

## COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.05  
Complaint Investigator: [Redacted]  
Date Complaint Filed: August 26, 2021  
Date of Report: October 20, 2021

### Issues Investigated

1. Did the District allow the Parent to appropriately participate in the development and implementation of the Student's IEPs, as required by 92 NAC 51-009.01A?
2. Did the District timely review and revise the Student's 2019/2020 and/or 2020/2021 IEPs, as required by 92 NAC 51-007.01?
3. Did the District provide special education and related services to the Student in accordance with the Student's IEPs, as required by 92 NAC 51-007.02?
4. Did the District provide the Student with a FAPE, as required by 92 NAC 51-004.01?

### Documents Reviewed by Investigator

#### *From the Complainant:*

- Letter of Complaint dated August 25, 2021; received by NDE on August 26, 2021;
- Email from School Social Worker to Parent dated August 15, 2019;
- Emails between the Parent and School Social Worker, dated August 21, 2019;
- Emails between the Parent and School Social Worker, dated August 23-26, 2019;
- Emails between the parent and District Staff, dated August 27-29, 2019; and
- Email from District Staff to the Parent, dated September 21, 2020.

#### *From the School District*

- Response from District, dated September 23, 2021; received by complaint investigator on September 28, 2021;
- Notice and Consent for Initial Evaluation, dated September 24, 2018;
- Medical Records Release from Parent, dated September 24, 2018;
- Notice of Multidisciplinary Team and Individualized Education Program Team Meeting, dated October 29, 2018;
- Student's Initial Evaluation Report, dated November 6, 2018

- Student's Initial Multidisciplinary Team (MDT) Report, dated November 6, 2018;
- Student's Initial Individualized Education Program (IEP), dated November 6, 2018;
- Student's IEP, dated April 9, 2019;
- Consent for Special Education Services, signed by Parent, dated February 24, 2021;
- Student's IEP, dated March 22, 2021;
- Student's Kindergarten Report Card, school year 2020/2021
- Contact Log between Parent and District Staff from August 1, 2020 to September 21, 2021;
- District's Message History with Parent from September 18, 2020 to May 21, 2021;
- Emails between District Staff and Parent from August 6, 2020 to August 30, 2021;
- Student's Enrollment History in the District; and
- Student's Period Attendance Detail in the District.

#### *Interviews Conducted by Investigator*

- Telephonic interviews with the School Principal, Special Education Teacher/Case Manager, and General Education Teacher.

#### **Introduction**

The Student is 7 years of age and resides with the Parent. During the relevant time period involved in this complaint investigation, the Student attended an elementary school in the District (the School). The Student's initial special education MDT evaluation was conducted by the District in November, 2018, when the Student was four years of age (November 6, 2018, Evaluation Report). The MDT determined that the Student was a student with a disability and was eligible to receive special education services under the disability classification of Developmental Delay (DD) (November 6, 2018, MDT Report). On November 6, 2018, School staff and the Parent met to develop an initial IEP for the Student (Initial IEP dated November 6, 2018). On April 9, 2019, the Student's IEP team, including the Parent, met to review and revise the Student's IEP (IEP dated April 9, 2019). The documentation indicates that the Parent was invited to, and participated in, the IEP team meetings held during the 2018/2019 school year. On October 14, 2019, the Parent dis-enrolled the Student from the District. On September 14, 2020, the Parent re-enrolled the Student in the School through the District's online enrollment system. The Student participated in the District's Remote Learning Program, but the Student did not receive special education services from the District. School staff made three documented attempts to

contact the Parent beginning September 18, 2020, and stated to the Parent that an IEP team meeting was required in order for the Student to continue to receive special education services. The Student returned to in-person learning on February 10, 2021. School staff again sought consent for services from, and to schedule an IEP team meeting with, the Parent. On February 17, 2021, the Parent responded to School staff that she was ready to proceed and on February 24, 2021, the Parent signed and returned Consent for Services. An IEP team meeting was eventually scheduled and held on March 22, 2021, which the parent attended and participated in. On August 24, 2021, the Parent again dis-enrolled the Student from the School and applied for a homeschool exemption. The Parent filed the Complaint in this matter against the District on August 26, 2021. The parties thereafter discussed the option to participate in mediation, but mediation has not been conducted to date.

This investigation is limited to a review of alleged IDEA violations that occurred not more than one year prior to August 26, 2021. Any facts that are discussed that occurred outside the one-year time period for this investigation are provided for background information only.

#### **Issue # 1**

Did the District allow the Parent to appropriately participate in the development and implementation of the Student's IEPs, as required by 92 NAC 51-009.01A?

State rule 92 NAC 51-009.01A provides as follows:

009.01A      *The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.*

#### *Allegations*

The Parent has been denied the opportunity to participate in the development and implementation of the Student's IEPs.

#### *Parent Position*

The Student's Special Education Case Manager failed to appropriately communicate with the Parent regarding the Student's behavior and special education services.

#### *District Response*

The District's Letter of Response dated September 23, 2021, states that after the Parent re-enrolled the Student in the District on September 14, 2020, District staff emailed the Parent on three separate occasions in September and October to

ask whether the Parent wanted the Student to receive special education services and proposed dates for an IEP team meeting for the Student. The Parent did not respond to the District's inquiries. In February, 2021, the Student's teacher again emailed the Parent and indicated that in order for the Student to be placed in special education the IEP team would need to meet to update the Student's IEP and to obtain consent for services. The Parent responded that she was ready to proceed. On February 24, 2020, the Parent provided signed consent for services. An IEP team meeting was scheduled and held on March 22, 2021, which the Parent attended and participated in.

