COMPLAINT INVESTIGATION REPORT

Complaint Number: 20.21.06

Complaint Investigators: [Redacted]

Date Complaint Filed: December 14, 2020

Date of Report: February 12, 2021

Issues Investigated

1. Did the District ensure that the Parents were notified of IEP Team meetings early enough to ensure that the Parents would have an opportunity to attend and that meetings were scheduled at mutually agreed on time and place in accordance with 92 NAC 51-007.06?
2. Did the District ensure that a reevaluation was conducted at the request of the Student's Parents, as required by 92 NAC 51-006.05A2, or that prior written notice was provided to the Parents if the District declined to evaluate, in accordance with 92 NAC 51-009.05A2?
3. Did the District ensure that the Student's education placement was made by a group of persons, including the Parents and other individuals knowledgeable about the Student, the meaning of the evaluation data and the placement options, including as close as possible to the Student's home, was made in conformity with the least restrictive environment requirements in accordance with 92 NAC 51-008.01C, and was based on the Student's unique needs and not on the Student's disability, in accordance with 92 NAC 51-008.01C?
4. Did the IEP Team review and revise the IEP, as appropriate, to address information about the Student provided by the Parents, including the Student's anticipated needs or other matters in accordance with 92 NAC 51-007.10?
5. Did the District consider the use of positive behavioral interventions and supports to address behavior which impedes the learning of the Student or the learning of other students in accordance with 92 NAC 51-007.07B3?
6. Did the District fail to provide special education and related services set forth in the IEP to the Student as required by 92 NAC 51-007.02, resulting in a denial of a free appropriate public education to the Student as required by 92 NAC 51-003.24?
7. To what degree did the District abide by the terms of the agreements made within the mediation process pursuant to 92 NAC 51-009.12G?

Information Reviewed

From the Parents

- Letter of complaint received December 14, 2020
- Emails with attached documents and recordings
- Phone interview with the Mother on January 22, 2021

From the School District

- Letter of Response dated January 6, 2021
- Supplemental Letter of Response dated February 8, 2021
- Exhibits A through K consisting of the following:
    - Exhibit A – Complaint Investigation 20.21.04
    - Exhibit B – District response to allegations in Complaint Investigation 20.21.04
    - Exhibit C – Complaint Investigation Report 20.21.04
    - Exhibit D – Emails
    - Exhibit E – IEP Meeting Notes
    - Exhibit F – Progress Notes
    - Exhibit G – Attendance Records
    - Exhibit H – Health Records
    - Exhibit I – District Policies
    - Exhibit J – Information received from the Student's medical providers
    - Exhibit K – Signed consent for evaluation
- Emails with additional documents received the week of January 25, 2021
- Mediation Agreement dated October 29, 2020
- Emails between the District, the Physician, and the Parents dated between October 30, 2020 and November 2, 2020

Introduction

Pursuant to 92 NAC 51-009.1, the Nebraska Department of Education (NDE), Office of Special Education, is required to resolve complaints alleging violations of the Individuals with Disabilities Education Act (IDEA) that have occurred not more than one year prior to the date the complaint is received.

The complaint was filed on behalf of the Student whose Parents alleged IDEA violations. A previous complaint was filed by the Student's Parents and was identified as Complaint 20.21.04, and a Complaint Investigation (CI) Report was issued on November 17, 2020.

To conduct this complaint investigation, an outside investigator was used along with a complaint investigator with the NDE Office of Special Education. The

documents received from the Parents and the School District were reviewed, and interviews were conducted with the Mother and School District personnel.

This investigation is limited to a review of alleged IDEA violations that occurred not more than one year prior to December 14, 2020, the date the complaint was received by the NDE. Any facts that are discussed that occurred outside the one-year time period for this investigation are provided for context purposes only. To the extent there was an overlap of the allegations and facts in this investigation and the findings in CI Report 20.21.04, those allegations were not reinvestigated. Additionally, certain findings of facts set forth in CI Report 20.21.04 were utilized in this report.

Finding of Facts

1. The Student is 5 years old and in Kindergarten.
2. The Student's initial multidisciplinary evaluation was conducted by another district in the state in June 2017, just before the Student turned two years of age. (CI Report 20.21.04 at 2.)
3. The multidisciplinary evaluation determined that the Student is a student with a disability and is eligible for special education services under the disability category of Other Health Impairment (OHI). (CI Report 20.21.04 at 2.)
4. On February 14, 2020, the school nurse emailed the Parents a seizure action plan form to take to the Student's doctor for completion. (Health Contact Log.)
5. The most recent seizure action plan in the Student's file is dated July 18, 2018. District email, 1/28/21. The Parents have a seizure action plan dated November 29, 2019. (Parent email 1/22/21.)
6. In February 2020 the Parents requested a reevaluation, and on February 18, 2020, the District received signed consent from the Mother for an evaluation. (Interview, Mother.)
7. On February 24, 2020, the school nurse noted that the seizure action plan that was emailed to the Parents on February 14, 2020 had not yet been returned. (Health Contact Log.)
8. On March 12, 2020, the District announced the suspension of in-person learning at all District schools beginning March 16, 2020. The District did not conduct the Student's three-year reevaluation during the fourth quarter of the 2019-2020 school year. (CI Report 20.21.04 at 4.)
9. On April 24, 2020, the District informed the Parents that due to the school closure the Student's three-year reevaluation would be completed when the District was able to reopen. (CI Report at 20-21.04 at 4.)

