

COMPLAINT INVESTIGATION REPORT

Complaint Number: 20.21.10
Complaint Investigator: [Redacted]
Date Complaint Filed: February 17, 2021
Date of Report: April 13, 2021

Issues Investigated

1. Did the School District provide special education and related services to the child in accordance with the child's IEP? [92 NAC 51-007.02]
2. Following IEP amendment, did the School District make special education and related services in accordance with the child's IEP available to the child as soon as possible following the development of the IEP? [92 NAC 51-009.04A3]

Documents Reviewed by Investigator

From the Complainant

- Letter of Complaint dated February 17, 2021; received by NDE February 17, 2021
- Email correspondence with Complainant
- Prior Written Notice provided to the Complainant on April 17, 2020.
- Telephone interview with Complainant March 18, 2021

From the School District

- Letter of Response dated March 8, 2021; received by NDE March 8, 2021
- IEPs for the Student for the 2019-2020 and 2020-21 school years
- Evaluation Report dated January 31, 2019
- Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through February 19, 2021
- Assistive Technology Consultation for the Student dated May 18, 2020 through November 30, 2020
- Summary of "Whole Group" Family Contacts dated March 16, 2020 through September 18, 2020
- Student Communication Logs dated October 26, 2020 through March 5, 2021
- Speech Services Letter provided by speech therapist March 17, 2020-February 24, 2021
- Daily schedule developed by the District for the Student's remote learning
- Progress reports for the Student dated March 6, 2020; May 13, 2020; and March 5, 2021

- Contact logs outlining correspondence between the District and the Parent
- Email correspondence between the Parent and the District
- Telephone interviews with the Student's teacher, the school principal, the Teaching and Learning Consultant for the District and Associate Legal Counsel for the District March 18, 2021

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 Parent alleged IDEA violations. To conduct this complaint investigation, an outside investigator was used by the NDE Office of Special Education. The documents received from the Parent and the School District were reviewed.

This investigation is limited to a review of alleged IDEA violations that occurred not more than one year prior to February 17, 2021, 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.

A complaint was filed on behalf of the Student, who is an 8th grader attending the District. The Student is eligible for special education services as a student with an Intellectual Disability and an Orthopedic Impairment and is diagnosed with Cerebral Palsy and a seizure disorder. The Student receives self-contained special education services throughout the school day as well as speech, occupational therapy, physical therapy, and assistive technology. The Student is in a wheelchair and communicates only through the use of assistive technology devices. Due to the Student's medically fragile condition, the Parents have elected for the Student to participate in virtual learning from home for the 2020-21 school year, one of the options presented by the District during the COVID-19 pandemic. Although the Student's classmates have attended school in-person since September of 2020, the Student has livestreamed classes using Microsoft Teams on an iPad provided by the District.

Issue # 1

Did the School District provide special education and related services to the child in accordance with the child's IEP? [92 NAC 51-007.02]

92 NAC 51-007.02 states:

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.

Allegations

The Parent alleges that between March 16, 2020 and November 2020, the Student did not receive any physical therapy, occupational therapy, speech therapy, or assistive technology supports, all indicated in the Student's IEP.

Parent Position: The Parent believes that from mid-March to November 2020, the Student's unique needs as they relate to communication, mobility, participation in class, social interaction, and assistive technology have not been adequately addressed. (Letter of Complaint dated February 17, 2021)

District Response: During the school closure due to the COVID-19 pandemic in the spring of 2020, the District provided packets and email correspondence and related service providers made themselves available for consultation. Since school has re-opened, the Student has been provided virtual access to the classroom through Microsoft Teams and a District iPad. Related service providers have resumed services in-person and have provided the Student with virtual services while the Student participated virtually. (Letter of Response dated March 8, 2021)

Investigative Findings

- The Student's most recent evaluation (Evaluation Report dated January 31, 2019) includes the following findings:
 - From physical therapy assessment: [The Student's] limitation in strength, mobility, and balance impact [the Student's] educational setting, requiring [the Student] to have assistance with all activities."
 - From occupational therapy assessment: [The Student] continues to have difficulties with accessing her school environment and completing classroom and self-help tasks independently.
 - No speech and language testing was completed.
- The IEP dated January 31, 2020 lists physical therapy provided 9 times per year, occupational therapy provided 4 times per year, and assistive technology provided 4 times per year. None of these services include an amount of time listed on the IEP, only a frequency.
- The Student is non-verbal and uses assistive technology to communicate (IEP dated January 31, 2020).
- The goals listed on the Student's IEP (dated January 31, 2020) include the following:

