

COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.08
Complaint Investigator: [Redacted]
Date Complaint Filed: September 3, 2021; 14-day extension granted
November 1, 2021
Date of Report: [Redacted]

Issues (both Investigated and Dismissed)

1. Does the Student's current IEP offer a free and appropriate public education (FAPE) within the least restrictive environment as required by 92 NAC 51-008.01A; 008.01C; 008.01D; and 008.01H? This issue remains ripe for determination.
2. Was the Student's current IEP developed to address the academic and functional goals that meet the needs that result from the Student's disability as required by 92 NAC 51-007A2a and 007.07A2b? This issue remains ripe for determination.
3. Does the Student's current IEP include the related services needed to ensure the Student receives FAPE as required by 92 NAC 51-003.49? This issue is withdrawn by the Student's Mother after successful mediation and development of an IEP through facilitation. See November 1, 2021 Confirmation Letter, NDE Office of Special Education to the Student's Mother and the District.
4. Has the Student's IEP Team revised the Student's IEP to address the Student's anticipated needs or other matters as required by 92 NAC 51-007.10? This issue remains ripe for determination
5. Was the Parent given an opportunity to participate in meetings held to revise the Student's IEP to determine appropriate placement to enable the Student to receive a FAPE as required by 92 NAC 51-007.03A; 007.06A and 009.01A? This issue is withdrawn by the Student's Mother after successful mediation and development of an IEP through facilitation. See November 1, 2021 Confirmation Letter, NDE Office of Special Education to the Student's Mother and the District.
6. Does the Student's IEP provide FAPE by addressing extended school year services as required by 92 NAC 51-007.07C5? This issue is withdrawn by the Student's Mother after successful mediation and development of an IEP through facilitation. See November 1, 2021 Confirmation Letter, NDE Office of Special Education to the Student's Mother and the District.

7. Did the District evaluate the child to determine whether the child was no longer a child with a disability as required by 92 NAC 51-006.06E? This issue is withdrawn by the Student's Mother after successful mediation and development of an IEP through facilitation. November 1, 2021 Confirmation Letter, NDE Office of Special Education to the Student's Mother and the District.

Information Reviewed by Investigator

From the Complainant

- Letter of Complaint, received by NDE September 30, 2021
- Nature of the Problem/Proposed Resolution Letter
- Email August 17, 2021 with Cystic Fibrosis Foundation Notice
- Email August 17, 2021, Urging Universal Masking in Schools
- Medical Record, dated August 26, 2021
- Prior Written Notice dated August 25, 2021
- Email August 19, 2021, Health Department Notice
- Email correspondence between the Parent and District, and Parent to Complaint Investigator, dated: August 24, 2021-October 20, 2021

From the School District

- Letter of Response dated September 29, 2021; received by NDE September 29, 2021
- Email correspondence between the District and the Parent, dated August 2, 2021- October 20, 2021
- Home plans for the weeks of: September 13-15, 2021, September 20, 2021, September 27, 2021
- Assignment Packets multiple dates
- Letter to Parents, District masking policy letter dated September 22, 2021
- Return to School General Protocols dated September 21, 2021
- Covid testing sites email dated August 20, 2021
- Frequently asked questions, exposure to Covid email dated September 1, 2021
- Individual Education Program (IEP), effective May 14, 2020 to May 13, 2021
- Individual Education Program (IEP), effective May 11, 2021 to May 4, 2022
- Electronic Signature Form dated May 7, 2020
- Multidisciplinary Evaluation Team MDT Report dated May 5, 2021
- Notice of IEP Meeting dated August 25, 2021

- Prior Written Notice (of proposed or refused actions) dated August 23, 2021
- Prior Written Notice (of proposed or refused actions) dated August 25, 2021
- April 22, 2021 Notice of IEP Meeting
- Neighboring School's COVID-19 Absence Reporting announcements, dated August 20, August 27, and September 3, 2021
- Neighboring School's Email, mask mandate undated, unknown origin
- Chart, COVID-19 deaths ages 0-18 years undated, unknown origin
- Document or web print out generated by a State Non-Profit Agency contesting Governor Ricketts undated
- Notice of IEP Meeting, dated October 27, 2021
- Individual Education Program (IEP), effective November 1, 2021 to October 28, 2022; meeting on October 29, 2021 (the October 29, 2021 IEP), and undated e-signature form by the Student's Mother

Interviews

- Telephone interview conducted with Student's Mother on October 4, 2021
- Telephone interview conducted with District representatives on October 7, 2021

Introduction

This matter arises on a State Complaint filed by the Student's Mother, on behalf of the Student, against the District on September 3, 2021. Pursuant to 92 NAC 51-009.1, the Nebraska Department of Education (NDE), Office of Special Education, must resolve complaints alleging violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., (IDEA) which are alleged to have occurred not more than one year before the date the complaint was received.

An outside complaint investigator has conducted this investigation, along with a complaint investigator with the NDE Office of Special Education. Documents received from the Student's Mother, and from the District, were reviewed. Telephone interviews were conducted with the Student's Mother and with representatives of the District.

The Student's Mother and the District met and successfully resolved Issues Numbered 3, 5, 6, and 7. Based on a request from the Student's Mother, these issues are withdrawn.