10. On May 13, 2020, the Student's IEP team, including the Student's Mother, met through a virtual meeting to review and revise the Student's IEP. (CI Report 20.21.04 at 4.)
11. The May 13, 2020 IEP provided the following:
    a. Student's primary disability was identified as Other Health Impairment.
    b. A behavioral assessment plan and intervention plan were considered, but not needed.
    c. Modifications or supports for school personnel include awareness of seizure action plan and touching base with the school nurse if there are any concerns.
    d. Participation in education programs provided that:
        i. For the remainder of the 2019-20 school year, the Student will receive virtual services that include access to the lesson plans, including accommodations, on the school website, video lessons on Class Dojo and weekly video meetings.
        ii. In the fall, the Student will move to a general education kindergarten classroom with resources (in the classroom), speech, OT and PT services.
    e. Transition services were determined not to be needed due to the Student's age.
12. Prior Written Notice for the May 13, 2020 IEP was provided to the Parents on June 5, 2020 and states that "[i]n the Fall [2020] [the Student] will move from the early childhood special education classroom to a general education kindergarten classroom with resource support (in the classroom), speech, OT and PT services." The team determined that receiving resource support for social skills in the classroom would be more beneficial to the Student than outside the classroom. Further, the team considered the Student not attending a general education kindergarten classroom, but this was rejected as it was determined the Student would be successful in a general education classroom. (CI Report 20.21.04 at 4.)
13. The Parents requested a particular elementary school with a full-time nurse that was a different school than the one attended by the Student for the early childhood special education program. The District agreed to assign the Student to the elementary school requested by the Parents, and the Parents enrolled the Student at the agreed-upon school on May 14, 2020. (Emails, 5/14/20 – 5/15/20; CI Report at 4.)
14. The Student's three year reevaluation was due on June 30, 2020. (CI Report at 7.)

15. On July 13, 2020, the Mother emailed a medical order from a pediatrician requesting homebound schooling for the Student.
16. On July 28, 2020, the special education supervisor emailed the Mother and informed her that since the doctor stated it was unsafe for the Student to return to school, the District would provide home services, and that an IEP team meeting to develop a new IEP was needed.
17. On August 4, 2020, staff emailed the Parents to set up an IEP meeting for the Student's change of placement for home services and suggested August 10 or August 11 as possible meeting dates.
18. On August 7, 2020, a decision was made by the District to move to 100% remote learning for all students and schools within the District due to the COVID-19 pandemic.
19. On August 7, 2020 the special education supervisor notified the Mother by email that due to the District moving to 100% remote learning, the Student's distance learning plan would be followed as stated in the current IEP. Remote and virtual services would be scheduled with the assigned elementary school team.
20. On August 12, 2020, the Student's assigned Kindergarten teacher emailed the parents of the students assigned to her classroom, including the Parents, with information about her class and remote learning.
21. On August 13, 2020, the Mother emailed the Kindergarten teacher and indicated she was confused after picking up the Kindergarten information, which showed the Student in general education. The Parents did not want the Student to leave special education services, a full day would not work for the Student, and the Student needed a modified day. The Mother asked that an expedited IEP meeting be held to ensure the Student's needs are met.
22. A resource room teacher emailed the Mother on August 14, 2020 regarding the request for an IEP meeting and suggested September 3, 2020 as the meeting date.
23. On August 17, 2020, the Mother emailed staff to inform them that the Student would not be participating in remote learning until after the IEP meeting was held on September 3, 2020, as the Parents did not feel there was sufficient support for the Student to be successful in remote learning.
24. On August 17, 2020, District staff emailed the Parents a Notice of Individualized Education Program Team Meeting for September 3, 2020 and identified the purpose of the meeting was to "develop, review and/or revise an appropriate IEP" for the Student.
25. Prior to the start of the 2020-21 school year the District offered to conduct a virtual re-evaluation of the Student, but the Parent requested an in-

person evaluation. The District made arrangements to conduct the re-evaluation in person. The Parent informed the District that the Parent wanted to sit with the Student during the evaluation. The District objected to this because it could affect or invalidate the evaluation results. (CI Report 20.21.04 at 7.)

26. The 2020-2021 school year began on August 18, 2020 with 100% remote learning for all students. (Email, 8/17/20.)
27. On September 3 and September 9, 2020, the Student's IEP team, including the Parents, met to review the Student's IEP dated May 13, 2020. (CI Report 20.21.04 at 7-8.)
28. At the September 3, 2020 IEP team meeting the Mother requested a change of placement for the Student to a self-contained special education classroom, or, in the alternative, to have a 1:1 paraprofessional aide assigned to the Student. District staff did not agree with the more restrictive proposals of the Parents. The District requested that the Student be allowed to participate in remote learning, but the Parents refused the District's request. The team agreed to reconvene the IEP team meeting on September 9, 2020. (CI Report 20.21.04 at 7.)
29. At the September 3, 2020 IEP meeting, the school nurse planned on discussing the seizure plan but did not get the opportunity to do so. (Health Contact Log.)
30. On September 4, 2020, the school nurse mailed several documents to the Parents, including a healthcare provider order form for the Seizure Action Plan. (Health Contact Log.)
31. The IEP team reconvened on September 9, 2020. The Student's IEP team offered to fully implement the May 13, 2020 IEP, to have several Special Education Coaches and a Board Certified Behavior Analyst observe the Student in the general education classroom, collect data on the Student's participation and performance and to reconvene the IEP team to review the data and further discuss placement. The Parents did not accept this proposal and requested that the District issue a PWN regarding the District's refusal of their placement request. The District responded that the IEP team needed to complete the Student's IEP before the District would issue a PWN to the Parents. (CI Report 20.21.04 at 8.)
32. At the IEP team meeting on September 9, 2020, the District offered to conduct the reevaluation remotely, but the Mother stated that a remote assessment was not appropriate for the Student. (9/9/20 IEP team meeting recording.)
33. During the IEP team meeting on September 9, 2020, the school nurse confirmed she was full time at the elementary school and stated that

every year the District needs new orders and medications. The nurse informed the Mother that she sent a letter to the Parents explaining that an updated seizure plan and medication was needed. (Health Contact Log.)

