

BEFORE THE IOWA DEPARTMENT OF EDUCATION
(Cite as 30 D.o.E. App. Dec. 005)

<p>In re [REDACTED] a child:</p> <p>[REDACTED] and [REDACTED],</p> <p style="padding-left: 40px;">Complainants,</p> <p style="padding-left: 40px;">v.</p> <p>ANKENY COMMUNITY SCHOOL DISTRICT and HEARTLAND AREA EDUCATION AGENCY,</p> <p style="padding-left: 40px;">Respondents.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Dept. Ed. Docket No. SE-524 DIA No. 21DOESE0006</p> <p>DECISION</p>
--	--	---

On or about September 10, 2020, Complainants [REDACTED] and [REDACTED] filed a due process complaint against Respondents Ankeny 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.

On October 9, 2020, Respondents filed a counterclaim requesting an order compelling cooperation from Complainants to complete a comprehensive reevaluation. Prior to the hearing, Respondents filed a motion to withdraw their counterclaim as the parties reached an agreement on the issue of reevaluation. Respondents’ motion is granted and the counterclaim is deemed withdrawn.

Hearing in this matter was held on November 17 and November 18, 2020 by videoconference. Attorney Megan Regennitter represented Complainants, who attended the hearing. Attorneys Katherine Beenken and Elizabeth Heffernan represented Respondents. Nancy Lehman and Kelsie Goodman attended the hearing as representatives of the district. [REDACTED] attended the hearing as representative of the AEA.

The following witnesses testified at the hearing: [REDACTED]; [REDACTED]; [REDACTED], case management supervisor for ChildServe; Nancy Lehman, director of special programs for the district; [REDACTED], health/physical education teacher; Kelsie Goodman, associate principal; [REDACTED], special education associate; Gina Koehler, special education consultant for the AEA; and Barbara Rohn, special education strategist for the district.

Complainants’ Exhibits A through O were admitted as evidence. Respondents’ Exhibits 1 through 179 were admitted as evidence. At hearing, arrangements were made to hold the record open in order for Respondents to provide written responses to written questions that they had submitted to Dr. Barbara Guy, state director of special education

for the Iowa Department of Education. Ultimately, the responses to the written questions were not submitted by the deadline that the parties agreed to at hearing and the record closed. Respondents filed a motion to reopen the record to include the responses from Dr. Guy. Respondents' motion was denied by order dated January 26, 2021. Dr. Guy's responses to Respondents' written questions are not part of the record in this matter.

The parties requested that a schedule be established to submit post-hearing briefs. Complainants' brief was due January 11, 2021. Respondents' brief was due February 3, 2021. Complainants' reply brief was due February 12, 2021. Complainants and Respondents each timely submitted a post-hearing brief according to the schedule. Complainants did not submit a reply brief.

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. At the conclusion of the hearing, the parties made a joint motion to extend the 45 day timeline until March 12, 2021 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 due process complaint. The issues raised in the due process complaint are:

1. Whether Respondents' actions in refusing Complainants' request for a one-to-one paraprofessional in Complainants' home to support remote learning constituted a denial of a free appropriate public education (FAPE).
2. If a violation is proven, what remedies are Complainants entitled to under the IDEA?

IDENTIFICATION OF RELEVANT PERSONS

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

[REDACTED]: Student

[REDACTED]: Mother

[REDACTED]: Father

[REDACTED]: Parents

Barbara Rohn: Special Education Strategist

[REDACTED]: Special Education Associate

FINDINGS OF FACT

Background: Student was 16 years old and in 10th grade at the beginning of the 2020-21 school year and at all relevant times was a resident of the Ankeny Community School

District. Student's diagnoses include cerebral palsy, seizure disorder, and developmental delay. Student's conditions cause him to have impaired muscle control and weakness, developmental and cognitive delays, delayed communication skills, impaired physical mobility, impaired social interactions, and inability to be independent with activities of daily living. Student is dependent on varying levels of adult support for all of his activities of daily living, including self-care/hygiene, dressing, toileting, cooking, cleaning, transportation, and safety. Student can complete some activities, such as feeding himself and cooking, with adult support. (Comp. Exh. A, H; Father testimony).

May 2020 IEP: Student's IEP, which was drafted in May 2020, contains goals in reading, writing, and math and provides for 2,840 minutes per month of specially designed instruction in those areas in the special education setting. Under the IEP, Student spends 66% of his time in the general education setting per month. The IEP provides for one-to-one paraprofessional assistance 435 minutes each day. Activities with which the paraprofessional assists Student under the IEP include all activities of personal care and toileting, cutting up food and assisting with self-feeding and drinking at lunch, monitoring and meeting nutritional needs, accommodating and modifying work tasks in the general education setting, and maintaining a safe environment. Under the IEP, the paraprofessional is to provide support during all classes to modify activities as needed and facilitate Student engaging in and paying attention to instruction. (Comp. Exh. A-9-16, 21-22).

