacy of each student's IEP to be "reasonably calculated to provide educational benefit" was evaluated based on information and data available at the time each of the student's IEPs were developed and varied based on the needs of each individual student. Each student's BIP - as well as IEPs reviewed throughout the year - contained instructional strategies, responses, and behavioral interventions and supports that actually reinforced the behaviors of concern and amplified the behavioral problems the strategies purported to solve.

When taken as a whole, the BIPs and behavioral goals in the IEPs for the two students do not meet professional standards of minimal technical adequacy. See generally *IDEA State Complaint Decision 14-01*, 26 D.o.E. App. Dec. 390, 440-46 (2013). It is required to conduct a technically adequate FBA and from those results implement and evaluate a specific BIP for each function of behavior that is verified through experimental analyses of challenging behavior exhibited by the students. An FBA and BIP must be individualized and evidence-based. *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.

Given the level of treatments employed, both students needed a rigorous and technically adequate FBA, BIP, measurable and meaningful behavioral goals, as well as consideration of positive behavioral interventions and supports to address the behaviors of concern. Iowa Admin. Code r. 281-41.324(1)"b"(1). As such, their behavioral programming is not legally compliant when taken as a whole.

This allegation is confirmed. Corrective action will be ordered.

2. Lack of individualization/implementation of academic IEP goals

Findings: Student A

Student A's IEP addressed two math goals in the areas of time, money, addition and subtraction which align with the Iowa Core Standards in Mathematics. The IEPs, dated May 12, 2015, and January 28, 2016, documentation of the student's present levels of academic achievement and functional performance were based on performance on Iowa Assessments taken in March 2015. The IEP provided no additional data regarding specific skills or unique needs in mathematics. The IEP stated that the student would receive SDI "in the areas of reading, math, social studies, science, health, social skills, specials and physical education." However, there was not a specific description of the frequency, duration, or delivery of the SDI to address the area of math. The student's progress on the math goals showed regression in a trend line analysis with no change reported to the instructional interventions from September 2015 to February 2016.

Additionally, the IEP described the student's limited ability to communicate wants and needs effectively as an area that effects the student's involvement and progress. It noted that the student "struggles to make cause and effect connections as well as properly communicating things she needs and wants in the everyday school setting." However, this was not addressed in the IEPs or reported in

the PWN as an area of consideration for action until an IEP Meeting held on May 10, 2016.

An academic goal in the area of writing was added in February 2016 based on data from the *Woodcock McGrew Werder Mini Battery of Achievement* given on September 10, 2016 and data from one writing sample. While the IEP stated that targeted interventions would be implemented to support progress in the area of writing organization, structure and composition, the data also indicated areas of concern with handwriting. While the IEP documented that Occupational Therapy services (begin date: October 24, 2013) were available as needed for strategies in the area of fine motor and visual motor skills as it relates to the use of functional writing skills, there was no documentation of this service being provided to support the student or the teaching staff in this area. The NWAEEA Occupational Therapist (OT) was not listed on the IEP Meeting notices, was not provided the opportunity to address the writing needs of the student, and did not contribute the knowledge and expertise of occupational therapy to supplement or support the educational program of the student at the IEP Meeting in which the writing goal was added.

Findings: Student B

For Student B the IEP dated September 22, 2015, addressed the academic goal of writing composition. The data from the *Woodcock McGrew Werder Mini Battery of Achievement* given on August 26, 2015, indicated skills in this area equivalent of 11.1 grade level. It was noted that spelling was the most predominant obstacle in writing samples. However, the IEP goal addressed a cluster of skills including spelling, grammar, punctuation, and capitalization. The IEP did not provide relevant data to describe the unique needs in areas other than the spelling concerns for Student B. There was not a description of SDI provided for the student in the area of writing other than the total of 410 minutes of SDI in the behavior classroom. The description included a brief statement that the student would receive SDI in written language with targeted instruction for grammar and mechanics, but the frequency, duration, or description of the instruction to be provided was not listed. In subsequent IEPs, the goal was changed by adding the additional expectation of paragraph structure even though the goal had been met

within the first four data points. The SDI remained the same in subsequent IEPs, with no description of frequency, duration, or delivery of SDI included.

