BEFORE THE IOWA DEPARTMENT OF EDUCATION
(Cite as 29 D.o.E. App. Dec. 111)

In re [redacted], a child:	)	
	)	
[redacted] and [redacted],	)	
	)	Dept. Ed. Docket No. SE-484
Complainants,	)	DIA No. 19DOESE0005
	)	
v.	)	
	)	
WEST DES MOINES COMMUNITY SCHOOL DISTRICT and HEARTLAND AREA EDUCATION AGENCY,	)	
	)	**DECISION**
Respondents.	)	

On or about August 19, 2018, Complainants [redacted] and [redacted] filed a due process complaint against Respondents West Des Moines Community School District ("LEA" or "district") and Heartland Area Education Agency ("AEA") pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., as implemented by 281 Iowa Administrative Code chapter 41.

At the scheduling conference that took place on September 11, 2018, the parties notified the undersigned that they disagreed regarding Student's stay put placement during the pendency of the due process proceeding. A briefing schedule was established for the stay put issue and both parties timely submitted briefs. An order was issued November 16, 2018 establishing that Student's stay put placement during the pendency of the due process proceeding was the placement identified in the prior written notice with an effective date of November 21, 2017.

At the parties' request, deadlines were also established at the scheduling conference for submission of any dispositive motions. On or about October 8, 2018, Respondents filed a Motion to Dismiss/Motion for Summary Judgment and supporting documents. While Respondents' motion was pending, Complainants filed an Amended & Substituted Due Process Complaint. By order dated November 28, 2018, Complainants' request to amend their due process complaint was granted and the amended complaint was substituted for the original complaint. An order issued the same date denied Respondents' combined motion to dismiss/motion for summary judgment.

Hearing in this matter was held on February 20 through February 22, 2019 at the West Des Moines Community School District Learning Resource Center in West Des Moines, Iowa. Attorneys Curt Sytsma and Edie Bogaczyk represented Complainants, who attended the hearing. Attorneys Miriam Van Heukelem and Carrie Weber represented the district and the AEA. Jerry Gruba and Keri Steele attended the hearing as representatives of the AEA. Kandi Hansel attended the hearing as representative of the district.

The following witnesses testified at the hearing: [redacted], special education nurse consultant for the AEA; [redacted] former substitute associate for the district; [redacted], school psychologist for the AEA; [redacted] former special education teacher for the district; [redacted], clinical director for Universal Pediatrics; [redacted], LPN for Universal Pediatrics; [redacted]; [redacted]; [redacted] school nurse for the district; [redacted], special education teacher for the district; and [redacted], director of special education for the district.

Joint Exhibits 1 through 29 were admitted as evidence; the joint exhibits include Joint Exhibit 8A.[1] Complainants' Exhibits A through I were admitted as evidence. Respondents' Exhibits 1 through 53 were admitted as evidence.

The parties requested that a schedule be established to submit post-hearing briefs. Complainants' brief was due April 24, 2019. Respondents' brief was due May 22, 2019. Complainants' reply brief was due June 6, 2019. The parties timely submitted briefs according to this schedule.

Pursuant to 34 C.F.R. § 300.515(a), a final decision must be reached in the hearing no later than 45 days after the expiration of the 30 day resolution period. This timeline had previously been extended at the request of the parties to accommodate the hearing schedule. At the conclusion of the hearing, the parties made a joint motion to extend the 45 day timeline until July 29, 2019 to accommodate the agreed-upon briefing schedule and the drafting of a decision in the case.

ISSUES PRESENTED

Pursuant to 34 C.F.R. 300.511(d) and 281 Iowa Administrative Code 41.511(4), the issues in this hearing are limited to those issues raised in the amended due process complaint. The violations alleged by Complainants in the amended due process complaint are:

1. Respondents failed to prepare or provide to Complainants a Prior Written Notice conforming with 20 U.S.C. § 1415(c)(1) proposing to initiate an evaluation of Student or proposing a change in Student's evaluation in February 2017. Complainants assert that this alleged failure is a violation of 20 U.S.C. § 1415(b)(3).

2. The assessment conducted by Respondents in Spring 2017 was not implemented pursuant to recognized protocols for trial interventions and did not constitute a "valid and reliable" measure of Student's medical needs. Complainants assert that Respondents' implementation and use of this trial intervention is a violation of 20 U.S.C. § 1414(b)(3)(A)(iii).

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[1] With the exception of Joint Exhibit 8A, the joint exhibits submitted by the parties are sequentially numbered as RL 001 through RL 219. The joint exhibits will be referenced in this decision by their RL numbers for ease of reference and also to distinguish them from Respondents' exhibits, which are also designated by numbers.

3. On or after May 23, 2017 and on or after October 5, 2017, Respondents generated Prior Written Notices and IEP plans that were not contemporaneously shared with parents. Complainants assert that this alleged failure is a violation of 20 U.S.C. § 1415(b)(3).

4. Respondents' proposal to change the care provided to Student during the school day, including the failure to provide a dedicated nurse on the bus and the failure to provide a dedicated nurse on school premises is a denial of a free appropriate public education (FAPE) to Student as: 1) it threatens Student's health and safety; and 2) it exceeds Respondents' expertise and authority under the IDEA and violates the fundamental right of parents to make medical decisions for their child.

IDENTIFICATION OF RELEVANT PERSONS

In the interest of protecting the privacy of and the following individuals will be referred to by the following designations in this Decision:

: Student
: Mother
: Father
: Parents
: Elementary School Nurse
: Elementary Special Education Teacher
: Junior High School Nurse
: Associate A
: Associate B
[last name unknown]: Associate C

FINDINGS OF FACT

Student is a 14 year-old girl who resides within the boundaries of Respondent West Des Moines Community School District. From the time she entered school through the 2016-17 school year, Student attended Elementary. During the 2016-17 school year, Student was in sixth grade at Elementary. During the 2017-18 school year, Student began attending Junior High as a seventh grade student. Both Jordan Creek Elementary and Junior High have a full-time registered nurse (RN) employed as a school nurse. (Elementary School Nurse testimony; RL 090, 131).

Student was born with lumbosacral meningomyelocele, a type of spina bifida, and chiari malformation type II. She had corrective surgery immediately after birth. At two months of age she underwent a spinal decompression surgery and also had a tracheostomy placed. She had multiple additional surgeries during her first few years of life. In 2011, the tracheostomy was removed. Student had a normal swallow study in 2016. In 2011, Student had an appendico-vesicostomy placed for catheterization. Student uses a wheelchair at school at all times except when stretching and walking with

a walker during PE class. Student has asthma that is currently under control with medication. Student uses supplemental oxygen at home, but not at school. (RL 088-89, RL 122; Mother testimony).

Student's treatment team includes [redacted], her local pediatrician, as well as a neurosurgeon, an otolaryngologist, a pediatric urologist, a gastroenterologist, an ophthalmologist, an optometrist, a nephrologist, a pulmonologist, and a neurologist. (Mother testimony).

Student has been approved for and receives services under the Medicaid health and disability waiver program.[2] As part of this program, her care needs are reevaluated every year. Student has been approved for 18 hours of nursing care seven days per week. Student's family currently uses [redacted], a home health agency, to provide nursing services to Student. (Mother testimony).

Beginning at the time she started attending school in Respondent district, Student was accompanied by a private duty nurse (PDN) employed by [redacted] to meet her health needs at school. The PDN who accompanied Student was typically a licensed practical nurse (LPN); an LPN must complete one year of nursing education prior to licensure. Student's family arranged for the PDNs. (Elementary School Nurse, [redacted], Mother testimony).

As of the beginning of the 2016-2017 school year, a PDN from [redacted] was assisting Student with catheterization during the school day, administering fluid boluses through Student's G-tube during the school day, monitoring Student's respiratory and gastrointestinal systems, and completing an assessment every four hours to assess functioning, with emphasis on neurological functioning related to Student's VP shunt. During the 2016-17 school year, Elementary School Nurse conferred with Student's PDNs to encourage oral fluid intake. By the time of the events underlying the complaint, Student was no longer taking fluids through G-tube at school. Student was not receiving any regular medications at school. (Resp. Exh. 34; [redacted], Elementary School Nurse testimony).

Student's last emergent medical event at school took place in kindergarten. On that occasion, Student's PDN noticed that she was cyanotic and short of breath and Student was complaining of chest pain. Mother was notified and picked Student up and took her to the emergency room. It was determined that she had a pneumothorax. (Mother testimony).

Parents identified another incident of respiratory distress in 2012 that occurred at home. Student's night nurse called an ambulance because Student stopped breathing. It was never determined what caused Student to stop breathing on that occasion. (Mother testimony).

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[2] Prior to August 1, 2013, the waiver program under which Student receives benefits was called the ill and handicapped waiver and it is referenced as such in parts of the record in this case.

There is no additional evidence in the record that Student has needed or received emergency care, either in school or out of school, since 2012.

December 2016 Reevaluation: In December 2016, a scheduled reevaluation took place and a new IEP was developed for Student. The December 2016 IEP provides for five minutes per month of nursing services provided in the general education setting. The provider is listed as "nurse" and the services are described as follows: "[Student's] health status requires ongoing assessment, diagnosis, planning, intervention, evaluation, consultation with healthcare providers, staff, and parents and possible emergency intervention." (Joint Exh. 8A).

The December 2016 IEP also provides for 410 minutes per day of health services, 350 in the general education setting and 60 in the special education setting. The providers are listed as "Nurse" and "Special Education." The services are described as follows: "[Student] requires 1:1 assistance of a licensed nurse at all times for maintenance of her airway, seizure monitoring, diapering/toileting and catheterization, tube/oral feedings, mobility, safety, medication administration, and personal hygiene." (Joint Exh. 8A).

The December 2016 IEP also provides:

> Because of her many serious health issues, [Student] needs the assistance of a full-time nurse who directly provides 1:1 care throughout her day. The nurse will monitor her brain shunt, her breathing status, monitor her for seizures and perform the catheterization and tube feedings as needed. The nurse will also assist [Student] with mobility transfers, communication, transportation, diapering/toileting, safety and hygiene. Her nurse will accompany her to and from school on the school bus.