### *Investigative Findings*

1. The Student is 7 years of age and resides with the Parent. During the relevant time period involved in this complaint investigation, the Student was enrolled in the District and attended the School. (Response from District).
2. District records indicate that the Student was referred for Early Childhood Special Education services, and received an initial special education MDT evaluation by the District, in November, 2018, when the Student was four years of age. The MDT determined that the Student was a student with a disability and was eligible to receive special education services under the disability classification of DD. (November 6, 2018, Evaluation Report).
3. On November 6, 2018, School staff and the Parent met to develop an initial IEP for the Student. (Response from District).
4. On April 9, 2019, the Student's IEP team, including the Parent, met to review and revise the Student's IEP.
5. The District's documentation indicates that the Parent was invited to, and participated in, all of the IEP team meetings during the 2018/2019 school year.
6. The Student began the 2019/2020 school year in kindergarten at the School. Parent and District records indicate that the Student experienced some significant behavior issues in August, 2019, which was the subject of a significant amount of communication between School staff and the Parent. The Student was suspended for several days for aggressive behavior toward school staff. (Response from District, Emails between School and Parent).
7. On October 14, 2019, the Parent dis-enrolled the Student from the District. The Parent enrolled the Student in a private daycare for students with challenging behaviors for the rest of the 2019/2020 school year. (Response from District). This private daycare is located within the jurisdictional boundaries of the District. The documentation does not include a written revocation of consent for special education services signed by the Parent.

8. On September 14, 2020, the Parent re-enrolled the Student in the District through the District's online enrollment system. At that time, the District was entirely on a remote learning plan due to the ongoing COVID-19 pandemic concerns. The Student initially participated in the District's Remote Learning Program. (Response from District).
9. School special education staff made three documented attempts to contact the Parent soon after the Student was enrolled, beginning on September 18, September 21 and October 19, 2020. In these emails, School staff indicated to the Parent that if she wanted the Student to receive special education services an IEP team meeting would need to be held to update the Student's IEP. The September 21, 2020, email also stated that the Student's IEP "is expired, but if you still want [the Student] to receive Special Education services, we will need to hold a meeting to update the IEP so it is current." The Parent did not respond to these three emails. (Emails between School and Parent).
10. The Student's IEP team did not meet without the Parent to review and revise the Student's IEP. The Student did not receive special education services from the School during this remote learning period. (Response from District).
11. School staff have reported that the Student's attendance and participation during remote learning was very poor, and the documentation supports this claim. (Response from District and Attendance Detail).
12. The Student returned to in-person learning at the School on February 10, 2021. (Response from District).
13. On February 17, 2021, School staff again emailed the Parent to ask whether she wanted the Student to receive special education services. The email also stated that "we will need to hold a meeting to update [the Student's] IEP and you will need to sign a consent form to be placed in Special Education." The Parent responded to this email and stated "Ok I am ready." (Emails between School and Parent).
14. On February 24, 2021, the Parent returned a signed Consent for Services. (Consent for Services). On the same day, the Student's Special Education Case Manager sent an email to the Parent thanking her for agreeing to have the Student receive special education services and introducing herself as the Student's case manager. The Case Manager further stated that the IEP team would meet after Spring Break to formalize the Student's IEP. (Email from School to Parent). Spring Break for the 2020/2021 school year was March 8-12, 2021, so the School was not in session from March 6 through March 14.

15. An IEP team meeting was eventually scheduled and held on March 22, 2021, which the parent attended and participated in. (March 22, 2021, IEP).
16. On August 16, 2021, the first day of school, the Parent emailed the Student's Case Manager and provided her phone number for emergencies and expressed her desire to keep communication open as possible. (Email from Parent).
17. On August 17, 2021, the Case Manager emailed the Parent to inform her that the Student's behavior during that afternoon was very disruptive to the class and that the Student did not follow any direction or redirection from adults. The Parent responded later that afternoon that she would "reinforce school time at home," and also that she had signed the Student up for a private behavior management therapy program and would let the Case Manager know when it started so they could monitor progress. (Emails between Case Manager and Parent).
18. On August 18, 2021, the Parent emailed the Case Manager and expressed several concerns regarding the School's response to the Student's disruptive behavior. The Parent also indicated that the Student would be bringing a lunch to school to help the Student with the outside therapy the Student would be receiving, and further indicated that she was thinking of having an additional private program provide outpatient therapy to the Student. (Email from the Parent to Case Manager).
19. In the morning on August 19, 2021, the Parent sent an email to the Student's Case Manager and other School staff stating that the Student could eat all the foods sent by the Parent at any time and that the Student will eat school lunch. The Parent also stated that "it seems that [the Student's IEP] is not being followed already." The Parent also stated that she "would like the IEP reevaluated. The resources once again seem to not be there." The parent further indicated that she believed a lack of rapport between herself and the Case Manager was affecting the implementation of the Student's IEP. Later in the morning the Parent sent an additional email asking School staff to email her when the student becomes disruptive and stated that "I have to try and keep record to prove [the student's] condition is chronic." The School's Assistant Principal responded to the Parent's email and agreed to email her when the student is disruptive to the learning environment. School staff report that the Parent requested a meeting with School staff that afternoon. The Assistant Principal sent an email to the Parent and School staff regarding meeting that afternoon "to review and make plans to support [the Student] . . .," and to "get release of information paperwork completed

