

COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.10
Complaint Investigator: [Redacted]
Date Complaint Filed: October 12, 2021
Date of Report: [Redacted]

Issues Investigated

1. Did the District pre-determine the Student's in-school placement set forth in the Student's September 13, 2021, IEP, and thus deny the parent a meaningful opportunity to participate in the Student's placement decision, as required by 34 CFR §300.116(a)(1) and 300.501(b), (c)(1); and 92 NAC 51-008.01C, 009.01A and 009.02A?
2. In selecting the LRE for the Student, did the District consider any potential harmful effects on the Student from an in-school placement, as required by 34 CFR §300.116(d); 92 NAC 51-008.01H?
3. Did the District provide an accurate and appropriate PWN to the Parent regarding the District's refusal to change the educational placement of the Student to homebound services as requested by the Parent, as required by 34 CFR §300.503(b); and 92 NAC 51-009.05B?
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 October 11, 2021; received by NDE on October 12, 2021;
- Letter dated July 30, 2021, from Student's doctor;
- Email from the Parent to the Student's Special Education Teacher, dated August 2, 2019;
- Letter dated August 2, 2021 from an Alternative Curriculum Program Supervisor for District;
- A copy of the District's webpage as it appeared on or around September 13, 2021;
- Email from the Parent to the District regarding homeschooling, dated September 22, 2021;
- Emails between the parent and Special Education Director, dated August 23, 31, 2021;
- Student's Functional Behavior Assessment (FBA) and General Behavior Intervention Plan (BIP), dated October 2, 2021;

- First Prior Written Notice (PWN) dated September 13, 2021, emailed to the Parents on September 21, 2021, at 11:37 a.m.;
- Emails from the school to the Parent regarding IEP documents, dated September 21, 2021;
- Second PWN dated September 13, 2021, emailed to the Parents on September 21, 2021, at 1:06 p.m.;
- Email from Parent to the Student's Special Education Teacher, dated September 30, 2021, regarding questions about IEP documents; and
- A copy of Parent's detailed explanation of the Student's educational loss.

From the School District

- Response from District, dated November 5, 2021; received by complaint investigator on November 5, 2021;
- Student's IEP, dated December 19, 2019;
- PWN, undated, regarding school closures and virtual instruction due to COVID-19;
- Notice of IEP team meeting dated December 3, 2020;
- Student's IEP, dated January 7, 2021;
- Student's IEP, dated August 19, 2021;
- Student's IEP, dated September 13, 2021;
- PWN dated September 13, 2021;
- Handwritten notes from IEP team meetings on August 19, 2021, and September 13, 2021;
- Written narrative statements from school staff regarding the IEP team meetings held on August 19, 2021, and September 13, 2021, regarding the parents request for homebound services;
- Letter from the Student's pediatrician regarding homebound services, dated July 30, 2021;
- Request for Medical Information by the District, dated August 2, 2021;
- District's Homebound Procedures;
- Notice to parents regarding return to in-person learning for 2021/2022 SY, dated July 23, 2021.
- District's Resolution requiring all staff to wear a mask on District premises, dated August 9, 2021.

Interviews Conducted by Investigator

- Telephonic interviews with: the Parent; Director of Special Education; Special Education Supervisor; Special Education Teacher/Case Manager, and General Education Teacher.

Introduction

The Student is currently 9 years of age, in the 4th grade, and resides with the Parent within the jurisdictional boundaries of the District. During the relevant time period involved in this complaint investigation, the Student attended an Elementary School in the District (the School). The Student has been diagnosed with Autism, a significant speech disorder and fine motor deficits. Based upon the Student's disabilities, it has been determined that the Student is a student with a disability and is eligible to receive special education and related services under the disability classification of Autism. On December 19, 2019, School staff and the Parent met to develop an IEP for the Student. In March, 2020, the District began remote learning for all students enrolled in the District due to the COVID-19 pandemic. In October, 2020, students in the District had the option to return to in-person learning under a hybrid model, and in February, 2021, students had the option to return to full in-person learning or continue with 100% remote learning. The Parent opted to have the Student attend school remotely for the entire 2020/2021 school year. On January 7, 2021, the Student's IEP team, including the Parent, met to review and revise the Student's IEP. On August 2, 2021, the Parent emailed to the Student's Special Education Teacher a letter from the Student's pediatrician dated July 30, 2021, requesting that the Student be considered "for eligibility for Homebound Services as a 504 accommodation." On August 2, 2021, the District's Special Education Teaching and Learning Consultant mailed a Request for Medical Information regarding homebound educational services to the Parent. On the following day, the Teaching and Learning Consultant sent an email to the Parent stating that she had mailed the medical request form to the Parent and indicating that once the medical information was received, she would schedule an IEP team meeting to discuss the proposed homebound placement. On August 19, 2021, the Student's IEP team, including the Parent, met to discuss the Parent's request for a change of placement to homebound services. The August 19, 2021, IEP indicates that the Parent's proposal for homebound services for the Student was denied. On August 23, 2021, the parent emailed the School and requested an additional IEP team meeting to discuss the Student's placement. On September 13, 2021, the Student's IEP team met to further discuss the Parent's proposal for homebound placement, and safety measures for the Student. The Student's September 13, 2021, IEP states that the Parent's request for homebound services was rejected, and the IEP includes additional health and safety measures. On September 18, 2021 the Parents submitted paperwork to the Nebraska Department of Education to disenroll the Student from the District and homeschool the Student. On September 21, 2021, the Student's Special Education Teacher emailed a PWN to the Parent regarding the September 13,

2021, IEP team meeting. One hour and 24 minutes later the teacher emailed the Parent and stated that she had mistakenly emailed the wrong PWN, and five minutes later sent a second email indicating that she had mistakenly emailed the draft of the PWN and attached the “final one” to the email. On September 22, 2021, the Parent sent an email to the District explaining the reasons why the Parents believe they were forced to homeschool the Student. The Parent filed the Complaint in this matter against the District on October 12, 2021.

This investigation is limited to a review of alleged IDEA violations that occurred not more than one year prior to October 12, 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 pre-determine the Student’s in-school placement set forth in the Student’s September 13, 2021, IEP, and thus deny the parent a meaningful opportunity to participate in the Student’s placement decision, as required by 34 CFR §300.116(a)(1) and 300.501(b), (c)(1); and 92 NAC 51-008.01C, 009.01A and 009.02A?

34 CFR §300.116(a)(1) provides as follows:

300.116(a)(1) In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that 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.

34 CFR §300.501(b)(1) provides as follows:

300.501(b)(1) 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.