(Joint Exh. 8A).

February 2017 Staffing Issues: In February 2017, Student began missing days of school due to a staffing shortage at [redacted]. Mother notified Elementary Special Education Teacher that several of the nurses who worked with Student through [redacted] had quit. Mother reported that she would only be able to send nurses to school with Student on Mondays and Wednesdays, leaving Student without nursing care through [redacted] the remaining three days each week. (Resp. Exh. 35).

Elementary Special Education Teacher immediately reached out to Elementary School Nurse and other district personnel, as well as [redacted] RN, clinical nurse manager at [redacted] to discuss how to meet Student's needs at school so that she could attend on days when [redacted] could not send a nurse. Specifically, Elementary Special Education Teacher requested that [redacted] provide a "list of all cares that are needed." (Resp. Exh. 35).

[redacted] responded to that e-mail on February 13, 2017, in relevant part:

> The most important things that need to be addressed through the course of the day health wise are her urinary needs. If the school nurse is able to set aside time to straight cath [Student] 2-3x's/day, I'd think that would be sufficient. I do think she'd have to have someone with her at all times, an associate would be fine (in order to ensure her safety and redirect her when she's getting distracted). Her other health needs are monitoring for emergent situations. Her neuro needs have been very stable – as long as staff are aware that if she becomes nonresponsive they'd need to call 911 (but that's obvious of course). Otherwise, the associate would need to be able to recognize if she's acting asthmatic – in which case she'd need to be taken to the nurse for appropriate intervention. If the nurse is able to give her a water flush per GT a few times/day, then her hydration needs can be encouraged by the associate.
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> . . .
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> If [Mother] and [Father] are ok with these things, I'd think [Student] would actually do really well . . . [I]n order to attempt to meet [Student's] educational needs, I do think it's appropriate for you guys to pursue whatever you need to. Our agency has failed to meet her needs when it comes to daytime staffing, and for that I feel terrible.

(Resp. Exh. 35).

[redacted], the clinical director at [redacted] and [redacted]' supervisor, affirmed at hearing that it was safe for Student to be cared for by an associate under the direction of the school nurse. [redacted], an RN, trusted [redacted]' judgment and agreed that Student's needs could be safely met in that fashion. ([redacted] testimony).

February 2017 IEP Meeting: On February 14, 2017, Parents met with Elementary Special Education Teacher, AEA school psychologist [redacted] and other district and AEA personnel to discuss how to meet Student's health needs in the absence of the [redacted] PDNs. Parents brought [redacted] to the meeting with them. Parents were informed by Respondents that a reevaluation would have to be initiated in order to move forward with a trial of using an associate to meet Student's care needs when a PDN was not available. Mother recalled that she was told this would only be on a trial basis and at any time Parents wanted to go back to using a PDN they would be able to do so. (Mother, [redacted] testimony).

The team decided that Student could come to school with a PDN on days when a PDN was available during the spring. On days when a PDN was not available, the team determined that an associate trained by the school nurse would provide one-to-one assistance to Student throughout the day. Parents and [redacted] reported at the meeting they felt an associate could meet Student's needs if the associate was trained and as long as the school nurse was available for emergency situations. Mother was not concerned about Student's safety during the trial period; she believed that if she felt it was not safe,

Student could revert to the PDN staffing model. (Resp. Exh. 12; Elementary Special Education Teacher, Mother, [redacted] testimony).

On February 14, 2017, Mother signed a Consent for/Notice of Reevaluation. The form states that the IEP team has recommended additional assessment in the area of health and proposes to initiate an evaluation in order to determine health needs at school due to a change in nursing services. The consent form indicates that evaluation methods will be determined by the professionals involved in the evaluation and may include review of the results of previous interventions, review of relevant records, interviews of individuals with knowledge of the child, observations completed by team members, and tests. By signature the same date, Parents affirmed they had received a copy of the Procedural Safeguards Manual for Parents, which contains information about who to contact to obtain assistance in understanding their rights. The form also indicates that Parents may contact the school administrator or the AEA director of special education with any questions. (RL 101).

In response to an inquiry from Elementary School Nurse, [redacted] Student's primary care provider, sent a letter, including orders, to Elementary School Nurse dated February 15, 2017. [redacted]'s letter referenced a plan of care provided to the school by [redacted][3] and included the following "[o]rders":

> Please provide urinary catheterization every 2-3 hours during the school day.
> Please provide a target of 1200 ml water orally if possible or via g-tube as necessary during the school day.

(Resp. Exh. 20; Mother testimony).

On February 15, Elementary School Nurse e-mailed Mother a form and requested her signature. The form provides approval for the school nurse to perform urinary catheterization and give fluids through Student's G-tube. It further states, "Doctor's orders are on file for these cares. Cares are to be performed in the school nurse's office and may be delegated by the school nurse to an associate when the school nurse feels it is safe and appropriate under the state of Iowa's delegation laws." Father signed the form and returned it on February 16, 2017. It was not necessary for Elementary School Nurse to get permission from Parents to delegate cares to an associate, but [redacted], a nurse consultant with the AEA, recommended that Elementary School Nurse obtain this document from Parents. (Resp. Exh. 39-40; Elementary School Nurse testimony).

On Wednesday, February 15, Elementary School Nurse also communicated to Mother that in order to make the transition as smooth as possible they should have Student wait

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[3] Dr. [redacted]s letter did not attach the [redacted] plan of care to which he referred and it is unclear in the record what plan of care [redacted] had provided to Respondents. Respondents' Exhibit 30 is a Home Health Certification and Plan of Care signed by [redacted] on February 28, 2017. As this plan of care is dated after Dr. [redacted]s letter, it is likely not the plan of care to which he was referring.

until the following week to come back to school. During the remainder of the week that Student was home, Elementary School Nurse created logs to document cares at school and set schedules for associates to perform cares for Student so that she would not miss out on academic instruction while cares were being performed. (Resp. Exh. 39; Elementary School Nurse testimony).

Elementary School Nurse followed the orders received from Dr. [redacted] in developing a care schedule for Student. While [redacted] had at some point provided their plan of care for Student, Elementary School Nurse did not view that document as directly applicable to the cares Student needed in the school setting. Elementary School Nurse never received any other orders from any other provider of Student's. (Elementary School Nurse testimony).

Delegation of Cares: The rules of the Iowa Board of Nursing govern delegation of cares by a registered nurse.[4] The Iowa Department of Education issued an interpretive statement in 2016-17 regarding delegation of health services in schools. The statement provides that as part of the process of determining whether a task can be delegated to an unlicensed assistive personnel (UAP), a school nurse must ensure that the task or activity meets the following criteria: it is not complex; it is part of the student's routine healthcare; it follows a sequence of steps; it does not require assessment, judgment, interpretation, or modification by the UAP; it has a predictable outcome; and it is not beyond the ascribed level of practice of a Licensed Practical Nurse. The IEP team, in collaboration with the school nurse and other health professionals, determines when delegation is appropriate. The school nurse, however, may decline to delegate a task if she determines that delegation is not appropriate. (Resp. Exh. 103; [redacted] testimony).

As part of delegation, the school nurse must provide and document training to the UAP on the delegated health task. The training must include a return skills check on the task to demonstrate competency. Even after delegation, the school nurse must continue to provide the UAP with supervision, monitoring, and evaluation on the delegated nursing tasks or activities. (Resp. Exh. 104-06).

Elementary School Nurse documented in Student's file that she would delegate cares of G-tube fluids and catheterization of Student to an associate, who would be trained and pass a skills checklist before performing cares independently. The delegation documentation provides that the school nurse will observe skills and sign off on each associate. Elementary School Nurse only delegates cares when a procedure is predictable, has a predictable outcome, and does not require nursing assessment; she determined that catheterization and G-tube care fit those criteria. [redacted] offered her opinion at hearing that catherization does not require nursing assessment or judgment. (Resp. Exh. 18; Elementary School Nurse, [redacted] testimony).

Two associates, Associate A and Associate B, were trained to provide cares to Student during spring 2017. Associate A was the primary associate who provided cares to Student. During this time period, Associate A was in school to become a teacher; she

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[4] *See generally* 655 Iowa Administrative Code (IAC) 6.2.

had no nursing background. Associate A was a full-time associate at the school, therefore she was at the school every day. On the days when Associate A was not available to work with Student and when no PDN was available, Associate B provided cares to Student. Associate B had been a registered nurse since 2016, but she was not selected to work with Student on that basis. Associate B was the daughter of the school principal and was trained as a backup provider for situations when no PDN came to school with Student and when Associate A was unavailable. (Elementary Special Education Teacher, Elementary School Nurse testimony).

Elementary School Nurse trained the two associates on catheterization with a procedure checklist, demonstrated the procedure to the associates, then required that they demonstrate the process from start to finish several times without any direction before signing off on them performing the procedure independently. The associates were also trained to look for problems during the catheterization process, such as a clogged catheter or unusual appearance of urine. Catheterization of Student always took place in Elementary School Nurse's office. (Elementary School Nurse testimony; Resp. Exh. 17).

In addition, Elementary School Nurse trained the associates on signs and symptoms of respiratory distress, such as increased breathing rate, color changes on skin and nails, grunting, chest retractions, sweating, and wheezing. She created a document explaining the signs and symptoms; the associates signed off on the document, indicating they had reviewed it and understood that if these symptoms occurred they were to immediately take Student to the school nurse. In addition, the associates were instructed that any time they observed symptoms that were out of the ordinary for Student or otherwise concerning they were to bring her to the school nurse for assessment. Student is also able to report pain or distress, which would trigger the associate to take Student to be assessed by the school nurse. [redacted] opined at hearing that monitoring for signs and symptoms of respiratory distress does not require nursing judgment or assessment. (Resp. Exh. 17; Elementary School Nurse testimony).

Elementary School Nurse and the associates kept logs documenting Student's fluid intake each day, her brief change schedule, and urinary output. In total, Associate A and Associate B, under the supervision of Elementary School Nurse, provided care for Student at school on 19 days during the spring semester of 2017. Elementary Nurse had no concerns about how Student's cares were performed during the time between February and May 2017; things went smoothly. (Comp. Exh. G, p. 87; Resp. Exh. 14, 15, 16; Elementary School Nurse, [redacted] testimony).