Spring 2020: On March 15, 2020, Governor Kim Reynolds, in consultation with the Iowa Department of Public Health, recommended that Iowa schools close for a total of four weeks because of the nationwide COVID-19 pandemic. Once it became clear that schools would be closed for some time, the Iowa Department of Education (DOE) issued guidance requiring that schools provide either mandatory distance learning or voluntary educational enrichment programs in order to comply with state instructional time requirements. The district chose the voluntary model and students did not return to school buildings for the remainder of the 2019-20 school year. (Resp. Exh. 90-92, 102-03; Goodman, Lehman testimony).

Summer/Fall 2020 Return to Learn Planning: During summer 2020, the district worked intensely to rebuild the structure of school and methodology for delivery of instruction in advance of the beginning of the 2020-21 school year. In late July, plans were changing practically daily. (Lehman testimony).

On July 17, 2020, Governor Reynolds signed a proclamation directing districts to "take all efforts to prepare to safely welcome back students and teachers to school in-person this fall." The proclamation provided that a brick-and-mortar school district could only provide instruction primarily through remote learning where, among other things, a parent or guardian voluntarily selected a remote learning opportunity from among multiple options or where the DOE approved a temporary move to remote learning for a building or district because of public health conditions. As a result of this proclamation, the district went back to the drawing board to add a remote learning option for families based on family choice. (Resp. Exh. 109-10).

On July 22, 2020, the district shared its draft Return to Learn plan with the community. The plan was designed to comply with the required components of instruction mandated by the DOE. Under the plan, the district would recommend a hybrid model to the Ankeny Board of Education. Based on the guidance from Governor Reynolds, the district was required to have every student on site at least 50% of the time over a period of two weeks in the hybrid model. The district determined that there would be two groups for the hybrid model, with one group in school on Mondays and Thursdays, the other group in school on Tuesdays and Fridays, and the groups alternating school attendance on Wednesdays. (Resp. Exh. 5-6; Goodman testimony).

The draft plan also provided that families would be offered a remote learning option for each semester of the 2020-21 school year. All district families were offered the remote learning option; there was no requirement that a student or family member have a medical reason to select that option. The district noted that students participating in the remote learning option would engage in a learning experience aligned to the Required Continuous Learning model outlined in the Return to Learn plan. Under the remote learning schedule for high school, students would have synchronous learning on Monday and Thursday mornings and Tuesday and Friday afternoons. On Monday and Thursday afternoons, Tuesday and Friday mornings, and Wednesdays, student learning would be asynchronous.¹ The district's July 28, 2020 Return to Learn e-Newsletter explained, with regard to the remote learning option, that "[s]tudents with 504s and IEPs will continue to receive the services required by their plans. The Director of Special Programs will work with building leaders to develop a process for ensuring student needs are met." (Resp. Exh. 5-6, 44-45; Goodman testimony).

The July 31, 2020 Return to Learn e-Newsletter provided additional information regarding the remote learning option for the first semester. Families were informed about the roles and responsibilities they would be required to take on if selecting the remote learning option, including establishing routines and expectations, defining a physical space for the student to study, and taking an active role in helping the student to process learning. Regarding special education, the remote learning addendum noted that service plans would be adjusted as needed for circumstances of the learning environment and that a combination of settings might be required to best meet a student's instructional needs. Families were informed that all settings for service would be determined by the IEP team and be based on a child's least restrictive environment. (Resp. Exh. 75-89).

Families were required to submit a form by August 2, 2020 if they wished to opt into the district's remote learning option. Parents discussed the district's options with Student's treating physician, [REDACTED]. According to Parents, [REDACTED] identified the remote learning option as the most appropriate for Student based upon his health needs. When making the remote learning selection, Parents believed that Student would be able to have a district-provided one-to-one paraprofessional in person in the home setting. Parents completed the form opting into the remote learning option for

¹ Synchronous learning refers to live/face-to-face instruction provided either virtually or on site. Asynchronous learning refers to opportunities for engagement and skills practice outside of live instruction, including assignments. (Lehman testimony; Resp. Exh. 55).

Student. On August 7, 2020, Mother received an e-mail confirmation that Student had been enrolled in the remote learning option for the first semester. (Resp. Exh. 43-44, 150-52; Father, Goodman testimony).

In the Return to Learn planning, the district focused efforts on COVID mitigation and the health and safety of students, families, and staff. A team worked on positive behavioral expectations for students, including where they would enter and exit the building, how they would engage in sanitation during the day, and how they would wear masks. On an operational level, teachers reconfigured classrooms based on the proposed hybrid model to ensure that desks were distanced and custodial staff increased the level of air and surface cleaning in school buildings. (Goodman testimony).

Iowa DOE Guidance and IEP I Page: Each page of an IEP is assigned a letter that identifies what the page's function is within the IEP. The I page has traditionally been used for teams to identify any additional information valuable to development of a student's IEP. With the COVID-19 pandemic and school changes, the DOE instructed districts to use the I page to document and translate what brick-and-mortar services for each student would look like in a hybrid or required continuous learning setting.² (Lehman testimony).