- for [the Student's outside therapists] so all lines of communication are open." The Parent was unable to attend the meeting on August 19th due to her work schedule. (Emails from Parent and Assistant Principal).
20. The Student's Case Manager sent an email to the Parent to reschedule the meeting to the following day, August 20th, and asked for clarification regarding the school lunch issue and the intended use of the food provided by the Parent, the Student's medication, and the student's therapy schedule. Later that evening the Parent responded to the Case Manager's email as follows: "At this point I'm just tired of emailing you, lol. It's not effective communication clearly because when things change YOU rely on it too much and it's become a crutch for you. You want to speak to me, call me [telephone number deleted]." (Emails between Case Manager and Parent).
  21. At this time the Parent began making efforts to transfer the Student to another elementary school in the District. The District's Contact Log describes several relevant communications between District staff and the Parent regarding a transfer of the Student. On August 20, 2021, School staff called the Parent and informed her that her request to transfer the Student to [school name deleted] was denied by that school "due to capacity and behaviors and attendance." (Contact Log).
  22. On August 20, 2021, School records indicate that the Parent attended the District's enrollment fair to discuss a transfer for the Student. In response, the District's Student Placement staff contacted the Special Education Director regarding the Parent's transfer request. (Contact Log).
  23. On August 23, 2021, the Special Education Director spoke with the Parent and the Parent shared her concerns regarding the School and again requested a new school for the Student. The Special Education Director spoke with Student Placement regarding a transfer. (Contact Log).
  24. On August 24, 2021, Student Placement called the Parent. Student Placement offered to have the Case Manager at the School changed, but the Parent stated that she was not interested in the Student remaining at the School. Student Placement indicated a willingness to contact other school principals for a transfer but stated there were no guarantees. The Parent explained that she was looking into home school or private school because the Student "needs a classroom smaller than 15 students." The Parent stated that she would think it over and call back to discuss how to move forward. (Contact Log).
  25. On August 24, 2021, the Parent dis-enrolled the Student from the School. (Student Enrollment History).
  26. On August 26, 2021, the Parent filed the Complaint in this matter.

27. On August 30, 2021, the Parent informed the School Principal that she had submitted an application to the District for a homeschool exemption for the Student, which could take six weeks for approval, and asked how she should proceed forward. The Principal informed the Parent that she should get started with the curriculum right away and that the School would note in the Student's attendance record that the Parent was working on the homeschool process. The Principal further stated that the School was ready to partner with the Parent should she decide to bring the Student to the School. (Emails between Parent and School Principal).

### *Summary and Conclusions*

The Federal regulations and Nebraska State Rule 51 provide that a state complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with 92 NAC 51-009.11. 34 CFR §300.153(c); and 92 NAC 51-009.11B5. The Complaint in this matter was received on August 26, 2021. The facts show that the Student's most recent enrollment in the District by the Parent occurred on September 14, 2020, and was a transfer from a private school in the state. A review of the Parent's complaint indicates that many of the factual allegations and claims made by the Parent occurred prior to August 26, 2020. In view of the statutory jurisdiction of this complaint investigation, this investigation will not include any alleged violations occurring prior to August 26, 2020, and any of the findings of fact herein related to periods prior to that date are for background purposes only.

The IDEA Federal regulations and State Rule 51 require that each school district or approved cooperative must ensure that parents of children with disabilities have the opportunity to participate in meetings described in 92 NAC 51-009.01A, or are afforded the opportunity to participate. 92 NAC 51-009.01B and 009.02C. A meeting may be conducted without a parent in attendance if the school district or approved cooperative is unable to convince the parents they should attend. In this case, the school district must keep a record of its attempts to arrange a mutually agreed on time and place. 92 NAC 51-007.06D. In developing the IEP school personnel are required to consider the concerns of the parents for enhancing the education of their child (20 USC §1414(d)(3)(A)(ii)). A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (Fuhrmann v. East Hanover Board of Education, 993 F. 2d 1031,1036 (3rd Cir. 1993).)

The IEP team should work towards a general agreement, but the district is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a FAPE and to make sure that eligibility determinations

are appropriately conducted. "The core of the statute, however, is the cooperative process that it establishes between parents and schools. School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them." Schaffer v. Weast, 126 S. Ct. 528, 536 (2005). Although parents are "equal" participants in the IEP process, they do not have veto power over the IEP. Garden Grove Unified Sch. Dist., 115 LRP 20924 (SEA CA 05/05/15). Also, there is not a "majority vote" rule for making decisions in IEP team meetings. According to the ED, if the team cannot reach consensus, the public agency must provide the parents with PWN of the agency's proposals or refusals, or both, regarding the child's educational program. 34 CFR §300.503(a); Letter to Richards, 55 IDELR 107 (OSEP 2010) and Letter to Lieberman, 56 IDELR 141 (OSEP 2008); and Buser v. Corpus Christi Indep. Sch. Dist., 20 IDELR 981 (S.D. Tex. 1994), aff'd, 22 IDELR 626 (5th Cir. 1995).

At the time that the Parent enrolled the Student in the District on September 14, 2020, the Student's April 9, 2019, IEP was "expired," meaning that it had been more than one year since it had been developed by the Student's IEP team at the School. The Student's April 9, 2019, IEP was subsequently reviewed and revised by the Student's IEP team on March 22, 2021. The facts set forth above indicate that the Parent was notified of, and fully participated in, the IEP team meetings held on April 9, 2019, and March 22, 2021, each of which resulted in the development of an IEP for the Student. It is also clear that the Parent was invited to, and participated in many additional meetings with School staff regarding the Student. In addition, the documentation includes a great number of emails and in-person and telephone contacts between the Parent and members of the Student's IEP team, including School administration, the General Education Teacher, the Special Education teachers and the Student's Case Managers. The attendance of the Parent at the numerous meetings, including the March 22, 2021, IEP team meeting, as well as the very large number of additional communications between School staff and the Parent all indicate that the Parent was afforded an opportunity to participate in the development and implementation of the Student's IEP.