In April 2017, Elementary School Nurse e-mailed the IEP team, including Parents, indicating that she would recommend that Student have a 1:1 nurse as she transitioned to junior high school the following fall. School personnel were in agreement with Student having a 1:1 nurse with her during her transition to junior high for her comfort level. The idea was that Student would have the PDN with her for approximately two to three weeks in order to get a health associate trained and able to perform Student's cares. The recommendation that Student have a 1:1 nurse during the transition time was based upon her perceived comfort level, not her medical needs. (Comp. Exh. F; Elementary School Nurse testimony).

Elementary School Nurse authored a health report dated May 5, 2017 that discussed Student's relevant past medical and developmental history, her current health status, and her school health needs. The report notes that an IEP meeting will be held at the end of May to make a decision regarding the care that Student requires for the next academic year. (RL 087-89).

May 2017 IEP Meeting: The IEP team met on May 23, 2017 to discuss Student's care during the 2017-18 school year. and from were present at the meeting; they were aware that the team would be discussing Student's nursing cares at the meeting and they had the opportunity to provide input to the team. was also at the meeting. (RL 099; testimony).

The team discussed that the IEP going forward would include the health associate; an overlap was contemplated whereby the PDNs would continue to be used for the first several weeks of Student's seventh grade year while an associate was trained. Elementary School Nurse and believed, based upon the success of using a trained associate under the supervision of the school nurse to meet Student's care needs on days during spring 2017 when no PDN was available, that this would be a successful model to safely meet Student's needs going forward. The team also discussed at the meeting that the bus driver along with an additional adult on the bus would be sufficient to meet Student's health needs while being transported to and from school. (Resp. Exh. 11, 46; , testimony).

Parents shared at the meeting that they preferred to have PDNs continue to meet Student's needs at school. One of Parents' biggest concerns during the meeting was how they would manage before and after school care. Making the change to a health associate as opposed to a PDN during the school day was going to make it more difficult for them to obtain nursing care before and after school. It would have been nearly impossible for to provide home nursing care to Student for short shifts before and after school if they did not also have a PDN accompanying Student during the school day. (Elementary School Nurse, Elementary Special Education Teacher, testimony).

Parents believed at the conclusion of the IEP team meeting that they would be able to continue sending a PDN with Student when available using their own funding, in addition to the associate. In a May 30, 2017 e-mail to Elementary Special Education Teacher and , wrote that the team had "conflicting conversations" at the IEP meeting regarding the use of a PDN. 's e-mail stated, "If the parent can get daytime hours they may elect to send some of this to school at their expense. WDM will no longer pay for this. Or if the transition goes well they may not." (Resp. Exh. 46; Mother, testimony).

The PWN drafted after the May 2017 IEP meeting stated that the IEP team proposed that Student's health needs be met by a health associate, to be trained and supervised by

the registered school nurse.[5] The PWN states that the team considered continuing with the present model of staffing Student with a 1:1 LPN or RN throughout the day, but rejected that option as the PDNs from [redacted] are not available every day and, as she has gotten older, her respiratory status has become more stable. The PWN also states that the team considered not having a 1:1 associate for Student and only having a trained associate available as needed for Student's health needs, but rejected this option as well. The PWN notes that Student has both health and academic needs during the day and by having the same person perform both tasks the number of adults surrounding Student is reduced, thereby making her environment less restrictive. The PWN states that a health associate will be hired for the start of the 2017-18 school year. Additionally, it states that the district will allow the family to use private nursing hours at the start of the school year to help with transition and training of the new health associate. The PWN states, "The family and the building school nurse, in collaboration with district administration, will determine the amount of time needed for this training and transition. The anticipated time is 2-3 weeks." (RL 102).

As Student's roster teacher, Elementary Special Education Teacher was responsible for delivering the prior written notice (PWN) for the May 2017 IEP to Parents. She printed the IEP and PWN on the last day of the 2016-17 school year and placed them in an envelope in the general education classroom that contained Student's report card. Elementary Special Education Teacher recalls going to Student's home after the last day of school to deliver something, but she cannot specifically recall what she delivered. The school does not have any method or procedure for verifying when a PWN has been sent or given to parents. It is the responsibility of the student's roster teacher – in Student's case, this was Elementary Special Education Teacher – to make sure the PWN gets sent home, but there is no record made of when that is done. (Elementary Special Education Teacher testimony; Comp. Exh. F).

Parents did not receive the PWN related to the May 23, 2017 IEP meeting. Parents acknowledge that Elementary Special Education Teacher came to their house in the summer after Student's sixth grade year, but deny that she brought the PWN. (Mother testimony).

Fall 2017: When Student started school in the fall, a PDN from [redacted] accompanied her. Parents did not send Student to school when a PDN was unavailable. Mother requested that an IEP meeting be held in October 2017 to address her concerns regarding how the PDNs who accompanied Student were being treated in the school environment.[6] (Comp. Exh. C; Mother testimony).

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[5] The PWN states that Student's health needs at school include assistance with toileting, including urinary catheterization and changing of briefs, monitoring for safety while Student independently transfers from her wheelchair, respiratory concerns, and any potential problems with her shunt. The PWN states that Student has not had any seizure activity while at [redacted] It also states that Student still has a G-tube in place but it is not used during the school day. (RL 092).

[6] Complainants' counsel stipulated at hearing that the concerns that precipitated the October 2017 IEP meeting were not raised in the amended due process complaint.

An IEP team meeting was held on October 5, 2017. A PWN with an implementation date of October 6, 2017 proposed that Junior High School Nurse would perform necessary medical cares for Student; once Student's family approved Junior High School Nurse to perform Student's cares, she would in turn train a health associate, Associate C. Additionally, it was proposed that Student's cares should be done at specific times throughout the school day and that any cares in addition to this would be arranged through the school and nurse. Hourly vitals would be completed at the end of class prior to moving to the next class and full vitals would be done once every four hours outside of the classroom. The PWN provides that if a nurse is not available, an adult from the school will get Student off the bus. It further provides that Student does not need a nurse to ride the bus. The PWN indicates that the parents wanted to ensure that Junior High School Nurse could safely perform the necessary items needed for cares before they felt comfortable for Student to be at school without a nurse. The PWN states that the parties will reconvene on November 16, 2017 to discuss progress. (RL 115-16).

Junior High Special Education Teacher drafted the PWN that went out in conjunction with the October 2017 meeting and sent it to Parents via first class mail. Mother called Junior High Special Education Teacher after she received the notice to let her know that Student's first name was spelled wrong in some places. Mother indicated it would be acceptable for her for Student's name to be changed with white out, rather than through formal amendment, and for care to be taken spelling her name correctly going forward. Junior High Special Education Teacher sent a corrected copy home with Student on October 12 after notifying Mother that she was going to do so. ([redacted] testimony; Resp. Exh. 48).

After the October 2017 meeting, Student's PDNs continued to accompany her to school when available. ([redacted] testimony).

November 16, 2017 IEP Team Meeting: An IEP team meeting was held on November 16, 2017. A PWN provided to the parents on November 22, 2017 proposed that the last day for Student's PDN to accompany her to school to assist with transition would be November 21, 2017. As explanation for the proposed action, the district noted:

> A reevaluation to determine [Student's] health needs at school was initiated on 02/14/2017. An exchange of information was also signed by the parent and medical records were obtained. A summary report was written by [Student's] [redacted] school nurse at the time and shared with the parent prior to the 5/23/2017 IEP meeting. The evaluation determined that [Student's] immediate health needs could be met by a health associate under the direction and supervision of the RSN.
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> The prior written notice dated 5/23/2017, outlined a plan for transition between the PDN and the school health service delivery model, including return demonstration training of the new health associate (HA) at [redacted] Anticipated overlap time outlined on the PWN was 2-3 weeks. The length of time actually has been 12 weeks.

> An IEP meeting was called by the parent on 10/05/2017 to discuss difficulties with role conflict between the PDN, HA, and RSN. Also discussed at the meeting was the fact that the private duty nurse was performing hourly vitals in the classroom, removing [Student] from instruction when not an emergency, and instances where the PDN reported to the parents conversations between [Student] and staff as well as between the PDN and staff. Although [Student's] private nursing provider performs hourly "vitals" as a criteria for service, "vitals" are not required to access instruction.[7] The purpose of this meeting from the school's perspective was to facilitate transition between PDN and the HA.
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> After the 10/05/2017 meeting parents requested to observe the RSN perform the cath procedure and then gave the RSN permission to provide care for [Student] at school. As of 10/06/2017 this allowed the HA to observe the RSN perform the cath and also return demonstrations for cathing. (Prior to this meeting the PDN performed this procedure daily and the parent did not send [Student] to school when the PDN was not available.)
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> The HA, under the direction and supervision of the RSN, has demonstrated proficiency with all delegated skills. The HA has provided care on seven school days since 10/05/2017 when the private duty nurse has not accompanied [Student] to school. This HA is also certified in CPR to address [Student's] diagnosis of asthma.

(Comp. Exh. C).

The PWN states that since the beginning of the 2017-18 school year, Student has had five different PDNs, while her school nurse and health associate have not changed. Prior to Student leaving school in November 2017, a trained associate, rather than a PDN, had provided care for her on eight school days during the fall semester. Neither the Junior High School Nurse nor the associate who had been trained to provide cares to Student had any concerns about their ability to meet Student's needs. (Comp. Exh. C, G; ██████ testimony).

November 2017 State Complaint: On November 27, 2017, Mother filed an IDEA State Complaint with the Department. The complaint alleges that Student has high risk medical problems and the family has home nursing care approved through private insurance and a Medicaid waiver program for 18 hours per day. The complaint alleges that the district has determined that a nurse is not necessary. The resolution proposed by Mother was that the district allow Student to attend school with her PDN, plus a

[7] Dr. ██████s orders for school care did not require that Student's vital signs be monitored periodically in the absence of signs or symptoms of illness. Since the orders did not include this, monitoring vital signs is up to the discretion of the school nurse if there is a suspicion of an exacerbation of symptoms or observation of something out of the ordinary. (██████ testimony).

separate associate for education, to address both her health and learning. (RL 042; Mother testimony).