The F page of an IEP describes the supports and services that a student requires to access education, including accommodations and modifications. It outlines the specific amount of services, typically in minutes, which a student receives of specially designed instruction. The DOE's guidance to schools was that the F page should not be changed to mirror the I page. The F page was designed to document the services a student would receive in the traditional brick-and-mortar setting. The I page was intended to describe the services a student would receive in a hybrid or remote model. The DOE guidance indicated that the IEP team could indicate minutes of service on the I page, but noted that the team should keep in mind that "the minutes may look different than brick and mortar." The DOE's guidance specifically noted that there was no need for the I page and the F page to match. (Lehman testimony; Resp. Exh. 118-20, 126).

The Q&A document that the DOE provided included the following:

(7-28-20) Will the minutes of services such as direct instruction and paraprofessional support listed on each students' IEP be modified if a student/family chooses on-line learning or if the district is shut down?

The minutes, services, and supports may change depending on the individual needs of the student and the individual circumstances. The IEP team will to [sic] explore various options to address the needs to

² The required continuous learning (RCL) setting is distinct from the district's remote learning option. As the district understood the DOE's guidance, it was required to have provisions in place in case the district was placed into mandatory virtual learning based on public health considerations. RCL refers to mandatory virtual learning that would occur if public health considerations required it. (Lehman testimony).

determine and document the virtual/hybrid learning plans due to the COVID-19 pandemic.

(Resp. Exh. 121).

The goal of the I page, as articulated in the DOE guidance and understood by the district, was to have a comprehensive IEP that would allow the district to toggle between learning environments – traditional, hybrid, and virtual – as conditions required throughout the year. If an IEP team recommended a different learning modality than that selected by a student’s family, that information was documented on the I page. (Lehman, Goodman testimony; Resp. Exh. 124-26).

The DOE disseminated an I Page Template to districts to be used in preparing the I Page for individual students’ IEPs. It required the IEP team to discuss and document certain decisions, including identifying a student’s unique accessibility and other needs for virtual and hybrid learning, identifying how services on a student’s F page would be prioritized, adapted, and delivered in virtual and hybrid settings, what goals would be prioritized by the IEP team, and how to adapt progress monitoring for a virtual and hybrid setting. (Resp. Exh. 160-61).

Fall Semester IEP Planning: On August 11, 2020, Kelsie Goodman, associate principal at Ankeny High School, reached out to Parents via e-mail following a phone call in order to offer times to meet to discuss Student’s IEP and the return to school in the fall semester. Parents and the team agreed to meet on August 19, 2020. Goodman noted in an August 13, 2020 e-mail to parents that the IEP team would make decisions about how to move forward for the fall semester at the meeting. Goodman also referenced the IEP I page and the guidance the district had received about completing it. In a separate e-mail, Special Education Strategist sent Parents a link to the I Page Template that the DOE had provided to the district. (Resp. Exh. 157-59; Goodman, Special Education Strategist testimony).

August 19, 2020 IEP Team Meeting: On August 19, 2020, the IEP team met to discuss and draft an I page for Student’s IEP and to determine how necessary educational services would be provided to Student beginning in fall 2020 in light of the pandemic. The team members who were district staff prepared and brought to the meeting a draft of an I page that contained multiple options as a starting point for discussions. The draft provided options for: 1) Student to attend school in the hybrid setting, but with a modification to attend five days per week instead of the two to three days per week that would be typical of the hybrid schedule; 2) Student to attend in the brick and mortar setting less than full-time, in order to receive specially designed instruction only; 3) Student to access instruction and educational services in the building but in a separate room; and 4) Student to receive support from a virtual associate during any time that he would be learning remotely off-site. (Resp. Exh. 174-75; Koehler testimony).

At this meeting, the educators on the team recommended that Student participate during the fall semester in a modified hybrid schedule that would allow him to attend in-person school five days per week in a controlled environment. This recommendation was made based on the belief that this option would best meet Student’s unique needs

and provide guaranteed services and supports at no cost to Parents. The five days per week of in-person instruction was greater than the amount of in-person instruction that students who participated in the district's hybrid model would receive. (Exh. B-1; Goodman testimony).

At the time of this meeting, the district was not planning to send staff into students' homes, based on health and safety concerns. The district had been planning its on-site mitigation measures throughout the summer, including increased cleaning by custodial staff, and did not feel that the same mitigation measures could be guaranteed to staff if they were off-site. As the educators on the IEP team understood it, the decision to send a paraprofessional into a student's home under current conditions was not one that they could make at the IEP team meeting; this was a decision that would have to be made higher up in district administration. (Goodman testimony).

Parents reiterated at this meeting that they wished for Student to engage in the district's remote learning option based on concerns about his health and safety. Parents requested that the district provide a paraprofessional in their home to assist Student with the same types of things he would receive assistance with if he were on-site at school. The meeting was paused in order for the district to consider Parents' input and get some questions answered at the district level. (Goodman, Koehler testimony).

August 27, 2020 IEP Team Meeting: The educators on the IEP team came back to the August 27 meeting with much more detailed information about how the district could structure Student's time inside the building in response to Parents' concerns regarding safety. Where the draft discussed at the August 19 meeting listed options that were broader, more detailed mitigation measures and strategies were discussed at the second meeting. (Koehler testimony).

