

COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.17
Complaint Investigator: [Redacted]
Date Complaint Filed: December 24, 2021
Date of Report: [Redacted]

Issues Investigated

Did the Nebraska Department of Education violate the Individuals with Disabilities Education Act (IDEA) and the regulations implementing IDEA, when it promulgated 92 Neb. Admin. Code § 51-015.03J1 which does not permit a parent, who has voluntarily enrolled their child in a Nebraska private school and the child is receiving services under 92 Neb. Admin. Code § 51-015.03C1a, to file a due process hearing against the school district or approved cooperative in which they reside alleging a denial of a free appropriate public education? [20 U.S.C. §§ 1415(a), (b)(6); 34 C.F.R. §§ 300.500, .507]

Information Reviewed by Investigator

From the Complainant

- Letter of Complaint dated 12.24.2021; received by NDE 12.24.2021

From the Department of Education

- Legal Analysis conducted by the NDE Legal Counsel dated 01.24.2022; received by NDE, Office of Special Education 01.24.2022.
- 92 NAC 51(Rule 51)
- The Individuals with Disabilities Education Act (IDEA)
- Special Sch. Dist. No. 1 v. R.M.M., 861 F.3d 769, 778 (8th Cir. 2017)
- Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1035 (8th Cir. 2000)
- Engfer, 869 N.W.2d at 300, quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 [(1992)]

Introduction

The complaint was filed by a Parent's legal counsel as a result of on-going concerns the parent has for a child who was parentally placed in a non-public school. The nonpublic school the child is attending is not within the district of residence's boundaries. During the past year, the parent has filed three complaints, two of which resulted in required corrective action for the District of residence.

Issue # 1

Did the Nebraska Department of Education violate the Individuals with Disabilities Education Act (IDEA) and the regulations implementing IDEA, when it promulgated 92 Neb. Admin. Code § 51-015.03J1 which does not permit a parent, who has voluntarily enrolled their child in a Nebraska private school and the child is receiving services under 92 Neb. Admin. Code § 51-015.03C1a, to file a due process hearing against the school district or approved cooperative in which they reside alleging a denial of a free appropriate public education? [20 U.S.C. §§ 1415(a), (b)(6); 34 C.F.R. §§ 300.500, .507]

92 NAC 51-015.03J1 states: Except as provided in 92 NAC 51-015.03J2, the procedures in 92 NAC 51-009.06, 009.07, 009.10, 009.12, 009.13, 009.14 and 92 NAC 55 do not apply to complaints that a school district or approved cooperative has failed to meet the requirements of 92 NAC 51-015.03C1 through 015.03I and 92 NAC 51-014.01D and 012.08 including the provision of services indicated on the child's equitable services plan.

Allegations/Parent Position

According to the complainant, in the state complaint filing, dated 12.24.2021, pursuant to 92 NAC 51-015.03J1, NDE permits the relevant group of parents (parents of parentally-placed nonpublic school students with disabilities in Nebraska who have elected for their children to receive FAPE services from the school districts in which they reside) to file state complaints in accordance with the "State Complaint Procedures" in Section 009.11 of Rule 51 in order to allege "that a school district or approved cooperative has failed to meet the requirements of" the section of Rule 51 pertaining to "Provision of Services for Parentally-placed Nonpublic School Children."

According to the complainant, 92 NAC 51-015.03J1 specifically denies these parents the right to initiate a due process hearing against the school district in which they reside in order to allege a denial of FAPE. Subsection 92 NAC 51-015.03J1 states that (with the exception of complaints related to child find matters) "the procedures in... 009.14... do not apply to complaints that a school district or approved cooperative has failed to meet the requirements of 92 NAC 51-01503C1 through 015.03I...." Section 09.14 of Rule 51 pertains to "Special Education Due Process Hearings," and 92 NAC 51-01503C1a grants the right to a FAPE from the resident school district to parentally-placed nonpublic school children with disabilities.

NDE Response

92 Neb. Admin. Code §51-015.03J1 (Revised 2017), states that, with the exception of the child find requirements, the procedures in 92 Neb. Admin.

Code §51009.14 (Revised 2017) (Special Education Due Process Hearings), and 92 Neb. Admin. Code §55 (Revised 2017), do not apply to complaints that a school district has failed to meet the requirements of parentally-placed nonpublic school children with disabilities who are eligible for the provision of a free appropriate public education (FAPE) from the school district in which they reside. The Complainant claims that this is a violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412 (2019), and NDE's 92 NAC 51 (Rule 51).