Findings and Conclusions Common to Both Students

An IEP must contain statements of the SDI and support and related services required by each particular child. Iowa Admin. Code rr. 281-41.22, 281-41.320. The SDI 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". 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.*

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 to 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 IEP must be implemented as written. Failure to implement an IEP as written may result in a denial of FAPE. *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). Furthermore, if a child is not making progress and the child's team does not take reasonable steps to respond, then the IDEA's substantive requirement is violated. *C.B. v. Special Sch. Dist.*, 636 F.3d 981 (8th Cir. 2011).

The IEP of each student provided limited data to determine the unique needs of each student in the academic performance areas identified as presenting problems of concern. Neither of the student's IEP addressed the modification of instructional techniques, strategies, or materials required to assist the students in taking advantage of, or responding to, the educational program and opportunities. The IEPs do not adequately address the provision of SDI, accommodations, modifications, or support and related services needed to provide each student with a

reasonable opportunity for educational benefit. The IEPs and progress measurement data do not reflect instructional changes when any reasonable special educator would have requested it.

This allegation is confirmed. Corrective action will be ordered.

3. Failure to provide education in the LRE

Each eligible individual is to receive an 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.

While the IEP Teams have the obligation to educate Student A and Student B with nondisabled peers to the maximum extent appropriate, each of the student's IEP Teams determined the services and placement prior to the complaint. Each student's IEP Team agreed that the educational needs would be met in a self-contained special education classroom, specifically designed to provide individualized instruction in the area of behavioral interventions and supports. Each student's resident district, REDACTED AND REDACTED, arranged for the location of special education services identified in the IEP to be provided by the Sheldon, which was under a contractual agreement with PRIVATE VENDOR to provide such a classroom in the Sheldon Elementary building. Each student required direct, explicit, individualized, and small group instruction with supplemental aids and services to meet the unique educational needs of each student. Upon review, each student demonstrated a lack of academic and behavioral progress, as well as an increase in instances of non-compliance and disciplinary actions. Thus, each student's placement in a self-contained classroom designed to provide behavioral interventions and supports was the LRE in which each student can receive educational benefit.

The issues identified in this state complaint focus on the development and implementation of the students' IEPs. Any violation and resulting loss of educational benefit is due to IEP rules violations, not LRE rules violations.

This allegation is not confirmed. No issues that need the Department's involvement are noted at this time. To the extent the corrective action addresses the provision of education in the LRE, the corrective action will not be monitored by the DE.

4. Failure to have required IEP team members at the meetings

Findings: Student A

The IEP Meeting held on May 12, 2015, proposed action to end Nursing Services that were providing "nursing consultation with parent, medical doctors, and other mental health providers regarding medication, side effects and mental health status." However, the provider of nursing services was not listed on the IEP Meeting notice or provided the opportunity for written input, or excused from attending the IEP Meeting in which the nursing services were discontinued. Additionally, the documentation on the PWN indicated that the service ended for the reason that "Service not utilized in the PRIVATE VENDOR classroom."

At an IEP Meeting held on February 25, 2016, a goal in the area of writing was added. The IEP documented that Occupational Therapy services (begin date: October 24, 2013) were available as needed for strategies in the area of fine motor and visual motor skills as it relates to the use of functional writing skills. The NWAEA Occupational Therapist (OT) was not listed on the IEP Meeting notices or provided the opportunity to address the writing needs of the student, and did not contribute the knowledge and expertise of occupational therapy to supplement or support the educational program of the student at the IEP Meeting in which the writing goal was added.

Additionally, at IEP Meeting held on May 10, 2016, the NWAEA Speech-Language Pathologist (SLP) was added to the IEP as a support for school personnel for consultation to help meet the student's functional communication needs. However, there is no documentation on the IEP Meeting notice that the SLP was requested to attend this meeting or contributed information to supplement or support the

educational program of the student at the IEP Meeting in which this service was added to the IEP.

The complainants alleged that a regular education teacher and a representative of the local education agency either failed to attend IEP meetings or were not properly excused. This portion of the allegation is not confirmed. Documentation was provided that required IEP team members were excused from attending the meetings and the public agency and the parent agreed, in writing, with this decision. A member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. Iowa Admin. Code r. 41.321(5)"a".