34 CFR §300.501(c)(1) provides as follows:

300.501(c)(1) Each public agency must ensure that the parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

State rule 92 NAC 51-008.01C provides as follows:

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.

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.

State rule 92 NAC 51-009.02A provides as follows:

009.02A The school district or approved cooperative shall ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of their child.

Allegations

The District pre-determined an in-school placement for the Student outside of an IEP team meeting which denied the Parent a meaningful opportunity to participate in the Student's placement decision.

Parent Position

The Parent's Complaint argues that the District has attempted to avoid an actual IEP team consideration of placement by setting rigid, non-individualized criteria about homebound placements prior to any actual IEP team meeting, and deciding those placements based on its own administrative preferences and without regard to the appropriateness of the placement for the Student.

District Response

The District's Letter of Response dated November 5, 2021, states that the District held two IEP team meetings to discuss the Parent's request for a homebound placement for the Student, and the parent participated in both meetings. At both meetings, the IEP team went through the District criteria for a homebound placement, noting that the medical information provided did not include enough information to determine that the most restrictive setting of homebound was a necessary placement for the Student. At each meeting the IEP team engaged in discussions related to providing the Student FAPE safely in the Student's current placement.

Investigative Findings

- 1) The Student is currently 9 years of age, in the 4th grade, and resides with the Parent within the jurisdictional boundaries of the District (Parent's Complaint; District's Response).
- 2) During the relevant time period involved in this complaint investigation, the Student attended the School (Parent's Complaint; District's Response).
- 3) The Student has been diagnosed with Autism, a significant speech disorder and fine motor deficits. Based upon the Student's disabilities, it has been determined that the Student is a student with a disability and is eligible to receive special education and related services in an IEP under the disability classification of Autism (Parent's Complaint; District's Response; Student's IEP)
- 4) On December 19, 2019, School staff and the Parent met for the annual review of the IEP for the Student (Student's December 19, 2019, IEP).
- 5) In March, 2020, the District began remote learning for all students enrolled in the District due to the COVID-19 pandemic, and provided PWN to the Parent that the Student would receive special education services remotely until school was "back in session." (PWN regarding school closures and virtual instruction due to COVID-19).
- 6) In October, 2020, students in the District had the option to return to in-person learning under a hybrid learning model, which the Parent chose not to do (March, 2020, PWN; Parent's Complaint; District's Response).
- 7) On January 7, 2021, the Student's IEP team, including the Parent, met for the annual review of the Student's IEP (Student's January 7, 2021, IEP).

- 8) In February, 2021, students in the District had the option to return to full in-person learning or continue with 100% remote learning. The Parent opted to have the Student attend school remotely for the entire 2020/2021 school year (March, 2020, PWN; Parent's Complaint; District's Response).
- 9) During the Summer, 2021, the District notified parents that the District was returning to in-person learning for the 2021/2022 school year (Interview with the District's Director of Special Education; District's Planning for a Responsible Returned to School 2021-22, dated July 23, 2021).
- 10) On August 2, 2021, the Parent emailed to the Student's Special Education Teacher a letter from the Student's pediatrician dated July 30, 2021, which requested that the District "consider [the Student] for eligibility for Homebound Services as a 504 accommodation." (The Doctor's Note). The Doctor's Note also states that "[the Student] is a 9 year old [gender] with a complicated medical history including Autism Spectrum Disorder and significant speech sound disorder for which [the Student] is receiving intensive speech therapy. [The Student] also has a history of asthma and allergies and would be considered high risk for contracting COVID as [the Student] is not able to be vaccinated and not able to consistently wear a mask. Homebound Services would allow [the Student] to avoid possible exposures. The anticipated duration for this accommodation (sic) would be until [the Student] can be fully vaccinated for COVID. (August 2, 2021, email from Parent; July 30, 2021, Doctor's Note).
- 11) On August 2, 2021, the District's Special Education Teaching and Learning Consultant mailed to the Parent a Request for Medical Information regarding homebound educational services. The August 2, 2021, Letter to Parent states, in relevant part, as follows:

"The parent/guardian of [the Student] has requested consideration for eligibility of accommodations for virtual or homebound educational services due to an indicated medical condition. Virtual or homebound services offer short-term, limited educational programming to students who are confined to the home or hospital setting due to a physical illness or a health condition. Virtual and homebound services are the most restrictive setting, and your recommendations will be valuable information for the 504 or IEP team. Please provide a dated letter signed by the physician to the school containing the following information:

 - a) Student's name
 - b) Medical diagnosis
 - c) Statement regarding whether or not the student is confined to the home or hospital

- d) Anticipated length of duration (number of weeks or end date) that requested accommodations are necessary.
 - e) Conditions that must exist in the school for the student to attend in-person such as: partial day or partial week attendance (e.g., late start/early release, every Wednesday off, etc.), CDC Health and safety guidelines in place, reduced class size (indicate number of students appropriate), in-person instruction with staff only, etc.
 - f) Indicate specifically if it is safe for school staff member(s) to enter the student's home to provide educational services."(Letter to Parent, dated August 2, 2021, emphasis in original).
- 12) On August 3, 2021's, the District's Teaching and Learning Consultant sent an email to the Parent which stated that she had mailed the medical request form to the Parent and indicated that once the medical information is received, she would schedule an IEP team meeting to discuss the Student's eligibility for a homebound placement. (Email to Parent, dated August 3, 2021).
- 13) In response to the District's request for additional medical information, the Parent did not provide an additional doctor's note, or any further medical information regarding the Student, to the District. (District's Response).
- 14) The Parent reports that the Student's doctor did not order, and has not afterward ordered, home confinement for the Student in connection with the Student's disabilities and medical diagnoses. (Interview with Parent).
- 15) The District does have written policies and procedures regarding homebound services for students who have an IEP (Homebound Procedures). The District's Homebound Procedures provide, in relevant part, as follows:
- a) "For students with an IEP, the IEP team determines eligibility for homebound instruction utilizing information provided by a physician. The medical information provided by a physician should be current, signed, dated, and include the following:
 - i) Medical Diagnosis
 - ii) Anticipated length of duration that accommodation is necessary (number of week or end date included)
 - iii) Statement that the student is confined to their home or a hospital.
 - iv) Safety considerations school may provide for in-person learning (if applicable)
 - v) Clearance for school staff to enter home (if required)"
 - b) "Beginning the Process"
 - i) A parent request for homebound instruction should be referred to the IEP case manager.