Only Issues Numbered 1, 2, and 4 will now be addressed.

Only alleged violations which may have occurred one year prior to September 3, 2021, will be considered. Matters outside of this window, if any, are provided for context purposes only.

Due to extenuating circumstances to allow time to engage in ongoing dispute resolution, the NDE Office of Special Education granted an extension of 14 days to the standard 60-day deadline for completion of the Investigative Report. This Investigative Report is due by November 16, 2021. See November 1, 2021 Extension Timeline Letter, NDE Office of Special Education to the Student's Mother and the District.

Findings of Fact

1. Within the statutory time frame, the Student was, and is, a student at a District Elementary School (IEP dated May 11, 2021).
2. The Student is qualified for special education services under Other Health Impairment based on a diagnosis of Cystic Fibrosis (IEP dated May 11, 2021).
3. Cystic Fibrosis is a progressive condition which primary affects the lungs, and which will eventually result in death (Physician's Reports dated August 26, 2021 and October 5, 2021).
4. As a result, the Student is at a higher risk of complications from exposure to COVID-19 (Physician's Reports dated August 26, 2021 and October 5, 2021).
5. The Student began kindergarten, yet in-person school was discontinued due to the COVID-19 pandemic (IEP dated May 14, 2020 IEP).
6. School transitioned to remote learning on March 13, 2020 (IEP dated May 14, 2021 IEP).
7. An IEP was completed, effective May 14, 2020, through May 13, 2021 (IEP dated May 14, 2020).
8. The May 14, 2020 IEP reported the Student's academic testing was at benchmark, with reference to first sound fluency, letter naming fluency, phoneme segmentation fluency, nonsense word fluency-correct, and letters segmented.
9. The May 14, 2020 IEP reports that due to the Student's medical condition the Student may require specialized care and hospitalizations taking the Student out of the school environment, and during those time frames the District will provide pertinent school work to be sent home for the Student to complete, with additional "re-teaching" to be made available should the Student return to the school setting, "if needed."

10. The May 14, 2020 IEP states that participation will be in general education instruction; self-advocating needs in the Student's classroom environment will be for 10 minutes per week.
11. School continued remotely, that is, through computer access services, for the remainder of kindergarten, through the 1st grade, and into the current 2021-2022 school year. (Student's Mother's Interview, October 4, 2021.)
12. During the current 2021-2022 school year the Student is in the 2nd grade (IEP dated May 11, 2021).
13. Before beginning the 2nd grade, another IEP was completed, effective on May 11, 2021 and continuing through May 4, 2022 (IEP dated May 11, 2021).
14. The May 11, 2021 IEP reported that the Student performed well below benchmark on Acadience testing (non-sense word fluency correct letter sound), below benchmark in the Student's non-sense word fluency whole sounds read, below benchmark in oral reading fluency, and below benchmark in the Student's composite score at 130.
15. Just as in the May 14, 2020 IEP, the May 11, 2021 IEP reports that due to the Student's medical condition Student may require specialized care and hospitalizations taking the Student out of the school environment, and during those time frames the District will provide pertinent school work to be sent home for the Student to complete, with additional "re-teaching" to be made available should the Student return to the school setting, "if needed."
16. The May 11, 2021 IEP considered ESY services, but found they were not appropriate at the time.
17. Just as in the May 14, 2020 IEP, the May 11, 2021 IEP states that participation will be in general education instruction; self-advocating needs in the classroom environment will be for 10 minutes per week.
18. On May 11, 2021, a May 5, 2021 Prior Written Notice was delivered to Student's Mother which noted that the IEP Team considered moving the Student to a medical 504 Plan from the IDEA's IEP, yet at the time rejected the proposal to allow the Student to transition back into the school building after participation in distance learning (Prior Written Notice dated May 5, 2021).
19. School began for the current 2021-2022 school year on August 12, 2021. (Student's Mother's Interview, October 4, 2021.)
20. The normal school day begins at 8:00 a.m., and ends at 3:00 p.m. (Interview, District Representatives, October 7, 2021).

21. The District issued a mask-optional policy for school attendance for the current school year; that is, there is no mandatory requirement for students or staff to wear masks while at school (District's Letter to Parents, July 22, 2021; District's Email to Parents, August 20, 2021).
22. The Student attended in-person classes until the Student's last day of in-person school, which was August 20, 2021 (Student's Mother's Interview, October 4, 2021).
23. The Student's Mother removed the Student from in-person attendance because of the Student's increased risk of contracting COVID-19, and complications from COVID-19 should the Student contract it, because the Student suffers from the disease of Cystic Fibrosis (Student's Mother's Interview, October 4, 2021).
24. The Student's Physician, M.D., opines that decreasing the Student's exposure to respiratory germs and viruses, and in particular to COVID-19, is "critically important" (Physician's Reports dated August 26, 2021 and October 5, 2021).
25. To reduce the Student's exposure, and the Student's risk of complications, the Physician medically directs, among other things, that everyone in the Student's indoor classroom setting wear a mask throughout the school day (Physician's Report dated October 5, 2021.)
26. The Physician initially reported that all persons in the school setting should follow the Center for Disease Control's (CDC) guidelines for all students and staff to be masked (Physician's Report dated August 26, 2021).
27. The Physician later clarified this by directing that to protect this the Student's unique, individual needs, all people in the indoor educational setting must be masked (Physician's Report dated October 5, 2021)
28. The Physician also directs that the Student be physically distanced from others, that the Student remain in the back of the classroom far from the door, that large group settings be limited, that while in engaged in singing (choir) the Student should be masked and be in the back of the classroom, that the Student should mask during physical education and engage in alternate activities, like playing with balls, stretching, walking and push-ups, and that the Student be distanced from others with obvious respiratory symptoms (Physician's Reports dated August 26, 2021 and October 5, 2021)
29. If the Student is outdoors, then the Student does not have to wear a mask, according to the Physician, yet the Student must physically be distanced from others (Physician's Report dated October 5, 2021).