- By the end of the IEP period, the Student will apply reading skills and strategies to demonstrate comprehension of leveled reading materials by completing tasks with 3 or fewer prompts as measured by teacher observation and charting.
 - By the end of the IEP period, given direct instruction and repeated practice, the Student will improve [the Student's math skills by completing tasks with 3 or fewer prompts as measured by teacher observation and charting.
 - By the end of the IEP period, given a power wheelchair with appropriate seating and practice, the Student will access different locations and technology within the school with verbal cues as needed and fewer than 2 physical assists, 4/5 observations by therapist or teacher.
- The Student's teacher reported, that prior to the school closure, the Student was receiving speech therapy, but that it was "integrated" into the program, and therefore was not listed on the IEP. According to the teacher, these services were provided by the speech therapist for 30 minutes each week to the whole class (School Staff Interview, March 18, 2021).
- The Student's teacher reported that the Student received 1 hour of direct service from the physical therapist each month, checking the Student's equipment and working with the Student to properly use a gait trainer and wheelchair and to make progress on the third goal listed above (School Staff Interview, March 18, 2021).
- Physical therapy logs provided reflect direct services during the 2019-2020 school year prior to school closure on the following dates: September 3, September 19, October 10, November 4, November 8, November 22, January 30, February 7 (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020). This totals 8 sessions of direct physical therapy services in 6 months.
- The Student's teacher reported that individualized and direct occupational therapy services were also provided to the Student for roughly 30 minutes, though the teacher was unclear as to the frequency of these services (School Staff Interview, March 18, 2021).
- Occupational therapy logs provided reflect direct services during the 2019-20 school year on the following dates: October 3, 2019, October 16, 2019, November 22, 2019, January 31, 2020 and March 6, 2020 (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020). This constitutes 5 sessions of direct occupational therapy services in 6 months.

- A Prior Written Notice provided by the District on April 17, 2020 reads, Due to the Covid-19 health-related closure of {District} Schools on March 16, 2020, your student will be receiving special education services virtually. The agreed upon services that work best at this time are the availability of the district learning packets, as well as emails with ACP curriculum attachments. Learning activities and suggestions will be in the areas of reading, fine motor, math, science, social and functional skills, speech and language, and gross motor. The teacher will also call, text, or email parent weekly to discuss and problem-solve any academic or social/emotional needs that arise during the week. The teacher is available via phone calls, texts, and emails. Teacher will be available during school hours and the Student can receive accommodations and support on various assignments and needs. The occupational therapist, physical therapist, assistive technology support, and speech language pathologist will be available to communicate with parent to provide consultative support via phone/email if needs arise. During the closure, the Student will receive services in a virtual setting to work on lessons chosen by [the Student's] caregivers. When the district re-opens, previously stated IEP services will resume unless adjusted by the IEP team.
- General education students within the District were provided packets for completion reflecting grade level curriculum during the school closure ([District] Continuity of Learning Plan, March 2020).
- During the school closure (March 16- May 15, 2020), physical therapy logs reflect email and text messages communication on March 23, April 24, and May 15 informing the Parent that the physical therapist was "available for questions and concerns" and offering to "chat" with the Student via Zoom or Teams (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020).
- During the school closure (March 16- May 15, 2020), occupational therapy logs reflect two emails sent to the Parent on March 20 and April 24, 2020, offering consultation if needed (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020).
- During the school closure, no consultation or services were provided related to the Student's IEP goals or specific occupational therapy, physical therapy, or speech needs (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020).
- No speech services were provided in any form during the school closure (Speech Services Letter provided by speech therapist March 17, 2020-February 24, 2021).
- Once school re-opened in the fall of 2020, logs reflect the following:

- Physical therapy consultation and participation in virtual courses include: August 26, October 7, and October 16 (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020).
- Occupational therapy virtual participation in a TEAMS class on August 27, 2020 (Physical Therapy/Occupational Therapy Contact Logs dated August 14, 2019 through May 22, 2020).
- Speech therapy logs reflect integrated speech instruction provide to the whole class with the Student participating virtually for 30 minutes once per week (Speech therapy letter reflecting services provided March 17, 2020- February 24, 2021).
- Assistive technology logs reflect one email during the school closure to the Parent and consultation with the teacher to develop the new IEP on October 14, 2020 (Assistive Technology Consultation for the Student dated May 18, 2020 through November 30, 2020).

Summary and Conclusions

Federal and state 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; 92 NAC 51-007.02.