While Parents specifically requested a one-to-one paraprofessional in the home to assist Student, this was something that the IEP team discussed only minimally. Instead of focusing on this request, the team focused instead on what options could be considered to accommodate the concerns for Student's health within the school setting. The district believed that providing mitigating measures in the school setting would allow for smoother integration of Student into the school setting once the pandemic improved. Another of the district's considerations in evaluating Parents' request was the safety of any paraprofessional who would be required to go into Student's home. The district would not have control over the mitigation measures that Parents followed in the family home. (Lehman, Goodman testimony).

The final I page resulting from the IEP team's meetings noted that the AEA and district recommended a modified hybrid schedule, with Student attending school in person five days per week in a controlled environment. The district personnel on the team contemplated Student participating in virtual instruction from a separate classroom in the building where a paraprofessional would be present at all times to assist Student. While Student was in the building, instruction would be provided in individual and small group virtual instruction, or whole group virtual instruction aligning to his goal areas. A number of specific COVID-19 mitigation strategies for the modified hybrid setting were listed on the I page, including:

- Provision of a separate and dedicated classroom for use by Student only, with a restroom near and accessible that is not utilized by other students.
- Cleaning protocols following CDC and Iowa Public Health guidelines, including deep cleaning at the beginning and end of the day, frequent cleaning of high touch surfaces, frequent hand washing/sanitizing for Student and adults, and cleaning of Student's work area, including his computer and educational tools, between classes
- Student entering and exiting the building through a separate entrance to limit interactions
- Slightly adjusted school start and end times to minimize Student's contact with other students or adults during hallway transition
- Staff wearing face coverings, face shields, and gloves at all times
- Individually plated meals/lunches brought to Student on disposable trays, with adaptive utensils and cup washed daily.
- Staff assisting during lunch wearing gloves and a mask
- Cleaning of restroom by associate prior to Student entering the restroom

(Comp. Exh. B-1-3).

In accordance with the DOE's guidance regarding the need to address student learning in all modalities, including virtual learning, on the I page, Student's final I page provided:

Within the required continuous learning setting, [Student's] goals will need to be prioritized and adapted as listed below. [Student] has some experience accessing computers; however, does require adult cueing/support/assistance to access needed instruction and to complete work demands. [Student] will require explicit instruction and ongoing support on how to access and participate in the virtual process. He requires support with accessing and understanding instructional materials independently. He may need assistive technology support, such as Google classroom, Zoom or other programs for meeting virtually. Google Read Write and activate reader mode for chrome would also be a supportive assistance. Learning material will need to be presented in a format (text to speech, pre-recording human audio, larger font enlarging information on screen, etc.) that meets his individual needs. While virtual and technology support could be provided for [Student] remotely, he would require intensive adult assistance to access his education. Parents would need to play an active role in supporting [Student] in a remote setting, until such time that it is safe to provide school based support in the home. We will use the current district matrix, along with IDPH guidelines to determine safety.

(Comp. Exh. B-2).

The Prior Written Notice (PWN) provided to Parents following the August IEP meetings noted that the school district refused three requests made by Parents: 1) Parents' request for provision of an in-home one-to-one paraprofessional; 2) Parents' request that the district lease their home for a nominal amount so that a district employee could work inside the residence; and 3) Parents' request for reimbursement to hire an individual to support Student while participating in remote learning. The PWN stated that all three of the parent proposals were refused because the district had offered Student FAPE at no cost to the parents through a modified hybrid model, with Student attending school five days per week in a controlled environment with specific health and safety protocols. (Comp. Exh. E).

Medical Documentation: After the second IEP meeting, Parents solicited a letter from [REDACTED] regarding her recommendations for Student's learning model for the 2020-21 school year. In response to Parents' request, [REDACTED] authored a letter dated August 31, 2020 stating that Student's "complex medical history puts him at increased risk of more severe illness with infections, including COVID." The letter states that it is medically in Student's best interest to participate in online learning during the current pandemic and that the recommendation can be reconsidered once the COVID outbreak becomes better controlled. Father provided this letter to the district on approximately September 8 or 9, 2020. (Comp. Exh. H).

Parents also requested a letter from [REDACTED], Student's treating neurologist. A nurse in [REDACTED] office, [REDACTED], authored a letter dated August 27, 2020, stating, "Due to [Student's] complex medical history he is at increased risk of developing a sever[e] case of COVID-19." (Comp. Exh. I).

[REDACTED], Student's rehabilitation specialist, authored a letter dated September 3, 2020 in response to Parents' request. [REDACTED] wrote:

The Center for Disease Control have indicated that children who have medical complexity including neurologic, genetic, metabolic conditions or congenital heart disease might be at increased risk for severe illness from COVID-19 compared to other children. Therefore, it continues to be important to reduce [Student's] risk of being exposed to COVID-19 to prevent chance of infection. Even if [Student] were to have a mild or subclinical infection, he would be at risk to infecting his parents who are his primary caregivers due to their need for close proximity to assist with [Student's] cares. Distancing from [Student] would not be an option for his parents.