30. The Physician medically directs that should the Student be vaccinated, then the increased risk due to complications due to COVID-19 is reduced, so to allow the Student to return with the general unmasked student population, although the Student will still be directed to wear a mask (Physician's Reports dated August 26, 2021 and October 5, 2021).
31. Because of the Student's age, the Student is not able, at this time, to receive a COVID-19 vaccination (Mother's Interview, October 4, 2021).
32. The District, during the telephone interview, concurs that the Student is a medically fragile student (Interview, District Representatives, October 7, 2021).
33. Prior to removing the Student from the in-person setting, the Student's Mother asked the District for all students to wear masks (Email from the Student's Mother dated August 11, 2021).
34. The District sent a message to the other parents in the Student's 2nd grade classroom letting them know that an immunocompromised student was in their children's classroom, and asked them to consider having their children mask voluntarily (See Email chain, District, August 26, 2021, letter to go out to Parents; Email, District, September 24, 2021, forwarding Email copy of August 27, 2021, optional mask use, one student immunocompromised).
35. According to the School Principal, only 12 students in the second grade class would regularly wear masks, and noted for information purposes to the Student's Mother that another family in another grade chose to open enroll their child in another district (Email, District, September 27, 2021 chain including Email, Principal, August 26, 2021).
36. The District proposed that if physical education and music (chorus) class environments could impact the Student then [Redacted] subjects could be changed to library and art (Email, Principal, August 26, 2021).
37. Prior to, and after, removing the Student from the in-person setting, the Student's Mother requested the District to allow the Student to attend classes remotely, in order to receive educational benefit for the Student if indoor masking was not required (Prior Written Notices dated August 23, 2021 and August 25, 2021).
38. The District denied the Student's Mother's request for remote learning (Prior Written Notices dated August 23, 2021 and August 25, 2021).
39. The District began to send homework assignments in general education instruction to the Student's Mother, for the Student's Mother to teach to Student (Assignments for Monday 9/13/21 - 9/15/21; home plans week of 9/20/21; home plans week of 9/27/21; Weekly Schedule, 9/6 to 9/9).

40. On August 25, 2021 another IEP Meeting was held (Prior Written Notice dated August 25, 2021).
41. A new IEP did not arise from the meeting, although two Prior Written Notices of Proposed Action did occur addressing the issues (Prior Written Notice dated August 23, 2021; Prior Written Notice dated August 25, 2021).
42. The first Prior Written Notice, dated August 23, 2021, states the District was not able to require other students in the Student's classroom to mask because it is contrary to the District's current policy of optional masking, and that it was not able to provide the Student education in a remote learning environment due to COVID-19 – the District was not offering remote learning.
43. In addition, the August 23, 2021 Prior Written Notice provides that the education environment where the Student is to be educated be sanitized, that the Student be moved away from others who show symptoms of illness, that separate supplies be made available, that the Student will only sit next to other students who are masked, and that the school nurse will meet with the Student at a location other than the nurse's office.
44. The second Prior Written Notice, dated August 25, 2021, once again states that the Student's Mother's requests for masking and remote learning were rejected, and again noting the mask optional District policy. Attached to the Prior Written Notice of August 25, 2021 is a Notes page which states the Student's Mother attended the IEP Meeting on August 25, 2021, via Zoom, noting the Student's Mother did not feel comfortable with an electronic signature indicating attendance.
45. The District proposed in its August 25, 2021 Prior Written Notice that cleaning methods would be performed, and peer physical placement, as in its August 23, 2021 Prior Written Notice, but also reflected, yet without requiring, Physician's initial directions, and noted that Physician recommended remote learning if Cystic Fibrosis Foundation and CDC guidelines are not followed.
46. Cystic Fibrosis and CDC Guidelines provide for masking for all students and staff (Physician's Report dated October 5, 2021)
47. Weight is only given to Physician's medical directions based on the Student's unique needs, not to educational placement or setting recommendations.