However, there was no documentation that the LEA or NWAEA support or related service providers for nursing services, occupational therapy services, or speech-language services were invited to participate in the IEP meetings where the related and support services were discussed. The IEP meetings proposed a change or modification in each of the student's IEPs in which the student's performance in areas of the support or related service provider's knowledge and special expertise were discussed. The IEP meetings did not include the team members with the expertise to interpret instructional implications of the student's areas of concern or determine appropriate services and supports to provide each student with a reasonable opportunity for educational benefit under *Rowley*. *Id.* This portion of the allegation is confirmed.

This allegation is confirmed in part. Corrective action will be ordered.

5. Failure to provide related services

Findings: Student A

Student A started the 2015-16 school year with an IEP dated May 12, 2015, that indicated health was a concern and would be addressed in the IEP. However, according to the PWN, Nursing Services were removed as a related service and the reason stated was "service not utilized in the PRIVATE

VENDOR Classroom." Health concerns were not addressed anywhere else in the IEP and this continued to be the case for IEPs dated January 26, 2016, and February 25, 2016, despite ongoing concerns regarding the student's health and well-being. The student was receiving medication during the school day, as administered by the teacher, and concerns were noted regarding possible side effects of drowsiness. The student was sleeping through major portions of the school day during the 2015-16 year. Records contain the following notation in January 2016: "*Student is observed sleeping 90% or more of the school day. Student is additionally refusing to eat and appears to be more tired and lethargic over the past 6-8 weeks.*" (Emphasis added.). This health concern was not addressed until the IEP on April 20, 2016, at which time it was determined an Individual Health Plan was needed.

Related services include school health services and school nurse services, social work services in schools, and parent counseling and training. Related services are supportive services to assist a child with a disability to benefit from special education." Iowa Admin. Code r. 281-41.34(1).

Denial of related services when health concerns were noted in the IEP harmed the student's ability to benefit from special education as well as the student's access to the general education curriculum.

This allegation is confirmed. Corrective action will be ordered.

6. Failure to follow state standards in regards to the use of confinement and detention

A violation of Iowa's administrative rules on physical confinement and detention and on physical restraint may result in a denial of FAPE. *IDEA State Complaint Decision*, 25 D.o.E. App. Dec. 192, 193 (2009). Even though the allegations did not deny these two students a FAPE, the Department must consider the potential for harm to other students. Iowa Admin. Code r. 281-41.151(2)"b".

According to the documentation provided by the complainant and respondents, the locks on the doors for the two break or confinement rooms are equipped with a "*Schlage ND45 Time Out Lock.*" The locking mechanism meets the requirements

established for Physical Confinement and Detention. Iowa Admin. Code r. 281-103.6(8).

The lock on the observation room is equipped with a "Schlage ND 75PFD Classroom Security Lock." The lock on the observation room allows for a key in either lever to lock and unlock the outside lever. According to Iowa law,

If a locking mechanism is used, it shall be constructed so it will engage only when a handle, knob, or other device is held in position by a person, unless the mechanism is electrically or electronically controlled and automatically releases when the building's fire alarm system is activated, the buildings serve weather warning system in activated or electric power to the mechanism is interrupted.

Iowa Admin. Code r. 281-103.6(8). The "Schlage ND 75PFD Classroom Security Lock" does not meet these conditions. It uses a key to engage the mechanism. The State Board of Education specifically limited keyed locks for a reason: adult action would be required to open the door in case of an emergency. This additional risk is intolerable as a matter of public policy and student safety. The "Schlage ND 75PFD Classroom Security Lock" does not meet the requirements established for physical confinement and detention. *Id.*

Corrective action will be ordered. The "Schlage ND 75PFD Classroom Security Lock" must be changed to ensure compliance with 281-IAC 103.

IV. 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). The Department must also address the needs of other children with disabilities served by the public agencies. *Id.* r. 281-41.151(2)"b".

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 provide 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.

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. When those factors are considered, substantial corrective action is required. The IEPs reviewed have each of the confirmed violations and relate to basic elements of the IDEA entitlement.

DRI proposed a resolution to this complaint on May 20, 2016, and August 31, 2016. Iowa Admin. Code r. 281-41.152(2). Counsel for the respondents proposed corrective action on August 16, 2016, in response to this complaint. By rule, the respondents are entitled to propose a resolution. *Id.* r. 281-41.152(1)"c"(1). The Department has independently considered the proposed resolution in light of the confirmed violations. The Department finds and concludes that the proposed corrective action is, with exceptions noted below, appropriate.