Therefore, it is concluded that the District did afford the Parent the opportunity to participate in the development and implementation of the Student's IEPs, as required by 92 NAC 51-009.01A. As to Issue No. 1, the District is not cited. Corrective Action is **not required**.

#### *Issue # 2*

Did the District timely review and revise the Student's 2019/2020 and/or 2020/2021 IEPs, as required by 92 NAC 51-007.01?

State rule 92 NAC 51-007.01 provides as follows:

007.01        *An IEP shall be developed, reviewed, revised, and implemented for each child who receives special education and related services.*

#### *Allegations*

The District Failed to timely review and revise the Student's April 9, 2019, IEP.

#### *Parent Position*

The Student's Special Education Case Manager managed an expired IEP.

#### *District Response*

The District's Letter of Response dated September 23, 2021, states that after the Parent re-enrolled the Student in the District on September 14, 2020, District staff emailed the Parent on three separate occasions in September and October to ask whether the Parent wanted the Student to receive special education services and proposed dates for an IEP team meeting for the Student. The Parent did not respond to these inquiries. In February, 2021, the Student's teacher again emailed the Parent and indicated that in order for the Student to be placed in special education the IEP team would need to meet to update the Student's IEP and to obtain consent for services. On February 17, 2021, the Parent responded that she was ready to proceed. On February 24, 2020, the Parent provided signed consent for services. An IEP team meeting was scheduled and held on March 22, 2021, which the Parent attended and participated in.

#### *Investigative Findings:*

1. On April 9, 2019, the Student's IEP team, including the Parent, met to review and revise the Student's IEP. (April 9, 2019, IEP).
2. The District's documentation indicates that the Parent was invited to, and participated in, the development of the April 9, 2019, IEP. (March 22, 2021, IEP).
3. The Student began the 2019/2020 school year in kindergarten at the School. (Student Enrollment History).
4. On October 14, 2019, the Parent dis-enrolled the Student from the District and enrolled the Student in a private school located within the jurisdictional boundaries of the District. (Student Enrollment History). (Student Enrollment History and Response from District).
5. On September 14, 2020, the Parent re-enrolled the Student in the District. At that time, the District was entirely on a remote learning plan due to the ongoing COVID-19 pandemic concerns. The Student initially participated in the District's Remote Learning Program. (Response from District).

6. On September 14, 2020, the Student's April 9, 2019, IEP was expired because it had been more than one year since the IEP had been reviewed and revised. (See IEPs).
7. School special education staff made three documented attempts to contact the Parent soon after the Student was enrolled, on September 18, September 21 and October 19, 2020. In these emails, School staff asked the Parent whether she wanted the Student to receive special education services and, if so, stated that an IEP team meeting would need to be held to update the Student's IEP. The September 21, 2020, email also stated that the Student's IEP "is expired, but if you still want [the Student] to receive Special Education services, we will need to hold a meeting to update the IEP so it is current." The Parent did not respond to any of these three emails. (Emails from School).
8. The District did not at that time take any further action to schedule an IEP team meeting to review and revise the Student's expired April 9, 2019, IEP. (Response from District).
9. The Student returned to in-person learning at the School on February 10, 2021. (Response from District).
10. On February 17, 2021, School staff again emailed the Parent to ask whether she wanted the Student to receive special education services. The email also stated that "we will need to hold a meeting to update [the Student's] IEP and you will need to sign a consent form to be placed in Special Education." The Parent quickly responded and stated "Ok I am ready." (Emails from School to Parent).
11. On February 24, 2021, the Parent returned a signed Consent for Services. On the same day, the Student's Special Education Case Manager sent an email to the Parent and stated that the IEP team would meet after Spring Break to formalize the Student's IEP. Spring Break for the 2020/2021 school year was March 8-12, 2021, which means that school was not in session from March 6 through March 14. (Consent for Services and Email from Case Manager to Parent).
12. An IEP team meeting was eventually scheduled and held on March 22, 2021, which the parent attended and participated in. (March 22, 2021, IEP).
13. On August 24, 2021, the Parent again dis-enrolled the Student from the School. (Student Enrollment History).

### *Summary and Conclusions*

The IDEA Federal regulations and State Rule 51 contain very specific provisions regarding the timing and procedures for reviewing and revising a child's IEP. After the initial IEP meeting, IEPs must be in effect at the beginning of each

school year . . . for each child with a verified disability within the jurisdiction of each school district and approved cooperative in the state. 92 NAC 51-007.09C, and 92 NAC 51-007.02A. The IEP team shall review the child's IEP periodically, but not less frequently than annually, to determine the educational placement of a child with a verified disability and whether the annual goals for the child are being achieved. 92 NAC 51-007.09C, and 92 NAC 51-008.01E1. The school district or approved cooperative shall take steps to ensure that one or both of the parents of the child with a disability are present at the IEP conference or are afforded the opportunity to participate. 92 NAC 51-007.06A. However, a meeting may be conducted without a parent in attendance if the school district or approved cooperative is unable to convince the parents they should attend. In this case, the school district must keep a record of its attempts to arrange a mutually agreed on time and place. 92 NAC 51-007.06D. Finally, if at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the school district or approved cooperative is not required to convene an IEP team meeting or develop an IEP under 92 NAC 51-007 for the child for further provision of special education and related services. 92 NAC 51-009.08B4d.