48. The District did not, and will not, follow the CDC's Guidelines for all students and staff to be masked (Prior Written Notices dated August 23 and August 25, 2021).
49. On September 7, 2021, the Student's Mother sent an Email to the District stating she attended the meeting, but that she disagreed with the District's unwillingness to make adjustments to the IEP (Email from the Student's Mother dated September 7, 2021).
50. The Student's Mother then engaged a private teacher/tutor, an organization, to teach reading and language arts foundations to Student (Student's Mother's Interview, October 4, 2021).
51. While tutoring Student, the tutor assessed the Student to be at the 1st grade fluency level (Email, Teacher/Tutor to Student's Mother, October 11, 2021).
52. The out-of-pocket cost paid by the Student's Mother for the Student's educational program for the continued reading and language arts foundation is \$250.00 for twelve ½ hour sessions twice a week (Interview, Student's Mother, October 4, 2021).
53. On about October 20, 2021 there were ten private teacher/tutor sessions completed (Email, Student's Mother, October 20, 2021).
54. The IEPs, with subsequent Prior Written Notices, and the subsequent October 29, 2021 revised IEP, are not appropriate, and the Student's Mother's tutoring program while in the home setting is appropriate.
55. On September 27, 2021 the District forwarded a letter to the Student's Mother stating the Student has totaled twenty absences, and that a report will be submitted to the County Attorney noting the excessive absences (Letter from Principal dated September 27, 2021).
56. On October 29, 2021 an IEP revision meeting was held, after these Complaint Investigation proceedings were begun, to address the seven issues in this case.
57. Attached to the revised IEP is a Prior Written Notice Section of proposed or refused action; subsequently a Notes Page was disclosed which stated the Student's Mother did not feel comfortable signing an electronic signature form noting her attendance (IEP dated October 29, 2021).
58. The October 29, 2021 IEP, in relevant part, continues to assess the Nonsense Word Fluency Correct Letter Sound at 28, which is below benchmark, and the Nonsense Word Fluency Whole Words Read at 8, which is also below benchmark.

59. The October 29, 2021 IEP, in relevant part, continues to find the Student eligible for services under the Other Health Impairment due to a diagnosis of Cystic Fibrosis.
60. The October 29, 2021 IEP, in relevant part, provides for the use of Zoom opportunities for the Student with the class when the Student is unable to participate in the in-person general education classroom during transition to full-time in-person general education classroom.
61. The October 29, 2021 IEP, in relevant part, finds the Student's medical condition puts the Student at risk for frequent illness, "some of which may require hospitalization;" when that occurs, then the IEP team will reconvene to consider alternate settings in the least restrictive environment.
62. The October 29, 2021 IEP, in relevant part, in a statement of special education and related services, refines the issue of hospitalizations by stating that within three days of receiving "medical notification" of an absence due to "hospitalization, future pandemic or outbreak, or other need for extended absence," an IEP meeting will be called.
63. The Prior Written Notice Section rejects homebound instruction because the Student "is not currently ill and [Redacted] is able to attend school with intensive accommodations."
64. The Student's Mother had requested that a plan be put into place in the Student's IEP that reflects immediate action because the Student will be hospitalized at some point in time because of Cystic Fibrosis and will need immediate educational services while hospitalized or in a homebound setting -- not a contingency that another IEP meeting be held to determine if, or when, educational services will be appropriate (Interview, Student's Mother, October 4, 2021).
65. As in prior IEPs, the October 29, 2021 IEP, in relevant part, provides that the Student may have frequent absences throughout the year, due to illness, with possible hospitalization stays for several weeks at a time -- during those times "pertinent school work will be assembled by the teacher" and sent home for the Student to complete, and additional re-teaching may be done at school "if needed."
66. The October 29, 2021 IEP, in relevant part, provides for "infection control," such as washing hands, the use of water fountains, tissues and hand sanitizer, being moved away from a child who may show signs of congestions, using elbows to cover coughs, notice of cross contamination, no outdoor activity when air quality is poor, lunch and snack with peers, sanitized tables for "specials," textbook and readers to be sent home, physical education with regular education peers

- using sanitized equipment, and substitution of art or library instead of music and physical education.
67. Other accommodations include, according to the October 29, 2021 IEP, separate supplies for the Student for library/art/music, in classroom seating next or close to only those students who will masks throughout the day and "social distanced at least 6 ft apart from others when necessary," and that hand sanitizer will be used before entering the classroom, with the Student's classroom desk to be sanitized daily; otherwise, the school custodian "will Vital Oxide" the rooms where "specials" are held, and the other classrooms, three times a week.
 68. While attending school in-person, according to the October 29, 2021 IEP, the Student is to mask when not eating, and when eating to physically distance [Redacted]; the Student is to "generally physically distance throughout the day as best as possible," limit attendance in large groups; seating and distance 6 feet from others, wear a mask (and others around [Redacted] to be masked) while in choir, be masked while at physical education and have alternative activities like stretching, playing with balls, push-ups, and walking available, and that Student is to sit in the back of the classroom "as far away from the door as able."
 69. If outside, the Student may take off [Redacted] mask, but otherwise physically distance; notice is to be sent to the Student's Mother of any positive COVID tests, the Student's Mother is allowed to pick up the Student during lunch to eat outside of the classroom, and that the school principal has asked other parents to voluntarily have their children masked because there may be an immunocompromised child (IEP dated October 29, 2021).
 70. The Student's educational services, according the October 29, 2021 IEP, are from November 1, 2021 to December 21, 2021, unless otherwise fully vaccinated and given "the green light from [Redacted] doctor" to return to school full time, are to be according to an undefined "alternative schedule" to be created by the IEP Team, yet which will include a "slightly shortened day schedule of 8:05 start and 2:40 dismissal" which will allow the Student to enter and exit the building safely.
 71. The October 29, 2021 IEP provides that these educational services during the time frame from November 1, 2021 to November 5, 2021, are to have the Student placed in a "separate room close to [Redacted] classroom" all day Monday and Wednesday and 10:30 through the end of the day on Tuesday and Thursday, allowing the

