

IOWA DEPARTMENT OF EDUCATION

In re State Complaints Concerning )  
House File 847 and Children with )  
Disabilities ) Nos.: 21-4, 21-5, 21-6, 21-8, 21-10  
)  
Multiple Districts and Area ) ORDER  
Education Agencies, )  
) CITE AS 30 D.o.E. App. Dec. 179 (2021)  
Respondents. )

The parents in the above-listed cases filed state complaints under the Individuals with Disabilities Education Act (“IDEA”), alleging that enforcement of the prohibition on implementing a local face covering requirement by districts contained in House File 847 violated federal law, including the IDEA.

House File 847 added the following new section to the Iowa Code.

**NEW SECTION. 280.31 Facial coverings.** The board of directors of a school district, the superintendent or chief administering officer of a school or school district, and the authorities in charge of each accredited nonpublic school shall not adopt, enforce, or implement a policy that requires its employees, students, or members of the public to wear a facial covering for any purpose while on the school district's or accredited nonpublic school's property unless the facial covering is necessary for a specific extracurricular or instructional purpose, or is required by section 280.10 or 280.11 or *any other provision of law*.

2021 Iowa Acts, House File 847, § 28 (adopting new Iowa Code § 280.31) (emphasis added). The Department has not been enforcing House File 847 since September 13, 2021, when the United States District Court for the Southern District of Iowa issued a temporary restraining order in *Arc of Iowa v. Reynolds*, 4:21-cv-00264. The court subsequently issued a preliminary injunction which remains in place at this time.

The question is whether the IDEA is “any other provision of law” that would allow an exception to section 280.31. After full consideration, the Department concludes it is and it does.

#### *Jurisdiction and Timelines*

The Department has jurisdiction of the parties. 34 C.F.R. § 300.153. An IDEA complaint need not be filed by a parent and need not concern a specific child. *Id.* Some of these complaints do not concern specific children with disabilities; however, they are still received and investigated. The Department will only investigate allegations of IDEA violations. *Id.* § 300.153(b)(1). The Department does not have jurisdiction under the state complaint process over allegations of non-IDEA violations. *See, e.g., In re B.D.*, 27 D.o.E. App. Dec. 979, 981 (2015). The complaints are timely. 34 C.F.R. § 300.153(c).

The timeline to decide these state complaints is extended to the present date. The Department finds and concludes that “[e]xceptional circumstances exist with respect to a particular complaint.” *Id.* § 300.152(b)(1)(i). This is due to the novelty and broad public import of the question, including the need to consult with guidance documents from the United States Department of Education. *See, e.g., Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act*, 79 IDELR 232 (OSERS 2021) (hereinafter “*Return to School Roadmap*”); *Letter to Special Education and Early Intervention Partners*, 79 IDELR 139 (OSERS & OSEP 2021) (hereinafter “*Letter to Partners*”).

The timeline is also extended due to repeated communications from a particular complainant about this subject matter but not directed to state complaint officials. Extra time was needed to gather and review these unorthodox communications, including Twitter posts about the chief author of this decision. The Department has considered those communications and given them the weight they deserve.

### *Legal Background*

The scope of the Department's review of an IDEA state complaint is well-settled.

IDEA regulations and state rules require the Iowa Department of Education to investigate any complaint alleging a public agency violated a provision of the IDEA or of Iowa Administrative Code chapter 281-41. Iowa Admin. Code r. 281 – 41.153(2). The Department is to make an independent assessment of the complaint. Iowa Admin. Code r. 281 – 41.152(1). I make the following findings of fact by a preponderance of the evidence when the record is considered as a whole. *Letter to Reilly*, 64 IDELR 219 (OSEP 2014). Consistent with *Letter to Reilly*, I do not assign the burden of producing evidence to either party.

The Department assesses the actions taken by the public agencies from the vantage point of when the public agencies acted. They are not judged with the benefit of hindsight. *K.E. v. Independent Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011).

The actions of the public agencies are viewed through a compliance lens. The standard is "compliance with the law's basic requirements." *IDEA State Complaint Decision 14-01*, 26 D.o.E. App. Dec. 390, 400 (2013). Failure to implement recommended practices or best practices will not result in a finding of noncompliance, assuming that the law's mandatory minimum terms have been met. *Id.*

*State Complaint Concerning Seclusion Rooms*, 28 D.o.E. App. Dec. 41, 43-44 (2017).