In a letter accompanying the complaint, Mother asserts:

> In May 2017 IEP meeting it was talked about phasing nurses out after training a health associate. We disagreed with this because our nursing agency could not provide care before and after school or during holidays because no one can afford to work part time and these kind of off hours.

(RL 043).

The letter also details conflicts with the school nurse and the health associate assigned to Student. One area of conflict is the focus by the school nurse and health associate on increasing Student's independence with her cares; Mother objected to this course of action and asserted a belief that encouraging self-catheterization had resulted in a urinary tract infection. The evidence in the record does not support the conclusion that Student had a urinary tract infection during the relevant time period. (RL 045-47; Resp. Exh. 33, pp. 277, 279, 282; [redacted] testimony).

After November 22, 2017, Complainants elected not to send Student to school until she could be accompanied by her private nurse. (RL 132).

January 17, 2018 Mediation Agreement: After the filing of the state complaint, the parties participated in a mediation process and executed a mediation agreement on January 17, 2018. As part of the agreement, the AEA agreed to conduct a second opinion evaluation by a medical provider not employed by the AEA. The agreement also provided that in order to avoid unnecessary litigation over the stay put issue, the district agreed to allow Student's private duty nursing service to continue pending completion of the evaluation. Following the parties' execution of a legally binding mediation agreement in January 2018, the state complaint was withdrawn. (Comp. Exh. G, pp. 1-5, RL 132).

2018 Reevaluation: The March 19, 2018 Independent Educational Evaluation Request provided assessment questions for the evaluator to consider, including whether "an experienced registered school nurse on site daily and a specifically trained and supervised paraprofessional" could meet Student's health needs. Additionally, the evaluator was asked to evaluate whether there was any medical reason for Student to have her vitals checked hourly and have a physical nursing assessment every four hours during school in the absence of symptoms of illness or injury. (RL 130).

Second Opinion Evaluation and May 21, 2018 IEP Meeting: Dr. [redacted] of ChildServe Pediatric Rehabilitation Medicine Consultation authored a second opinion evaluation dated May 14, 2018. As part of the evaluation process, Dr. [redacted], a pediatric physiatrist, reviewed medical documentation that was provided to him regarding Student, examined Student, interviewed Student and Parents, reviewed pertinent medical literature, and drew upon his experience of caring for and serving children and families with spina bifida. After conducting the evaluation, Dr. [redacted]

opined that Student could be safely and successfully cared for at school by an on-site paraprofessional who has received appropriate instruction and training, demonstrated competency, and is supervised by a qualified on-site registered nurse. Dr. [redacted] also determined that Student does not require periodic monitoring of vital signs or periodic physical assessments at school in the absence of any signs and symptoms of illness or injury. On the basis of that evaluation, Respondents issued a PWN with an effective date of May 25, 2018 proposing to meet Student's health needs at school with a 1:1 trained paraprofessional under the supervision and direction of the licensed registered school nurse. (RL 135-37; RL 150-52).

In full, the proposed action in this PWN is described as follows:

> Following the health evaluation performed by AEA Nurse Consultant [redacted][,] MPH, RN with outside evaluation provided by Dr. [redacted], Pediatric Physiatrist, ChildServe, the IEP team met and the District and AEA are affirming the IEP team's previous decision that [Student's] health needs can be met in the school setting by a 1:1 trained paraprofessional, under the supervision and direction of the licensed registered school nurse. The District and AEA reject the parents' request that [Student] continue to attend school with her private duty home nurse.
>
> The team proposes that the 1:1 para receive specific training in providing [Student] with clean intermittent catheterization, encouraging and documenting fluid intake as ordered, encouraging and coaching independence with self-care, and assistance with toileting. These services will be provided in accordance with [Student's] Individualized Health Plan. The team also proposes that the school nurse provide the 1:1 para with training and ongoing support from the school nurse in how to monitor [Student] for signs and symptoms of acute neurological, respiratory, gastrointestinal, urinary, and dermatologic illness and injury. In the event that the 1:1 para observes any potential signs of distress, the 1:1 para will immediately contact the school nurse and request immediate assistance. While [Student] has not had a medical emergency at school in the last 6 years, the school nurse will also train the 1:1 para at the beginning of the school year what circumstances would require an immediate call to 911 in addition to calling the school nurse. The 1:1 para will have the ability to contact the school nurse and 911 at all times when she is with [Student].

(RL 150).

On May 22, 2018, Dr. [redacted] submitted to the district a document entitled Physician Orders for Special Health Services. The form reiterates that Student requires the following procedures during the school day: 1) urinary catheterization every 2-3 hours; and 2) providing a target of 1200 mL of water orally or via G-tube if necessary. No other procedures are listed. (RL 205).

Parents elected for Student not to return to school following the May 21, 2018 IEP meeting. Student has not been enrolled as a student in Respondent district since the end of the 2017-18 school year.

Treating Physician Letters/Opinions: In November 2017, Parents obtained and provided to Respondents several letters from Student's physicians. Dr. [redacted] Student's primary care physician, wrote that Student "requires a qualified/licensed home care nurse to be with her at school" and to do all of her catheter care and monitor her oral intake and swallowing. Dr. [redacted] wrote, "A school health associate is not ideal/not as qualified to care for [Student's] multiple medical co-morbidities. The family has the staff in place caring for [Student] in the home setting whom are able to best handle her cares and are familiar with her underlying conditions." (RL 200).

Dr. [redacted], Student's otolaryngologist, wrote a letter indicating that Student has done quite well since her tracheotomy was removed in 2011, although he noted she is "at risk for emergency airway issues" and was admitted to the hospital in April 2012 for a cyanotic episode at home. Additionally, Dr. [redacted] noted that Student had been hospitalized for a pneumothorax that occurred at school. Dr. [redacted] concluded, "[Student] has complex airway issues and requires a level of monitoring that is best provided by a licensed nurse." (RL 201).

Dr. [redacted] Student's urologist, wrote a letter dated November 21, 2017 stating that Student requires intermittent catheterization through a reconstructed bowel-bladder segment. Dr. [redacted] wrote, "This requires a degree of expertise and for medical reasons a health care professional that is knowlegable [sic] in this area of catheterization and bladder irrigation for her at school would be medically indicated." Dr. [redacted] concluded that Student "has complex urologic issues and it is my opinion that she requires a dedicated licensed nurse while at school in order to provide her with the care that she needs."[8] (RL 202).

In August 2018, Dr. [redacted] authored another letter stating that discussions with Student's family and observations of Student had made it apparent that "she had benefited immensely from intensive home nursing staff involvement." Dr. [redacted] expressed concern that a single school nurse would not be able to provide the "one-on-one attention that [Student] requires." Dr. [redacted] opined that training of a health associate by the school nurse would result in "suboptimal cares" in the school setting, citing difficulty in adhering to Student's daily routine and "keeping up with potential new innovative medical advancements as it would relate to [Student's] cares." Dr. [redacted] indicated that Parents had voiced concerns regarding safety and a belief that the absence of a qualified home nurse within the classroom could potentially jeopardize

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[8] On November 20, 2017, Mother contacted Dr. [redacted]'s office to discuss her concern regarding the IEP team's decision to discontinue the practice of Student's PDN accompanying her to school. Notes from the nurse in Dr. [redacted]'s office who took the phone call state, "Mother stated she was very upset by this as the nurse was approved by Medicaid, took a long time to get a nurse, and if the nurse doesn't go w/ her daughter to school, they will lose her coverage. Mom was requesting a letter of necessity for the private nurse at school." (RL 204).

Student's health. Dr. [redacted] indicated that he agreed with their conclusion. (RL 207).

Dr. [redacted], a pediatric gastroenterologist, authored a letter dated August 1, 2018 indicating that it is "medically necessary" for Student to have "[her] private duty nurse help during school hours for bladder/bowel care." Dr. [redacted] indicated this would give Student the opportunity to work with consistent help and ensure compliance and good hygiene techniques, in addition to allowing Student to spend time efficiently for school activities and socializing. (RL 206).

Parents consulted Dr. [redacted] of the University of Iowa Center for Disabilities and Development in January 2019 after the filing of the due process complaint. Mother's primary concern motivating the visit was the desire for Student to be served at school by a PDN from [redacted]. Dr. [redacted]'s notes from the visit state, "Evidently the school has indicated that she should be more independent and should be able to function at school with assistance only from a 'health assistant' and not a trained nurse." Student's Parents informed Dr. [redacted] that Student had only had one UTI, which they reported occurred after she was asked to self-catheterize at school. Dr. [redacted]'s notes from the visit indicate that she strongly recommends that a private nurse be allowed to accompany Student to school. Dr. [redacted] states that Student cannot independently provide her cares and that her needs cannot be met by a school nurse or a health assistant. (Comp. Exh. D).

None of Student's medical providers contacted [redacted], the school nurses, or any other school or AEA personnel to discuss the care that had been provided to Student during the school day between February 2017 and May 2018 or the plan that was proposed going forward prior to writing these letters and offering these opinions. Presumably, the providers obtained whatever information they had from Parents. While Respondents considered these letters and opinions in the decisionmaking process, they did not give great weight to them as they did not see data supporting the recommendations in the letters. ([redacted] testimony).

CONCLUSIONS OF LAW

IDEA Overview: One of the principal purposes of the Individuals with Disabilities Education Act (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."[9] The IDEA offers states federal funding to assist in educating children with disabilities and, in exchange for acceptance of such funding, the state must agree to, among other things, provide a free appropriate public education to all children with disabilities residing in the state between the ages of 3 and 21.[10]

Free appropriate public education (FAPE), as defined by the IDEA, means special education and related services that:

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[9] 20 U.S.C. § 1400(d)(1)(A).
[10] 20 U.S.C. § 1412(a)(1)(A).

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.[11]

Related services are defined by the IDEA's implementing regulations to include school health services and school nurse services.[12] School health services and school nurse services are defined as health services designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services provided by either a qualified school nurse or other qualified person.[13]

<u>*Complaint:*</u> Under the IDEA, a parent or public agency may file a due process complaint relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the child.[14] The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief.[15] Complainants, therefore, bear the burden of proof in this proceeding.