Therefore, I believe that [Student's] parents['] request for distance learning for [Student] during the pandemic is a thoughtful request and should be honored.

(Comp. Exh. J).

None of the providers who authored letters in September 2020 regarding the suitability of in-person learning for Student reviewed the I page prepared by the district listing the

proposed mitigation measures for Student. During their discussions regarding Student's learning model for 2020-21, the district requested that Parents authorize one of Student's medical providers to speak directly with school staff to discuss Student's needs. Parents did not consent. At hearing, Father cited privacy concerns as the reason Parents did not consent to this request for collaboration. (Father testimony).

In anticipation of hearing, Parents requested that ██████████ prepare a more detailed letter regarding Student's health concerns and provided her with Student's I page to review. ██████████ letter stated, in relevant part,

Given [Student's] fragile medical state, it is medically advisable to limit his potential exposure to illness. He is at elevated risk of severe illness or death from COVID-19. Despite the accommodations proposed by the school district, it is almost certain that [Student] will come in contact with a greater number of people in the school setting than if he were provided with an associate at home. At home, he would only be in contact with his parents and one associate. The use of face coverings is also problematic for [Student], as he does not tolerate wearing anything on his head, and face coverings limit his ability to communicate even further. This further limits mitigation options in an in-school setting. From an infectious disease standpoint, keeping [Student] isolated at home is the safest option.

...

After reviewing the recommendations from the ipage document along with [Student's] medical needs, I do not believe the recommendations outlined provide sufficient mitigation of risk. From a medical standpoint, especially in light of increasing COVID cases in the Polk County area, learning in a virtual format with an associate provided in the home provides the safest option from a health standpoint along with fulfilling his IEP.

(Comp. Exh. K-1).

Services Provided to Student in Virtual Model: Despite the district and AEA's recommendation that Student's needs would best be served by the modified hybrid model with Student attending school in a separate classroom in the building five days per week with in-person paraprofessional support, Parents reaffirmed their desire for Student to participate in the district's 100% virtual model at the beginning of the 2020-21 school year. While Parents' decision did not accord with the district and AEA's recommendation, once Parents determined that Student would stay in the remote learning model the IEP team worked with Parents and Student in order to provide accommodations to make remote learning more feasible for Student. Parents and the educators on the IEP team collaborated regarding scheduling and how associate support would look. Virtual associate support for Student was increased after the start of the school year to keep pace with his reported needs. Additionally, the district ensured that there were multiple associates cross-trained on Student's plan so that he would have

available support in the event of quarantine of usual staff who supported him. (Goodman testimony).

All students in the remote learning model in the district have a staggered class schedule, with synchronous learning on Mondays, Wednesdays, and Thursdays, and asynchronous learning on Tuesdays and Fridays. Student has two separate paraprofessionals who assist him; one assists him on Monday, Wednesday, and Thursday mornings for scheduled classes and on Tuesday and Friday mornings with asynchronous learning and homework. The other assists him in the afternoons with classes and asynchronous learning and homework. The addition of a paraprofessional for the asynchronous learning times is an accommodation the district made in order to allow for Student to participate in the remote learning model that Parents selected. In this model, Student has virtual paraprofessional assistance at all times during the school day. (Mother, Goodman testimony).

The virtual paraprofessionals assist Student in a variety of ways. They attend Student's Zoom classes so that they are aware of the instruction taking place and can capably assist Student with work on asynchronous learning days. They go into Zoom breakout rooms with Student during class in order to work on class work. The virtual paraprofessionals can also enlarge text for Student if needed and read text to him. For math, the virtual paraprofessionals assist Student by pulling up an online calculator so that Student can dictate numbers for calculator functions. On asynchronous learning days, Student's paraprofessionals meet with him in Zoom to do the required work for each class, assisting him in understanding the instruction and typing his answers to questions and submitting them in the required platform. (Special Education Associate testimony).

Student's virtual teachers are able to share their screens with Student. His science teacher, who is also his special education roster teacher, magnifies her Google slides by 30 to 40 percent so that Student can see them. She also uses remote highlighting or color block to highlight items for Student to see. (Special Education Strategist testimony).

Student is able to do some things independently, such as muting and unmuting his microphone and providing verbal responses to questions. Even with the assistance of the virtual paraprofessional, there is still some assistance that Mother provides to Student during the school day in order to facilitate his participation in remote learning.³ Mother assists Student with logging into Zoom and physically moving and placing some of his school materials, including his calculator, white board, and CCTV reader that enlarges text for reading. Additionally, Mother assists Student with plugging his enlarged keyboard into the device he is using. Mother also assists Student in gathering the physical education equipment that Student's teacher provided for remote learning. Mother assists Student in answering questions posed by teachers in the chat box of his

³ Mother is employed by an insurance company and, as of the time of the hearing, was working from home. Father works in sales and has been working outside of the home. As the parent in the home, Mother has been the primary person assisting Student with hands on school tasks during remote learning. (Mother, Father testimony).

virtual classes. Student can verbally respond to questions and can open the chat function, but cannot type his answer in the chat function because of the size of the text. (Mother, Special Education Associate testimony).