- Student to "zoom into [Redacted] regular class for specific instruction and to zoom into specials for specific activities."
72. Beginning Monday, November 8, 2021, according the October 29, 2021 IEP, the Student will attend in-person school from 8:05 to 2:40 daily according to the normal school schedule.
 73. In-person Tier 1 instruction will be provided, according the October 29, 2021 IEP, and Tier 2 instruction for 35 minutes per day four times a week to compensate for gaps in decoding.
 74. The IEP Team will reconvene on December 17, 2021, to review data and progress for additional goals or instruction time which may be needed to make up for lost learning, if any, according the October 29, 2021 IEP.
 75. The October 29, 2021 IEP provides that the School District will reimburse the Student's Mother an unspecified sum for past tutoring and tutoring during the first week of the IEP.

Issue # 1

Does the Student's current IEP offer a free and appropriate public education (FAPE) within the least restrictive environment as required by 92 NAC 51-008.01A; 008.01C; 008.01D; and 008.01H?

92 NAC 51-51.008 states:

008	Placement of Children With Disabilities		
	008.01	Least Restrictive Environment (LRE) Requirements	
		008.01A	The school district or approved cooperative shall establish policies and procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or nonpublic schools and approved service agencies, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when 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.

008.01C

In determining the educational placement of a child with a disability, including a preschool child with a disability, school districts and approved cooperatives must ensure that:

008.01C1 The placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

008.01C2 The placement decision is made in conformity with the least restrictive environment requirements in 92 NAC 51-008.01 and based on the child's unique needs and not on the child's disability.

008.01D

Each school district or approved cooperative must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

008.01D1

The continuum must:

008.01D1a Include instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions; and

008.01D1b Make provision for supplementary services (such as resource or itinerant instruction) to be provided in conjunction with regular class placement.

008.01H In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or on the quality of services which he or she needs.

Allegations/Parent Position

The Student's Mother contends that the Student's least restrictive environment, as a medically fragile student entitled to special education services under Other Health Impaired because of the Student's Cystic Fibrosis, is in a home bound or remote setting. See 34 C.F.R §300.39. This is because, the Student's Mother contends, the District will not provide in-person educational benefits in the general academic, "specials," and special education services in a setting other than in-person at the brick and mortar school. Students in the 2nd grade are not required to wear masks to prevent the spread of COVID-19. The Student's health care provider medically directs that the Student, based on [Redacted] individual, unique needs, cannot safely function in an environment where all students and staff are not masked indoors.

District Response

The District contends that the least restrictive environment is generally the in-person setting beginning November 8, 2021. The District has a policy that remote learning is not available, and that this applies to this Student, as well.

Investigative Findings

The Student's Mother removed the Student from the in-person educational environment on August 20, 2021. The Student has been home since that time and is currently in the 2nd grade. While at home, the Student's Mother has engaged the services of a private teacher/tutor to provide educational services in reading and language arts. She has paid \$250.00 for twelve ½ hour sessions twice a week.

Notice was provided to the District that the Student's Mother sought either mandatory masking of all students in the Student's 2nd grade indoor educational environment, given the Student's medically fragile condition, or to allow the Student to access to remote learning. The District provided neither

mandatory masking nor remote learning options. The District has a policy that it will not provide remote learning.

The Student's health care provider medically directs the Student not to be in an environment with other students and staff without the masking of all persons, because the Student's individual, unique medical needs due to Cystic Fibrosis place the Student at an increased risk of contracting COVID-19, and complications from COVID-19 should the Student contract it. Cystic Fibrosis is a progressive condition which primarily affects the lungs. It will eventually lead to death.

Medically, the Student will be able to participate in outdoor activities in the general brick and mortar school setting without masking requirements. Similarly, from a medical standpoint, the Student will no longer be at the increased COVID-19 risk should [Redacted] become vaccinated. The Student, however, at this time, is not vaccinated due to the Student's age.

Summary and Conclusions

This issue of the least restrictive environment is the primary issue under this State Complaint. It is concluded that the District has violated the Student's right to a free, appropriate public education (FAPE) by not providing home-based or remote education services to this medically fragile Student. That is, "the nature or severity of the disability" of this medically fragile Student while in the in-person, unmasked indoor educational setting, "is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 92 NAC 51-008.01A.

"[A] child is entitled to 'meaningful' access to education based on her individual needs." *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743, 753-754 (2017). "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). This requires a "prospective judgment by school officials . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Id.* at 999-1000. The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. *Endrew*, 137 S. Ct. at 1001.

In 2005, then Justice O'Connor described the IDEA as a function of cooperative federalism, which requires cooperation and reporting between the state and federal administrative agencies. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As a

result, regulatory policy from the federal Office of Special Education and Rehabilitative Services (OSERS) must be explored in this current COVID-19 issue of a least restrictive environment.