34. A draft IEP dated September 9, 2020 contains discussions that occurred during the September 3 and 9, 2020 IEP meetings. The IEP was not finalized. (CI Report at 8.)
35. On September 11, 2020, the special education director emailed the Parents to arrange another IEP meeting to finish reviewing the Student's IEP. September 24, 2020 was suggested as the next meeting date. Once the IEP review and changes were complete, the District would issue a Prior Written Notice (PWN) of those changes.
36. By email on September 11, 2020, the Parents responded to the special education director's email and indicated that the IEP team met for more than four hours in IEP meetings. The Parents further set forth the following:

> Our demands are simple:
> 1. Place [Student] back into the appropriate placement of self-contained special education
> 2. If the district refuses to offer [the Student] the appropriate placement then they must provide [the Student] a 1:1 who can support [the student's] behavioral, activity of daily deficits and medical needs
> 3. Provide and execute the unaltered version of the IEP from 05/13/2020 that includes [the Student's] diagnosis's [sic], behavior plan, extended school year, history of elopement, no restraint, communication log and student transportation
> 4. Complete the "overdue" DMT [evaluation]

37. The Parents filed a letter of complaint on behalf of the Student on September 14, 2020, identified as Complaint Investigation 20.21.04.
38. A Health Care Provider's Input for In-School Nursing Services form was initialed by the Student's health care provider on September 15, 2020. In handwriting the form states "1:1 para or home health aide if placed in general education," "seizure action plan," and "behavioral monitoring & safety monitoring for elopement & medical for seizures." A seizure action plan is not included.
39. On September 17, 2020, the Father emailed District staff and stated that the Student's doctor had faxed homebound orders to the District, which was approved by the District on July 28, 2020. The Father inquired when homebound services would begin for the Student, as other children were returning to in-person learning.

40. On September 21, 2020 District staff emailed the Parents a Notice of Individualized Education Program Team Meeting with a date of the notice identified as 9/4/2020 and 9/24/2020 and with meeting dates identified as 9/9/20 and 9/24/20.
41. On September 21, 2020, the Mother emailed staff and stated that at the September 3 and September 9, 2020 IEP meetings the team was unable to come to an agreement. A meeting on September 24, 2020 provided insufficient time for the Parents' team to come together, and the Parents asked for clarification as to what would be different from the previous IEP meetings.
42. By email on September 21, 2020, staff informed the Mother that the proposed meeting for September 24, 2020 would be a continuation of the September 9, 2020 IEP meeting and homebound services would also be discussed.
43. By email on September 23, 2020, the Mother was asked to confirm whether she would be able to attend the IEP meeting scheduled for September 24, 2020 to finish reviewing the sections of the IEP that had not been discussed during the previous meetings.
44. By email dated September 23, 2020, the Mother notified District staff that the Parents were not able to attend a meeting on September 24, 2020 and requested that at least 10 days' notice be provided to the Parents so that the Parents' team could be notified.
45. On September 23, 2020 the special education coordinator emailed the Mother and asked that she coordinate with her team and provide a date and time that works for the Parents and their team. The IEP team at the elementary school would make that date and time work for a meeting.
46. On September 24, 2020, staff sent an email to the IEP team members, including the Parents, indicating that the Student's IEP meeting for that date was cancelled.
47. The Parents informed the District that they did not want to finish reviewing the IEP and the proposed revisions and/or amendments to the Student's May 13, 2020 IEP were never finalized by the IEP team. (CI Report 20.21.04 at 8; District response.)
48. Beginning on October 5, 2020 all elementary school students returned to school on a 3/2 model consisting of students attending in-person three days one week and two days the next week. Students receive remote instruction on the days they are not attending in-person. (District Remote Learning Timeline.)
49. The District and Parents engaged in Mediation and an agreement was made:

a. The District would review records to confirm receipt of correspondence from the physician reflecting that the Student is medically required to remain at home. The District would contact the Parents by October 30, 2020.
b. If notification from the physician did not meet requirements, the District would communicate the reasons the requirements are not met allowing the Parents to follow up with the physicians that meets requirements.
c. The Parent will obtain a letter from the physician that states:
    i. The Student is confined to home and cannot go anywhere
    ii. List the diagnoses that support that conclusion.
d. The Parent will have the physician sign and date the letter and fax it to the District
e. IEP for purposes of determining homebound access minutes will be scheduled and completed within 14 weeks from the date the letter from the Student's physician's letter is confirmed by the District's Director of Special Education

50. On October 30, 2020, the special education director received a fax from a pediatric office with an attached unsigned and undated letter which recommended that the Student's sibling should receive homebound services.
51. Complaint Investigation Report 20.21.04 was issued on November 17, 2020. (CI Report 20.21.04.)
52. On November 3, 2020, a doctor wrote a letter "To Whom It May Concern" regarding the needs of the Student's brother, and also stated that "[i]t is also reasonable that [Student] be able to participate in remote learning during this unprecedented pandemic because of [brother's] immune status."
53. On December 3, 2020, the special education director emailed the Parents and stated that the District wished to proceed with the Student's special education evaluation. The testing would occur at a location where the Parents could observe the testing through a window.
54. The Mother responded by email on December 4, 2020 and provided available dates in December for the evaluation.
55. On December 11, 2020, the special education director emailed the Mother and offered January 6, 2021 as the first date available for an evaluation to be conducted by a psychologist.
56. On December 11, 2020 the Mother emailed the special education director and asked whether the evaluation date could be scheduled sooner.

57. On January 6 and 8, 2021, the Student's evaluation was conducted in part. (Mother interview; District email 1/28/21)
58. The Student has not attended a District school, either virtually or in-person since the beginning of the 2020-21 school year. (District Response; Attendance Records.)

