

## COMPLAINT INVESTIGATION REPORT

Complaint Number: 21.22.19  
Complaint Investigator: [Redacted]  
Date Complaint Filed: February 1, 2022  
Date of Report: [Redacted]

### Issues Investigated

1. Did the District afford the Parent(s) the opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and provision of a free appropriate public education (FAPE) for the Student in accordance with 92 NAC 51-007.06, 009.01, and 009.02?
2. Did the District consider an individualized family service plan (IFSP) that contains the IFSP content for the Student in accordance with 92 NAC 51-007.02A1?
3. Did the District develop, review, revise and implement an individual education plan (IEP) for the Student in accordance with 92 NAC 51-007.01?
4. Did the District provide special education and related services to the Student in accordance with the Student's IEP pursuant to 92 NAC 51-007.02?
5. Did the District determine the Student's placement considering the requirements for least restrictive environment (LRE) in accordance with 92 NAC 51-008.01A, 008.01C2, and 008.01D?

### Information Reviewed by Investigator

#### *From the Complainant*

- Letter of Complaint dated January 26, 2022; received by NDE February 1, 2022
- Zoom interview with Complainant

#### *From the School District*

- Letter of Response dated February 24, 2022; received by NDE February 24, 2022
- Communication between the school or the District and Parent(s)
- Contact Information for Student's providers in both Part C and Part B
- District document explaining continuum of placement options available for preschoolers

- Changes to the District's 2021-2022 Safe Return to School statement – Statement that 1) on February 19, 2022, masks in schools will be recommended rather than required; 2) masks still required on school busses; 3) visitors and volunteers may return into schools but not into cafeteria during eating time
- Student's educational records
- Student's evaluations
- Student's IFSP and IEP
- Interoffice communication
- Student's medical information
- Documents relevant to Student's transition from Part C to Part B services.
- Additional information submitted by the District following interviews with staff
  - Early Childhood Covid Policies
  - Early Childhood Covid Policies Updated
  - Four versions of the District Policy for Safe Return to School at various times during the pandemic
  - Supplement to the District's Letter of Response
- Zoom interviews with District staff

### **Introduction**

The Student is a three (3) year old who was born with hearing impairment/deafness. The Student has had cochlear implants since approximately eight (8) months of age. All of the information and testimony supports the conclusion that the implants are working successfully, that the Student is progressing well and is developing commensurate with same age peers. During the relevant time period involved in this complaint, the Student received services from Nebraska Early Intervention under Part C of the Individuals with Disabilities Education Act (IDEA), and is now eligible to receive special education and related services as a preschool student with developmental delays and a hearing impairment under Part B of the IDEA.

The Student was receiving Early Intervention services during the 2019-2020 school year. These services transitioned away from in person, home based services to services provided by telephone, email, or other online services at the onset of the Covid-19 pandemic in mid-March 2020.

During the 2020-2021 school year, the ongoing pandemic was still at the forefront of educational concerns. Schools, as well as early intervention programs, were striving to get back to in-person learning to the greatest and safest extent possible by providing both in person and online options. Nebraska

was no exception. In August of 2020, the Parent was given the option to return to in person, home based service. The Parent declined to have District staff enter the family's home because of the pandemic. During this time, the Student's IFSP was implemented by email, telephone, and other remote strategies to avoid personal contact with any school staff. Later, the Parents agreed to resume some in-person services, but only outside and with distancing. On March 31, 2021, an IFSP meeting for the Student was conducted remotely at Parent's request, based on concerns about the pandemic. The meeting included a discussion about transition from Part C, early intervention to Part B, early childhood/preschool (pre-K). District staff informed the Parent that the Student would be going to preschool at the commencement of the 2021-2022 school year. The Parent stated that the Parent had not yet decided whether the Student would be enrolled in preschool.

In anticipation of the Student transitioning into Part B services for the 2021-2022 school year, school staff and the Parent met, on August 27, 2021, to develop an IEP for the Student. The team considered the Student's language and communication needs, the Student's opportunity for direct communication with peers and professionals in the Student's language and communication mode, and the Student's academic level and opportunities for direct instruction in the Student's language and communication mode. The team determined that each was an area of need for the Student.

The Student's IEP, developed on August 27, 2021, has three (3) annual goals. 1) An articulation goal for (h), (f), (k), and (g), in order to improve the overall intelligibility of the Student's speech; 2) a goal for repeating a statement or phrase heard to check for understanding; and 3) a goal to build skills for self-advocacy by notifying an adult that the remote microphone is turned off/muted. The IEP provides that the Student will receive 465 minutes of service per quarter in the areas of services for the deaf/hard of hearing, speech and language services, and specialized instruction. The team determined that the Student does not need any related services or supplemental aides and services and also that the Student is not eligible for extended school year services (ESY). The team determined that the Student would benefit from preferential seating in class, use of remote microphone technology, and the availability of a teacher for students who are deaf/hard of hearing to share information relating to the Student's technology and/or hearing loss as needed. Finally, the team determined that the Student's placement would be in a school-based or community-based preschool classroom. The Parent objected to this placement by marking a box on the IEP indicating that the Parent did not agree to the IEP

and stating that Parent's did not want the Student to attend a formal preschool program, but still wanted services.