On September 30, 2021, OSERS issued the Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act. See Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act, 121 LRP 33345 (the Roadmap). Particularly, the Roadmap acknowledges that children with underlying medical conditions may be placed at increased risk of severe illness if they contract COVID-19, and services, supports and modifications, under the IDEA necessary to provide FAPE to the child in the least restrictive environment. Additionally, the Roadmap recognizes that some LEAs may have inconsistent policies with the CDC's COVID-19 and prevention and risk strategies.

In answer to Roadmap Question C-10, OSERS requires that despite State or local laws, regulations, rules, or policies which limit COVID-19 prevention and risk reduction strategies in the regular education classroom, a continuum of alternate placements to meet the child's educational needs must be made available to provide a FAPE. Otherwise, as OSERS states, the child's parent is faced with an in-person educational placement that puts their child at increased risk of severe illness, which is unacceptable.

Given the very recent persuasive federal Roadmap requirements, and Nebraska's current least restrictive environment rules, it is concluded the LEA has violated the Student's right to a FAPE by not providing remote access or homebound instruction under the continuum of alternate placements, based on the Student's unique, individual needs. 34 C.F.R. § 300.114. 92 NAC 51-008.01A.

In addition, using persuasive guidance regarding unilateral placement, for the reasons noted above, it is concluded that the current IEP and Prior Written Notices were not appropriate and violated FAPE, and that the Student's Mother's home services teacher/tutor to fill the void was appropriate. See *Burlington v. Dept. of Educ.*, 105 S.Ct. 1996 (1985) (unilateral placement reimbursement award). The May 11, 2021 IEP reported that the Student performed well below benchmark on academic testing (non-sense word fluency correct letter sound), below benchmark in [Redacted] non-sense word fluency whole sounds read, below benchmark in oral reading fluency, and below benchmark in [Redacted] composite score at 130. The private teacher taught reading and language arts foundations to the Student, and found the

Student to be at a 1st grade reading level. The October 29, 2021 revised IEP continued to find the Student below benchmark on Nonsense Word Fluency Correct Letter Sound and the Nonsense Word Fluency Whole Words Read. While Tier 2 instruction for 35 minutes per day four times a week to compensate for gaps in decoding arises in the revised IEP of October 29, 2021, it does not lengthen the school day as in the case of extended services.

Corrective action is required.

Corrective Action

1. Within 30 days from the date of this report, the District will provide remote access educational services to the Student for all general education and special education services.
 - a. Consideration has been given to having individual home services provided to the Student, but given the Student's high risk of infection from COVID-19, and masking and vaccine requirements for staff which might arise (notice is taken that some educators may not mask or be vaccinated). As a result, remote education services, that is, via Zoom or other type of remote services, are required action.
 - b. Similarly, consideration is given the masking issue for "specials" in choir. The Student will be provided remote services for choir, as well.
 - c. As for physical education, if it is outside, then it may be in-person, with the Student to be masked and removed, as [Redacted] healthcare provider directs. Recognizing, however, that IEPs are to be reasonable, see *Endrew*, 137 S. Ct. at 999, should the Student's Mother be unable to transport the Student to and from school every session for physical education, then it may be, at [Redacted] option, remote. Should physical education services be held indoors, then access will be remotely.
2. The District will provide the Student's Mother equipment for remote educational access, as well as all books, services, and supplies the Student would otherwise be provided should [Redacted] be attending class in-person. 34 C.F.R §300.42.
3. Within 30 days from the entry of this plan, the District will reimburse the Student's Mother \$250.00 for twelve ½ hour private teaching sessions. The revised IEP of October 29, 2021 recognizes reimbursement to some extent, and this refines it. The Student completed [Redacted] 10th session on about October 20, 2021. The Student's Mother will continue with those services through the Student's date to begin remote

education. If those dates before remote access begins fall outside the 12 sessions then the LEA will reimburse the Student's Mother the rate of \$20.83 per session until the Student returns within the 30 day window. This is a form of compensatory education.

4. With 45 days from the date of this report, the District will provide NDE a letter indicating the following:
 - a. Verification that the Student has been provided remote access
 - b. A list of materials provided to the Student to access remote instruction and how alterations to materials will be handled;
 - c. Verification the Parent has been reimbursed for tuition

There is insufficient evidence to award other compensatory education services, as in hours missed to remediate for lost services, for the denial of FAPE, which began on August 20, 2021. Equitable factors are considered in fashioning a remedy, with broad discretion allowed. See *Florence County Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. See *Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. See *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005). While the Student may be regressing, of which the District is now placed on notice, the regression cannot be tied to the denial of FAPE commencing on August 20, 2021, rather than to regression generally attributed to the COVID-19 educational environment all students had undergone. Inquiry was made seeking information on compensatory education to put the Student back in the place Student would have been under the Student's unique needs beginning on August 20, 2021, but there is no qualitative measure which was found to distinguish the two. Regression due to virtual learning during the 1st grade and the Student's possible need for COVID-19 recovery services (also sometimes called compensatory services) are not a part of this State Complaint and will not be addressed.

Issue # 2

Was the Student's current IEP developed to address the academic and functional goals that meet the needs that result from the Student's disability as required by 92 NAC 51§§007A2a and 007.07A2b?