Rule 51 is extremely difficult to navigate, as it covers various subjects and, within it, various exceptions. Despite its complexities, the Complainant has found the relevant provisions within Rule 51 which explain that parentally-placed nonpublic school children with disabilities are not entitled to a due process hearing to adjudicate an allegation of FAPE violations. See 92 Neb. Admin. Code §51-015.03J1.

There is no violation of Rule 51 contained in the complaint regarding the right of a due process hearing. The Complainant is conflating the right to FAPE and the right to a due process hearing to adjudicate an allegation of FAPE violations.

The Complainant claims that there is a federal right to a due process hearing when a parent disputes the provisions of FAPE under the IDEA. However, 34 CFR § 300.137(a) (2007), states that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." Rather, the local educational agency (LEA) "must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities." See *id.*

The case law cited by the Complainant explicitly stated that "[a]dmittedly, under IDEA, due process hearings are not available for complaints from private school students about the inadequacy of the proportional funding of services or the provision of specific services to such students." See *Special Sch. Dist. No. 1v. R.M.M.*, 861 F.3d 769, 778 (8th Cir. 2017). It was state law that granted the individual the right to a due process hearing in that case upon which the Complainant heavily relies in her argument. Minnesota law clearly states that "[a] parent . . . is entitled to an impartial due process hearing . . . when a dispute arises over . . . the provision of a free appropriate public education to a child with a disability." Minn. Stat. § 125A.091, Subd. 12 (Reissue 2019). R.M.M.'s parents disputed the provision of a FAPE the Minneapolis Public Schools, Special Schools District No. 1 (MPS) offered to their daughter. To that end, they were

entitled to an impartial due process hearing under state law. *Id.* (emphasis added).

Unnecessarily, the Court in *R.M.M.* took its holding a step further and in non-binding dicta concluded that federal law, in addition to state law, offers an impartial due process hearing to settle disputes between MPS and *R.M.M.* That Court cites *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000), and *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). The *R.M.M.* Court, when reviewing precedent, does not find itself bound by its own precedent if the precedent involves laws of different states. See e.g., *R.M.M.*, 861 F.3d at 777. As stated above, the *R.M.M.* Court clearly analyzed a Minnesota Statute, and not Nebraska Rule 51. The former explicitly granted a due process hearing to settle disputes like the one at issue in that case under Minnesota state law, while the latter explicitly denies a right to such a hearing in this situation in Nebraska under Rule 51.

Additionally, the *R.M.M.* Court was very clear that "[w]hen a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms." *R.M.M.*, 861 F.3d at 774 (citing *Engfer v. General Dynamics Advanced Info. Sys.*, 869 N.W.2d 295, 300 [Minn. 2015]). It is the Court's goal to "ascertain and effectuate the intent of the [state] legislature." *Id.* The Court will "presume that 'a legislature says in a statute what it means and means in a statute what it says.'" *Id.* (citing *Engfer*, 869 N.W.2d at 300, quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 [(1992)]). The Complainant seeks to apply only portions of Rule 51 and piece them together with the IDEA, in an effort to claim a greater right than that to which Complainant is entitled from a plain reading of the IDEA and Rule 51, the right to a due process hearing, while ignoring the clear language in Rule 51 that such a right does not exist.

Investigative Findings

92 Nebraska Administrative Code 51 does give FAPE to the Complainant, but overtly denies a due process hearing to adjudicate any issues the Complainant has under said administrative code (Rule 51). The complaint at issue fails to articulate a reason for NDE to find that 92 NAC 51 (Rule 51) creates an enforceable right under the IDEA, the right to a due process hearing, when 92 NAC 51 (Rule 51) plainly states that it does not.

Summary and Conclusions

The Nebraska Department of Education's Rule 51 aligns with and appropriately reflects the requirement of IDEA, thus in promulgating 92 NAC 51 (Rule 51), the Department was not in error. Based on 34 CFR § 300.137(a), the Nebraska

Department of Education implemented the requirements of 92 NAC 51 and no corrective action is required.

Corrective Action

No Corrective Action is required at this time.

Notice to District

Having found that the NDE is implementing the requirements of 92 NAC 51 in the areas raised in the complaint, the complaint is closed as of the date of this letter.