This investigation is limited to a review of alleged IDEA violations that occurred not more than one year prior to February 1, 2022. 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 afford the Parents the opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and provision of a free appropriate public education (FAPE) for the Student in accordance with 92 NAC 51-007.06, 009.01, and 009.02?

92 NAC 51-007.06 states:

- 007.06      *Parent Participation*
- 007.06A      *The school district or approved cooperative shall take steps to ensure that one or both of the parents of the child with a disability are present at the IEP conference or are afforded the opportunity to participate.*

92 NAC 51-009.01A and -009.02A states:

- 009            *Procedural Safeguards*
- 009.01            *Parent Participation in Meetings*
- 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.*
- 009.02            *Parent Involvement in Placement Decisions*
- 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/Parent Position*

The Parent's letter of complaint and information shared during the interview with the investigator state that the District would not consider any placement except enrollment and attendance at an in-person community or school-based preschool. Alternatively, the District expected the Parent to revoke consent for services.

### *District Response*

The District's written response and staff interviewed indicate that the Student's IEP Team determined that an in-person preschool classroom was the least restrictive environment (LRE) for the Student.

### *Investigative Findings*

The following information was taken from the Parent's letter of complaint, documents provided by the District and interviews with District staff and the Parent.

1. The Student resides within the jurisdictional boundaries of the District and was diagnosed with deafness/hearing impairment at approximately three months of age.
2. The Student received cochlear implants at approximately eight months of age. The parties agree that the cochlear implants are working very well for the Student and that language development is commensurate with age appropriate nondisabled peers.
3. Based on hearing loss, Student was determined eligible as a child with a disability under Part C of the IDEA and received early intervention services until three years of age.
4. March 2020 marked the onset of the Covid-19 pandemic. At that time, in-person early intervention services ceased. The District provided the Parents with notice indicating that services would be adjusted and continued via telephone, email, or online/virtual platforms. The District's Early Intervention Coordinator reported that this Parent was much more cautious about the pandemic and was also committed to continuing early intervention services with her child. While some families decided to pause their early intervention services during this time, this family chose to continue receiving services in the modified style.
5. Early intervention services are not scheduled using a school year calendar. Rather, early intervention services take place year-round. The Early Intervention Coordinator reported that in August 2020, the Parents were given the option to resume home visits; however, this Parent was much more cautious about the pandemic, did not want

- early intervention staff to enter the home, and only agreed to some in-person visits outside with distance. Additional service continued in the modified style and the parties agree that the Student was making very good developmental progress with the exception of four articulation errors that impacted the intelligibility of the Student's speech.
6. The IFSP Team for the Student, including Parents, met on March 31, 2021. The meeting took place over Zoom due to Parent's concerns for safety in light of the ongoing pandemic. The team determined that the cochlear implants were working well for the Student and that the Student was developing at or above levels of same age, nondisabled peers including the areas of language development, self-advocacy, and social skills. The IFSP Team discussed transition from Part C services to services under Part B of the IDEA at this meeting in anticipation of the Student's third birthday on June 29, 2021, and the Parent checked the "YES" box indicating consent to continue early intervention services through an IFSP following the Student's third birthday. On the transition planning document, the team noted that the Student is eligible for pre-K services at age 3. Notes indicate that the team discussed differences between Part C and Part B services, that the Student was not in the least restrictive environment (LRE) and therefore the Student will attend a pre-K classroom beginning with the 2021-2022 school year. The notes also indicate that the Parent was undecided about enrolling the Student in preschool.
  7. In anticipation of the 2021-2022 school year, the Student's IEP Team met, including Parents and representation from Early Intervention services, on August 27, 2021. The Student's IEP Team developed an IEP with three goals. In the area of communication, the team stated that the Student's receptive and expressive language skills are above age expected norms, that the Student speaks regularly in phrases of six or more words, tells stories, and answers complex questions. The student struggles with articulation that impacts the intelligibility of speech and may not consistently receive auditory input accurately which impacts ability to participate in classroom activities and understand verbal information being presented. To address communication, the Student's IEP Team set the following goals:
    - a. Annual goal #1 – articulation of (h), (f), (k) and (g); and
    - b. Annual goal #2 - check for understanding by repeating what an adult or peer says.

In the area of hearing, the IEP stated that the Student wears the cochlear implant processors regularly during all waking hours. The

Student is able to alert an adult when processors are not working, such as when a battery is dead. The IEP also stated that the Student has strong language skills, including the ability to state needs. The Student has experience wearing a personal, family-owned remote microphone system; however, the Student is not able to show recognition when it is not connected or becomes disconnected by notifying an adult. The Student needs support to learn how to detect and notify when the remote microphone assistive technology is not on or working. To address this area of need, the IEP Team set the following goal:

- Annual goal #3 for self-advocacy to notify an adult when the remote hearing assistive technology is turned off or muted.