92 NAC 51§007.07 A2 states:

- | | |
|-----------|--|
| 007.07A2 | A statement of measurable annual goals, including academic and functional goals, designed to: |
| 007.07A2a | Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; or for preschool children, as appropriate, to participate in appropriate activities, and |
| 007.07A2b | Meet each of the child's other educational needs that result from the child's disability. |

Issue 2 Part 1

Allegations/Parent Position

The Student's Mother contends that because all persons in the school are not masked, due to the District's local policy, then the Student cannot receive a FAPE under an in-person setting.

District Response

The District's position is that while all students are not required to wear masks, by District policy, the District may place the Student in an environment where 3-4 students may voluntarily mask, among other things.

Investigative Findings

The Investigative Findings in Issue No. 1 are incorporated herein by reference.

Summary and Conclusions

Essentially, this issue seeks not a continuum of placement under the least restrictive environment, as does Issue No. 1, but a conclusion that FAPE is violated because the District does not mandate masks for all students and staff. Reference is made to the Summary and Conclusions in Issue No. 1, adopted for legal background.

Once again, the Roadmap provides insight. Question C-10 references the in-person health school-related health needs with underlying medical conditions, which are to include COVID-19 prevention and risk reduction strategies in determination of the least restrictive environment. *Id.* Based on this Student's unique needs as a medically fragile student, the least restrictive environment, as determined by Issue No. 1, is remote access to learning, with additional services. As a result, there is no violation of FAPE because the Student cannot attend classes in-person. 92 NAC 51-007.07 A2.

No corrective action is required in this part of the issue.

Issue 2 Part 2

Allegations/Parent Position

The Student's Mother's position is that the May 11, 2021 IEP recognizes that the Student may be hospitalized or taken out of the educational setting due to Cystic Fibrosis, yet that the only education to meet the Student's educational needs is for homework to be sent home, rather than individualized instruction in the hospital setting.

District Response

The District submits that homework assignments are appropriate.

Investigative Findings

The May 11, 2021 IEP only provides that due to the Student's medical condition the Student may require specialized care and hospitalizations taking the Student out of the school environment, and during those time frames the District will provide pertinent school work to be sent home for the Student to complete, with additional "re-teaching" to be made available should the Student return to the school setting, "if needed."

The revised IEP of October 29, 2021 creates a "three-day window" for no services until medical reports show the District that the Student has been hospitalized, at which time a new IEP meeting will be held. In the meantime, having materials sent home to the Student's Mother and post-hospitalization re-teaching, "if needed," is what the revised IEP requires. As the revised IEP reflects, due to the Student's fragile condition, the Student may be hospitalized at some point in time.

Summary and Conclusions

Children who are hospitalized for medical purposes will be provided with education while hospitalized. 34 C.F.R. § 300.39 (a)(1)(I). See Letter to Power, 211 IDELR 31 (BEH 1978). Congress intended to provide public education for every child with a disability, unconditionally and without exception, regardless of the

severity of their disability. See *Timothy W. v. Rochester, N.H., Sch. Dist.*, 441 IDELR 393 (1st Cir. 1989), cert. denied, 493 U.S. 983 (1989).

A student's continuum of alternate placements is to include instruction in, among other areas, hospitals. 34 C.F.R § 300.115(b)(1).

The three-day hospitalization stay window, and post-return-to-school re-teaching "if needed," do not provide for educational benefit for the Student while hospitalized. The Student is entitled to services while hospitalized -- creating a gap in the Student's services for three days, and then a corresponding recovery method to re-teach if needed, does not align with the regulatory requirement to reflect a continuum of alternate placements while in the hospital to meet the Student's educational needs. As reflected in 92 NAC 51-007.10DA, a revised IEP must reflect the child's anticipated needs. The revised October 29, 2021 IEP fails to do so.

The October 29, 2021 IEP does not provide for a continuum of alternate placements for instruction while the Student may be hospitalized, in violation of 92 NAC 51-007.07A.

Corrective action is required.

Corrective Action

1. Within 60 days from the date this report, a facilitated IEP will be convened to provide for a continuum of alternate placements for instruction while the Student may be hospitalized. See The Individuals with Disabilities Education Act (IDEA), 92 NAC 51 (Rule 51), Nebraska IEP Facilitation Guide, August 2020.
2. A copy of the IEP will be sent to NDE 10 days after the facilitated IEP.

Issue #4

Has the Student's IEP Team revised the Student's IEP to address the Student's anticipated needs or other matters as required by 92 NAC 51-007.10?

92 NAC 51-007.10 reads:

007.10	The IEP team shall revise the IEP as appropriate to address:
007.10A	Any lack of expected progress toward the annual goals described in 92 NAC 51-007.07 and in the general education curriculum, if appropriate;

007.10B	The results of any re-evaluation conducted under 92 NAC 51-006.05A;
007.10C	The information about the child provided to, or by, the parents, as described in 92 NAC 51-006.06A1;
007.10D	The child's anticipated needs; or
007.10E	Other matters.

Allegations/Parent Position

The Student's Mother contends that there was not an IEP which arose after the then most recent meeting of August 25, 2021, to address the Student's anticipated needs if unable to attend school, and the least restrictive environment requested for remote access.

District Response

The District 's position is that it has addressed the Student's Mother's concerns in its Prior Written Notices, and that it will update the IEP as it "moves forward with the parent."