1. Lack of individualized supports and services for challenging behaviors, lack of complete implementation of the behavioral goal, and lack of a cohesive FBA/BIP

The corrective action proposed by DRI for Student A and Student B is accepted and is incorporated by this reference. The respondents shall provide a timeline for implementing the corrective action, which shall be completed no later than one year from the date of this decision.

For all students who were placed in the PRIVATE VENDOR classroom at Sheldon for more than 30 days during the time of this complaint, the NWAEA and District respondents, in collaboration with the NWAEA Challenging Behavior Team, must complete the following:

- Review all IEPs with BIPs in terms of adequacy. This review must include the NWAEA Challenging Behavior Team, who have received training in challenging behaviors; and
- Conduct new FBAs and revise BIPs, if the FBA identifies new needs, for each student who has had the following restrictive procedures as part of a student's BIP:
 - o The use of Suspension for more than 5 times in a year;
 - o The use of Seclusion or Crisis Management procedures (i.e., holds) for 3 or more times in the school year;
 - o If Police Involvement specifically for behavior has occurred;
 - o If more than 10 Office Discipline Referrals have occurred; or
 - o If a Placement Change is being considered due to challenging behavior.

Additionally, all NWAEA and LEA respondents responsible for the development of BIPs and who conduct FBAs shall attend, at a minimum, professional development on Basic Behavioral Principles, in collaboration with the NWAEA Challenging Behavior Team; and

All NWAEA and LEA respondents who are responsible for implementing FBAs or the development of BIPs based off of these data should complete additional professional

development in collaboration with the NWAEEA Challenging Behavior Team, and shall if required by their direct supervisors; and

All NWAEEA and LEA respondents serving students with challenging behaviors should consult with the NWAEEA Challenging Behavior Team, which has specific expertise in FBA and BIP and also attends regular professional development around these technologies.

2. Lack of individualization/implementation of academic IEP goals

The corrective action proposed by DRI for Student A and Student B is accepted and is incorporated by this reference. The respondents shall provide a timeline for implementing the corrective action, which shall be completed no later than one year from the date of this decision.

3. Failure to provide education in the LRE

No corrective action is ordered.

4. Failure to have required IEP team members at the meetings

The corrective action proposed by DRI and counsel and is accepted and is incorporated by this reference. The respondents shall provide a timeline for implementing the corrective action, which shall be completed no later than one year from the date of this decision.

The NWAEEA special education staff assigned to the LEA respondents and the LEA respondents who are IEP Team members must engage in professional learning to develop and implement IEPs that are compliant with IDEA and address student needs. The professional learning must provide information on the regulatory requirements and effective practices, including the following content:

- The IEP is a process and a product which documents that the student is receiving FAPE consistent with all federal and state requirements.
- To the maximum extent appropriate, students requiring special education services, activities and supports are educated with students who do not require special education.

- IEP development is a collaborative process and is essential to ensure each student's educational experience is designed to provide educational benefit.
- The IEP team members are knowledgeable or have special expertise about the student and the special education services, activities and supports that could benefit the student.
- The IEP team develops a student's IEP with high expectations based on the student's capabilities, strengths, needs and interests including involvement and progress in the Iowa Core.
- The IEP team must consider special factors based on the student's needs in the development, review and revision of IEPs, including behavior and health needs.
- The IEP process involves on-going progress monitoring and decision making.

5. Failure to provide related services

The corrective action proposed by DRI and counsel is accepted and is incorporated by this reference. The respondents shall provide a timeline for implementing the corrective action, which shall be completed no later than one year from the date of this decision.

The NWAEA special education staff assigned to the LEA respondents and the LEA respondents who are IEP Team members must engage in professional learning to understand how to effectively involve and utilize special education support and related services as well as NWAEA specialty teams. The content must include how such services may augment, supplement, or support the educational program of eligible individuals. The corrective action must address building the capacity of staff to develop and implement IEPs to meet the regulatory requirements and address the unique educational needs of students.

6. Failure to follow state standards in regards to the use of confinement and detention

The corrective action proposed by DRI and counsel is accepted and is incorporated by this reference. The respondents shall provide a timeline for implementing the corrective action, which shall be completed no later than one year from the date of this decision.