Issue # 1

Did the District ensure that the Parents were notified of IEP Team meetings early enough to ensure that the Parents would have an opportunity to attend and that meetings were scheduled at mutually agreed on time and place in accordance with 92 NAC 51-007.06?

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, including:

007.06A1 Notifying parents of the IEP conference early enough to ensure that they will have an opportunity to attend; and

007.06A2 Scheduling the meeting at a mutually agreed on time and place.

Allegations/Parents' Position

The Parents assert that the District failed to schedule an IEP meeting as Parents requested within the required time frame. Parents and their therapist requested an IEP meeting be rescheduled with appropriate written notice with an explanation as to why another meeting needed to be held on September 24, 2020 when two others had been held. Further, the IEP notice set forth incorrect dates and did not provide the parents with seven days written notice as required.

District Response

The District asserts that Complaint Investigation Report 20.21.04 addressed this issue and there have been no additional IEP meetings for the Student since the issuance of that report.

Investigative Findings
On August 13, 2020, the Mother emailed District staff and requested an IEP meeting, as she was concerned that the Student was assigned to a general education classroom (Fact 21). A special education resource room teacher emailed the Mother the next day and suggested September 3, 2020 as an IEP meeting date (Fact 22). On August 17, 2020, staff emailed the Parents a Notice of the team meeting, and the Mother participated in the meeting (Fact 24, 27, 28). The IEP team was unable to conclude the review of the Student's IEP and the meeting continued on September 9, 2020 (Fact 27, 31).

The Mother participated in the two IEP meetings regarding the Student that were held on September 3, 2020 and September 9, 2020 (Fact 27). In each of these IEP meetings the Mother provided input regarding her child's needs and the educational services and placement the Parents wanted for the Student (Fact 28, 31, 32).

On September 11, 2020, a third IEP meeting was proposed by staff for September 24, 2020, as the IEP team had not completed the review of the IEP (Fact 34, 35). Parents were provided a written notice for the meeting, which set forth the date of notice as 9/4/20 and 9/24/20 (Fact 40). An IEP meeting on September 24, 2020 did not occur as the Parents indicated they were not available on that date as there was insufficient time to prepare and the meeting was cancelled (Fact 36, 41, 43, 44, 57). The Parents were requested to provide other available dates and the team would then meet, but the Parents informed the District that they did not want to finish reviewing the IEP (Fact 45, 47). Because the IEP team did not meet to finalize the review of Student's IEP, no final changes were made to the May 13, 2020 IEP (Fact 47).

Summary and Conclusions
Neither the Individuals with Disabilities Education Act (IDEA) nor Nebraska regulations impose any specific timelines for an IEP meeting notice, but parents must be notified of a meeting early enough in advance to ensure that they will have an opportunity to attend. 34 CFR 300.322 (a)(1); 92 NAC 51-007.06.

School districts must make a reasonable effort to ensure that parents are given the opportunity for meaningful participation in the IEP process. It is assumed that if the parent was, in fact, present at the IEP meeting, notice was given in a timely manner. Letter to Constantian, 17 IDELR 118 (OSEP 1990).

The facts set forth above reveal that the District took appropriate actions to ensure that the Parents were present at the IEP team meetings held on September 3 and 9, 2020 and were afforded the opportunity to participate and provide meaningful input. When District staff was informed that the Parents

were not available on September 24, 2020 for another IEP meeting to finalize the IEP review, the meeting was cancelled, and the Parents were asked to propose available dates for another meeting. The Parents informed the District they did not wish to meet again. Although the Parents assert that the Notice of Individualized Education Program Team Meeting for the proposed IEP meeting on September 24, 2020 set forth an incorrect date, the emails between the parties make it clear that the Parents understood the date for the proposed meeting and informed the District that they were not able to attend on that date.

In addition, the Parents assert that the District is required to provide them with notice of an IEP team meeting seven to ten days before the meeting. However, the regulations set forth no such timeline requirement.

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.06 and **no corrective action** is required.

Issue # 2

Did the District ensure that a reevaluation was conducted at the request of the Student's Parents, as required by 92 NAC 51-006.05A2, or that prior written notice was provided to the Parents if the District declined to evaluate, in accordance with 92 NAC 51-009.05A2?

92 NAC 51-006.05A2 states:

006.05A A school district or approved cooperative shall ensure that a reevaluation of each child with a disability is conducted in accordance with the verification procedures in Section 006 of this Chapter:

006.05A2 If the child's parents or teacher requests a reevaluation.

92 NAC 51-009.05A2 states:

009.05 Prior Written Notice

009.05A Prior written notice shall be given to the parents of a child with a disability a reasonable time before a school or approved cooperative:

009.05A2 Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

Allegations/Parents' Position
The Parents assert that the District failed to provide evaluations as requested by the Parents within the required timeframe. The Parents requested a multidisciplinary evaluation on September 4, 2020 where they were told they would have to drop the Student off and were not allowed to be present. A therapist and nurse for the Student requested an evaluation on October 8, 2020.

District Response
The District asserts that the Student's Parents were offered a reevaluation prior to the first complaint filing in September 2020 but the evaluation was refused by the Parents unless they were allowed to sit next to the Student during the evaluation. Such an arrangement would have invalided the results of the evaluation.

The District contacted the Parents on December 3, 2020, to schedule a time for an evaluation, which was scheduled and conducted, in part, on January 6 and 8, 2021. The Parents were allowed to observe the evaluation process through a window without jeopardizing the validity of the evaluation.

Investigative Findings
All of the investigative findings discussed previously are incorporated herein by reference.

The Student's initial evaluation was conducted by another school district in June 2017 (Fact 2). The Parents requested a reevaluation in February 2020 and signed consent for an evaluation on February 18, 2020 (Fact 6). The Student's reevaluation was due June 30, 2020 (Fact 14). Due to the COVID-19 pandemic, the District ceased in-person instruction on March 16, 2020 and informed the Parents that due to the school closure the Student's reevaluation would be completed when the District was able to reopen (Fact 8, 9).