Investigative Findings

On August 25, 2021 another IEP Meeting was held. The record does not indicate that an IEP resulted from that meeting. The District's position is that the IEP is apparently ongoing, and that it will create an IEP as it "moves forward with the parent." An IEP did not result from the August 25, 2021 meeting.

The District did, however, create two Prior Written Notices, one dated August 23, 2021 (which was dated before the IEP meeting), and one dated August 25, 2021, which is the date of the meeting.

The August 23, 2021 Prior Written Notice states that the District was not able to require other students in the Student's classroom to mask because it is contrary to the District's current policy of optional masking, and that it was not able to provide the Student education in a remote learning environment due to COVID-19 – the District was not offering remote learning. Additionally, it provides that the education environment where the Student is to be educated be sanitized, that the Student be moved away from others who show symptoms of illness, that separate supplies be made available, that the Student will only sit next to other students who are masked, and that the school nurse will meet with the Student at a location other than the nurse's office.

The August 25, 2021 Prior Written Notice again states that the Student's Mother's requests for masking and remote learning were rejected, and again notes the

mask optional District policy. The District proposed that cleaning methods would be performed, and peer physical placement, as in its August 23, 2021 Prior Written Notice, but also reflected, yet without requiring, the Physician's initial directions, and noted that the Physician recommended remote learning if Cystic Fibrosis Foundation and CDC guidelines are not followed.

Two Prior Written Notices were completed by the District summarizing the results of the IEP meeting. They noted the description of the refused action by stating that the District was not able to require other students to wear masks, nor was it able to provide remote learning due to COVID-19. (Prior Written Notices, August 23, 2021 and August 25, 2021). They note the reasons for the proposed refusal by stating that reasonable accommodations are made to prevent the Student from contracting COVID-19. They describe other options considered by the IEP Team. They note what procedures are used to support their actions. Finally, they explain the other factors relevant to the refusal. Absent an IEP, however, other information required under 34 C.F.R § 300.320 remains unreported. As other issues in this report disclose, an IEP resulting from the August 25, 2021 meeting would provide information to develop these other issues.

Only after the Complaint Investigation process was begun was another IEP meeting held, resulting in the revised October 29, 2021 IEP.

Summary and Conclusions

There was no revised IEP developed after the August 25, 2021 meeting. While the parties may agree to not to convene a meeting to make changes to an IEP, see 34 C.F.R § 300.324(a)(4), or proceed by amendment, see 34 C.F.R § 300.324(b), there nothing to provide that a Prior Written Notice, or Notices, are sufficient substitutes for an IEP. The IEP is the authoritative document which develops the child's plan. 34 C.F.R § 300.324(a). Indeed, after developed, an IEP is to be implemented as soon as possible after the meeting. 34 C.F.R § 300.323(c)(2).

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed 690 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. Id. at 207. A determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education

only if the procedural inadequacies: (1) impeded a child's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. Id. at (a)(2).

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). In this instance, no IEP has been offered resulting from the August 25, 2021 meeting. A substantive violation has occurred. It was left open-ended "as it moves forward with the parent." Nothing moved forward with the Student's Mother -- a State Complaint was filed.

92 NAC 51-007.10 is an IEP revision rule. Alternatively, the District's failure to follow the revision rule is also deemed a procedural violation of FAPE. Because of the procedural violation, and while considering the two Prior Written Notices, the Student's right to a free appropriate public education was impeded and significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education. The District's position that an IEP would be forthcoming at some open-ended time as it "moves forward with the parent" impedes a FAPE and significantly impeded the Student's Mother an opportunity to participate in the decision-making process for a FAPE. A substantive violation of FAPE has occurred.

Only after the Student's Mother filed a State Complaint did the District move forward to have a new IEP meeting, which did result in the October 29, 2021 revised IEP. This does not correct the procedural and substantive violations for failure to have an IEP from the August 25, 2021 meeting, although it does impact a need for corrective action, since requiring a new IEP at this stage would be redundant because a revised IEP was completed on October 29, 2021.

Corrective action is not required on this part of the issue.

Nonetheless, as found under Issue 2, above, in addition to a failure to provide for a continuum of alternate placements for instruction while the Student may be hospitalized, the revised October 29, 2021 IEP also fails to reflect the child's anticipated needs because of anticipated hospitalizations. It results in a procedural violation. 92 NAC 51-007.07A.

The October 29, 2021 IEP resulted in a three-day window "re-teaching if needed" provision should the Student be hospitalized. The Investigative Findings and Summary and Conclusions in Issue 2 are adopted for this part of the issue.

Corrective action is required.

Corrective Action

1. Consistent with Issue 2, within 60 days from the date this report is issued, a facilitated IEP will meet to provide for the child's anticipated needs because of anticipated hospitalizations. See The Individuals with Disabilities Education Act (IDEA), 92 NAC 51 (Rule 51), Nebraska IEP Facilitation Guide, August 2020.
2. A copy of the finalized facilitated IEP will be provided to NDE within 10 days of the conclusion of the meeting.

Notice to District

Corrective action is required under Issues Numbered 1, 2, and 4. 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 Investigation Specialist
nde.speddr@nebraska.gov