The overarching issue in this case is whether the plan proposed first in the May 2017 IEP team meeting and later reaffirmed in the November 2017 and May 2018 PWNs to meet Student's health needs at school through a trained health associate supervised by the full-time school nurse denies Student FAPE. Complainants argue that the plan denies FAPE for two reasons: 1) the plan threatens Student's health and safety; and 2) the plan exceeds Respondent's expertise and authority under the IDEA and violates "the fundamental right of the parents to make medical decisions for their child."

In addition to the substantive issue related to denial of FAPE, Complainants also assert that Respondents violated several procedural protections under the IDEA that entitle Complainants to a remedy.

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[11] 20 U.S.C. § 1401(9).
[12] 34 C.F.R. 300.34(a).
[13] 34 C.F.R. 300.34(c)(13).
[14] 34 C.F.R. § 300.507(a); 281 IAC 41.507(1)..
[15] *Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (2015) (*citing Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61-62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)).

I.
Denial of FAPE

Necessary Cares in the School Setting: In order to determine whether the plan being proposed by Respondents, and which was partially implemented in spring and fall of 2017, is safe for Student, it is necessary to identify the services that Student requires at school. When the staffing shortage at [redacted] first opened this discussion between Respondents and Parents in February 2017, the clinical nurse manager at [redacted] identified that the most important health need for Student during the school day was catheterization. She further indicated that Student needed monitoring for emergent situations, which would require Student to have someone with her at all times. The clinical nurse manager noted that Student's neurological needs had been very stable and opined that an associate under the supervision of the school nurse would be fine to meet her health needs. The clinical nurse manager noted she thought Student would do well under the proposal Respondents made to have the full-time school nurse supervise a trained associate who was with Student at all times. There was no indication from [redacted] staff that school personnel would need to implement as written the plan of care that [redacted] followed when caring for Student both in and out of the school setting.

At the same time, Dr. [redacted] was consulted in order for Respondents to obtain orders for Student's care at school. His orders indicated that Student needed urinary catheterization every two to three hours during the school day and a target of 1200 mL of water orally or via G-tube as necessary during the school day. In November 2017, after Respondents had proposed to end the practice of allowing Student's PDN to accompany her to school, Dr. [redacted] wrote a letter in which he stated that Student needed a "qualified/licensed home care nurse" to be with her at school in order to perform catheter care and monitor Student's oral intake and swallowing. No other nursing care needs in the school setting were identified by Dr. [redacted] in that letter.

In August 2018, after Dr. [redacted] had completed the IEE, Dr. [redacted] wrote another letter at Parents' request. In this letter, he opined that Student had benefited from "intensive home nursing staff involvement" and expressed that a school nurse would not be able to provide the one-on-one attention Student required. Dr. [redacted] did not identify any additional nursing cares that Student required in the school setting.

Dr. [redacted], Student's otolaryngologist, opined in his November 2017 letter that, due to Student's complex airway issues, she required a level of monitoring best provided by a licensed nurse. Other than monitoring, Dr. [redacted] identified no other cares that were required. Dr. [redacted] and Dr. [redacted] indicated that Student required bladder care, including catherization, at school.

Respondent's proposal, as outlined in the PWN issued following the May 2018 IEP meeting, provided for a one-to-one health associate to receive specific training from the school nurse in catheterization, encouraging and documenting fluid intake, and monitoring Student for signs and symptoms of acute neurological, respiratory, gastrointestinal, urinary, and dermatologic illness and injury. The IEP takes into

account all of the cares that were identified by [redacted] and Student's providers as the cares that Student needs during the school day.

Complainants also argue that the May 2018 IEP ignores the "regimen of care" prescribed by Student's treating physician. Complainants assert that the plan of care from [redacted] that was shared with the school district in spring 2016 governs the care that should be provided to Student in the school setting. The Home Health Certification and Plan of Care in this record is the one that covers the time period from March 2 through April 30, 2017. It lists the provider as [redacted] Services. Dr. [redacted] is identified on the form as Student's physician, but his signature does not appear on the form. The form was signed by [redacted] and contains 11 pages. In the plan, the need to catheterize Student is identified, as well as the need to ensure that a fluid intake target is met each day. While Complainants argue that Dr. [redacted]s reference to the [redacted] plan of care was an explicit adoption by reference, that argument does not make sense in light of Dr. [redacted]s specific articulation of items already in the plan of care. If Dr. [redacted] had wished to simply order the school to complete all items in Student's plan of care during the school day, he could have made such an order clear. Instead, Dr. [redacted] identified specific nursing needs – catheterization and fluid promotion – that Student had during the school day in response to the school's inquiry on that point.

It is telling that [redacted] emphasized largely the same points when asked by Elementary School Nurse what cares were needed during the school day. She identified catheterization, hydration, and monitoring for emergent situations; [redacted] noted that an associate could safely monitor Student for emergent situations, including neurological issues and asthma exacerbations.

Additionally, even after Complainants had filed their state complaint and Dr. [redacted] had completed the IEE, Dr. [redacted] reaffirmed in May 2018 that the only nursing procedures Student required at school were catherization and fluid promotion. Dr. [redacted] had the opportunity to weigh in with a differet set of prescribed orders if he believed additional monitoring was needed over and above what had already been articulated in the November 2017 PWN. He declined to do so.

Under these circumstances, Complainants' argument that Respondents have ignored the regimen of care ordered by Student's treating physician is unpersuasive. The November 2017 and May 2018 IEPs provide for the cares that Dr. [redacted] and other providers indicated were needed for Student during the school day: urinary catheterization; fluid promotion and monitoring; and monitoring for emergent situations. While Complainants have emphasized the fact that Respondents did not ensure that Student's vitals were taken every four hours while her care needs were being met by an associate under the supervision of the school nurse, none of the professionals who weighed in expressed any belief that Student's vitals had to be routinely taken during the school day in the absence of suspicion of illness or injury.

Delegation of Nursing Cares: Having determined that Respondents' proposed IEPs accounted for the cares that were identified as necessary for Student in the school setting, the next step in determining whether FAPE was provided is to examine whether the cares that Respondents proposed to delegate to a trained associate could be safely delegated in that fashion. Iowa nursing regulations provide that that a registered nurse is responsible for using professional judgment in assigning and delegating activities and functions to unlicensed assistive personnel (UAP).[16] A registered nurse remains accountable for supervising persons to whom she has delegated activities and functions that do not require the knowledge and skill level of a registered nurse.[17] The parties agree that a school nurse cannot delegate tasks that require the nursing skills of assessment, judgment, or interpretation.[18]

Complainants devoted a significant amount of space in briefing – approximately 26 pages in their initial brief and six pages in their reply brief – to a discussion of the scope of school nurse practice and delegation of nursing duties. Complainants assert that Respondents have argued that a school nurse under the IDEA has "sole authority to decide whether the related services in a child's IEP can be delegated to unlicensed assistive personnel."[19] Respondents have not made such an argument and, even if they had, the facts in evidence do not support the conclusion that either Elementary School Nurse or Junior High School Nurse exercised sole authority to decide whether delegation was appropriate. The facts demonstrate instead that the IEP team, considering input from various team members, including the school nurses, the AEA nurse consultant, Parents, and others, including personnel from [redacted] and Dr. [redacted] came up with the plan for certain functions and tasks to be performed by an associate under the supervision of the school nurse. Leaving aside for a moment the question of whether the functions that were delegated were appropriate for delegation, the school nurse is generally permitted to use this model because it is explicitly provided for in the nursing regulations; the school nurse did not, however, unilaterally make a determination to delegate without the input of the IEP team. Respondents' reference to the nursing regulations reflects that this is an allowable practice model under certain circumstances; they have not argued that the school nurse has unilateral authority to decide when delegation is appropriate for a student who is covered by the IDEA.[20]

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[16] 655 IAC 6.2(5)(c).
[17] 655 IAC 6.2(5)(b).
[18] *See* Parents' Post-Hearing Brief, pp. 26-27, Respondents' Reply Brief, p. 20. In support of this proposition, Complainants cite *In re Petition for Declaratory Ruling filed by Rhoda Shepherd, R.N., M.A. on May 20, 2004*, Declaratory Ruling No. 63 (Iowa Board of Nursing, September 22, 1994) ("While tasks and procedures may be delegated, the nurse should not delegate practice pervasive functions of assessment, evaluation and nursing judgement [sic]."). The undersigned could not locate the declaratory ruling on the Iowa Board of Nursing's website, nor was it attached to Complainants' brief. Respondents do not dispute that Complainants have accurately cited this declaratory ruling; Parents' Post-Hearing Brief contains an approximately four-page excerpt from the ruling.
[19] Parents' Post-Hearing Brief, p. 14.
[20] Complainants have characterized Respondents' presentation of evidence related to the principles of nursing delegation as an "unpleaded affirmative defense." As Respondents have correctly noted, there is no requirement in the IDEA to plead affirmative defenses. *See* 34

While Iowa's nursing regulations require that a registered nurse execute the regimen prescribed by a physician, the registered nurse is responsible for determining, using her professional judgment, whether activities and functions can be delegated to unlicensed assistive personnel.[21] ██████ and Elementary School Nurse, who are both RNs, credibly testified that the tasks that Student needed done on a routine basis at school, such as catherization, promotion and monitoring of fluid intake, and monitoring for respiratory distress and other exacerbations, could be safely delegated to a trained associate. The record includes training records that reflect the training of Student's associates in the spring of 2017. During that period of time, there was credible testimony from Elementary School Nurse that Student's cares went smoothly. ███, the clinical director for ██████, credibly testified that the plan that Respondents had designed to delegate catheterization and other nursing cares to a trained associate could be implemented without jeopardizing Student's health or safety.