As set forth above, on October 14, 2019, subsequent to the initial provision of special education services to the Student, and the development of the April 9, 2019, IEP, the Parent dis-enrolled the Student from the District and placed the Student in a private school within the jurisdictional boundaries of the District. There is no evidence in the record that the Parent signed a Revocation of Consent for the provision of special education services to the Student. Under these facts, the legal authorities set forth above clearly require that after the Student's April 9, 2019, IEP was developed by the School, and the Parent thereafter placed the Student in a private school within the District's jurisdictional boundaries, the District had a continuing obligation to annually review and revise the Student's IEP, and have an IEP in place at the beginning of each subsequent school year. However, the facts indicate that at the time of the Student's September 14, 2020, enrollment in the District, which occurred more than 17 months after the development of the April 9, 2019, IEP, the Student's April 9, 2019, IEP was expired. It is true that the District did initiate efforts to schedule an IEP team meeting with the Parent within days after the Student was re-enrolled in order to review and revise the IEP. However, when the Parent failed to respond to the School's efforts to schedule a meeting, the School should have implemented the Student's expired IEP until it could convince the Parent to attend a meeting, or hold a meeting without the Parent, to review and revise the Student's expired IEP. Rather than doing so, the School waited

four months to obtain the Parent's participation in scheduling an IEP team meeting, without providing any special education services to the Student.

It is concluded that the District failed to annually review and revise the Student's April 9, 2019, IEP and also failed to have an IEP in place for the Student at the beginning of the 2020/2021 school year. Therefore, it is concluded that the District did not timely review and revise the Student's April 9, 2019, IEP.

Based on the foregoing facts and conclusions of law, the District failed to fully implement the requirements of 92 NAC 51-007.01. Thus, the **following corrective action is required.**

*Corrective Action*

1. The District shall require all district and school level general and special education personnel including administrators, teachers, case managers, counselors, instructional coaches, and Team members to attend a training regarding:
  - a. A school-based and District-level system for tracking all student IEPs in the District in order to schedule, plan and hold the annual reviews for each student with an IEP in the District, including all students with IEPs who attend nonpublic schools (or service locations for preschool students) or homeschool located within the jurisdictional boundaries of the District.
  - b. The policies, procedures and practices for ensuring that each eligible student in the District has an IEP in place at the beginning of each school year, including eligible students with IEP's attending nonpublic schools (or service locations for preschool students) or homeschool located within the jurisdictional boundaries of the District.
  - c. The policies, procedures and practices for ensuring that all IEPs are updated at least annually for each eligible student with an IEP in the District including students with IEPs attending nonpublic schools (or service locations for preschool students) or homeschool located within the jurisdictional boundaries of the District.
2. Any and all trainings described above or ordered in the abovementioned corrective action shall be provided by NDE staff.
  - a. The District must contact Jo Gunderson within 14 calendar days of the date of the Investigation Report to complete the following:
    - i. arrange a day and time for the required training which will be conducted virtually;
    - ii. determine who the contact person will be for arranging the virtual training and disseminating the training information.

- b. NDE will provide training materials to the District contact within five days prior to the training.
  - c. The District must submit a sign-in sheet or other evidence that each staff member required to participate in the training was present or attended the training.
  - d. All documentation from the training must be submitted within 10 calendar days of the training date.
3. NDE will review 3 files of students who attend a nonpublic school, a private preschool, or homeschool to ensure IEPs are updated and in place for students who are eligible to receive special education from the District.

### **Issue # 3**

Did the District provide special education and related services to the Student in accordance with the Student's IEPs, as required by 92 NAC 51-007.02?

State rule 92 NAC 51-007.02 provides as follows:

007.02 *School districts or approved cooperatives must provide special education and related services to a child with a disability in accordance with the child's IEP.*

#### *Allegations*

The District failed to implement the Student's expired April 9, 2019, IEP and the March 22, 2021, IEP, and failed provide special education and related services to the Student.

#### *Parent Position*

The Student's behavior issues in the classroom indicate that the Student's Special Education Teacher did not implement the BIP or provide the accommodations and services listed on the Student's IEP.

#### *District Response*

The District's Letter of Response dated September 23, 2021, states that after the Parent re-enrolled the Student in the District on September 14, 2021, the Parent did not provide the District with Consent for Services until February 24, 2021. The District states that the Student received special education services as outlined on the Student's IEP beginning March 23, 2021, following the IEP meeting on March 22, 2021.

#### *Investigative Findings*

1. The Student's April 9, 2019, IEP was the last IEP developed and implemented by the District prior to the beginning of the 2020/2021 school year. (Response from District).

2. The Student's April 9, 2019, IEP provides, in relevant part, as follows:
  - a. The Student's primary disability is identified as DD.
  - b. It was indicated that the Student's behavior could affect the Student's behavior and participation in the classroom setting, as well as social and emotional growth in school.
  - c. The IEP includes a BIP with the following interventions:
    - i. Reinforcement Interventions: being a teacher helper, one-on-one time;
    - ii. Structure/Visual Support Interventions: "classroom visual schedule, social narratives, warnings of upcoming events or changes (ex: 5 min. left, today is special, we will not have centers because we are. . .)";
    - iii. Task Demand Interventions: clear expectations; and
    - iv. Skills to Teach Interventions: ability to request a break, self-regulation.
  - d. Annual Goals were developed in the following areas:
    - i. Classroom Management;
    - ii. Reading; and
    - iii. Math Skills.
3. The Student receives special education services both in the general education classroom and in the resource classroom.
4. The Student began the 2019/2020 school year in kindergarten at the School. On October 14, 2019, the Parent dis-enrolled the Student from the District and enrolled the Student in a private daycare located within the jurisdictional boundaries of the District. (Student Enrollment History).
5. On September 14, 2020, the Parent re-enrolled the Student in 1st grade in the District. At that time, the District was entirely on a remote learning plan due to the ongoing COVID-19 pandemic concerns. The Student initially participated in the District's Remote Learning Program. (Response from District and Student Enrollment History).
6. School staff sent emails to the Parent three times, on September 18 and 21, and October 9, 2020, to ask whether the Parent wanted the Student to receive special education services, to schedule an IEP team meeting and to obtain consent from the Parent, but the parent did not at that time respond to any of the District's emails. (Emails from School to Parent).
7. The Student's IEP team did not meet to review and revise the Student's expired IEP until March 22, 2021. (Response from District).
8. The Student did not receive special education services from the School from September 14, 2020, to March 22, 2021. (Response from District).