The Parent checked the box indicating “NO” and “the parent does not agree with the IEP” and added wording to clarify that the Parent did not want the Student to attend either school-based or community-based preschool at this time.

8. The District provided policies or other information regarding the continuum of placement alternatives available for preschool age students. In response, the District provided a single page that appears to be an excerpt from a draft of a more comprehensive document that is in the process of modification. Some portions are highlighted or have blank spaces for insertions and includes strikethrough text and indicates changes in red. The page has headings in a bold font style that appears to be placement options with partial definitions and instructions for staff. See below:

#### Services

It is the policy of [the District] to comply with all aspects of Rule 51. This includes ensuring that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum of placements includes instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. The continuum includes making provision for supplementary services (such as resource or itinerant instruction) to be provided in conjunction with regular class placement.

Placement in the continuum of alternative placements is determined by the IEP team based on the least restrictive environment. To the maximum extent appropriate, children with

disabilities are educated with children who are not disabled, and 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 child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

If one of the options located on this continuum are not available on Synergy, speak with your supervisor who will assist you.

1. **Early Intervention:** (specific service) will be provided through the coaching model with a primary service provider. With Parent permission, co-visits with any member of the IEP team will be scheduled as needed by the Parent and provider.  
**Preschool:** STUDENT will receive specially designed instruction (resource services and/or Speech language therapy) through a variety of service delivery models based on his/her performance and needs.
  2. **Preschool/Community Based Services:** "(child) is educated with same age, non-disabled peers."  
**Homebased Services:** "(child) will receive services in the home - per Parent request. (Highlighted portion is struck out)"  
**Special Classes:** "(child) will receive \_\_\_\_\_ special classes in addition to being educated with same age, non-disabled peers." (Note: This is in the continuum but would not typically be the least restrictive environment. Contact your supervisor if you have questions).  
**Special Schools:** "(child) will receive services in \_\_\_\_\_ school."  
**Instruction in Hospitals and Institutions:** "(child) will receive services in \_\_\_\_\_ Hospital" or "(child) will receive services in \_\_\_\_\_."  
**Supplementary Services:** Supplementary services are to be inserted in the section on the Services page which states: "Supplementary Aids and Services/Accommodations(sp)."
9. Relevant email correspondence between school staff includes the following:
- March 31, 2020 – Notice of the District's decision to modify early intervention services for all students due to the ongoing pandemic. The District will provide access to strategies and

coaching so that Parents may work with their children to make progress toward goals on the IFSP.

- September 2, 2021 – Email from the District notifying the Parent that services will cease because the school-based preschool was determined to be the Student's LRE and the Student is not enrolled.
- September 22, 2021 – Notice of decision providing the Parent with the District's decision to refuse the Parent's request for services to continue in a home-based setting. The District states that the school-based preschool is the regular early childhood setting and as such is the LRE for the student where the IEP will be implemented because the services are able to be provided in this setting.
- October 27, 2021 – The District provided the Parent with Notice of Refusal to conduct the Student's three year reevaluation in the Student's home because the evaluation is able to be conducted at an elementary school or the district office by preschool staff.
- November 2, 2021 – Email from the District notifying the Parent that the District has determined that no additional evaluation is needed in order to continue the Student's eligibility.
- November 12, 2021 – Email from the District explaining the District's decision and providing paperwork for the Parent to revoke services.
- January 31, 2022 – Email from the District reminding the Parent to complete and return the forms for revocation of services. Parent replies with refusal to sign the revocation document because it does not accurately represent the situation. Parent does not want to discontinue services.

10. During interviews, the Parent reported the school's position that services would only be provided to the Student if the Parent enrolled the Student in pre-K. Parents shared that they had significant concerns about Covid-19 and took all available precautions to protect their family during the Covid-19 pandemic. While the Student is not known to be immunocompromised or have specific medical issues that would result in increased risk of contracting Covid-19, Parent's reported their overall concern for the safety of their entire family, including immediate effects of Covid-19 and potential risks of long-term side effects resulting from Covid-19. Parents expressed their awareness of risks such as heart and lung damage, brain fog, and other side effects

that might not be immediately noticeable, diagnosable, or measurable and details of their effort to protect everyone in their family. The entire family maintained a significant practice of social isolation with very few contacts outside their family unit which includes aged and vulnerable grandparents. The Student's IFSP was successfully implemented by email, telephone, and other remote strategies to avoid personal contact with any school staff. The parties agree that the Student has made exceptional progress. Parents willingly shared that all members of the family were vaccinated as soon as vaccines were available to them. The only member of the family who has not been vaccinated is the student at issue because no vaccine is available for children four years of age and younger. While the rest of the immediate family has a measure of protection that comes with vaccination, this student does not. As precautions have been eased, in order to protect this Student from contracting Covid-19, Parents indicated that they have allowed their Student to receive some in-person services by meeting outside and maintaining distance, as well as resuming selected outdoor activities with small groups of known peers such as playing during sibling's soccer games, at parks, swimming lessons, and playdates with cousins and some select neighborhood children. The Parent shared that they have a grandfather who is unwell and the family continues to maintain a high level of caution so that they can visit with him. Also, the Parent indicated that Omicron-effective KN95 masks are challenging for the deaf/hard of hearing because they cover and hide the mouth and that clear plastic masks do not provide the same level of protection. The Parent indicated that the Student would participate in other activities when it seems safe to do so.