Complainants have cited to the testimony of ██████, an LPN with ██████ ██████ who has cared for Student, to support the argument that Student's cares could not be delegated to an associate. While ██████ testified that nursing training, assessment, and judgment are required to perform some of Student's cares, including checking Student's pupil responses in order to ascertain whether Student's shunt is malfunctioning, ██████ is not an RN and the professional practice standards relating to delegation of tasks by RNs do not apply to her. The testimony of ██████, Elementary School Nurse, and ███, who have experience with delegation and are RNs subject to the applicable practice standards, is more credible and persuasive on this point.

It is important to note that Respondents have not argued that there will never be situations where nursing training, judgment, or assessment is required for Student at school. The May 2018 IEP, however, accounts for this by providing for supervision of the trained associate by a full-time school nurse. If the associate notices signs or symptoms of illness or something out of the ordinary with Student, the school nurse is available at any time to assess Student and exercise nursing judgment in order to determine appropriate next steps.

This is an important distinction from the situation that was addressed in the Iowa Board of Nursing ruling that preceded *Cedar Rapids Community Sch. Dist. v. Garret F.*,[22]

C.F.R. § 300.508(e) (requiring an LEA to send the parent a response to a complaint only if a prior written notice has not already been provided regarding the subject matter contained in the parent's due process complaint). Additionally, Respondents have cited to evidence regarding nursing delegation and state regulations setting out practice standards for registered nurses in response to Complainants' argument that a trained associate performing cares for Student under the supervision of the school nurse is unsafe. This is not an affirmative defense; rather, it is evidence offered to rebut Complainants' assertion that the model proposed by Respondents is unsafe. Respondents are required to proffer a "cogent and responsive explanation for their decisions" in response to a due process complaint alleging that a student's IEP has not provided FAPE. *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 1002 (2017).

[21] 655 IAC 6.2(5)(b), (c), (e).

[22] 526 U.S. 66 (1999).

which was cited by Complainants.[23] *Garret F.* established that continuous, one-on-one nursing services received by a quadriplegic, ventilator-dependent student were related services, not medical services, under the IDEA.[24] Prior to the IDEA due process proceedings that led to the Supreme Court's decision in the matter, however, the Iowa Board of Nursing considered the question of whether a school nurse could delegate Garrett F.'s cares to an unlicensed associate when an RN was not in the same building. The board determined that the school nurse could not do so. It was important to the board in making its ruling that the school nurse was not necessarily in the same building as the student and not readily available in case of emergency.

Complainants have also cited to *School District of Philadelphia* in support of the argument that Student's cares cannot safely be delegated.[25] The student in question in that case was fed through a G-tube and there was evidence in the record that the student had previously aspirated during G-tube feedings. While the evidence showed that many non-nurses had successfully performed G-tube feedings for Student, the hearing officer was concerned about the "unavoidable" risk involved in the G-tube feedings and the possibility that the nurse might not be in close physical proximity to Student if a problem occurred. The facts in the present case can be distinguished from those in the *School District of Philadelphia* case. In that case, there was evidence that a particular procedure had resulted in past medical distress coupled with the need for that same procedure to be performed on at least a daily basis going forward. Student, on the other hand, has not had an incident of respiratory distress in the school setting since kindergarten or in any setting in approximately the past seven years. Student's neurological needs have been very stable. The degree of risk present in the school setting for the student in the *School District of Philadelphia* case is not the same as the degree of risk that Student presents in the school setting.

<u>*Treating Physician Letters/Opinions:*</u> Complainants have also pointed to letters authored by some of Student's treating physicians in order to support their argument that Student requires the support of a 1:1 licensed nurse throughout the school day. Upon careful consideration, the opinions expressed in those letters are unpersuasive as to whether Student's cares can be safely delegated to a trained associate under the supervision of a full-time school nurse.

Dr. [redacted]'s letters and communications have already been discussed in some detail. It is worth noting, however, that the letter he wrote in August 2018 does not articulate any specific concerns about cares that he believes cannot be delegated. Dr. [redacted] states that Student has benefitted from "intensive home nursing staff involvement." Dr. [redacted] expressed concern about whether a single school nurse could provide Student with the one-on-one attention she requires. There is no evidence in the record, however, that Dr. [redacted] ever communicated with Respondents to obtain detailed

[23] *In re Petition for Declaratory Ruling filed by Rhoda Shepherd, R.N., M.A. on May 20, 2004*, Declaratory Ruling No. 63 (Iowa Board of Nursing, September 22, 1994). As noted above, the declaratory ruling is not available on the Iowa Board of Nursing's website, but is excerpted extensively in Complainants' post-hearing brief.
[24] 526 U.S. at 74-76.
[25] 114 LRP 17099 (Pa. SEA, March 24, 2014).

information about how Student's needs would be met at school; he provided orders in November 2017 and May 2018, but there is no evidence that he reviewed the IEPs at issue or was otherprise privy to detailed information about their contents, including the training and supervision contemplated by Respondents.

Dr. [redacted] also referenced concerns that Parents had communicated to him regarding times that they believed Student's safety had been compromised while under the care of an associate. There is no information whatsoever in the letter to support the basis for the claim that Student's safety was in question, nor any information to identify the incidents to which Parents were referring. Dr. [redacted] also stated his belief that Parents have staff in place that are familiar with Student's unique disposition and are motivated to assist. This ignores the reality that these plans were made as a result of staffing shortages on the part of the home health agency that Parents use to provide Student's nursing services at home and resulting absences on the part of Student.

Dr. [redacted] was not the only one of Student's providers who referenced the importance of Student having her needs bet by individuals who are personally familiar with her. Dr. [redacted] also highlighted the need for Student to have "consistent help." There is no evidence in the record to suggest that Student's health needs are better served by someone who knows or is familiar with her personally. There is no requirement under the IDEA that Student have someone with particularly specialized knowledge of her to provide for her health needs at school, as long as there is adequate training to ensure that her cares can be completed safely.[26] The opinions expressed by Dr. [redacted] and Dr. [redacted] on this point are also undermined by the evidence reflecting that Student did not have consistent care through [redacted]. [redacted] cycled through multiple PDNs for Student during the fall of 2017 and was unable to provide care on multiple dates.

Taken together, these letters from Student's medical providers are largely devoid of specific supporting information explaining how the plan proposed by Respondents is unsafe or insufficient to meet Student's needs. The letters on the whole contain largely conclusory statements and do not identify specifically why the cares Respondents propose to delegate to a trained associate under the supervision of a registered nurse are not appropriate for delegation. Dr. [redacted]'s clinical notes stand out in this respect. While she offers the conclusion that Student's needs cannot be met by the school nurse, who is an RN, or an associate, she offers no specific reasons why this is the case. Dr. [redacted] cites to no specific cares that she believes are beyond the capacity of the school nurse or a trained associate.[27] Without any communication between these providers

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[26] *See North Bend School District*, 70 IDELR 139, 117 LRP 23752 (Oregon SEA, April 6, 2017) ("At hearing, Parents elicited much testimony about best practices in the continuity of care. That testimony revealed that, under ideal circumstances, a patient or student would best be served by a provider whom he/she trusted and was familiar with. Nonetheless, each of the witness testifying on this subject, including Student's own pediatrician, acknowledged that a nurse can successfully and safely provide services to a patient or student with whom they are not familiar. Nothing in the IDEA requires a District to provide services under only ideal circumstances.").

[27] Dr. [redacted] expressed concern that Student could not self-catheterize. Respondents' May 2018 IEP does not require that Student self-catheterize. Dr. [redacted] offered no explanation as

and Respondents about the specifics of the associate training and level of supervision in the school setting, the letters appear to be more about supporting the family's wishes than providing an objective assessment of whether the plan proposed by the IEP team can safely meet Student's needs in the school setting.

It is important to note that none of Student's treating physicians testified at hearing regarding these opinions. There was no opportunity for cross-examination of these opinions in order to get at the specific concerns these providers expressed regarding Student's cares being provided by a trained associate under the supervision of the full-time registered school nurse. As such, these opinions are given less weight than those of ███ ██████, Elementary School Nurse, and Dr. █████, who had more comprehensive and accurate information about Respondents' plan for meeting Student's health needs at school.[28] Given the credible and persuasive evidence that the cares Student regularly requires in the school setting can be safely performed by a trained associate under the supervision of the full-time registered school nurse, Respondents are not required to provide a full-time licensed nurse to perform these cares, even if Student's treating providers have expressed a preference for this model.[29]

Applicability of DHS Determination of Necessity for Nursing Services: Complainants also argue that the May 2018 IEP is unsafe based on a determination by the Iowa Department of Human Services (DHS) approving Student for one-on-one nursing services under the health and disability waiver seven days per week for 18 hours per day. Complainants argue that this determination, coupled with the plans of care for ██████████████, require that Student have a 1:1 nurse during the school day.

As an initial matter, there is no evidence in the record that DHS has determined that the plan of care for ██████████████ is the only way to meet Student's needs in the school setting. The care model available at school for Student, with a school nurse who is an RN being physically present on a full-time basis to supervise cares delegated to a trained associate, is not one that is available outside the school setting. There is no evidence in the record that DHS has weighed in on the question of whether Student's health needs can be safely met as identified in the May 2018 IEP. Supervisory personnel from the agency that provides nursing services to Student under the waiver program, however, have weighed in on whether this model of care is safe for Student. █████ and █████ have offered credible opinions that the school nurse supervising a trained associate is a safe way to have Student's health needs met at school.

Respondents' proposal in the May 2018 is not indicative of a belief that Student does not require 1:1 nursing services in the home setting where a school nurse who is an RN is

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to how she determined that Junior High School Nurse, an RN, could not safely perform catheterization of Student.

[28] *See In re K.S.*, 28 D.o.E. App. Dec. 457, (SEA Iowa 2012) (where student's treatment team members had no contact with school staff, did not review the student's IEP, and relied exclusively on information relayed by parents and student that did not accurately portray the true state of events, their views were given less weight).

[29] *See Collier County School District*, 110 LRP 7471 (Fla. SEA, September 15, 2009).

not present at all times to supervise care. Respondents' proposal relates only to the school setting where this arrangement is available.