7. Compensatory Education

DRI requests calculation of compensatory education for all students, including but not limited to Student A and Student B, who were placed in the PRIVATE VENDOR classroom at Sheldon CSD for more than 30 days during the time of this complaint and order appropriate remedies. The corrective action proposed by DRI is accepted and is incorporated by this reference. The respondents shall provide a timeline for implementing the corrective action, which shall be completed no later than one year from the date of this decision.

A. *In General.* The DE orders compensatory education for the confirmed systemic violations identified in items 1 and 2. Compensatory education will be awarded by applying the following common framework to the facts of each individual student's case.

B. *Method of Calculation.* The common framework is based on an analysis of the student's specific information to answer the following questions: "What would the student's expected performance have been if the student had received legally compliant special education?" and (2) "What was the student'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.

In initially calculating compensatory education, each student's IEP team shall consider the factors listed in this decision. If the student's IEP team is in agreement with the plan for compensatory education, the respondents shall report the plan to the DE for its review and implement it. If the student's IEP team is in disagreement about compensatory education, the respondents shall refer this matter back to the DE, which shall award compensatory education based on the student's specific facts. The DE retains jurisdiction over all determinations of compensatory education.

Any compensatory education awarded shall be reasonably calculated to place the student in the position the student 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 student's unique needs (one student may require thirty hours of compensatory education to compensate for a sixty hour FAPE denial, and another student might require 120 hours for a similar denial).

The respondents shall apply this decision to all students, including Student A and Student B, who were placed and educated in the REDACTED PRIVATE VENDOR classroom for more than thirty days, beginning on May 20, 2015, to the date of this decision. For any student in that class, the respondents shall convene an IEP team meeting within sixty days of the date of this decision. The respondents and the other members of each student's IEP team, shall examine each student'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 student'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 May 20, 2015, to the date of this decision.
- The measure of the compensatory education will be the difference in expected performance if each student had received a FAPE during the relevant period and the student's actual performance during the relevant period.
- The compensatory services shall be reasonably to close that "gap" between expected and actual performance.
- In the event that there is no "gap" between expected and actual performance, there will be no award of compensatory education.
- 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 student are not entitled to require services in a particular location or manner, or to request monetary compensation.
- If the student is no longer attending Sheldon, each student's IEP team shall determine a plan for compensatory education that is reasonable in light of the student'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 student's needs.
- The DE 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 DE's order, the DE will establish such a plan for each student.

C. *Refusal of Compensatory Education.* If the respondents offer to calculate compensatory education, and a student's parent (or student who is making her own educational decisions) declines the offer, the respondents shall provide documentation of such to the DE. If the respondents offer to implement an award of compensatory education calculated by a student's IEP team, and that offer is declined, the respondents shall provide documentation of such to the DE.

D. *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 student's IEP services appropriate?
- Was each IEP reasonably calculated to confer benefit?

- Were IEP goals and services individualized based on the student's present strengths and needs at the time the IEP was implemented?
- 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 student receive required behavioral supports and services?
- Were the student's behavior supports and services individualized?
- Were the student's behavior supports and services based on appropriate assessment data?

E. Timeline for Completion of Compensatory Education.

Compensatory education shall be completed as soon as possible, but no later than one year from the date of this decision. If there are questions about whether that deadline will be met for a particular student, please contact the Department for further instructions.

V. Conclusion

For the reasons stated above, this complaint is **Confirmed in Part**. Corrective action is ordered as described.

There are no fees or costs to be awarded in this matter. Any party that disagrees with the DE'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. Alternatively, and to the extent that a due process hearing would have jurisdiction over an allegation, a party may file a due process complaint to challenge or determine the compliance of an action of a public agency.

We offer our 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.
We sincerely wish the best for all involved.

Because these matters have recurred in multiple state complaints, this continues to be matter of public importance. For that reason, 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/
Dee Gethmann
515-281-5502
Consultants & Complaint Investigators
Division of Learning and Results

/s/
Betsy Lin
515-725-2039

/s/
Thomas A. Mayes
515-242-5614
Attorney II & Complaint Officer
Division of Learning and Results

Concur,
/s/
Barbara Guy
State Director of Special Education
Learner Strategies & Supports
Division of Learning and Results
515-281-5265

/s/
W. David Tilly
Deputy Director
515-281-3333