By accepting a grant under the IDEA, the State of Iowa is bound by the IDEA's requirements. 20 U.S.C. § 1412(a). The IDEA requires all children with disabilities to be provided a free appropriate public education ("FAPE"). 34 C.F.R. § 300.101. This includes specially designed instruction, support and related services, and "program

modifications” reasonably calculated to enable the child to advance toward annual goals, to access and make progress in the general curriculum, and “to participate in extracurricular and other nonacademic activities.” *Id.* § 300.320(a)(4). Special education, related services, and supplementary aids and services must be “based on peer reviewed research, to the extent practicable.” *Id.*; see also Perry A. Zirkel & Tessie Rose, *Scientifically Based Research and Peer-Reviewed Research Under the IDEA*, 25 J. Spec. Educ. Leadership 36 (2009).

Children with disabilities are entitled to education in the least restrictive environment (“LRE”). 34 C.F.R. § 300.114. That federal regulation provides:

- (2) Each public agency must ensure that -
  - (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
  - (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*Id.* § 300.114(a)(2). Each public agency must ensure that children with disabilities have an equal opportunity to participate in “nonacademic and extracurricular services and activities,” which

may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

*Id.* § 300.107. Each public agency must ensure that each child with a disability “have available ... the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.” *Id.* § 300.110.

Each child’s IEP Team determines what is necessary for each child’s FAPE. *Letter to Anonymous*, 18 IDELR 969 (OSEP 1992). A school board does not have the authority to override or modify an IEP Team’s decision. *Id.* If a state law or policy conflicts with the IDEA, it must yield. *See, e.g., Monahan v. Nebraska*, 645 F.2d 592 (8th Cir. 1981).

#### *IDEA and House File 847*

Consistent with the IDEA, IEP Teams have the authority to determine whether and the extent to which a requirement for masks or cloth face coverings is necessary for a child to receive a FAPE. This would be a program modification. *See* 34 C.F.R. § 300.320(a)(4). A state law that would attempt to limit an IEP Team’s ability to require some form of masking around an individual child runs the risk of running afoul of the IDEA assurances the State has made, *see* 20 U.S.C. § 1412(a), and must yield to the IDEA to the extent the state law results in the denial of a FAPE. *Accord Return to School Roadmap*, 79 IDELR 232, at C-8 through C-10.

In considering the interaction between the IDEA and House File 847, the Department is concerned that application of House File 847 without regard to the “or any other provision of law” safety valve, might lead to a forced choice between in-person instruction without masks and virtual instruction without masks. While virtual instruction may be necessary for a FAPE and may be a particular child’s LRE, it does

not follow that virtual instruction is the LRE and provides a FAPE for all children who need some form of masking. This forced choice runs the risk of depriving children with disabilities of, among other things, IDEA-required special education and support and related services, *see* 34 C.F.R. § 300.320(a), of education in the LRE, *see id.* § 300.114, of an equal opportunity to participate in extracurricular and nonacademic activities and services, *see id.* § 300.107, and of access to a full range of program options, *see id.* § 300.110. This risk is legally intolerable. *Accord Return to School Roadmap*, 79 IDELR 232, at C-10.

In making the decision to require masks or cloth face coverings to support a child with a disability and that child's access to a FAPE, any decision must be individualized based on the child's data and the school's circumstances. A one-size approach to implementing masks for children with disabilities is just as legally intolerable as not allowing any mask requirements for children with disabilities. In considering this question, the IEP Team must start with less restrictive alternatives. Specifically, the extent of the masking requirement must be directly related to the extent that it is necessary for a FAPE in the least restrictive environment.

In considering a request from a parent to adopt some variety of mask requirement, an IEP Team is not bound by a parent demand. The IEP Team must consider the parent's demand but must grant it only if the demand is necessary for a FAPE. If the public agency rejects the parent's demands, the parent is entitled to a prior written notice. 34 C.F.R. § 300.503. If a parent disagrees with an IEP Team's decision on

masking (or any other IEP Team decision), the parent has the IDEA's procedural safeguards. *Id.* § 300.504.

In considering a request for a mask requirement, a physician statement is not binding. It is entitled to respectful consideration; however, IEP Teams make special education decisions, not private medical providers. *M.M. v. District 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012). A private provider's opinion is one very important piece of a broader child-specific puzzle, but only a piece.