It is evident from the record in this case that Complainants are very concerned about losing their ability to access nursing services for Student outside of the school day if the May 2018 IEP is implemented. This was the explicit basis for the state complaint filed in November 2017. It is undisputed that it will be difficult for [redacted] to find nursing staff for Student during the periods before and after school if a PDN does not also accompany Student to school. While this concern is certainly understandable, it does not obligate Respondents to provide health services at school to Student through the PDN, as long as the health services offered are safe and effective to meet her needs. Beginning in February 2017, the PDN model became difficult due to staffing issues with [redacted]. Respondents' proposed alternative safely meets Student's health needs at school and, as such, does not deny her FAPE.

Parents' Right to Make Medical Decisions for their Child: In addition to their argument that the May 2018 IEP is unsafe for Student, Complainants also argue that the IEP: 1) exceeds Respondents' expertise and authority under the IDEA; and 2) violates "the fundamental right of the parents to make medical decisions for their chid." As to the second prong of this argument, Complainants devote one paragraph of their 106 page post-hearing briefing to discussing it.[30] Complainants have cited *Troxel v. Granville*, a United States Supreme Court case, for the proposition that the liberty interest of parents in the care, custody and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[31] Respondents counter that school health and school nurse services fall within the definition of "related services" under the IDEA and are therefore subject to the procedures and procedural safeguards of the IDEA, including collaborative decisionmaking by the IEP team.

Under the IDEA framework, special education and related services are provided in conformity with the student's individualized education program, or IEP.[32] "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child."[33] The IEP is developed by an IEP team, which includes the child's parents, at least one regular education teacher if the child participates in the regular education environment, at least one special education teacher or provider, a representative of the local educational agency, an individual who can interpret the instructional implications of evaluation results, other individuals who have knowledge or special expertise regarding the child, and, where appropriate, the child.[34]

Complainants have cited to no authority supporting the argument that decisions about related services that are medical or health-related are exempt from the IEP team process or outside the expertise of Respondents. The team can consider information from other

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[30] *See* Parents' Post-Hearing Brief, p. 105.
[31] 530 U.S. 57, 65 (2000).
[32] 20 U.S.C. § 1401(9)(D).
[33] *Endrew F.*, 137 S.Ct. at 994 (2017) (*citing Board of Educ. Of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 102 S.Ct. 3034, 458 U.S. at 181 (1982)).
[34] 20 U.S.C. § 1414(d)(1)(B).

professionals, including members of the Student's medical treatment team, but there is no support for the proposition that Student's parents have a right to make unilateral decisions about Student's related services that center around her medical needs. The *School District of Philadelphia* case, cited by Complainants and discussed in more detail above, supports the conclusion that the IEP team has the responsibility and authority to determine the type of medical support a student needs in the school setting, including whether a student requires the services of a full-time, 1:1 nurse.[35]

The first prong of Respondents' argument – that the IEP team decision to meet Student's needs through a 1:1 trained health associate supervised at all times by the full-time school nurse exceeded Respondents' expertise and authority under the IDEA – appears to dovetail with the argument that the proposed plan is unsafe. As discussed in great detail above, Complainants have not proven that the plan to meet Student's health needs outlined in the May 2018 IEP is unsafe and denies her FAPE.

II.
Procedural Safeguards

In addition to alleging a violation of FAPE, Complainants also allege that Respondents violated several of the procedural safeguards contained in the IDEA.

Prior Written Notice: The IDEA requires that a district must provide prior written notice to the parents of a child whenever the district proposes to initiate or change the evaluation of a child or the provision of FAPE to the child.[36] The prior written notice must include: 1) a description of the proposed action; 2) an explanation of why the action is being proposed and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed action; 3) a statement that the parents have protection under the procedural safeguards of the IDEA and the means by which a copy of a description of the procedural safeguards can be obtained; 4) sources for parents to contact to obtain assistance in understanding the procedural safeguards; 5) a description of other options considered by the IEP team and the reason why those options were rejected; and 6) a description of the factors relevant to the proposal.[37]

A. February 2017 Reevaluation Notice

Complainants allege two violations related to the prior written notice requirement contained in the IDEA. Complainants first allege that Respondents failed to prepare or provide to Complainants a prior written notice conforming with 20 U.S.C. § 1415(c)(1) proposing to initiate an evaluation of Student or proposing a change in Student's evaluation in February 2017.

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[35] 114 LRP 17099 (Penn. SEA March 24, 2014) ("The Student's IEP team may reconsider the need for a full time nurse if the Student's placement changes in future IEPs.").
[36] 20 U.S.C. § 1415(b)(3).
[37] 20 U.S.C. § 1415(c)(1).

The parties do not dispute that the February 2017 reevaluation triggered the requirement for a PWN to Parents. What is disputed is whether the documents that Respondents provided Parents in February 2017 conformed to the requirements for a prior written notice.

The Consent for/Notice of Reevaluation that Respondents provided in February 2017 explains that a reevaluation of health needs is being proposed for Student and that additional assessment in the area of health needs has been recommended by the IEP team. The notice explains that the reevaluation of Student's health needs is proposed as a result of a change in her nursing services. The notice states that evaluation methods will be determined by the professionals involved in the evaluation and may include review of previous interventions and relevant records and observations completed by team members. The notice further states that the IEP team did not consider any other options. Parents signed the notice, which contains a paragraph indicating that they have received a copy of the Procedural Safeguards Manual for Parents. Additionally, the consent form states that Parents may contact the school administrator or AEA director of special education if they have questions or wish to obtain another copy of the procedural safeguards manual.

In conjunction with the Parents' consent to reevaluation, Elementary School Nurse provided Parents with a form requesting consent for the school nurse to perform urinary catheterization and give fluids through Student's G-tube. Additionally, the consent for these cares indicated that they would be performed in the nurse's office and may be delegated to an associate when the nurse determines it is safe and appropriate. This form was signed by Father and returned to Elementary School Nurse on February 16.

The consent for reevaluation form, in conjunction with the consent form for the school nurse to perform cares and to delegate to an associate when safe and appropriate, complies with the prior written notice requirements in the IDEA. No violation has been proven.

In their briefing on this point, Complainants have placed great emphasis on the fact that a reevaluation had just been completed in December 2016, arguing in essence that Respondents' burden to obtain fully informed consent for a reevaluation is somehow enhanced due to the recency of the prior reevaluation process. The evidence in the record as a whole reflects that Respondents accommodated Parents' preference for their own PDN to accompany Student to school for many years. It was only when this staffing model became untenable and when Parents reached out to Respondents to assist in solving the problem that Respondents began the process of assessing Student's actual care needs in the school setting and whether the PDN model was the most efficient and sustainable to meet Student's health needs at school.[38] Both parties were fully aware of this background at the time that the February 2017 IEP meeting took place.

Complainants also argue that they could not give informed consent in February 2017 because the written notice did not inform them that Respondents had the duty to

[38] In their due process complaint, Complainants have not challenged the sufficiency of the December 2016 reevaluation process in regard to determining Student's health needs.

provide 1:1 nursing services during the school day if Parents could not provide PDNs to serve Student. The IDEA's regulations require that a parent be "fully informed of all information relevant to the activity for which consent is sought."[39] The activity for which consent was sought was a reevaluation of Student's health needs, to include a trial of using a trained health associate under the supervision of the school nurse to meet Student's needs on days when a PDN was unavailable.[40] While a parent must consent in writing, there is no requirement that the process of fully informing the parent must take place in writing. There is ample evidence that Parents were informed through the February 2017 IEP meeting that the school was proposing to meet Student's needs during spring 2017 through a trained health associate under the supervision of the school nurse. In addition, this model was laid out in the written consent that Father signed on February 16.

B. May and October 2017 Prior Written Notices Following IEP Meetings

Complainants' second alleged violation regarding the prior written notice requirement is that Respondents failed to provide PWNs to Complainants immediately following the May 23, 2017 and October 5, 2017 IEP meetings.

The credible evidence reflects that Complainants did not receive the PWN prepared by Respondents following the May 23, 2017 IEP meeting. Elementary Special Education Teacher provided credible testimony that she printed out the PWN and IEP and placed those documents in an envelope in Student's general education classroom containing her report card with the assumption that the envelope would go home with Student in her backpack. While Elementary Special Education Teacher testified that she went to Student's home in the summer following the 2016-17 school year to deliver something, she could not remember what she delivered. Parents provided credible testimony that they did not receive this PWN or IEP contemporaneously with the meeting and prior to the implementation date. Under these circumstances, Respondents failed to provide the required notice under the IDEA.

With regard to the PWN issued after the October 5, 2017 meeting, the evidence demonstrates that Complainants did receive this document. Junior High School Special Education Teacher provided credible testimony that she sent the documents to Parents via first class mail, then had a follow up telephone conversation with Mother regarding places in the PWN and IEP where Student's name was spelled incorrectly. After this conversation, Junior High School Special Education Teacher sent a corrected PWN and IEP home with Student, along with a letter documenting her conversation with Mother about the changes. In light of the evidence, Mother's denial of having received these documents is not determined to be credible.

The law in the Eighth Circuit regarding procedural violations of the IDEA is well settled: a procedural error provides a basis to set aside an IEP only when the "'procedural

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[39] 34 C.F.R. § 300.9.

[40] In addition to this trial, the reevaluation also included a review of Student's medical records, consultation with Universal Pediatrics, interviews of Parents, and consultation with Dr. Lonzarich to obtain orders for cares during the school day.

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.'"[41] As discussed above, Respondents' model of providing nursing services to Student through a trained associate under the supervision of the full-time school nurse does not deny Student FAPE.

Complainants argue, however, that the failure of Respondents to provide the notices related to the May 23, 2017 meeting seriously hampered the Parents' opportunity to participate in the formulation of the IEP. Additionally, Complainants argue that the failure to provide the PWN following the May 2017 meeting was especially prejudicial as the team did not come to any agreement at that meeting regarding removing the services of Student's PDN, therefore Complainants were not on notice of this possibility. Complainants' assertion is undermined by the state complaint Parents filed in November 2017 in which Mother stated that the May 2017 IEP meeting included a discussion of phasing out Student's PDN after training a health associate. While Mother indicated that Parents disagreed with this plan of action, Parents' disagreement does not mean that the IEP team did not engage in this discussion. The evidence in the record establishes that from February 2017 onward, Parents, Respondents, and Universal Pediatrics personnel were involved in ongoing discussions related to providing Student's nursing services through the model outlined in the May 2017, November 2017, and May 2018 PWN and IEP documents. While Complainants assert that they were blindsided at the November 2017 meeting when they were informed that they would no longer be able to send PDNs to school with Student, if this was the case it was because Complainants had disregarded the information that had been discussed and provided to them during this time period.