Some of the tasks that Mother performs for Student for convenience could be undertaken by the virtual paraprofessionals if necessary. For example, instead of Student's Mother setting up the CCTV reader for magnification, Student's paraprofessionals or virtual teachers can magnify instructional material and share a screen with Student. Additionally, virtual paraprofessionals can serve as scribes for writing probes if Mother is unavailable to set up Student's enlarged keyboard. (Special Education Associate, Special Education Strategist testimony).

As of the date of the hearing, Student was making progress on both of his reading goals and his writing goal. He was making some progress on his math goal and the math data appeared consistent with Student's progress pre-pandemic. (Special Education Strategist testimony).

U.S. Department of Education Guidance: Guidance provided in March 2020 from the United States Department of Education provides, in relevant part:

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.

...

It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency.

...

Finally, although federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific methodologies. Where technology itself imposes a barrier to access or where educational materials simply are not available in an accessible format, educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students.

(Resp. Exh. 97-98).

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.”⁴ 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 21.⁵

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

- (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.⁶

Special education is defined as specially designed instruction to meet the unique needs of a child with a disability across a range of settings, including in the classroom, in the home, in hospitals and institutions, and in other settings.⁷ Under the IDEA framework, special education and related services are provided in conformity with the student’s individualized education program, or IEP.⁸ “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.”⁹ 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

⁴ 20 U.S.C. § 1400(d)(1)(A).

⁵ 20 U.S.C. § 1412(a)(1)(A).

⁶ 20 U.S.C. § 1401(9).

⁷ 20 U.S.C. § 1401(28).

⁸ 20 U.S.C. § 1401(9)(D).

⁹ *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988, 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)).

evaluation results, other individuals who have knowledge or special expertise regarding the child, and, where appropriate, the child.¹⁰

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.¹¹ The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief.¹² Complainants, therefore, bear the burden of proof in this proceeding.

Complaint: In their due process complaint, Complainants argue that the district has denied a free, appropriate, public education to Student by denying their request for a one-to-one paraprofessional in the family home to assist Student with remote learning. Complainants argue that a one-to-one paraprofessional is a related service that is necessary to assist Student to benefit from special education and that denial of this service in the remote learning option that they selected for Student constitutes a denial of FAPE.

Denial of FAPE: The Supreme Court has held that in order to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make appropriate progress in light of the child's unique circumstances. The educational program must be appropriately ambitious in light of the student's circumstances and the student should have the chance to meet challenging objectives.¹³ In this case, the parties are in agreement that the F page of Student's IEP as written in May 2020 provides Student with FAPE. The dispute between the parties arose in determining how the services on the F page would be translated to a remote learning or hybrid model owing to the current pandemic. The district proposed for Student's special education and related services to be delivered in a modified hybrid model, with Student in a separate classroom in the school building with a suite of enhanced COVID-19 mitigation measures in place. Parents assert that, based on their choice of the remote learning model offered by the district to all families, FAPE must include the district providing a one-to-one paraprofessional in their home to assist Student with remote learning.

In order to determine whether the district has denied FAPE to Student by refusing to provide an in-person paraprofessional in the home setting, it is first necessary to determine whether Student, due to his medical conditions, requires instruction at home. Complainants argue that documentation from Student's treating providers, including ██████████, establishes that Student cannot safely attend school in person. Respondents, who do not dispute that Student's medical conditions place him at elevated risk from COVID-19, counter that the home setting proposed by Parents and the modified hybrid setting proposed by the district are virtually indistinguishable in terms of Student's

¹⁰ 20 U.S.C. § 1414(d)(1)(B).

¹¹ 34 C.F.R. § 300.507(a); 281 Iowa Administrative Code (IAC) 41.507(1).

¹² *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)).

¹³ *Andrew F.*, 137 S.Ct. at 999-1001.

potential exposure to COVID-19. The parties' dispute boils down to whether the modified hybrid setting the district has proposed is safe for Student.

The evidence demonstrates that in both settings Student would have a similar amount of contact with the paraprofessional staff assisting him. Student requires hands-on assistance for some tasks, such as adjusting his position and using the restroom, and close contact for a majority of the school day. The potential difference between the two settings is the amount of contact Student might have with other individuals during the school day.

In response to Parents' concerns expressed at the first IEP team meeting in August, Respondents provided very specific information at the second meeting about the COVID-19 mitigation measures they were prepared to put in place in order to allow Student to attend school in person in the modified hybrid setting that the district was recommending. The district could ensure that Student would be in a classroom where he was the only Student and that only the paraprofessional or other staff member assisting him would be in the classroom. Rigorous cleaning protocols were outlined, including deep cleaning at the beginning and end of each day, frequent cleaning of high touch areas in the classroom, and cleaning Student's work area between classes. The district's proposed plan provided for frequent hand washing and sanitizing by Student and staff assisting him and that staff assisting Student would always wear a face mask and, when serving lunch, gloves. The restroom Student would use, which would not be used by any other students, would be cleaned prior to his using it. Student's lunch would be delivered to the classroom on a disposable tray; he would not eat in a communal setting with other students. Student's school start and end times would be adjusted and he would enter the building through a separate entrance in order to minimize contact with other students and staff.