11. During interviews, Staff Member 1, the District preschool teacher participating in the Student's IEP Team meeting stated that the District's practice is that three choices are available to all pre-K age students:
  - For students attending a community-based preschool, IEPs are implemented in collaboration with the community-based preschool;
  - If the student is not attending a community-based preschool then the District recommends a school based pre-K class where the student's IEP will be implemented; or
  - Parents may choose to revoke services

According to the pre-K teacher, these were the only options available to the Parents and students, including this Parent and student. The pre-K teacher indicated that another Parent chose not to participate for a time due to concerns about Covid-19, but decided to come back to school so that the student could receive services. The teacher affirmed that masks were required to be worn in class for students and staff until February 18, 2022, when the District's policy, was amended to wearing masks indoors as an optional practice. The teacher also stated that there were no provisions for the Parents who are concerned about Covid-19 in light of the fact that vaccines are not available for children four years of age or younger. The teacher reaffirmed that "if you want to keep your kid home, you can revoke services" and that "others have also been given that option."

12. During interviews, Staff Member 2, the Speech and Language Pathologist participating in the Student's IEP Team meeting stated that during the 2019-2020 school year, special education services for Early Intervention (EI) and pre-K were provided via Zoom or other remote alternatives from mid-March through May of 2020. During the 2020-2021 school year, remote services were an option for students and families. Pre-K teachers and family service providers carried out those services. Beginning in August 2021, for the 2021-2022 school year, all pre-K services were offered in person. The District does not provide any option for alternatives this school year with the exception of one student receiving home-based service due to medical issues. This staff member recalls that one student stayed home when Omicron numbers were increasing and later returned to school. The staff member also recalls that quite a few other parents voiced concerns about the requirement to return to school, but the District required masks to be worn in class and the District interprets the law to say that the services must be provided around typically-developing peers.
13. During interviews, Staff Member 3, the District's teacher specialist for students who are deaf/hard of hearing stated that if a student were attending a community-based preschool then services would be provided one-to-one with the student and by working with staff at the community-based preschool. This staff member stated that in a District pre-K class there would be a lower adult-to-student ratio. Pull out service is not preferred and a home-based preschool would need to be licensed like a community-based pre-K in order to be recognized as an option. When describing the Student, this staff member reported that the Student had good language, but did have some articulation

- errors. The Student has good social interaction skills and generalizes those skills to others, skills such as caring and recognizing the need and feelings of others, recognizing the difference between a need and a desire, recognizing that the feelings of others may be different from your own, and that different people have different ways of doing things. This staff member reiterated that, before, services were provided via Zoom, telephone or email, but now there are no remote opportunities for pre-K age students or the option of pre-K service providers going to the family's home.
14. During interviews, Staff Member 4, the District's Director for Early Childhood programs, stated that the District has 1,400–1,500 pre-K students and that the District holds pre-K classes five days per week with 71 classrooms holding class for ½ day (3 ½) hours and three classrooms with a full day (six-hour) program. Staff Member 4 stated that the Governor's directive was schools would be open and kids attending; also stated that the District did take lots of precautions for safety.
  15. During interviews, Staff Member 5, a pre-K classroom family educator, stated that everyone attends in person and there are no remote learners. This staff member did not recall anyone asking for remote learning. This staff member indicated that there have been a handful of students and teachers who have tested positive for Covid-19.

### *Summary and Conclusions*

The IDEA and Rule 51 requires districts to ensure that parents of children with disabilities are members of any group that makes decisions about their child's educational placement. Predetermination occurs when district members of the IEP Team unilaterally decide a student's placement in advance of an IEP Team meeting thereby denying parents meaningful participation in the process. For example, in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), the court, approved funding for the student's applied behavior analysis (ABA) program, holding that the child was denied a FAPE where the school district impermissibly "predetermined" the child's educational program and failed to meaningfully include the child's parents at the IEP Team meetings. In *Deal*, during the meetings, the district allowed the parents to voice their opinion and present evidence regarding an appropriate program for their son, but District staff had already decided on his placement and educational methodology.

In this case, the Student, a child with profound hearing loss qualified as deaf/hard of hearing and was fitted with cochlear implants at approximately

eight months of age. The Student was eligible and receiving service through Part C, early intervention at the onset of the Covid-19 pandemic. Schools and early intervention programs ceased provision of in-person services in light of the pandemic. Between March and May 2020, the District modified placements and services by creating a model where providers were available to provide suggestions and coaching for Parents implementing students' IEPs at home. This Student's Parent communicated with school staff using email, telephone, and other electronic platforms to continue the Student's service and Student made exceptional progress. In August 2020, the District had modified its plan for safe return to school and early intervention. The Parents were given the option to return to school or early intervention services in person with safety precautions or to remain in a remote learning setting. Staff and Parents reported that this family was very cautious about Covid-19 and did not want staff entering their home.