Prior to the start of the 2020-21 school year, the District offered to conduct a virtual evaluation of the Student, but the Parents did not believe a virtual evaluation was appropriate and requested an in-person evaluation (Fact 25). The District began making arrangements for an in-person evaluation, but the Parents informed the District that they wished to be present with the Student during the in-person evaluation. The District objected, as the Parents' presence would invalidate the results (Fact 25).

At the IEP team meeting on September 9, 2020, the District again offered to conduct the Student's reevaluation remotely, but the Mother did not feel a remote evaluation was appropriate for the Student (Fact 32).

On December 3, 2020, the District emailed the Parents with an offer to evaluate the Student at a location where the Parents could watch the evaluation process through a window; the offer was accepted by the Parents and available dates for an evaluation were discussed. (Fact 53, 54, 55, 56). The evaluation occurred, in part, on January 6 and 8, 2021 (Fact 57).

Summary and Conclusions

Parental consent is required for a re-evaluation. However, parents who place extensive conditions on the reevaluation process effectively deny or withhold consent. In such circumstances, a district has no obligation to proceed with the reevaluation. G.J. v. Muscogee County School District, 58 IDELR (11th Cir. 2012).

CI Report 20.21.04 reviewed the Parents' allegations (Fact 37; 51) and addressed the issue of the Student's reevaluation as follows:

> *The issue of the timing of the Student's re-evaluation in connection with the review of the Student's IEP and a potential change of placement is clearly, and unfortunately, affected by the restrictions against in-person educational services during the COVID-19 pandemic. Prior to the COVID-19 restrictions being put in place, it would certainly have been a violation of Rule 51 for a district to fail to timely conduct a student's three-year re-evaluation prior to making a determination of eligibility and need and developing an IEP. However, in this matter the Student's current IEP was developed by the District on May 13, 2020, while the Student's eligibility was current, resulting in an IEP that did not violate the requirements of Rule 51. And because the IEP team meetings in September, 2020, did not result in a new or revised IEP for the Student, the District has not developed an IEP for the Student which was not based upon a current evaluation. The documentation does indicate that in-person learning in the District has resumed as of October 5, 2020, but this occurred after the date the Parents filed their Complaint. The District should be well advised hereby that a failure to take all appropriate actions to timely schedule and conduct the Student's three-year re-evaluation, make a determination of eligibility and educational need and develop an appropriate IEP for the Student could result in an IEP that is not appropriate for the Student and thus a violation of FAPE. CI Report 20.21.04 at 9.*

The facts established that the District offered to conduct the Student's evaluation, but because of the closure of all District schools due to the COVID-19 pandemic, it was only possible to conduct evaluations remotely, which the Parents rejected. The District subsequently offered to conduct an in-person evaluation at the beginning of the 2020-21 school year, but the Parents

conditioned the in-person evaluation on their presence while the evaluation was being conducted. The Parents' condition on the evaluation process resulted in withholding consent for the evaluation, as their presence during the evaluation could invalidate the evaluation results. The withholding of consent resulted in the District's inability to conduct the evaluation. It was not until December 3, 2020, when the District offered an in-person evaluation where the Parents could observe the evaluation process through a window that the Parents indicated their willingness to proceed with the evaluation. The facts establish that the District acted reasonably in identifying and offering a compromise that would allow the Parents to observe the evaluation process, but which would not compromise the evaluation results. The acceptance of the compromise by the Parents effectively reinstituted the Parents' consent to conduct the evaluation, which occurred, in part, on January 6 and 8, 2020.

Although the District was out of compliance as the Student's reevaluation was not completed by June 30, 2020, CI Report 20.21.04 identified the pandemic as the cause for the reevaluation to initially be postponed, as all schools were closed. Subsequently, the evaluation was postponed due to the Parents' refusal to agree to a virtual evaluation, and their provision of conditions placed on an in-person evaluation. Although beyond the timeline of this investigation, the reevaluation has been conducted in part.

A district is required to give the parents of a child with a disability prior written notice (PWN) a reasonable time before the district proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of a free appropriate public education (FAPE) to the child. The purpose of the PWN is to inform parents of a district's final action on a proposal or refusal. It is the district's responsibility to make a final decision and implement any determined change. Letter to Lieberman, 52 IDELR 18 (OSEP 2008).

The facts established that from September 2020 through December 2020 the District made no final proposals or refusals with regard to the identification, evaluation, educational placement or the provision of FAPE to the Student, and had no obligation to provide the Parents with Prior Written Notice.

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-006.05A2 and 92 NAC 51-009.05A2 and **no corrective action** is required.

Issue #3

Did the District ensure that the Student's education placement was made by a group of persons, including the Parents and other individuals knowledgeable about the Student, the meaning of the evaluation data and the placement

options, including as close as possible to the Student's home, was made in conformity with the least restrictive environment requirements in accordance with 92 NAC 51-008.01C, and was based on the Student's unique needs and not on the Student's disability, in accordance with 92 NAC 51-008.01C?

92 NAC 51-008.01C states:

> 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 the child's disability.

Allegations/Parents' Position
The Parents assert that the District failed to provide the Student homebound services as ordered by the Student's doctors. The Student has been unable to remote learn due to seizure activity from excessive screen use and unmanageable behaviors due to the Student's disabilities.

District Response
The District asserts that this issue was addressed in CI Report 20.21.04 and since the issuance of that Report no additional IEP meetings have been held.

Investigative Findings
All of the investigative findings discussed previously are incorporated herein by reference.