While the district attempted to involve Student's medical providers in the team's discussions regarding the 2020-21 school year, Parents refused the district's requests to consult with any of Student's health care providers. At the time of the two IEP meetings in August, Parents had not presented the district with any documentation regarding the opinions of Student's medical providers. The letters that Student's providers subsequently wrote for Parents in late August and early September 2020 were very general and did not contain any opinion regarding the mitigation measures the district had proposed and how those would impact their assessment of Student's safety in the school building.

Likewise, none of Student's treating medical providers testified at hearing regarding the opinions that they offered in support of Parents' desire for Student to receive 100% virtual instruction in the home setting. While ██████████ November 2020 letter contained additional detail and reflected that she had reviewed the I page with information about the modified hybrid setting, there was no opportunity for cross-examination of her opinion in order to identify specific concerns about the mitigation measures that the district had proposed to implement in the school setting and why ██████████ felt those measures were inadequate to protect Student.

At hearing, both Parents testified that they will not feel comfortable sending Student to school in person until there is a vaccine that protects against COVID-19.¹⁴ Parents also acknowledged that under the plan they are advocating for Student would still face some risk of COVID-19 exposure as at least one district-employed paraprofessional would have to be in the home five days per week.¹⁵ Based on Parents' testimony, no mitigation strategies proposed by the district would have been sufficient to make Parents feel comfortable with a plan that required Student to be present in the school building for any amount of time.

The preponderance of the evidence does not support the conclusion that Student is medically required to receive educational instruction in the home setting. Respondents planned extensive mitigation measures specifically responsive to Parents' concern regarding Student's elevated risk with regard to COVID-19 and their desire that Student not come into contact with individuals other than the staff person or persons specifically assisting him. Additionally, Respondents planned enhanced cleaning protocols to ensure that the places where Student would be in the building – his own separate self-contained classroom and a restroom not accessible to other students – would be sanitized frequently. Neither the setting that Parents proposed nor the modified hybrid setting proposed by Respondents can completely mitigate COVID-19 risk, as both settings contemplate Student being assisted by a one-to-one in-person paraprofessional. The modified hybrid model in the school setting proposed by Respondents was responsive to Student's status as an individual at higher risk for COVID-19 and prioritized Student's safety in educational service delivery. As such, Respondents' proposed model constituted FAPE for Student.

In addition to arguing that it is medically necessary for Student to receive all of his educational services in the home, Complainants also assert that an at-home placement is required as it is the least restrictive alternative (LRE) for Student. The IDEA's implementing regulations require that the school district ensure that children with disabilities are educated, to the maximum extent appropriate, with children who are nondisabled. Separate schooling and other removal of children with disabilities from the regular educational environment can occur only if the nature or severity of the

¹⁴ At the time of the hearing, there was not yet a COVID-19 vaccine that had been approved for use in the United States. In their testimony, Parents did not go into specifics about what criteria they would use to determine Student's level of safety after a vaccine was available; for example, whether they would consider school safe once educators were vaccinated, once Student himself was vaccinated, once a certain population of the student population was vaccinated, once a certain percentage of the population as a whole was vaccinated, or some combination of those factors.

¹⁵ The specifics of how Respondents might meet Complainants' proposal of sending a paraprofessional into the home was not explored extensively either in the IEP team meetings or at hearing as Respondents assert that their modified hybrid proposal offers Student FAPE. It is not difficult to imagine, however, that Complainants might be faced with more than one paraprofessional entering the home on a regular basis to assist Student, depending upon scheduling, potential quarantine, and other factors in and out of Respondents' control. In her November 2, 2020 letter, ██████████ speculated that Student would be in contact with only one associate under Parents' proposal, however it is not clear that assumption is accurate. ██████████ had no communication with the IEP team or any district personnel in formulating her opinion.

disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹⁶ The IDEA requires that a district ensure that a continuum of alternative placements is available to meet the needs of children with disabilities, ranging from instruction in regular classes at the least restrictive end of the continuum, to home instruction and instruction in hospitals and institutions at the most restrictive end of the continuum.¹⁷ In selecting the child's placement and determining LRE, the IEP team must consider any potential harmful effect on the child of the placement.¹⁸

The modification of Student's IEP, via the I page, to provide for Student's instruction to take place in the school setting with stepped up COVID-19 mitigation measures does not run afoul of the IDEA's LRE provisions. Complainants' argument that the home setting is a less restrictive alternative than the school setting with enhanced COVID-19 mitigation measures is unpersuasive. The argument is premised upon Complainants' assertion that Student finds the home setting more relaxing and would feel singled out if he were required to be present at school but not able to socialize with peers due to the enhanced mitigation measures required for his safety. It is true that one of the typical concerns with removing a student with disabilities from the school setting is the student's inability to socially interact with peers.¹⁹ In the unique circumstances of the current pandemic, the district's proposal of a modified hybrid setting would not have permitted Student to personally interact with peers; his interaction with peers would have been, as it currently is in the virtual learning setting selected by Parents, via Zoom videoconferencing. In both settings, then, Student would be isolated from peers for reasons of safety; the home environment is not less restrictive with regard to Student's isolation from peers. The district noted, however, that having Student in the school setting would allow for more seamless integration into more general education settings with peers as changing conditions allow. Parents' argument that a home placement is actually less restrictive than the modified hybrid setting proposed by the district is unsupported by the facts.