In the letter of complaint and interviews with the investigator, the Parent explained their reasons against enrolling the Student in preschool. The Parent stated that the Student is making great progress in all areas of development and IFSP goals in the modified remote settings designed by the District during the pandemic. Parents are pleased with the model and Student's exceptional progress and hope to continue that progress outside of preschool for the present. Additionally, the Parents point to the fact that the Student's qualified disability is deaf/hard of hearing. The Student's first IEP goal is to improve articulation of particular sounds in order to increase the intelligibility of the Student's speech. Parents point out that wearing a mask (KN95) that provides protection against the newer variants of Covid-19 is not conducive to practicing articulation of letters/sounds and that wearing a transparent mask or using plastic barriers does not provide sufficient protection against the new variants. Parents shared that they are very committed to protecting their family from Covid-19 especially the Student who is too young to be vaccinated. The family, including vulnerable grandparents, self-quarantined until all members except the Student were vaccinated. Parents continue to maintain high levels of distancing and caution to protect the Student from contracting the virus. To this end, Parents suggest that none of the Student's IEP goals need to be implemented in a preschool classroom and that the Student has ample opportunity to engage with peers in small groups selected by Parents who are committed to preventing the Student from contracting Covid-19.

District documents and staff interviews with the investigator, reflect an overarching District position that all students will attend classes in person and that remote learning options are no longer available. Overall, the District is

generally unwilling to consider unique and individual circumstances leading to any options other than in person attendance at school.

The facts presented in this case show that the District was entirely unresponsive to the Parents opinions about the Student enrolling and attending in person preschool. District staff permitted Parents to state their thoughts, but there was no discussion or consideration of any option besides in-person preschool or revocation of special education services. Staff consistently stated that in-person attendance was the only possibility and remote learning was no longer an option regardless of the individual needs of the student, the student's age, or consideration of a full continuum of alternative placement options, including, but not limited to, home instruction.

Based on the investigative findings, summary and conclusions, the District deprived Parents of the opportunity to have meaningful participation in IEP Team meetings because the District predetermined the Student's placement prior to the IEP Team meeting on August 27, 2021, and thereby failed to fully implement the requirements of 92 NAC 51-007.06, 92 NAC 51-009.01, and 92 NAC 51-009.02. Thus, **corrective action is required** and detailed at the end of this report.

## **Issue # 2**

Did the District consider an individualized family service plan (IFSP) that contains the IFSP content for the Student in accordance with 92 NAC 51-007.02A1?

92 NAC 51-007.02A1 provides as follows:

007.02A1	From the end of the school year in which a child reaches age 3, until the child's sixth birthday, the IEP team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in 92 NAC 52 (including an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills for children with an IFSP who are at least three years of age), and that is developed in accordance with the IEP procedures. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is agreed to by the school district or
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approved cooperative and the child's parents.

#### *Allegations/Parent Position*

In order to receive services under IDEA Part B, the District required the Parent to enroll the Student in either a community or school-based preschool. Alternatively, the District instructed the Parent to revoke special education services in writing.

#### *District Response*

The Student's IEP Team determined that a preschool setting, either community or school-based, was the least restrictive environment (LRE) for the Student.

#### *Investigative Findings*

See investigative findings above.

#### *Summary and Conclusions*

The federal regulations implementing the IDEA and 92 NAC 51-007-02A1 require a smooth transition process for eligible students receiving early intervention services by the student's third birthday. From the end of the school year in which a child reaches age three, until the child's sixth birthday, 92 NAC 51-007-02A1 requires the IEP Team to consider an IFSP developed in accordance with IEP procedures. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is agreed to by the District or approved cooperative and the child's parents.

In this case, the team developed an IEP for the Student. The IEP statements of strengths and weaknesses and goals reflect consideration of the Student's IFSP. The parties do not dispute the IEP content and goals. Rather, disagreement about the Student's placement in a school based preschool classroom is the crux of the matter. 92 NAC 51-007-02A1 includes the requirement that the IEP Team consider the use of an IFSP in place of an IEP which requires the consideration of "natural environments," (including home and community settings in which children without disabilities participate) described in 92 NAC 52, or if moving to an IEP, considering the continuum of alternative placement options including "home instruction."

The investigator requested that the District provide information regarding the continuum of alternative placements available for preschool age students. In response, the District provided a single page document that appears to be an excerpt from a more comprehensive document that is in the process of modification. Some portions are highlighted and include strikethrough text and indicates changes in red. The isolated page states that placement within the continuum of alternative placements is determined based on the LRE. However,

the District's document does not explain that natural environments include home and community settings, such as day care for students who will continue being served with an IFSP, as well as community and school-based preschools for students within the specified age range and that home instruction, along with other options along the continuum of alternative placement options must be considered within the context of LRE for this group.