- ii) The IEP case manager contacts the parent to gather additional information, asks if there is a physician's letter and provide the Physician Letter Request form;
 - iii) **“A medical note completed by the student's physician is required for consideration of homebound services. If the parent is not able to provide a letter with the necessary information, the team can meet to determine accommodations, but the student may not be eligible for homebound services.”** (Emphasis added.)
 - iv) IEP team, including the Special Education Teaching and Learning Consultant, convenes to determine if the student is eligible for homebound services. The discussion will include how the student will receive general education, special education, and related services.
 - v) An IEP team meeting to discuss a change of placement is required as well as a Prior Written Notice of Change of Placement.
- c) “Directions for determining eligibility:”
- i) Step 1: Determine if there is a physician's letter that includes the information above.
 - (1) If no, provide parent with the Physician Letter Request form. If the parent is not able to provide a note with the necessary information, the team can proceed to determine if there are accommodations that can be provided, but the student may not be eligible for homebound instruction.
 - ii) Step 2: Review the Physicians letter and discuss the information provided by the doctor. If the team identifies concerns that substantially limit the student's ability to attend school in-person, including confinement to home or hospital, proceed to step 3.
 - (1) If the parent is unable to provide a physician's letter or the team is unable to identify concerns that substantially limits the Student's ability to attend school in-person, the student is not eligible for homebound services, but the IEP team should discuss additional accommodations that may be provided to meet the student's needs.
 - (2) Information from Step 1 and Step 2 should be included in the PLAAFP.
 - iii) Step 3: What are the concerns of the IEP team? The team should review:
 - (1) the anticipated length of duration that accommodation is necessary,
 - (2) safety considerations school may provide for in-person learning.
 - (3) Teacher and administrator input

- (4) Academic performance
- (5) Behavioral performance
- (6) School nurse input. Information from Step 3 should be included in the PLAAFP section of the IEP under Concerns of the Parent. (District's Homebound Procedures).

- 16) The 2021/2022 school year began on August 16, 2021. Parents were notified during the previous summer that school would be 100% in-person learning at the School (Interview with the District's Director of Special Education).
- 17) On August 19, 2021, the Student's IEP team, including the Parent, met virtually to discuss the Student's eligibility for a change of placement to homebound services. The parties who attended the meeting were as follows: the Parent, District Special Education Supervisor, School Principal, Special Education Teacher, General Education Teacher, two Occupational Therapists (OT), and the Speech Language Pathologist (SLP). (Parents Complaint, District's Response).
- 18) Various reports and statements from the parties regarding the August 19, 2021, IEP meeting consistently state that the meeting proceeded as follows:
- a) Following introductions, the Special Education Supervisor stated that the purpose of the meeting was to discuss the Parent's request for a change of placement to homebound services for the Student.
 - b) The Special Education Coordinator then reviewed with the team the Doctor's Note provided by the Parent and the information requested by the District, and stated that the doctor's medical note did not contain all of the information required by the District and, therefore, did not meet the criteria for a change of placement to homebound services. She stated that the Parent's request for homebound services for the Student was denied.
 - c) The Parent shared her concerns regarding the Student being safe at school and that she did not feel comfortable sending the Student to School, and that she would probably be required to homeschool the Student to keep him safe.
 - d) The IEP team then proceeded to discuss the Student's IEP and the safety measures and procedures that would need to be implemented in order for the Student to safely attend school in-person.
 - (1) (Parent's Complaint, District's Response, Written statements from, and interviews with, School staff).
- 19) The Student's August 19, 2021, revised IEP provides, in relevant part, as follows:
- a) The Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) was amended by adding the following:

- i) "Safety Concerns due to Covid-19
[The Parents] requested an IEP meeting to determine if [the Student] is eligible for Homebound services. They provided a doctor's note from [Student's doctor]. The district is refusing the request for Homebound services. The IEP team discussed additional health and safety measures to be provided so that [the Student] is able to attend school. Actions include the use of social distancing, setting up [Student's] work area away from others, using plexiglass in the classroom, as well as speech therapy and specials. Setting up is work area away from others in specials, or in the case of PE, depending on the lesson, [Student] might attend with the paraprofessional and participate alongside the class, or the paraprofessional will take [Student] for a walk or playground, so [Student] still receives physical exercise. [The Student] will be able to eat lunch in the classroom at a study carrel."
- ii) "Concerns from [the Student's] parents:
[The Student's] parents are concerned about in person learning for [the Student] due to Covid-19. [The Student's] parents do not feel [the Student] understands the protocols for social distancing. [The Student's] parents are also concerned because [the Student] has a history of asthma and allergies and would be considered high risk for contracting COVID as [the Student] is not able to be vaccinated and not able to consistently wear a mask. They would like to receive homebound services or possibly home school [the Student] until [the Student] is able to be vaccinated."
- b) The Student's Educational Needs section was amended by adding the following:
 - i) "Extra Safety & health measures: social distancing, [the Student's] own personal work area away from others, using plexiglass in the classroom, speech & specials, accommodations in PE and eating lunch in the classroom in a study carrel away from others."
- c) Annual Goals were only slightly changed to remove a completed objective.
- d) Special Education and Related Services were not changed.
- e) The Participation in Education Programs section was amended as follows:
 - i) The IEP team discussed additional health and safety measures to be provided so that the Student is able to attend school. Actions include the use of social distancing, setting up [the Student's] work area away from others, using plexiglass in the classroom, as well as speech therapy and specials. Setting up [the Student's] work area away from others in specials, or in the case of PE, depending on the lesson, [the Student]

might attend with the paraprofessional and participate alongside the class, or the paraprofessional will take [the Student] for a walk or playground, so [the Student] still receives physical exercise. [The Student] will be able to eat lunch in the classroom at a study carrel. (Student's August 19, 2021, IEP).