In considering a request for a mask requirement, the IEP Team must base its decision based on child-specific and school-specific data, as well as "peer-reviewed research to the extent practicable." 34 C.F.R. § 300.320(a). Evidence that is not peer-reviewed or does not have similar indicia of reliability is not entitled to much weight from the IEP Team.

If an IEP Team decides that some form of mask requirement is necessary for a FAPE, the school district may not override that decision. *Letter to Anonymous*, 18 IDELR 969. It may, however, use the IDEA's procedural safeguards to challenge the decision. 34 C.F.R. § 300.504.

If an IEP Team decides that some form of mask requirement is necessary for a FAPE, it may require students and staff to wear masks around the child. This is consistent with other situations in which a child or adult is required to modify their behavior to ensure a child with a disability has access to a FAPE (e.g., preferential seating, using the child's assistive technology, using heightened sanitation practices around the child, using the child's communication method or communication device).

If a child with a disability is unable to wear a mask because of a disability, any conflict between the respective child's needs must be resolved consistent with the IDEA and without reflexively preferring one child's needs over the other's based on whether the child needs or does not need a mask requirement.

To the extent that an IEP Team has not considered the degree to which mask wearing around the child is necessary for a child to receive a FAPE, this complaint is CONFIRMED.

The Department cannot confirm these complaints to the extent that they demand universal, district-wide mask requirements. There is nothing in the IDEA that would impose that requirement. Furthermore, there is nothing in non-binding guidance documents from the United States Department of Education that would purport to impose such a requirement. *Return to School Roadmap*, 79 IDELR 232; *Letter to Partners*, 79 IDELR 139. To the contrary, the United States Department of Education's non-binding guidance documents seem to acknowledge that universal masking is a best practice. *Letter to Partners*, 79 IDELR 139 ("should", "recommends"). The Department will not confirm a complaint that is based solely upon a failure to do a best or recommended practice. *State Complaint Concerning Seclusion Rooms*, 28 D.o.E. App. Dec. at 44. This portion is NOT CONFIRMED.

In reaching this decision, the Department is mindful of current litigation challenging House File 847 and an order from the Centers for Disease Control and Prevention regarding masking on school buses. Those matters have statutory

underpinnings that are different from the IDEA and they do not change the analysis in this decision.

#### *Corrective Action*

Because the Department found IDEA violations, it must order corrective action. 34 C.F.R. § 300.151(b). This includes “corrective action appropriate to address the needs of the child, such as compensatory services or monetary reimbursement.” *Id.* § 300.151(b)(1). Corrective action may also include technical assistance activities. *Id.* § 300.152(b)(2)(i). In developing corrective action, the Department must consider the rights of other children with disabilities who are served by the District and AEA. *Id.* § 300.151(b)(2).

For each individual child who is IDEA-eligible in these state complaints, the child’s IEP Team shall meet to determine whether some form of masking is required for a child to receive a FAPE. If so, the IEP Team will require such masking and consider whether the child is owed compensatory education due to the failure to require masking. This shall be completed within forty-five days of the date of this decision. If the IEP Team does not come to an agreement, the public agencies shall report this to the Department, which will resolve any disagreement with a supplemental order.

Each area education agency in the state shall distribute this decision to each superintendent within its boundaries and to all regional administrators or facilitators. Each AEA shall report to the Department when this is complete, but no later than twenty-one days of the date of this decision.

### *Conclusion*

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

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

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

Any party that disagrees with the Department's decision may file a petition for judicial review under section 17A.19 of the Iowa Administrative Procedure Act. That provision gives a party who is "aggrieved or adversely affected by agency action" the right to seek judicial review by filing a petition for judicial review in the Iowa District Court for Polk County (home of state government) or in the district court in which the party lives or has its primary office. A party may also have the right to seek review through a due process complaint before an IDEA administrative law judge.

Because of the broad public importance of these questions, this decision will be published in the Department's appeal book.

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

Done on December 1, 2021, in Des Moines.

Sincerely,

*/s/ Original Signed*  
Thomas A. Mayes  
General Counsel  
515-281-8661

Concur,

*/s/Original Signed*  
Barbara Guy  
State Director of Special Education  
515-281-5265

*/s/ Original Signed*  
Amy J. Williamson  
Deputy Director  
515-281-3333