CI Report 20.21.04 addressed the issue of the Student's placement as follows:

> *As set forth above, Rule 51 requires Districts to consider the concerns of parents. However, consideration does not mean acquiescence. In this matter, at the May 13, 2020, IEP team meeting, the Parents expressed their belief that the best placement for the Student is in a self-contained*

special education classroom. The District considered the Parent's request and determined that the Student would be successful in a general education classroom with the Student's non-disabled peers, which is the Student's LRE. The District then provided a PWN to the Parents describing the rationale for why the placement chose by the IEP team was the most appropriate.

* * *

Therefore, it is concluded that the Student's placement decision was made by a group of persons, including the Parents and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options, and that the placement decision was made in conformity with the least restrictive environment requirements in 92 NAC 51-008.01 and based on the Student's unique needs and not on the Student's disability, and the District implemented the requirements of 92 NAC 51-008.01C. CI Report 20.21.04, at 9-10.

On July 13, 2020, the District received an email from the Mother with an attached medical order requesting homebound services for the Student (Fact 15). Staff responded to the Parents on July 28, 2020 that since the Student's doctor stated it was unsafe for the Student to return to school the District would provide home services, but that an IEP team meeting to develop a new IEP would be needed (Fact 16). On August 4, 2020, District staff proposed an IEP meeting for August 10 or 11, 2020 to discuss a change of placement for home services, but the Parents were subsequently notified that the Student's distance learning plan in the May 13, 2020 IEP would be followed, as the District was moving to 100% remote learning for the beginning of the 2020-21 school year (Fact 17, 18, 19, 26).

On September 11, 2020, the Father emailed staff after the IEP team had met for approximately four hours on September 3 and 9, 2020 and set forth the Parents' demands. At that time, the Parents did not request homebound services (Fact 36).

On September 17, 2020, the Father emailed staff, referred to the medical order forwarded to the District on July 13, 2020 and inquired when homebound services would begin for the Student, as other students in the district were returning to in-person learning (Fact 39, 48). District staff intended to discuss the Parents' request for homebound services at the IEP meeting scheduled for September 24, 2020, but the meeting was not held as the notice given to the

Parents by the District provided insufficient time for them to prepare (Fact 42, 43, 44, 46). The Parents were asked to propose another date and time to meet, but the Parents informed the District that they did not want to finish reviewing the May 13, 2020 IEP (Fact 45, 47). No further IEP meetings were held (Fact 47).

On October 30, 2020, the District received an unsigned and undated letter from a pediatric office which recommended that the Student receive homebound services (Fact 50).

In a letter dated November 3, 2020, a health care provider addressed the Student's brother's needs, and further stated, "[i]t is also reasonable that [Student] be able to participate in remote learning during this unprecedented pandemic because of [brother's] immune status" (Fact 51).

Summary and Conclusions

Placement decisions must be 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. Placement decisions must be in conformity with the least restrictive environment (LRE) requirements. Once the IEP is developed, the IEP team makes a placement decision. Letter to Anonymous, 21 IDELR 674 (OSEP 1994).

Least restrictive environment (LRE) requirements mandate that students be educated in regular classroom settings to the maximum extent appropriate. Further, special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may only occur if 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; 92 NAC 51-008.01A.

In determining LRE and placement, parent preference is an appropriate consideration. However, parental preference cannot be the sole or predominant factor in a placement decision. Letter to Burton, 17 LRP 1182, (OSEP 1991). Recommendations provided by a student's private doctor must be considered by the IEP team, although the team is not required to agree with and implement each outside recommendation. See Michael P. and Elizabeth G. v. Department of Educ., State of Hawaii, 57 IDELR 123, 656 F.3d 1057 (9th Cir. 2011). Special education determinations under the IDEA are distinct from diagnoses by medical professionals, and the IEP team makes the final determination regarding a student's educational services and placement. 34 CFR 300.304; 92 NAC 51-008.01C.

The findings quoted above from CI Report 20.21.04 continue to apply to this investigation, as no changes have occurred to the Student's IEP since it was finalized on May 13, 2020 and Prior Written Notice was provided to the Parents on June 5, 2020. While the Parents made a request for homebound services which the District intended to discuss with the Parents at the IEP meeting scheduled for the September 24, 2020, that meeting was cancelled and the Parents indicated they did not want to meet again.

Although the Parents believe that the documentation provided by their medical professionals to the District regarding homebound instruction requires that homebound instruction be provided by the District, the opinion of medical professionals is information the IEP team must consider, but the final determination as to the appropriate educational services and placement for the Student must occur through the IEP team process.

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-008.01C and **no corrective action** is required.

Issue #4
Did the IEP Team review and revise the IEP, as appropriate, to address information about the Student provided by the Parents, including the Student's anticipated needs or other matters in accordance with 92 NAC 51-007.10?

92 NAC 51-007.10 states:

007.10 The IEP team shall revise the IEP as appropriate to address:

- 007.10A Any lack of expected progress toward the annual goals described in 92 NAC 51-007.07 and in the general education curriculum, if appropriate;
- 007.10B The results of any reevaluation conducted under 92 NAC 51-006.05A;
- 007.10C The information about the child provided to, or by, the parents, as described in 92 NAC 51-006.06A1;
- 007.10D The child's anticipated needs; or
- 007.10E Other matters.

Allegations/Parents' Position
The Parents assert that that the Student's IEP fails to include diagnoses that affect the Student's education, such as Autism, Conduct Disorder and Receptive Expressive Language. Further, the District failed to include or implement a seizure action plan in the IEP and failed to include adequate

descriptions of transition services as three adults are necessary to execute the seizure action plan.

District Response
The District asserts that this issue was addressed in Complaint Report 20.21.04. Further, the IEP meetings of September 3, 2020 and September 9, 2020 did not result in any revisions to the Student's IEP. Since the issuance of CI Report 20.21.04, no additional IEP team meetings have been held.

Investigative Findings
All of the investigative findings discussed previously are incorporated herein by reference.