While certainly not ideal, the evidence does not reflect that the district's failure to provide Parents with the PWN following the May 23, 2017 IEP meeting compromised Student's right to an appropriate education, seriously hampered Parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefit. Accordingly, the error does not provide a basis to set aside the IEP.

Complainants argue that the procedural protections set forth in the IDEA are important and can be enforced by due process actions whether or not they resulted in a denial of FAPE. In support of this argument, Complainants cite to 34 C.F.R. § 300.513(a)(2). The first part of paragraph (a) indicates a hearing officer may find that FAPE was denied only when procedural inadequacies impeded a child's right to FAPE, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding FAPE, or caused a deprivation of educational benefit. The cited provision states that nothing in paragraph (a) shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements set out in 34 C.F.R. §§ 300.500 through 300.536. Complainants seek an order requiring Respondents to ensure that parents in the district receive a required PWN on a timely basis.[42]

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[41] 34 C.F.R. § 300.513(a)(2); *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1002-03 (8th Cir. 2011) (*quoting Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010)).
[42] *See* Complainants' Post-Hearing Reply Brief, p. 36 ("We fail to understand . . . why it is not practically feasible for the Heartland AEA to develop a protocol for contemporaneously

Respondents have acknowledged that the undersigned administrative law judge is entitled to order an LEA to comply with procedural requirements under §§ 300.500 through 300.536, regardless of the impact of any procedural violations. Respondents argue, however, that Complainants are not entitled to a remedy unless the procedural violation resulted in a denial of FAPE or impeded Complainants' ability to participate in the decisionmaking process.

The IDEA's implementing regulations provide additional requirements for what a PWN must include and the language in which it must be provided.[43] The regulations are silent, however, as to the manner in which the district provides the notice, except to state that a parent may elect to receive notices by electronic mail if the public agency makes that option available.[44] Additionally, the regulations contain no requirements for districts as to whether or how to document the provision of the PWN. The facts of this case reflect that Respondents prepared the PWN and attempted to deliver it to Parents, albeit unsuccessfully. Respondents are required to provide a PWN to parents under the situations set forth in the IDEA. Where Respondents fail to do so, such failure will be analyzed to determine whether it justifies a determination that the student's right to FAPE was compromised or that the parents' opportunity to participate in the IEP formulation process was seriously hampered. It is clearly in Respondents' interests to carefully consider how to document that a PWN has been delivered to a parent, in that failure to provide the PWN can provide the basis for a due process complaint. In the absence of guidance from the statute or regulations, however, the undersigned declines to set out a specific framework under which Respondents must operate in providing and documenting provision of prior written notices to parents.

For the reasons discussed above, Respondents' failure to provide the PWN following the May 2017 IEP meeting did not result in a denial of FAPE or seriously hamper the parents' ability to participate in the formulation of Student's IEP. Accordingly, Complainants are not entitled to any relief as a result of this procedural error.

Evaluation Procedures: Complainants also argue that Respondents failed to comply with the evaluation procedures laid out in the IDEA. The IDEA provides that assessments and other evaluation materials used to assess a child must be used for purposes "for which the assessments or measures are valid and reliable."[45] Complainants argue that Respondents' trial of using a health care associate under the supervision of the registered nurse on the days when a PDN was unavailable during

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documenting when prior written notice has been delivered to the parents, by whom, and by what reliable method of delivery . . . Given the importance that Congress attached to the procedural protections for parents set forth in the IDEA, we respectfully submit that it is vital that the local educational agency have a reliable method of ensuring that the parents actually receive the mandated notice on a timely basis.").

[43] *See* 34 C.F.R. § 300.503 (requiring that the notice be written in language understandable to the general public and in the native language of the parent).

[44] 34 C.F.R. § 300.505.

[45] 20 U.S.C. § 1414(b)(3)(A)(iii).

spring 2017 was designed and implemented in such a way as to render its conclusions invalid and unreliable.

In support of this argument, Complainants cite to *Stacey M. v. Tripoli Community School District*.[46] The parties to that case stipulated that certain general education evaluations used for Student "were not designed in accord with sound scientific principles" and that the district and AEA did not use "objective and consistently measured tests to monitor the effect of designated interventions." One of the jointly proposed conclusions of law prepared by the parties and adopted by the administrative law judge provided that general education interventions that Respondents utilized in 2009 violated the IDEA, as follows:

> When general education interventions are part of a local education agency's child find and evaluation procedures under the IDEA, those interventions must be implemented with integrity and in accord with sound scientific principles.[47]

Complainants argue that the manner in which the data was collected regarding Student's needs being met by paraprofessionals render conclusions about the data invalid or unreliable. In making this argument, Complainants extrapolate from the *Stacey M.* case to assert that interventions used to reevaluate a child's need for special education services must be based on sound scientific principles and that Respondents did not collect data "with scientific integrity." Respondents counter that there are clear records of the dates that the associates who worked with Student were trained, as well as records of the cares that they provided. As such, Respondents argue that the paraprofessional trial in spring 2017 was a valid and reliable measure of Student's need for nursing services at school.

In the case of a reevaluation, the IEP team is required to reviewing existing evaluation data on a child; under the regulations, this data includes evaluations and information provided by the child's parents, current assessments and classroom-based observations, and observations by teachers and related service provides. The team must decide whether the child continues to have a disability and the educational needs of the child. Additionally, the team must decide whether any additions or modifications to related services are needed to enable the child to participate, as appropriate, in the general education curriculum.[48] In order to make this determination, the district must administer "such assessments and other evaluation measures as may be needed" to produce evaluation data.[49]

Respondents set out in spring 2017 to reevaluate Student's health needs in service of developing a model to meet Student's health needs in the absence of a PDN, since Student's attendance was being impacted by Universal Pediatrics' staffing shortage. As discussed above, Parents consented to a trained associate providing one-to-one

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[46] 26 DOE App. Dec. 36 (Iowa SEA, Nov. 23, 2009).
[47] *Id.*
[48] 34 C.F.R. § 300.305(a).
[49] 34 C.F.R. § 300.305(c).

assistance to Student under the supervision of the school nurse, an RN, on days when a PDN was unavailable to accompany Student to school. Respondents kept logs of Student's cares on the dates that the paraprofessionals, under the supervision of the school nurse, provided care for her. Near the conclusion of the year, the IEP team met to discuss Student's care needs, especially her health care needs, as she transitioned to junior high school the following fall. As one data point, the IEP team considered information from Elementary School Nurse regarding how things had gone on the dates when Student's PDN was not present and the trained associate model was utilized. In addition to the data collected through trial use of paraprofessionals to meet Student's needs, the IEP team also considered information from Students' medical records, input from Universal Pediatrics personnel, the orders received from Dr. Lonzarich, and information provided by Parents.

On the evidence in this record, Complainants have failed to establish any violation of the IDEA's evaluation procedures. The overall thrust of what Respondents concluded as a result of using a trained health associate under the supervision of the school nurse during spring 2017 when Student's PDN was not available was that things went smoothly. The associates were trained by the school nurse and provided cares without incident. Respondents used the information collected in this trial to aid in assessing whether the cares that Student's health care providers, including Dr. Lonzarich and Universal Pediatrics, indicated were needed in the school setting could be safely provided by associates. The information collected was valid and reliable for the purpose it was used. Complainants' argument that the design of the trial was fundamentally flawed and its conclusions invalid and unreliable is rejected.

III.
Prevailing Party

In their Amended Due Process Complaint, Complainants have requested a declaration that they are the prevailing party in order to facilitate an award of attorney fees under the IDEA. Respondents, in their post-hearing brief, have likewise asked for a determination that they are the sole prevailing party in this action.[50] Under the IDEA, federal district courts have jurisdiction over awards of attorneys' fees.[51] A court may award reasonable attorneys' fees as part of the costs to a prevailing party under three scenarios:

> (I) to a prevailing party who is the parent of a child with a disability; or
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> (II) to a prevailing party who is a State educational agency or local education agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation or against the

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[50] In their post-hearing reply brief, Complainants characterized Respondents' request for a ruling that they were the prevailing party as "woefully premature." *See* Complainants' Post-Hearing Reply Brief, p. 22. Complainants have not explained how their request for prevailing party status differs from that of Respondents such that Respondents' request is premature and Complainants' is not.

[51] 20 U.S.C. § 1415(i)(3)(A).

attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

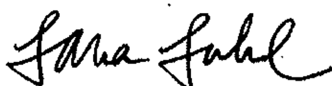
(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.[52]

Based upon the above Conclusions of Law, Respondents are the prevailing party in this action. Complainants have failed to establish that Respondents' plan to provide care for Student's health needs in the school setting through a trained associate supervised by the full-time school nurse constitutes a denial of FAPE. While Complainants have proven that Respondents did not provide a prior written notice to Parents following the May 23, 2017 IEP meeting, that procedural error does not provide a basis to set aside the IEP or to provide other relief. This decision makes no findings nor conclusions regarding whether the other criteria for awarding attorneys' fees to a prevailing local educational agency have been met. Neither Complainants nor Respondents have made any argument on this point.

DECISION

With one exception, Complainants have not proven that Respondents violated the IDEA as alleged in the amended due process complaint. Complainants have proven that Respondents did not provide them with a prior written notice following the May 23, 2017 IEP meeting. As discussed in more detail above, this procedural error does not provide a basis to set aside the IEP or to provide other relief. Complainants' requested relief is therefore denied and the due process complaint is dismissed.

Dated this 29th day of July, 2019.



Laura E. Lockard
Administrative Law Judge

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Miriam Van Heukelem and Carrie Weber, Attorneys for Respondents (via electronic and first class mail)
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[52] 20 U.S.C. § 1415(i)(3)(B)(i).