- 20) On August 23, 2021, the Parent emailed the School and requested an additional IEP team meeting to discuss the Student's placement (Email from Parent to School staff, dated August 23, 2021).
- 21) On September 13, 2021, the Student's IEP team, including the Parent, met virtually for a second time to discuss the Student's eligibility for the Parent's proposal to change the Student's placement to homebound services. The parties who attended the meeting were as follows: the Parent, Parent's attorney, District Special Education Supervisor, School Principal, Special Education Teacher, General Education Teacher, two OTs, the SLP, and District's attorney. (Parent's Complaint; District's Response; Student's September 13, 2021, IEP).
- 22) Various reports and statements from the parties regarding the September 13, 2021, IEP meeting consistently state that the meeting proceeded as follows:
 - a) Following introductions, the Special Education Supervisor stated that the purpose of the meeting was to discuss the Parent's request for a change of placement to homebound services for the Student.
 - b) The Special Education Supervisor began the discussion by going over each of the requirements stated in the District's Request for Medical Information letter regarding a request for Virtual or Homebound services, and then reviewing the Doctor's Note provided by the Parent. The Parent's attorney questioned why the team was focusing on the Doctor's Note and the letter provided to the Parent. The Supervisor stated that because of the highly restrictive nature of a homebound placement, the IEP team was required by District policy to apply the criteria set forth in the Request for Medical Information form to determine if the Student was eligible for a homebound placement. The Parent and her attorney stated multiple times during the meeting that the placement determination should be made after discussions related to the IEP development process, including whether the Student could safely socially distance or could consistently wear a mask. The Parent made repeated requests to reverse the order of the discussion, which were refused by the District.
 - c) The Supervisor asked each team member, including the Parent, to state whether the Doctor's Note contained each of the requirements set forth in the District's Request for Medical Information. Each member of the IEP team, including the Parent, responded that the Doctor's Note did not

- include a statement regarding whether or not the Student is confined to the home or hospital, and did not contain a statement with conditions that must exist in the school for the Student to attend in-person.
- d) The Parent agreed that the note from the Student's doctor does not order home confinement for the treatment of the Student's health conditions or disabilities. The Parent stated to the IEP team that the Student has been essentially confined to [the Student's] home since March, 2020.
 - e) All of the members of the IEP team, except the Parent, agreed that the Student did not qualify for a homebound placement because the Student was not confined to the home by the doctor's order. The Parent objected to this determination, and the team spent some time discussing it.
 - f) The Special Education Supervisor then directed the team to review and discuss the Student's IEP, specifically regarding measures to keep the Student safe at school. The team discussed many different safety measures that could be put in place for the Student, including safe social distancing, plexiglass shields, mask tolerance program, using a variety of masks for sensory issues, use of pre-teaching and social stories, positive reinforcement, using Mario stickers, 1:1 instruction at either a study carrel or a teacher station, wiping down services and tables, eating lunch in the classroom, attending PE with a paraprofessional or, if the PE activity requires close interactions, going for a walk or going to the playground instead, and use of a study carrel for work time or for lunch. These safety measures would be included in the Student's IEP.
 - g) The Parents indicated that they did not agree with the process used by the District to determine that the Student did not qualify for a homebound placement. (Parent's Complaint; District's Response; Statements from School staff; Student's September 13, 2021, IEP).
- 23) The Parent defines the Student's "home" as referring to the family's home, their front and back yards, and their driveway. The Parent admits that the Student has left the "home" for [the Student's] annual medical checkup, outdoor walks around the neighborhood with the parents, occasional nature trail walks at state parks with the parents, and occasional visits to outdoor parks and playgrounds with the parents." (Parent's Complaint; District Response; Interviews with Parent and District Staff).
- 24) 24. The Student's September 13, 2021, revised IEP provides, in relevant part, as follows:
- a) The Student's PLAAFP was amended by adding the following language to:
 - i) Safety Concerns due to Covid-19

- ii) "The team discussed mask concerns for [the Student]. There is not current baseline data on [the Student's] ability to wear masks. We will have to incorporate masks teaching through social stories, reinforcement, trying out different kinds of masks incorporating space for him to social distance and take mask breaks and etc."
 - b) Concerns from [the Student's] parents:
"[The Parent's] concerns for [the Student] this year are focused on his learning while at home and his eventual transition back to in person learning." The Parent's list of concerns discussed the following: Remote Speech, access to materials and resources, transitions between activities, increasing social interaction opportunities, and elopement when the class is outside.
 - b. The Student's Educational Needs section was discussed and amended by adding the following language to:
 - i) Extra Safety & health measures: "Mask teaching and reinforcement through social stories, masks breaks, social distancing, and trying out different masks and/or face shield. [The Student] might need a room divider or partition wall put in to help keep [the Student] safe in [the Student's] area for social distancing."
 - c) Annual Goals were discussed and were considered still appropriate for the Student.
 - d) Special Education and Related Services were discussed and not changed.
 - e) The Participation in Education Programs section continues to include the following:
 - i) "The IEP team discussed additional health and safety measures to be provided so that [the Student] is able to attend school. Actions include the use of social distancing, setting up the Student's work area away from others, using plexiglass in the classroom, as well as speech therapy and specials. Setting up is work area away from others in specials, or in the case of PE, depending on the lesson, [the Student] might attend with the paraprofessional and participate alongside the class, or the paraprofessional will take [the Student] for a walk or playground, so [the Student] still receives physical exercise. [The Student] will be able to eat lunch in the classroom at a study carrel."
 - f) The Parents did not sign the September 13, 2021, IEP. (Student's September 13, 2021, IEP).
- 25) Following the September 13, 2021, IEP team meeting, District staff prepared a draft of a PWN to the Parents. The District's Special Education Supervisor and legal counsel, who both attended the September 13, 2021, IEP team

meeting, reviewed and revised the PWN. (District's Response; Statement of Special Education Teacher; Interviews with District Staff).

- 26) On September 18, 2021, the Parents submitted paperwork to the Nebraska Department of Education to disenroll the Student from the District and homeschool the Student. (Parent's Complaint; Email from the Parent to School staff, dated September 22, 2021).
- 27) On September 20, 2021, the final revised PWN was sent by the District's legal counsel to the Special Education Supervisor. The District reports that it is the standard practice of the District to have a special education supervisor and legal counsel review and revise PWNs after IEP meetings that consider a change of placement. The Special Education Supervisor then electronically attached the revised PWN to the September 13, 2021, IEP in the District's electronic documents system. (District's Response; Statement of Special Education Teacher; Interviews with District Staff)
- 28) On September 21, 2021, at 11:37 a.m., the Student's Special Education Teacher emailed a PWN to the Parent regarding the September 13, 2021, IEP team meeting (First PWN). One hour and 24 minutes later the teacher emailed the Parent and stated that she had mistakenly emailed the wrong PWN, and five minutes later sent a second email indicating that she had mistakenly emailed the draft of the PWN and attached the "final one" to the email (Final PWN). (Email from teacher to Parent, dated September 21, 2021, at 11:37 a.m.; Email from teacher to Parent, dated September 21, 2021, at 1:01 p.m.; Email from teacher to Parent, dated September 21, 2021, at 1:06 p.m.).
- 29) The Special Education Teacher reports that when she was attaching IEP documents to her 11:37 a.m. email to the Parent, she mistakenly attached the original draft of the PWN that was on the District's documents database. The Special Education Teacher was notified by the Special Education Supervisor 9 minutes later that she had attached the draft PWN to the email sent to the Parent. The Special Education Teacher then emailed the Parent regarding her mistake and emailed the Final PWN to the Parent. The Final PWN was not revised by District staff or legal counsel at any time on September 21, 2021. (Interviews with Special Education Supervisor, Special Education Teacher, and legal counsel).
- 30) The First PWN is dated September 13, 2021. The First PWN does not identify the LEA Representative or a person to contact with questions about the notice.
- 31) The District's Final PWN regarding the September 13, 2021, IEP provides, in relevant part, as follows:
 - a) The Final PWN is dated September 20, 2021, and identifies the name of the LEA Representative;