9. School staff report, and the documentation does support, that the Student's attendance and participation during remote learning was very poor. The Student's attendance records indicate that the Student was marked absent 21 days during Terms 1-3. (Student Attendance Detail). The Student's General Education Teacher reports that Student was not online during remote learning approximately 95% of the time.
10. The Student returned to in-person learning at the School on February 10, 2021. (Response from District).
11. On February 17, 2021, School staff again emailed the Parent to ask whether she wanted the Student to receive special education services. The email also stated that "we will need to hold a meeting to update [the Student's] IEP and you will need to sign a consent form to be placed in Special Education." The Parent quickly responded and stated "Ok I am ready." (Emails from School to Parent).
12. On February 24, 2021, the Parent returned a signed Consent for Services. (Consent for Services).
13. On February 24, 2021, the Student's Special Education Case Manager sent an email to the Parent and stated that the IEP team would meet after Spring Break to formalize the Student's IEP. Spring Break for the 2020/2021 school year was March 8-12, 2021, which means that school was not in session from March 6 through March 14. (Email from Case Manager)
14. An IEP team meeting was scheduled and held on March 22, 2021, which the parent attended and participated in. (March 22, 2021, IEP).
  - a. The Student's March 22, 2021, IEP and the attached PWN, provide, in relevant part, as follows:
  - b. The Student's primary disability is identified as DD.
  - c. It was indicated that the Parent wants to keep the Student home to work remotely due to concerns about COVID-19.
    - i. Accommodations are identified for the Student as follows:
    - ii. Proximity control near an adult;
    - iii. Adjusted assignments if needed;
    - iv. Breaks if needed;
    - v. Verbal praise;
    - vi. 1 step directions; and
    - vii. Work for five minutes independently then break.
  - d. Supplementary Aids and Services are identified for the Student as follows:
    - i. Math manipulatives;
    - ii. First/then;

- iii. Sentence starter;
  - iv. Visuals to support academic and behavioral;
  - v. Flexible seating.
- e. The IEP includes a BIP with the following interventions:
- i. Sensory/Biological Interventions: movement breaks and stretch bands to stretch or to put on the end of Student's chair;
  - ii. Reinforcement Interventions: Earns time with an adult;
  - iii. Structure/Visual Support Interventions: Visual schedule of day with built in breaks; Visuals to support in reading, math, and writing; tape around the Student's area to stand or sit; and proximity control near an adult.
  - iv. Task Demand Interventions: Adjust assignments; Directions given one step at a time; and Work 5 minutes, then a short break; and
  - v. Skills to Teach Interventions: Curriculum for coping strategies i.e., thoughts and feelings, emotions scale (identify emotions); and Direct social skills lessons on keeping hands and feet to self, raising hand, staying in a signed area.
- f. IEP Progress Reports would be provided to the Parent quarterly.
- g. Annual Goals were developed in the following areas:
- i. Reading;
  - ii. Math Skills;
  - iii. Personal Management Skills; and
  - iv. Writing Skills.
- h. The Student receives Special Education Services from the Special Education Teacher in the general education classroom for 30 minutes per day.
15. The Student's attendance records at the School indicate that during Term 4 the Student was kept home by the Parent and was marked absent from school 43 days, and only attended 9 days. The School Principal reports that during the three years since the Student's initial IEP was developed by the School, the Student has spent a total of approximately 20 days at the School. (Student Attendance Detail and School Principal).
16. The Student's Special Education Teacher for the 2020/2021 school year left the District at the end of the school year for employment in another district. The District reports that the District has been unable to obtain any of said teacher's direct emails with the Parent. The District has not provided any documentation or reports from the Student's 2020/2021

special education teacher regarding implementation of the Student's IEP goals and services. (Response from District).