Complainants further assert that by offering a virtual learning option for all students in the district, Respondents were obligated to provide FAPE to students with IEPs in the 100% virtual model, regardless of whether FAPE was also offered in a different setting. Respondents acknowledge that 100% virtual learning was an option available to all families, but dispute that the district was required to offer exactly the same services to Student in the virtual model once it had offered FAPE in another setting. The next question to address, then, is whether a school district has the obligation to offer FAPE to students with disabilities in each and every learning model that is offered to families. The guidance from the federal Department of Education for services during the pandemic emphasized that federal disability law allows for flexibility in determining how to meet individual needs of students and stressed that specific methodologies are

¹⁶ 34 C.F.R. § 300.114(a)(2).

¹⁷ 34 C.F.R. § 300.115.

¹⁸ 34 C.F.R. § 300.116(d).

¹⁹ *See, e.g., A.K. v. Gwinnett County School Dist.*, 62 IDELR 253 (11th Cir. 2014) ("It seems clear, then, that the statute favors reintegrating children into the school setting, where they can socially interact with other children.") (Citation omitted).

not required. Districts do not have to provide the exact same methodology to children with disabilities as to children without disabilities; they must, however, provide equally effective alternate access. In this case, Respondents determined that the modified hybrid model provided Student an equally effective alternative access to the curriculum. Respondents' decision is supported by the evidence. While Respondents offered Student FAPE via the modified hybrid model, Complainants elected for Student not to participate in the recommended learning model and selected the virtual learning model instead. Having offered FAPE via the modified hybrid model, Respondents' refusal to provide an in-person paraprofessional in Complainants' home does not constitute a denial of FAPE.

Finally, Complainants argue that Respondents' denial of a one-to-one paraprofessional in the home setting was not an individualized determination based on Student's unique circumstances, but rather based on a blanket personnel decision at the district level. There was evidence presented at hearing that the district had concerns about sending its paraprofessionals into homes in a pandemic situation where the district would have little to no control over COVID-19 mitigation measures being utilized in those homes. That is a valid consideration on the part of the district, which was trying to balance the health and safety of its students and families with health and safety of its staff. While Complainants argue that the district's concern about sending paraprofessionals into private homes took focus off of Student's individualized needs, the evidence reflects that the fall planning process by the IEP team focused intensely on Student's needs. The district took the input provided by Parents in the first IEP team meeting regarding safety concerns and crafted COVID-19 mitigation measures that addressed Parents' desire for Student to stay relatively isolated but still allowed Student to receive hands-on paraprofessional assistance in the school building. The district's offer of an entirely separate classroom and restroom for Student reflects genuine consideration and incorporation of parental input. The district did not simply reject Parents' proposal of a paraprofessional in the home setting and recommend that Student participate in the same hybrid model as every other student in the district; careful consideration was given to how to make Student safe. The district's actions were in keeping with the guidance from both the state and federal government to be flexible in crafting solutions to provide FAPE to students with disabilities under pandemic conditions.

It is worth noting that despite the fact that the district did not recommend the virtual learning model for Student, the district has provided extensive support for Student in the virtual model. The district provides one-to-one virtual paraprofessional support to Student for both synchronous and asynchronous learning. His specially designed instruction is delivered via videoconference and Student is making progress in his goals. The district is open to collaborating with Parents and Student to identify and implement solutions that further decrease Student's reliance on hands on assistance from Mother during the school day.

Prevailing Party: Respondents, in their post-hearing brief, have asked for a determination that they are the prevailing party in this action. Under the IDEA, federal district courts have

jurisdiction over awards of attorneys' fees.²⁰ 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

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

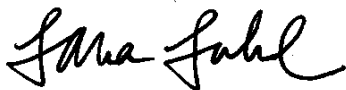
(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.²¹

Based upon the above Conclusions of Law, Respondents are the prevailing party in this action. Complainants have failed to establish that Respondents' denial of an in-person one-to-one paraprofessional for Student in the home setting constitutes a denial of FAPE. 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

Complainants have not proven that Respondents denied Student a free appropriate public education as alleged in the due process complaint. Complainants' requested relief is therefore denied and the due process complaint is dismissed.

Dated this 12th day of March, 2021.



Laura E. Lockard
Administrative Law Judge

²⁰ 20 U.S.C. § 1415(i)(3)(A).

²¹ 20 U.S.C. § 1415(i)(3)(B)(i).

Docket No. 21DOESE0006

Page 20

cc: Megan Regennitter, Attorney for Complainants (via electronic mail)
mregennitter@iowafirm.com

Katherine Beenken, Attorney for Respondents (via electronic mail)
kbeenken@ahlerslaw.com

Cheryl Smith, DOE (via electronic mail)
cheryl.smith@iowa.gov