- b) **Description of the action proposed by the district:** “The IEP team met on September 13, 2021, following a request from [the Parents] that [the Student] receive Homebound services. They provided a doctor's note from [the Student's doctor]. The IEP team determined that Homebound services were not appropriate and that [the School] remains the least restrictive environment for [the Student] to receive [the Student's] services. The district proposes [the Student] continue to attend [the School] and receive the following special education services/programs: Alternate Curriculum Program, Speech Language Therapy, Occupational Therapy, Speech Language Integrated Services and special education transportation.”
- c) **Explanation of why the district proposes to take this action:** “The IEP team reviewed the medical note provided by [the Student's Doctor]. The team reviewed whether the letter contained a medical diagnosis, a statement of confinement, an anticipated duration, conditions for in-person instruction, and whether it is safe to enter the home. The information provided did not indicate that the student is confined to [the Student's] home or a hospital. The IEP team discussed additional health and safety measures the District could provide so [the Student] is able to attend school safely in person. In addition to health and safety measures included in the 8/19/2021 IEP, the team discussed a mask tolerance program, allowing [the Student] to use different types of masks or a face shield, mask breaks, social distancing, plexiglass dividers in the classroom, frequent hand washing and hand sanitizer, and re-direction and reminders for masking. The IEP team proposed that [the Student] wear a face shield instead of a mask and that [the Student] have a plexiglass shield in front of [the Student] in the classroom.”
- d) **Description of any options the IEP team considered and the reasons for the rejection of those options:** “The team considered Homebound services and homebound as the most restrictive environment. The District is obligated to educate [the Student] in the Least Restrictive Environment. Homebound services were rejected since medical information does not indicate that the student is confined to their home and the district is able to implement the following safety measures in [the Student's] classroom: the use of social distancing, setting up [the Student's] work area away from others, mask teaching and reinforcement through social stories, mask breaks, trying different masks and/or face shield, using plexiglass in the classroom, as well as speech therapy and specials. Setting up [the Student's] work area away from others in specials, or in the case of PE, depending on the lesson, [the Student] might attend with the

paraprofessional and participate alongside the class, or the paraprofessional will take [the Student] for a walk or playground, so [the Student] still receives physical exercise. [The Student] will be able to eat lunch in the classroom at a study carrel."

- e) **Description of each evaluation procedure, assessment, record or report the district used as a basis for the proposed action:** "This proposal is based upon the medical note from [the Student's doctor], and [the Student's] needs as described in [the Student's] most recent IEP."
- f) **Description of any other factors that are relevant to the district's proposal:** "The District reiterated that [the Student] has an IEP in place and could provide the safety measures outlined on the IEP. The IEP team shared that [the Student] is welcome at [the School] and the team is ready to provide the health and safety measures listed on the IEP. The IEP team shared that [the Student] would be eligible for in-person special education services through the District if the parents chose to homeschool."
- g) The Final PWN does identify a person to contact with questions about the notice.

32) On September 22, 2021, the Parent sent an email to the District stating that the Parents had disenrolled the student from the District and submitted paperwork to the District to homeschool the Student on September 18, 2021, and explained the reasons why the Parents believe they were forced to homeschool the Student. (Email from the Parent to School staff, dated September 22, 2021).

33) The Student is currently being homeschooled by the Parent and is not receiving any educational services from the District. (Interview with Parent on November 24, 2021).

Summary and Conclusions

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 regarding the educational placement of their child, or are afforded the opportunity to participate. 34 CFR §300.501(b)(1); 92 NAC 51-009.01A. The school district or approved cooperative shall ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of their child. 34 CFR §300.501(c)(1); 92 NAC 51-009.02A. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that 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 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. 34 CFR §300.116(a)(1); 92 NAC 51-008.01C. 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)). However, 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 even if the team does not adopt the parent's views. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). Stated another way, a parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. *N.L. v. Knox Cnty. Schs.*, 315 F.3d 688, 693 (6th Cir. 2003).

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). 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).)

Courts have determined that one way a parent can be denied meaningful participation in the IEP process is when a district pre-determines the educational placement of a student with a disability. Pre-determination occurs when district members of the IEP team unilaterally decide a student's placement in advance of the IEP team meeting. In *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 110 LRP 46999, 546 U.S. 936 (U.S. 2005). The parents requested that the district fund an applied behavior analysis program, and the IEP team refused and indicated its policy prevented it from considering a program other than the one in which it had invested.

During IEP meetings, the district allowed the parents to voice their opinion and present evidence regarding an appropriate program for their son, but it already had decided on his placement and educational methodology. *Id.* The members of an IEP team must enter the IEP team meeting with an open mind and must meaningfully consider the parents' input. See, e.g., *R.L. and S.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014); and *H.B. v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (C.D. Cal. 2008), *aff'd*, 54 IDELR 73 (9th Cir. 2010, unpublished) (holding that the superintendent's announcement at the start of an IEP meeting that the team would discuss the student's transition to public school showed that the district predetermined the student's placement). A district that comes to an IEP team meeting with a "take it or leave it" offer may be subject to a claim of pre-determination. *J.G. v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 801, n.10 (9th Cir. 2008).

However, the IDEA does not prohibit the district IEP team members from meeting before an IEP to discuss a student's needs and services and prepare for the meeting. *N.L. v. Knox Cnty. Schs.*, 315 F.3d 688, 693 (6th Cir. 2003). The difference between "preparation" and "pre-determination" is the district's willingness to listen to the parents' concerns. See, e.g., *P.F. and S.F. v. Board of Educ. of the Bedford Cent. Sch. Dist.*, 67 IDELR 148 (S.D.N.Y. 2016). See, also, *Cobb County School District*, 109 LRP 72062 (GA SEA 2009). (The rule against predetermination does not prohibit a school district from attending an IEP meeting with a proposed placement. Nor is a school district prohibited from ultimately disagreeing with and refusing to implement the parents' requests, so long as it allows the parents to participate and considers their input.)