The most recent seizure action plan in the Student's file is dated July 18, 2018 (Fact 5). While the Parents have a seizure action plan dated November 29, 2019, a copy of that plan was not provided to the district (Fact 5).

On February 14, 2020, the school nurse emailed a seizure action plan form to the Parents and requested that the Student's doctor complete the form; however, the form was not completed (Fact 4, 7). The Student's current IEP was developed and finalized on May 13, 2020 (Fact 10, 11). The IEP provided that school personnel would be aware of a seizure action plan. (Fact 11). The school nurse planned on discussing the need for an updated seizure plan at the September 3, 2020 IEP meeting but did not have an opportunity to do so (Fact 29). The next day, the school nurse mailed the healthcare provider order form to the parents for the seizure action plan (Fact 30). At the IEP meeting on September 9, 2020, the school nurse stated that updated orders and medications were needed yearly (Fact 33). The nurse further explained that a seizure action plan was needed from the Student's doctor, and she had mailed the form to the Parents (Fact 33). On September 15, 2020, the Student's health care provider signed the Health Care Provider's Input for In-School Nursing Services form and "seizure action plan" was identified as needed in the school setting, but a current seizure action plan was not included (Fact 38).

The Student's initial multidisciplinary evaluation from June 2017 identified the Student as a student with a disability under the eligibility category of Other Health Impairment (Fact 3). The May 13, 2020 IEP identifies Student's primary disability as Other Health Impairment (Fact 11). The IEP also provides that transition services were determined not to be needed due to the Student's age (Fact 11).

Summary and Conclusions
"Central to IDEA is the requirement that local school districts develop, implement, and annually revise an individualized education program (IEP) calculated to meet the eligible student's specific educational needs." Thompson R2-J School Dist. v. Luke P., 50 IDELR 212, (10th Cir. 2008).

An IEP is a written statement for each child with a disability that is developed, reviewed and revised in accordance with federal law. 34 CFR 300.320(a). In order to be eligible for an IEP, a student must meet the definition of a child with a disability, must have been evaluated, and must be found as a child with autism, a behavior disorder (referred to as emotional disturbance), deaf-blindness, a developmental delay, a hearing impairment including deafness, an intellectual disability, multiple impairment, an orthopedic impairment, an other health impairment, a specific learning disability, a speech-language impairment, a traumatic brain injury or a visual impairment including blindness, who because of this impairment needs special education and related services. 34 CFR 300.8; 92 NAC 51-003.08.

Transition services are defined as a coordinated set of activities for a child with a disability that facilitates the child's movement from school to post-school activities. 34 CFR 300.43; 92 NAC 51-003.63.

The facts show that the Student's initial evaluation identified the Student's disability category as Other Health Impairment. The IEP team also identified the Student's disability category as Other Health Impairment, which is one of the qualifying disabilities. The IDEA does not require that an IEP contain all of a student's medical diagnoses in order to be compliant or find that a student has a disability and is entitled to special education services.

The facts further establish that a current seizure action plan has not been signed by the treating physician and is not available for school staff to implement. Further, the Student does not qualify for transition services as the Student is not moving from school to post-school activities.

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.10 and **no corrective action** is required.

Issue #5
Did the District consider the use of positive behavioral interventions and supports to address behavior which impedes the learning of the Student or the learning of other students in accordance with 92 NAC 51-007.07B3?

92 NAC 51-007.07B3 states:

007.07B3 In the case of a child whose behavior impedes his or her learning or that of others, the IEP team shall consider the use of positive behavioral interventions, and supports and other strategies to address that behavior.

Allegations/Parents' Position
The Parents assert that the District failed to include or implement a behavior management plan as part of the Student's IEP.

District Response
The District asserts that at the May 13, 2020 IEP meeting the Student's IEP team considered whether the Student would benefit from a behavioral assessment and intervention plan but determined it was not necessary.

Investigative Findings
All of the investigative findings discussed previously are incorporated herein by reference.

The May 13, 2020 IEP identifies that the IEP team determined that a behavioral assessment plan and intervention plan were considered but were determined not to be necessary. (Fact 11).

Summary and Conclusions
In the case of a student whose behavior impedes his or her learning or the learning of others, a school district is required to consider, as appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. 34 CFR 300.324(a)(2)(i); 92 NAC 51-007.07B3.

The facts establish that the Student's IEP team determined a behavioral assessment plan and intervention plan were not necessary for the Student. Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.07B3 and **no corrective action** is required.

Issue #6
Did the District fail to provide special education and related services set forth in the IEP to the Student as required by 92 NAC 51-007.02, resulting in a denial of a free appropriate public education to the Student as required by 92 NAC 51-003.24?

92 NAC 51-003.24 states:

003.24 Free appropriate public education or FAPE means special education and related services that are provided at public

expense, under public supervision, and direction, and without charge; meet the standards of the state including the requirements of this Chapter; include an appropriate preschool, elementary school, or secondary school education in Nebraska and are provided in conformity with an individualized education program (IEP) that meets the requirements of 92 NAC 51- 007.

Allegations/Parents' Position
The Parents assert that the District has not provided any of the services listed on the IEP to the Student, despite excessive absences that should have triggered placement evaluation meetings since the Student requires homebound services and is unable to attend school in person or through remote learning.

Further, the District will not allow the Student to attend the neighborhood school but claim the Student has to attend a school across town because it has a full-time nurse.

District Response
The District has offered the Student remote and in-person services since the beginning of the 2020-21 school year, but the Parents have refused to make the Student available for any of these services.

Investigative Findings
All of the investigative findings discussed previously are incorporated herein by reference.