In the Student's IFSP transition meeting on March 31, 2021, the Parent expressed uncertainty about enrolling the Student in a preschool program for the following year and checked the box indicating preference for continuing with the IFSP as the IEP. Only a few months later, on August 27, 2021, the District scheduled an IEP Team meeting in anticipation of the upcoming school year. The District did not include a discussion of "natural environments," including home and community based settings, and did not consider whether the IFSP should serve as the Student's IEP based on the Student's unique and individual circumstances. Instead, the District only presented the Parent with the option to enroll the Student in a community-based or school-based preschool or alternatively, to revoke their consent for special education services. The District erroneously concluded that a formal preschool setting was the Student's LRE without discussing or even mentioning other options for "home instruction" even when the Parent clearly stated that the Parent wanted the Student to remain at home and not attend formal preschool.

The District's failed to consider that, for a three-year-old child, or preschool-age student, the District and the Parent could agree to continue to use an IFSP rather than an IEP in which home is a natural environment and part of the LRE as described in 92 NAC 52 and is evidence of predetermination. "Home instruction" was also not considered as part of the continuum of alternative placements per 92 NAC 51-008.01D1a.

Based on the summary and conclusion, the District failed to fully implement the requirements of 92 NAC 51-007.02A1. Thus, **corrective action is required** and detailed at the end of this report.

### **Issue # 3**

Did the District develop, review, revise, and implement an individual education plan (IEP) for the Student in accordance with 92 NAC 51-007.01?

92 NAC 51-007.01 provides as follows:

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

### *Allegations/Parent Position*

In the written complaint and during the interview with the investigator, the Parents clarified that they do not dispute the contents of the IEP. Parent's concern is the District will only allow in person pre-K attendance or revocation of services. The District has refused to implement Student's IEP or consider other placement options.

### *District Response*

The Student's IEP Team developed the Student's IEP on August 27, 2021. The IEP Team determined that the LRE for the Student is a preschool setting. The Parent has not enrolled the Student in either a community or school-based preschool so the District is not implementing the Student's IEP.

### *Investigative Findings*

See investigative findings above.

### *Summary and Conclusions*

92 NAC 51-007-.01 requires that an IEP be developed, reviewed, revised, and implemented for each child who receives special education services. The Student's IEP Team developed an IEP for the Student on August 27, 2021. However, the District has not implemented the IEP because the District and Parent disagree on the Student's placement for implementation of the IEP.

The Student's IEP Team developed an IEP at the beginning of the 2021-2022 school year. However, the District has not implemented the IEP and the Student has not received any special education service during the 2021-2022 school year because the District refuses to implement the IEP unless the Parent enrolls the Student in a community or school-based preschool. The District insists that the Parent enroll or revoke services. On the IEP, the Parent checked the box indicating disagreement with the IEP and noting that the Parent does not agree to enroll the Student in preschool. As reflected in Issue #1, the District predetermined the Student's placement and denied the Parents meaningful participation in the IEP process because the school team had settled on the Student's placement before the IEP meeting began. While the Parents were allowed to express their concerns and dissatisfaction with the placement decision, the District's IEP Team members did not discuss and consider home instruction as part of the continuum of alternative placement options available in light of the Student's unique and individual circumstances. Once again, this action constitutes a predetermination of the Student's placement. Due to the District's requirement of the Parent to enroll the Student in preschool or revoke their consent for services, which the Parent has not done, the District has not implemented the Student's IEP for seven months.

Articulation/sound production is improved by practicing particular sounds until the formation of the mouth and sounds become more natural. The IEP Team indicated that articulation therapy is necessary to improve the Student's ability to produce sounds and the intelligibility of the Student's speech. Intelligibility is crucial to communication as the Student interacts with a larger range of peers and others who are less familiar with the Student and therefore less likely to understand his speech. The Student has missed approximately 21 sessions with the SLP. The Student's other goals in the areas of checking for understanding and self-advocacy are easily implemented with regular guidance from the teacher of the deaf and hard of hearing. Parents have closely collaborated with service providers to address Student's previous goals and the Student has made significant progress. The Student has been denied approximately 27 sessions with providers to work on these goals.

The District failed to implement the Student's IEP in violation of 92 NAC 51-007.01. **Corrective action is required** and detailed at the end of this report.

#### **Issue # 4**

Did the District provide special education and related services to the Student in accordance with the Student's IEP pursuant to 92 NAC 51-007.02?

92 NAC 51-007.02 provides as follows:

- 007.02 School districts or approved cooperatives must provide special education and related services to a child with a disability in accordance with the child's IEP.
  - 007.02A At the beginning of each school year, each school district or approved cooperative shall have an IEP in effect for each child with a verified disability within its jurisdiction.
    - 007.02A1 From the end of the school year in which a child reaches age 3, until the child's sixth birthday, the IEP team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in 92 NAC 52 (including an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills for children with an IFSP who are at least

three years of age), and that is developed in accordance with the IEP procedures. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is agreed to by the school district or approved cooperative and the child's parents.