Parents who seek relief for a violation of their IDEA procedural rights based on a claim that the district pre-determined a placement decision must show they suffered an actual injury as a result of the district's actions. 34 CFR §300.513; See, e.g., *L.M.P. v. School Bd. of Broward County, Fla.*, 71 IDELR 101 (11th Cir. 2018) (Parents who claimed that a Florida district excluded them from the IEP process by refusing to consider their 3-year-old triplets' need for ABA-based instruction could not convince the 11th Circuit that the district predetermined their children's programs.).

In this matter the Parent alleges that the District pre-determined that the Student was not eligible for homebound services, as proposed by the Parents, prior to the September 13, 2021, IEP team meeting. In support of the Parent's pre-determination claim, the Parent points to the fact that at the beginning of the August 19, 2021, IEP team meeting, the District's Special Education Supervisor reviewed the Doctor's Note provided by the Parent and the medical information requested by the District, and stated that the Doctor's Note did not

contain all of the medical information required by the District and, therefore, did not meet the criteria for a change of placement to homebound services. The Parent's request for homebound services was summarily denied. The facts indicate that this decision was announced by the Special Education Supervisor without a general discussion by the team members regarding the Parent's request. The Parent did not agree with this decision. The IEP team then went on to review the Student's IEP and added additional provisions regarding safety measures and protocols to put in place for when the Student returned to in-person learning at the School.

The District did follow its Homebound Procedures by requesting additional medical information from the Student's doctor prior to the August IEP team meeting, which was not provided by the Parent. While it is true that the Special Education Supervisor reviewed and discussed the Doctor's Note provided by the Parent and the concerns of the Parent, the IEP team members were not given an opportunity to discuss and consider the Parent's proposal in a meaningful way prior to the decision being announced by the Special Education Supervisor. Therefore, it is concluded that as to the August 19, 2021, IEP team meeting, the facts indicate that the District did determine in advance of the meeting that the Student was not eligible for homebound services as requested by the Parent. However, shortly after the August IEP team meeting, the parent requested, and the District agreed to, a second meeting to discuss the Parent's proposal for homebound services, which was scheduled for September 13, 2021.

With respect to the September 13, 2021, IEP team meeting, the Parent argues that since the District pre-determined the outcome of the August 19, 2021, IEP team decision to deny homebound services for the Student, the District came into the September 13, 2021, IEP team meeting with a pre-determined intention to again deny the Parent's request for homebound services. However, in the September 13, 2021, IEP team meeting, the team's process for determining the eligibility of the Student was different. The District again reviewed the District's Homebound Procedures, and then reviewed the information provided in the Doctor's Note. As more fully set forth in the facts above, the Doctor's Note requests that the District "consider" the Student for eligibility for Homebound Services. The Doctor's Note also states that the Student has a complicated medical history including Autism Spectrum Disorder and significant speech sound disorder, and that the Student has a history of asthma and allergies and would be considered high risk for contracting COVID as [the Student] is not able to be vaccinated and not able to consistently wear a mask. The Doctor's Note further provides that Homebound Services would allow the Student to avoid possible exposures, and the anticipated duration for this accommodation would

be until the Student can be fully vaccinated for COVID. Each of the IEP team's members were then given the opportunity to individually indicate whether the Doctor's Note provided by the Parent contained all of the medical information required by the District's Homebound Procedures for a homebound placement, including a statement that the Student was confined to the home due to the Student's medical condition. Each of the members of the IEP team, including the Parent, indicated that the Doctor's Note included the requested information except for a statement that the Student is confined the home. The Parent did not provide to the District any additional medical information regarding the Student's confinement to the home or a hospital due to his medical conditions. the Special Education Supervisor stated that due to the very restricted nature of a homebound placement the District has very strict procedures for determining a student's eligibility. Following the team's discussion regarding the Student's medical information, it was determined that the Student did not meet the eligibility requirements for a homebound placement. The Parent and her attorney both disagreed with this determination. The IEP team then went on to discuss, and include in the IEP, various safety measures and protocols to keep the Student safe at school when the Student returned to in-person learning.

The Parent asserts that the District denied meaningful participation in the September 13, 2021, IEP meeting by pre-determining that the Doctor's Note was not sufficient to support a determination that the Student was eligible for homebound services. However, the difference between the August 19, 2021, and the September 13, 2021, IEP team meetings is that in the second meeting there was a general discussion and consideration of the Parent's proposal by all of the IEP team members, and the Parent and her attorney were provided an opportunity to discuss their proposal and express their disagreement with the team's denial of eligibility for homebound services. As explained above, the IEP team can come to the meeting with a proposed placement in mind. The significant difference with the September 13, 2021, IEP team meeting is that all of the IEP team members discussed and considered the Parent's proposal, and all of the IEP team members except for the parent and her attorney agreed that the Student did not meet the eligibility criteria for a homebound placement. And, as the facts set forth herein clearly indicate, the Parent's medical information does not meet the District's requirements for a homebound placement. The team then went on to discuss the Student's safety at school and proposed accommodations to meet his safety needs.

Therefore, it is concluded that the Parent was invited to and did attend and participate in the August 19, 2021, and September 13, 2021, IEP team meetings. It is further concluded that in the September 13, 2021, IEP team meeting, the IEP

team did discuss and meaningfully consider the Doctor's Note provided by the Parent and the Parent's proposal for a homebound placement. It is further concluded that the District did provide meaningful participation for the Parent at the September 13, 2021, IEP team meeting. It is therefore concluded that the District did not pre-determine the Student's in-school placement set forth in the Student's September 13, 2021, IEP, and did not deny the Parent a meaningful opportunity to participate in the Student's placement decision. As to Issue No. 1, the District is not cited. **Corrective Action is not required.**

Issue # 2

In selecting the LRE for the Student, did the District consider any potential harmful effects on the Student from an in-school placement, as required by 34 CFR §300.116(d); 92 NAC 51-008.01H?

34 CFR §300.116(d) provides as follows:

300.116(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

State rule 92 NAC 51-008.01H provides as follows:

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

The District Failed to appropriately consider the potential harmful effects on the Student of an in-school placement when considering the Parent's request for homebound services.

Parent Position

The Parent's Complaint argues that the District did not engage in any consideration of the potential harmful effect on the Student of attending school in-person before the Student could be vaccinated for COVID-19 in order to receive educational services. The District's placement decision was made before the August 19, 2021, IEP team meeting, and was based entirely on the fact that the Student's doctor's letter did not contain the word "confined."