17. The Student's General Education Teacher for the 2020/2021 school year reports that the accommodations and modifications set forth in the Student's March 22, 2021, IEP were provided to the Student on each occasion that the Student attended school prior to the end of the 2020/2021 school year. The General Education Teacher reports that the Student's Special Education Teacher did provide special education services to the Student and implemented the Student's Behavior Intervention Plan (BIP) in the general education classroom on the few occasions when the student was in attendance at school.
18. The Student's General Education Teacher for the 2021/2022 school year reports that the accommodations and modifications set forth in the Student's March 22, 2021, IEP were provided to the Student in her classroom during the five days that the Student attended school at the beginning of the 2021/2022 school year.
19. On March 24, 2021, the Parent sent a message to the General Education Teacher letting her know that the Student was doing much better since the Student's IEP was in place. (Email from Parent Teacher).
20. The Student's Special Education Teacher/Case Manager for the 2021/2022 school year reports that the accommodations and modifications set forth in the Student's March 22, 2021, IEP were provided to the Student, and she implemented the Student's other IEP services, during the five days that the Student attended school at the beginning of the 2021/2022 school year. The Special Education Teacher/Case Manager reports that the Student's BIP was implemented in the general education classroom.
21. The Student's Kindergarten Report Card provides, in relevant part, as follows:
  - a. Learning Skills (cooperation, responsibility and self-control): Slight improvement over Terms 1-3; no improvement Term 4;
  - b. Reading/Language Arts: no improvement over Terms 1-3; good improvement Term 4;
  - c. Writing: no improvement over Terms 1-3; good improvement Term 4;
  - d. Mathematics: no improvement over Terms 1-3; slight improvement Term 4;
  - e. Science: no improvement over Terms 1-3; no improvements Term 4;
  - f. Art: no improvement;
  - g. Vocal Music: no improvement; and
  - h. Physical Education: good improvement.

22. The District has admitted that the Student's Special Education Teacher for the 2020/2021 school year failed to prepare, and provide to the Parent, a Progress Report for the Student at the end of the school year. (Response from District).
23. During the 2021/2022 school year, the Student only attended school five days prior to the Parent disenrolling the Student and applying for a homeschool exemption. (Student Enrollment History).

### *Summary and Conclusions*

The IDEA provides that students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1(a), and 92 NAC 51-006.01A. "Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program (IEP) calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d)." *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1144 (10th Cir. 2008). The "IEP is a written statement that sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals." *Ass'n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1043 (10th Cir. 1993). The goals must enable the child to be involved in and make progress in the general academic educational curriculum and meet each of the child's other educational needs that result from the child's disability. 34 CFR § 300.320(a)(2)(ii); 92 NAC 51-007.07A2.

The IDEA and State rules require districts to ensure that students' IEPs are implemented by each regular education teacher, special education teacher, the related services provider, and any other service provider responsible for its implementation. 34 CFR § 300.323(d). Although school districts should strive to follow IEPs as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA do not give rise to an IDEA violation. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist.* 5J, 502 F. 3d 811, 815, 821 (9th Cir. 2007) ("We hold that when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP"). The Eighth Circuit has adopted this material failure test. See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

The IDEA provides that each public agency must ensure that "as soon as possible following development of the IEP, special education and related

services are made available to the child in accordance with the child's IEP." 34 CFR 300.323 (c)(2); 92 NAC 51-007.02. It should be noted that the phrase "as soon as possible" does not mean immediately. The IDEA permits some delay in the implementation of the IEP. Board of Educ. of Montgomery County v. Brett Y., 28 IDELR 460 (4th Cir. 1998) (holding that 30 days to implement an agreed-upon IEP was consistent with IDEA regulations); D.D. v. New York City Bd. of Educ., 46 IDELR 181 (2d Cir. 2006) (noting that the IDEA permits some delay in implementing an IEP but also requires a specific inquiry regarding the causes of and reasons for the delay). In a situation where the student is being denied a significant portion of the services prescribed by the IEP, a failure to timely implement may rise to a denial of FAPE. Wilson v. District of Columbia, 56 IDELR 125 (D.D.C. 2011).

As clearly set forth above, the facts show that the School failed to implement the Student's IEP for at least four months following the Student's re-enrollment in the District on September 14, 2020. It is concluded that this failure to implement is a violation of the IDEA Federal regulations and State Rule 51, which will require corrective action. However, the facts also show that the Student's poor attendance and significant lack of participation during the Remote Learning period in Terms 1-3 are clearly factors in determining whether the Student was denied a FAPE as a result of the School's failure to implement the Student's April 9, 2019, IEP. Due to the many absences and the extreme lack of participation by the Student, it cannot be concluded that the Student suffered a loss of educational benefit due solely to the School's failure to implement the Student's IEP. It goes without saying that a student's attendance and participation at school is a very significant factor in the Student's educational performance. This is further supported by the fact that the Parent initially failed to cooperate and participate in the School's efforts to schedule a meeting to review and revise the Student's IEP. It is concluded that the Student's poor attendance and lack of participation in school and the Parent's failure to cooperate with the School are at least an equal contributor with the School's failure to implement the expired IEP to the Student's poor educational performance in Terms 1-3. Therefore, it is concluded that an award of compensatory education for the School's failure to implement the expired IEP is not appropriate under the circumstances.

The Parent has also generally alleged in her Complaint that the Student's March 22, 2021, IEP was not being implemented by the School. However, the Parent provides no specific facts or documentation to support her general allegation of a failure to implement the March 22, 2021, IEP. The Parent's allegations in the Complaint regarding this issue seem to flow out of the Parent's disagreement

with, and frustration with the communications with, the Student's Case Manager. In response, the District and School staff report that the Student's IEP accommodations and services were implemented by the General Education and Special Education Teachers and Case Manager following the development of the March 22, 2021, IEP until the Student was dis-enrolled from the District on August 24, 2021. Unfortunately for the District, the Student's 2020/2021 Special Education Teacher left the employ of the District immediately after the end of the 2020/2021 school year and failed to prepare and provide to the Parent a Progress Report for Term 4 of the school year. This is clearly a procedural violation of the IDEA and State Rule 51 and requires corrective action. The related question of whether there is any other evidence of implementation, such as whether the Student made progress on the Student's IEP goals, is also impacted by the lack of documentation from the 2020/2021 Special Education Teacher. Other than the, admittedly credible, statements from the Student's General Education teacher and Case Manager that they did implement the Student's March 22, 2021, IEP, the only documentation in the record to support the teachers' claims is the Student's Kindergarten Report Card. The Student's marks for Term 4 show no improvement in Personal Management Skills, good improvement in Reading, good improvement in Writing, and slight improvement in Mathematics. In view of the fact that the student was absent from school for 43 days during Term 4 due to the Parent keeping the Student out of school, it cannot be concluded that the Student's progress indicates a lack of implementation of the Student's IEP by the School.