- 007.02B Each school district or approved cooperative shall ensure that an IEP is in effect before special education and related services are provided to a child with a verified disability under this Chapter.
- 007.02C The child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and
- 007.02D Each teacher and provider described in 92 NAC 51-007.02C must be informed of his or her specific responsibilities related to implementing the child's IEP; and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

#### *Allegations/Parent Position*

The District refused to implement the Student's IEP unless the Parent enrolled the Student in a community or school-based preschool. Alternatively, the District impelled the Parent to revoke their consent for special education services.

#### *District Response*

The Student had an IEP in effect at the beginning of the 2021-2022 school year; however, the school provided prior written notice of refusal for the Parent's request to receive services in the Student's home in the style utilized during the 2020-2021 school year in light of the pandemic.

#### *Investigative Findings*

See investigative findings above.

#### *Summary and Conclusions*

The Student was determined eligible for Part B services and transitioned from Part C to Part B on June 29, 2021, the Student's third birthday. The Student's IEP Team developed an IEP in anticipation of the 2021-2022 school year. Because the District failed to properly consider and discuss "home instruction" in addition

to community and school-based preschool as part of the LRE within the continuum of alternative placement options available for children in the pre-K age range and did not give due consideration to the option of using the Student's IFSP as the IEP, the District predetermined the Student's placement when they informed Parents that no other options were available and that the only alternative to attending preschool in person was revocation of special education services. Notices of refusal, email correspondence between District staff and the Parent, the Student's IEP and interviews with District staff all indicate that the District had made up its mind that community or school-based preschool was the only option for the Student's placement. The District refused to provide services to the Student, unless the Parent enrolled the Student in an in-person preschool and informed the Parents that revocation of special services was the alternative option. The District refused to implement the Student's IEP and therefore, failed to provide special education and related services in accordance with the Student's IEP.

Based on the summary and conclusion, the District did not fully implement 92 NAC 51-007.02. **Corrective action is required** and detailed at the end of this report.

#### **Issue # 5**

Did the District determine the Student's placement considering the requirements for least restrictive environment (LRE) in accordance with 92 NAC 51-008.01A, 008.01C2, and 008.01D?

92 NAC 51-008.01 provides as follows:

#### 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 school 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.

- 008.01C2 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.

#### *Allegations/Parent Position*

The Student is a three-year-old deaf/hard of hearing child who uses cochlear implants. At the Student's first IEP Team meeting, the District stated that the Student was required to attend a community or school based preschool in order to receive special education services. The Parents don't want to send the Student to pre-K this school year, but would like the Student to receive services from an SLP and a deaf specialist. Seeing the Student through an individual lens and observing a continuum of placement options will ensure that the Student continues to make great progress.

#### *District Response*

Although the Parent disagreed, the Student's IEP Team determined that the Student would be placed in a pre-K classroom because it is the LRE.

#### *Investigative Findings*

See investigative findings above.

#### *Summary and Conclusions*

Compulsory attendance is a state legislative mandate requiring attendance in public schools, or authorized alternatives, by children within certain age ranges for specific periods of time within the year. In Nebraska, a child is of mandatory attendance age if the child will reach six years of age prior to January 1 of the then-current school year and has not reached eighteen years of age. While Nebraska provides optional preschool as part of the public school system for all students, parents are not required to enroll children who are not within the age range for compulsory attendance.

School attendance is not compulsory for infants, toddlers, preschoolers, or kindergarteners. Therefore, when considering the continuum of alternative placement options available for students under six years of age, homebased is not the same as homebound or home/hospital. Natural environments described in 92 NAC 52-007.06A, including home and community based settings in which children without disabilities participate are the LRE for EI students. The

requirement for IEP teams to consider an IFSP that contains IFSP content, including the natural environments statement for pre-K age children recognizes that natural environments are also part of the LRE for pre-K age children.

Children with disabilities who are eligible for service under the IDEA are entitled to a free appropriate public education. Part C of the IDEA provides early intervention service to infants and toddlers through an individualized family services plan (IFSP). Part B of the IDEA provides service to students ages 3 through 21 through an individual education program (IEP). Nebraska provides the possibility for an overlap of the IFSP and IEP for children from the end of the school year in which a child reaches age 3, until the child's sixth birthday when the child enters the age range for compulsory attendance. For this group of children, 3 through 5 years of age, who are eligible to receive IDEA services, the IEP Team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in 92 NAC 52 (including an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills for children with an IFSP who are at least 3 years of age), and that is developed in accordance with the IEP procedures. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is agreed to by the District or approved cooperative and the child's parents.

As evidence of a continuum of placement options available for EI and pre-K age students, the District provided an excerpt from a document that is included in the investigative findings above. The isolated page states that placement within the continuum of alternative placements is determined based on the LRE. However, the District's document does not mention, define, explain, or clarify "natural environments" that must be considered along with an IFSP during the IEP process for students of pre-K age.