District Response

The District's Letter of Response dated September 23, 2021, states that the District did consider potential harmful effects to the Student of an in-school placement.

The District was aware of the Student's Doctor's Note which described the Student as being at increased risk for COVID and may be unable to wear a mask consistently and other safety concerns. In response to the Parent and doctor's concerns, the IEP team discussed in depth the multitude of strategies and methods the District has available to keep students safe with in-person learning. The strategies include using social distancing, setting up work areas away from others, mask teaching, task breaks, alternatives to masks, face shields, Plexiglas dividers in the classroom, using a study Carrel, frequent sanitizing of the Student's workspace, and requiring all staff members to wear a mask.

Investigative Findings

Please see above Investigative Findings.

Summary and Conclusions

The IDEA Federal regulations and Rule 51 contain provisions requiring school districts to have in effect policies and procedures to educate students with disabilities in the Least Restrictive Environment (LRE). 34 CFR §300.114(a); 92 NAC 51-008.01A. These provisions clearly evidence a strong preference for school-based instruction for students with disabilities.

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.

34 CFR §300.114(a)(2); 92 NAC 51-008.01A. Moreover, the federal regulations and Rule 51 provide that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR §300.116(e); 92 NAC 51-008.011. However, the regulations and Rule 51 also contemplate situations in which the LRE for the student is not in regular education classrooms and identify a continuum of alternative placements to meet the needs of children with disabilities for special education and related services. The continuum required in the regulations and Rule 51 include instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. 34 CFR §300.115; 92 NAC 51-008.01D1. These provisions indicate that instruction in a

student's home or a hospital is the most restrictive educational environment for a student with a disability.

As required by the federal regulations and Rule 51, the District does have in effect a written policy and procedures for determining a student's eligibility for homebound instruction. One of the key components of the District's Homebound Procedures is a requirement that the medical information provided by a physician contains a "statement regarding whether or not the student is confined to the home or hospital." This requirement is one of the key contentions in this complaint investigation. It is clear from the facts set forth above that the Doctor's Note provided by the Parent to the District does not contain a statement that the Student is confined to the home or hospital.

The decision as to whether a student with a disability requires homebound instruction is an IEP team decision and must be made by the IEP team after considering the medical documentation. The U.S. Education Department has provided guidance to school districts regarding homebound instruction during the COVID-19 pandemic. "It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted." (Emphasis added.) Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (EDU 2020).

However, when determining the LRE for a student, the IEP team must also take into consideration any potential harmful effect of the placement on the child or on the quality of services which he or she needs. 92 NDE 51-008.01H. On September 30, 2021, the federal Office of Special Education and Rehabilitative Services (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, 121 LRP 33345 (OSERS 2021) (the Roadmap). 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 must be considered by the IEP team. Additionally, the Roadmap recognizes that some LEAs may have policies that are inconsistent with the CDC's COVID-19 prevention and risk strategies.

In answer to Question C-10 in the Roadmap, OSERS indicates 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.

The Parent argues in the Complaint that at the September 13, 2021, IEP team meeting, the District did not appropriately consider any potential harmful effects on the Student from an in-school placement due to the fact that the Student's medical diagnoses and [the Student's] inability to consistently wear a mask cause the Student to be at higher risk for contracting the COVID-19 virus at school. The IEP team did discuss the safety issues raised by the Parent and developed a plan for dealing with those safety concerns at school. The Parent and her attorney voiced their concerns that based on the Student's known behavior issues, the Student would not consistently wear a mask at school and the Student was too young to be vaccinated. The IEP team acknowledged that "there is not current baseline data on [the Student's] ability to wear masks." The Parent argues that in light of the Student's known medical issues and concerns with wearing a mask, which is related to [the Student's] disabilities, the IEP team should have considered a placement option other than in-person learning. An option on the continuum that was not discussed at the September 13, 2021, IEP team meeting was virtual learning in the home. Apparently, this option was not discussed by the IEP team because the District is not offering virtual learning for the 2021/2022 school year. However, according to the Roadmap, all placement options on the continuum should be considered by the IEP team during COVID-19 based on the individual needs of the Student and not only on current District policies. This view is also adopted by a recent NDE complaint decision with similar facts, which the NDE views as precedential authority in Nebraska.

In view of the very recent and 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 considering remote access 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.

Therefore, in view of the foregoing, it is concluded that in selecting the LRE for the Student, the District did not fully consider the potential harmful effects on the Student from an in-school placement. As to Issue No. 2, the District is cited. Corrective action is required.

Corrective Action

1. Within 10 days from the date of this report, the District will schedule and hold an IEP team meeting to discuss and consider providing remote access educational services to the Student for all general education and special education services in compliance with this Report.
 - a. The duration of such services will depend on the medical information provided by the Student's doctor and the individual needs of the Student.
2. The IEP team shall discuss and consider whether recovery services are needed by the Student to address any deficits the Student has incurred due to a lack of educational services being provided by the District following the September 13, 2021, IEP team meeting. The District will provide the Parent with equipment for remote educational access if needed, as well as all books, services, and supplies the Student would otherwise be provided should he be attending class in-person. 34 C.F.R §300.42.
3. With 30 days from the date of this report, the District will provide NDE documentation indicating the following:
 - a. A copy of the Student's revised IEP and the associated PWN provided to the Parent;
 - b. A schedule for providing any recovery services determined by the IEP team;
 - c. If the Student's placement is changed to remote learning, a list of materials provided to the Student to access remote instruction and how alterations to materials will be handled

Issue # 3

Did the District provide an accurate and appropriate PWN to the Parent regarding the District's refusal to change the educational placement of the Student to homebound services as requested by the Parent, as required by 34 CFR §300.503(b); and 92 NAC 51-009.05B?

34 CFR §300.503(b) provides, in relevant part, as follows:

300.503(b) The notice required under paragraph (a) of this section must include

- (1) a description of the action proposed or refused by the agency;
- (2) an explanation of why the agency proposes or refuses to take the action;

- (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;. . . (6) a description of other options that the IEP team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal.

State rule 92 NAC 51-009.05B provides, in relevant part, as follows:

- 009.05B Such prior written notice shall include:
 - 009.05B1 A description of the action proposed or refused by the school district or approved cooperative;
 - 009.05B2 An explanation of why the school district or approved cooperative proposes or refuses to take the action;
 - 009.05B3 A description of other options the IEP team considered and the reasons why those options were rejected;
 - 009.05B4 A description of each evaluation procedure, assessment, record, or report the school district or approved cooperative uses as a basis for the proposal or refusal;
 - 009.05B5 A description of any other factors which are relevant to the school district's or approved cooperative's proposal or refusal.