The District provided the Parents with an offer of a free appropriate public education (FAPE) for the Student in the May 13, 2020 IEP, and the subsequent PWN received by the Parents on June 5, 2020 (Fact 11, 12). The District and the Parent reached an agreement regarding the school the Student would attend with a full-time nurse on-site and the Parent enrolled the Student at that school (Fact 13). The Kindergarten teacher for that school reached out to the parents of the students assigned to her classroom, including the Student's Parents, before the start of school (Fact 20). The Parents disagreed with the May 13, 2020 IEP placement of the Student in the general education setting with special education support, and requested an IEP meeting, which was held on September 3, and 9, 2020 (Fact 21, 27). The District offered to provide the Student with educational services but the Parents chose not to have the Student participate in on-line learning or in-person learning (Fact 23, 28, 58).

Summary and Conclusions
Federal regulations provide that a free appropriate public education (FAPE) means special education and related services that: 1) are provided at public

expense, under public supervision and direction without charge to parents; 2) meet the standards of the state educational agency (SEA), including the requirements of the IDEA; 3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and d) are provided in conformity with an individualized education program (IEP). 34 CFR 300.17.

The U.S. Supreme Court construed the meaning of FAPE in Bd. of Education of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 198, 207 (1982) and stated: "The statutory definition of 'free appropriate public education,' in addition to requiring that States provide each child with 'specially designed instruction,' expressly requires the provision of 'such ... supportive services ... as may be required to assist a handicapped child to benefit from special education.' § 1401(17). ..." The U.S. Supreme Court further defined the standard for a free appropriate public education in Endrew F. v. Douglas County School District. RE-1, 137 S. Ct. 988 (2017), holding that the educational program for a child with a disability must be one that is "... reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

The IDEA requires that the placement of a student with a disability shall be "as close as possible to the child's home" and that "unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend it nondisabled." 34 CFR 300.116. This mandate, however, does not confer an absolute right to students to attend their neighborhood schools. Districts have significant authority when determining a school site and may be able to provide certain services at a centralized location without violating the IDEA. J.T. v. Newark Bd. of Educ., 61 IDELR 27 (D.N.J. 2013, unpublished); and J.T. v. Dumont Pub. Schs., 64 IDELR 248 (N.J. Super. Ct. App. Div. 2014).

Courts have looked favorably upon the idea of centralizing educational programs for students with low-incident disabilities. See Barnett v. Fairfax County Sch. Bd., 17 IDELR 350 (4th Cir. 1991), cert. denied, 112 LRP 24728 , 502 U.S. 859 (1991) (holding that because of a district's limited public funds, its decision to centralize a resource-intensive program such as cued speech did not violate the IDEA's LRE requirement as long as FAPE was available). A district has no obligation to modify a neighborhood school's programs if a student can receive the required services in another school. B.M. v. Board of Educ. of Scott County, Ky., 51 IDELR 5 (E.D. Ky. 2008) (Because another local elementary school already had a nurse on staff, it was not unreasonable for the district to suggest a transfer).

The District offered to implement the Student's most recent IEP dated May 13, 2020, which would provide the Student with a free appropriate public education (FAPE), but the Parents elected not to have the Student participate in remote or in-person learning. While the Parents have requested homebound instruction, it is the IEP team, not the Student's medical providers or Parents, that must make the determination that homebound instruction is appropriate for the Student. Such a determination has not occurred at this time.

The Parents also assert that the District will not allow the Student to attend the neighborhood school but claim, for administrative purposes, that the Student has to attend a school across town because it has a full-time nurse. The facts show that the Parent requested a specific elementary school that had a full-time nurse on staff, the Parents' request was granted by the District, and the Parent enrolled the Student at that school. The Student can receive the appropriate services at the school chosen by the Parent and the District is not obligated to provide a full-time nurse at the neighborhood school.

Based on the information discussed above, the District implemented the requirements of 92 NAC 51-007.07.02 and 92 NAC 51-003.24 and **no corrective action** is required.

Issue #7
To what degree did the District abide by the terms of the agreements made within the mediation process pursuant to 92 NAC 51-009.12G?

92 NAC 51-009.12G states:

> 009.12G In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that:
>
> 009.12G1 States that all decisions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
>
> 009.12G2 Is signed by both the parent and a representative of the agency who has the authority to bind such agency;

Allegations/Parents' Position
According to the mediation agreement, an IEP was supposed to be convened within 14 days to start homebound services no later than 7 days after the IEP meeting. The Student is still not receiving any school services despite providing documentation as requested.

District Response
The majority of the resolution activities that were agreed upon during mediation were dependent upon the District receiving medical information as outlined in the agreement. The District notified the parent on October 31, 2020 that the information sent did not meet the requirements and that the physician let the District know additional information would be sent on November 2, 2020. The District did not receive the information thus the documentation received did not meet the agreed upon terms of the agreement.

Investigative Findings
The Parents filed a previous complaint on September 14, 2020, and the parties agreed to participate in mediation. At the mediation, which was held virtually, the parties came to a conditional agreement which was in writing and verbal agreement was obtained. The conditional agreement specified the requirements of documentation needed from the physician to allow the District to hold an IEP meeting to consider a homebound placement (Fact 49). The District received documentation from the physician in relation to the Student's sibling which as a result did not meet the requirements of the mediation agreement (Fact 50). The District contacted the Parents to indicate the physician's information did not meet requirements but that the physician was sending additional information which was never received (Supplemental District Response dated February 8, 2021). The District again contacted the parents to notify them that the required information was not received (Supplemental District Response dated February 8, 2021).

Summary and Conclusions
The mediation agreement was a conditional agreement which hinged on the District receiving information from the physician including a statement that the Student was unable to leave the home, and the list of the diagnosis that support that conclusion. The information the District received was for the Student's sibling and not the Student, thus the conditional requirements were not met. However, the District is not the responsible party for the violation of the conditional agreement. Based on this information, the District implemented the requirements of 92 NAC 51-009.12G and no corrective action is required.

Notice to District

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