It is inappropriate for the District to eliminate natural environments or home instruction in a discussion of the LRE with Parents and to consider placement in a community or school based pre-K program the only placement option where the Student will receive services. Additionally, contemplation of placement in the LRE by considering a continuum of placement alternatives also requires consideration of the Student's unique and individual circumstances. As stated above, the District erred when it predetermined that enrollment in a pre-K classroom was the only possible placement for the Student. The District erred when it failed to consider natural environments or home instruction and the Student's unique and individual circumstances when considering the Student's placement in the LRE.

Based on investigative findings, the summary and conclusions, the District did not determine the Student's placement considering the continuum of alternative placements required when making decisions of a Student's least restrictive environment (LRE) and therefore failed to fully implement the requirements of 92 NAC 51-008.01A, 008.01C2, and 008.01D. Thus, the following **corrective action is required.**

### **Corrective Action**

#### *NDE-Provided Training with Quarterly Updates*

1. District staff will be initially trained by NDE on the following:
  - a. Detailed requirements of 92 NAC 51-007.06, 92 NAC 51-009.01, and 92 NAC 51-009.02; including what constitutes predetermination and how to refrain from predetermination. Training will then be provided quarterly up until April 1, 2023.
  - b. Continuum of alternative placement options available and repeated on a quarterly basis through April 1, 2023, including home instruction for preschool age children with disabilities.
2. Staff from the District involved in the training should include the following:
  - a. General education preschool or early childhood teachers;
  - b. Special education preschool or early childhood teachers;
  - c. Principals or individuals who may serve as the local education agency representative (LEA) of the District in IEP Team meetings;
  - d. Related services personnel providing services to preschool age children within the District; and
  - e. Any other school personnel who are responsible for attending IEP Team meetings who may be responsible for determining the educational placement of a child with a disability.
3. The District should contact Heather Ottoson within 30 days of the date of this report to schedule how and where the initial training will be delivered.
4. The District will send verification of attendance including the name and role of each individual attending after the initial training and the three additional trainings within 10 days of the training.

#### *Continuum of Alternative Placement Options*

1. Within 30 days of the date of this Investigation Report, the District will develop a full continuum of placement options available to preschool children with disabilities including thorough explanation of the continuum of alternative placements including home instruction. The

- list and explanation will be provided to Heather Ottoson for approval then be published.
2. The District will disseminate the publication above to the following:
    - a. Parents of students who were previously on IFSPs through Part C who turned three and transitioned to Part B services during the 2021-22 school year
    - b. Parents of preschool students with IEPs currently enrolled in District preschools
    - c. Parents of preschool students with IEPs currently enrolled in community preschools
  3. The District will include with the above publication a statement notifying parents that they may contact the District if they would like to request an IEP or IFSP meeting to reconsider their student's placement including natural environments (in the case of the IFSP servicing as the IEP) or the continuum of alternative placements including home instruction. The District must submit the letter of correspondence to Heather Ottoson for approval prior to dissemination.
  4. The District will write a letter of assurance that IEP Teams for students under compulsory attendance age will discuss with parents the option of maintaining the use of an IFSP and discuss "home instruction" as a placement option along the continuum of alternative placement options available for preschool-aged children and no longer require staff to obtain a revocation of consent from services from parents who want services for their child but do not want to enroll the student in preschool.

#### *Reconvene Student's IEP Team*

1. Within 14 days of the date of this Investigation Report, the District will reconvene the Student's IEP Team in order to do the following:
  - a. Carefully consider the Parent's concerns for the Student's unique and individual circumstances and revisit the Student's placement in light of the Student's unique and individual circumstances, considering the continuum of alternative placements and LRE including "home instruction" for students 3 through 5 years of age.
  - b. Options for placement, including home instruction.
  - c. Determine placement for the Student in light of unique and individual circumstances.
  - d. Discuss ways for the Student to access nondisabled peers in light of the Student's unique and individual situation.

2. The Student's IEP Team shall develop a schedule to provide compensatory services to the Student for services listed on the IEP that were unavailable to the Student during the seven months that the District did not implement the Student's IEP.
  - a. No fewer than 20 sessions with an SLP focusing on articulation goals within the IEP.
  - b. No fewer than 18 sessions with a teacher of the deaf/hard of hearing focusing on other goal areas.
  - c. Compensatory services shall be completed by November 1, 2022. Student absence or refusal of the parent to make the child available shall result in a waiver of service scheduled for that day. Staff absences must be rescheduled. Any compensatory services declined or not utilized by November 1, 2022, shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all compensatory services).
  - d. The schedule of agreed upon compensatory services will be provided to Heather Ottoson within 10 days of the IEP Team meeting, but no later than April 22, 2022.
  - e. Service provider logs verifying completion of all compensatory services must be submitted to NDE monthly until the service is complete and all service has been verified.

**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:

Heather Ottoson, 619 Coordinator  
NDE Office of Special Education  
Nde.speddr@nebraska.gov