Allegations

The District failed to provide an accurate and appropriate PWN to the Parent regarding the District's refusal to change the educational placement of the Student to homebound services, as requested by the Parent.

Parent Position

The Parent's Complaint states that the Student's teacher emailed a PWN to the Parent regarding the District's refusal to change the Student's placement to homebound services, and later the same day emailed the Parent indicating that she had mistakenly attached the draft of the PWN and attached the Final

PWN. The revised Final PWN describes the District's actions in a manner that does not comport with either the original PWN sent by the District or the truth of what transpired during the September 13, 2021, IEP team meeting.

District Response

The District's Letter of Response dated September 23, 2021, states that the Final PWN that the teacher sent to the Parent appropriately reflects the District's refusal to change the Student's educational placement. The initial PWN sent to the Parent was a draft which the teacher mistakenly attached to an email sent to the Parent. The Final PWN includes the requirements of Rule 51 regarding PWNs. The Final PWN accurately represents the criteria used for determining that the Student was not eligible to receive homebound services.

Investigative Findings

Please see above Investigative Findings.

Summary and Conclusions

The IDEA regulations and the Rule 51 provide that PWN must be given to the parents of a student with a disability a reasonable time before the LEA proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student, or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student. 34 CFR § 300.503; 92 NAC 51-009.05A. Such prior written notice shall include: a description of the action proposed or refused by the school district or approved cooperative; an explanation of why the school district or approved cooperative proposes or refuses to take the action; a description of other options the IEP team considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the school district or approved cooperative uses as a basis for the proposal or refusal; a description of any other factors which are relevant to the school district's or approved cooperative's proposal or refusal. 34 CFR § 300.503; 92 NAC 51-009.05B.

In Letter to Chandler, 59 IDELR 110 (OSEP 2012), OSEP explained that the PWN must be provided so that parents have enough time to fully consider the change and respond to the action before it is implemented. An appropriate PWN must provide sufficient detail to allow parents to participate in their child's educational services decisions in an informed way.

Substantive changes in placement should be accompanied by an IEP meeting prior to the implementation of those changes, whereas an IEP meeting is not necessary for mere location changes. See Letter to Lott, 213 IDELR 274 (OSERS 1989); and Letter to Fisher, 21 IDELR 992 (OSEP 1994). Additionally, PWN is

required even if the change is being proposed by the parent. Letter to Lieberman, 52 IDELR 18 (OSEP 2008). A school district is not required to change a student's placement merely based on a parent's request. However, if it declines the request, the district must provide prior notice of the decision. See, e.g., Constellation Schs: Elyria Cmty., 116 LRP 11802 (SEA OH 12/29/15).

In the Complaint, the Parent argues that the District's revised Final PWN describes the District's actions during the September 13, 2021, IEP team meeting in a manner that does not comport with either the First PWN sent by the District or the truth of what transpired during the IEP team meeting. As an initial matter, the issue of whether the District provided two PWNs, or only one PWN, must be decided.

After reviewing all of the above facts and circumstances and interviewing the District staff responsible for preparing and providing the PWN to the Parent, it is concluded that the first PWN was in fact an initial draft. The draft was mistakenly sent to the Parent. The Final PWN is the District's PWN provided to the Parent, via email, regarding the September 13, 2021 [will be henceforth identified as "the PWN"].

The Parent argues that the District made its decision based entirely on the lack of "confinement" language in the Doctor's Note from the Student's pediatrician that was provided by the Parent. It is clear that the IEP team did base its decision to deny the Parent's proposal for a change of placement on the medical information (the Doctor's Note) provided by the Parent.

A reading of the PWN clearly indicates that the PWN is describing and providing notice as to two actions being taken by the District. In the first section of the PWN entitled "Description of the action proposed by the district," the actions being taken include both a denial of the Parent's proposal to change the Student's placement, and the District's proposal to implement the Student's current IEP services and the additional COVID-19 safety measures for the Student included in the Student's September 13, 2021, IEP. Both of these actions are described throughout the PWN, and it cannot be denied that both of these actions were the subjects of the September 13, 2021, IEP team meeting. With both of these actions in mind, the language complained of by the Parent in the PWN does not appear to be false or misleading.

Finally, the stated purpose of the IDEA's procedural safeguard requiring PWN is to provide notice a reasonable time before the District proposes to initiate or change the identification, evaluation, or educational placement of the Student or the provision of a FAPE to the Student, or refuses to initiate or change the identification, evaluation, or educational placement of the Student or the

provision of a FAPE to the Student. As indicated above, the intent of the PWN is to provide notice to a parent in order to allow the parent to fully consider the proposals or refusals by the District and respond to the action before it is implemented. It is concluded that the PWN provided by the District to the Parent complies with the requirements set forth in the Federal regulations and Rule 51 and the authorities cited above.

Therefore, it is concluded that the District did provide an accurate and appropriate PWN to the Parent regarding the District's refusal to change the educational placement of the Student to homebound services as requested by the Parent. As to Issue No. 3, the District is not cited. **Corrective action is not required.**

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 Parent's Complaint states that the District's procedural and substantive violations have deprived the Student of FAPE. The Student has experienced educational loss throughout the COVID pandemic, which has been exacerbated during the 2021/2022 school year when the District denied the Student any educational opportunities.

District Response

The District's Letter of Response dated September 23, 2021, states that the District did offer a FAPE to the Student as documented in the Student's IEP's dated August 19 and September 13, 2021. The IEPs include special education and related services the IEP team determined were needed to meet the Student's unique needs, in accordance with state rules. The Student's IEP clearly describes each and every health and safety protocol that it would take to help ensure the Student's safety while at school. The District listened to the Parent's concerns

about the Student's ability to wear a mask, and determined that the Student could wear a plexiglass face shield, could take mask breaks and could work on a mask tolerance program. The District was ready, willing and able to provide the Student with the services described in the Student's IEP, but the Parent has not allowed the Student to attend school for even a single day during the 2021/2022 school year.

Investigative Findings

See above Investigative Findings.

Summary and Conclusions

As noted above, it has been concluded that actions of the District with respect to Issue No. 2 identified herein constitute a substantive violation of the IDEA Federal regulations and State Rule 51. Therefore, it is concluded that the District denied the Student with a FAPE.

Corrective Action

See corrective action required 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 Office of Special Education
nde.speddr@nebraska.gov