Therefore, it is concluded that after the Student was re-enrolled in the District on September 14, 2020, the District did not provide special education and related services to the Student in accordance with the Student's April 9, 2019, IEP, as required by 92 NAC 51-007.02. However, it is further concluded that the Student's many absences and lack of participation during Remote Learning are equal contributing factors to any lack of progress by the Student. Therefore, corrective action is required by the District with respect to the lack of implementation of the Student's April 9, 2019, expired IEP, but such corrective action will not include an award of compensatory education services.

It is further concluded that the District did implement the Student's March 22, 2021, IEP, in accordance with 92 NAC 51-007.01. Therefore, it is concluded that the District did provide special education and related services to the Student in accordance with the Student's March 22, 2021, IEP.

Based on the foregoing facts and conclusions of law, in connection with the April 9, 2019, IEP, the District failed to fully implement the procedural

requirements of 92 NAC 51-007.02. Thus, the following **corrective action is required.**

*Corrective Action*

1. The District shall require all district and school level general and special education personnel 's including administrators, teachers, case managers, counselors, instructional coaches, and Team members regarding the policies, procedures, and practices of implementing the special education and related services of eligible students with IEPs in the District including:
  - a. The circumstances and reasons under which a school team would implement the provisions of an "expired" IEP
  - b. The process for ensuring that IEPs of eligible students are reviewed and revised in a timely manner.
  - c. The proper way to document the implementation of a student's IEP.
  - d. The reasons for obtaining, and properly documenting, a written Revocation of Consent for special education services by a parent.
  - e. Progress monitoring for students with IEPs, and specifically including:
    - i. The appropriate information to include in the progress reports;
    - ii. The proper form and format for documenting each student's progress;
    - iii. The timing and manner in which progress reports are provided to parents and documented by the District
2. Any and all trainings described above and ordered in the abovementioned corrective action shall be provided by NDE staff.
  - a. The District must contact Jo Gunderson within 14 calendar days of the date of the Investigation Report to complete the following:
    - i. arrange a day and time for the required training which will be conducted virtually;
    - ii. determine who the contact person will be for arranging the virtual training and disseminating the training information.
  - b. NDE will provide training materials to the District contact within five days prior to the training.
  - c. The District must submit a sign-in sheet or other evidence that each staff member required to participate in the training was present or attended the training.
  - d. All documentation from the training must be submitted within 10 calendar days of the training date.

#### **Issue # 4**

Did the District provide the Student with a FAPE, as required by 92 NAC 51-004.01?

State rule 92 NAC 51-004.01 provides as follows:

004.01 School districts and approved cooperatives shall ensure that all children with verified disabilities, from birth through the school year in which the child reaches age twenty-one, including children who have been suspended or expelled from school, have available to them a free appropriate public education (FAPE) which includes special education and related services to meet their unique needs.

#### *Allegations*

The District failed to provide the Student with a FAPE.

#### *Parent Position*

The School staff failed to appropriately communicate with the Parent and failed to implement the Student's March 22, 2021, IEP.

#### *District Response*

The District's Letter of Response dated September 23, 2021, states that while the School team was attempting to obtain a Consent for Services and an IEP meeting date from the Parent, the School provided the Student with a FAPE in the general education classroom. The District further states that following the March 22, 2021, IEP meeting, the District provided the Student with a FAPE through special education services. On March 24, 2021, the Parent sent a message to the General Education Teacher letting her know that the Student was doing much better since the Student's IEP was in place.

#### *Investigative Finding*

See above Investigative Findings.

#### *Summary and Conclusions*

As noted above, it has been concluded that actions of the School do constitute procedural and substantive violations of the IDEA Federal regulations and State Rule 51. As to the procedural violations found in Issue Numbers 2 and 3, it has also been concluded that the Student's significant lack of attendance and participation during Terms 1-3 and the extreme number of absences during Term 4 of school, as well as the Parent's lack of cooperation with the School's effort to review and revise the Student's IEP, are concluded to be equal contributors in determining whether the procedural inadequacies impeded the Student's right to a FAPE, significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE the Student, or

caused a deprivation of educational benefit, and therefore a denial of FAPE, to the Student. 34 CFR §300.513(a)(2). It is concluded that the procedural deficiencies set forth in Issues Numbers 2 and 3 must be remedied by the District.

As to Issue Number 4, it has been concluded that the School's failure to implement the Student's April 9, 2019, IEP constitutes a substantive violation of the IDEA and, therefore, a denial of FAPE.

Therefore, it is concluded that as to Issue Number 4, the District did not provide the Student with a FAPE.

Based on the foregoing facts and conclusions of law, the District failed to provide the Student with a FAPE as required by 92 NAC 51-007.01. Thus, the following **corrective action is required**.

#### *Corrective Action*

Please see the Corrective Action set forth under Issues Numbers 2 and 3, above.

#### **Notice to District**

Unless otherwise indicated, the corrective action specified must be completed within sixty (60) calendar days of the date of this report. Documentation must be submitted as soon as possible following the completion of the corrective actions. All documentation of correction must be sent to:

Jo Gunderson, Complaint Specialist  
nde.speddr@nebraska.gov