In the early days of the school closures in the spring of 2020, the U.S. Department of Education provided guidance to school districts and clarified that if a school closes its doors to stop COVID-19 from spreading, and the district doesn't provide educational services to the student population in general, then "the [local educational agency] would not be required to provide services to students with disabilities during the same period of time." Once school resumes, districts must make every effort to provide special education and related services to the child in accordance with the IEP and would also need to make an individualized determination regarding compensatory education. Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (EDU 2020).

Districts must provide FAPE consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. The U.S. Department of Education recognized that during the COVID-19 pandemic,

schools might not be able to provide certain in-person services. Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elem., and Secondary Schs. While Serving Children with Disabilities, 76 IDELR 104 (OSERS/OCR 2020). The U.S. Department of Education further recommended that IEP teams consider providing "online or virtual instruction" to students with disabilities excluded from school because of the virus. Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (EDU 2020).

The related services listed in the Student's IEP did not include speech therapy and no amount of time was identified for any related service. The service logs and teacher interview revealed that the Student was receiving 30 minutes per week of speech therapy in a small group setting, 1-2 sessions of individual, direct physical therapy per month, and 1 session of direct occupational therapy per month prior to March 16, 2020.

From March 16, 2020 to May 15, 2020, District personnel emailed the Parent offering consultative services, but no direct services were provided to the Student, and the Student's IEP was not amended to remove direct services.

At the beginning of the 2020-21 school year, school began remotely for all students, though students returned to in-person learning beginning September 16, 2020. While school was provided remotely, no direct services were provided to the Student, and the Student's IEP was not amended to address online or virtual services.

When in-person school resumed on September 16, 2020, the Student began attending virtually, and some related services were provided virtually, though an IEP team meeting was not convened to determine how best to meet the Student's needs as a virtual learner, or if compensatory services were warranted. The District did not make a good faith effort to ensure that the Student was being provided a Free and Appropriate Public Education during the school closure and during the period from September 16 and the development of a new IEP in November.

Of additional concern, the Prior Written Notice provided to the Parent was dated April 17, 2020, over a month after schools were closed and minimal services were provided in the month between school being closed and the Parent being informed of the District's plan to meet student needs.

Based on the summary and conclusions above, the District failed to meet the requirements of 92 NAC 51-007.02 and **corrective action is required**.

Corrective Action

1. For the time period of March 16, 2020 to September 16, 2020: The Student's IEP team shall convene a facilitated meeting by May 15, 2021 to review the Student's need for recovery services due to school closure resulting from the COVID-19 pandemic.
 - a. An IEP team, including the Parent, shall determine what recovery services are needed to allow the Student to be at the skill level the Student would have been at if school were in session and determine a schedule for those recovery services to be provided during the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - b. Recovery services deemed necessary by the IEP team shall be completed by October 1, 2021. 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 recovery services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all recovery services).
 - c. The schedule for recovery services and the nature of those services shall be provided to NDE within 10 days from the date of the facilitated IEP meeting, but no later than May 31, 2021.
 - d. Service provider logs verifying completion of all recovery services must be submitted to NDE monthly until the service is complete and all service has been verified.

Issue # 2

Following IEP amendment, did the School District make special education and related services in accordance with the child's IEP available to the child as soon as possible following the development of the IEP? [92 NAC 51-009.04A3]

92 NAC 51-009.04A3 states:

009.04A3	As soon as possible following the development of the IEP, special education and related services must be made available to the child in accordance with the child's IEP.
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Allegations

The services outlined in the IEP developed on November 21, 2020 are not being provided.

Parent Position

Because the former IEP was not meeting the Student's needs, the Parent requested the development of a new IEP in the fall of 2020. Several meetings were held, and a new IEP was developed on November 21, 2020. Although the IEP developed November 21, 2020 includes specific language about the Student's need for 1:1 assistance throughout the Student's school day, providing opportunities to interact with nondisabled peers, and the provision of modified human growth and development instruction, none of these services are being provided as outlined in the IEP.

District Response

The District has ensured that an adult was on-screen throughout the Student's school day, the student has been included in 2 general education classes with non-disabled peers, and the District has developed a plan to provide the Human Growth and Development curriculum requested by the parent.

Investigative Findings

1. The IEP dated November 21, 2020 includes the following language:
 - a. In the section entitled, "Student's Educational Needs," Throughout the Student's entire school day [the Student] will be provided individual 1:1 adult support, either by a health para or an educational para. The Student will receive the assistance of an educational para for things such as:
 - i. Direct math instruction, direct reading instruction
 - ii. Prompting to respond to questions
 - iii. Verbal and physical prompts for positioning
 - iv. Assistance getting and positioning materials and tools
 - v. Modifying of activities to allow for participation
 - vi. Positioning of and assistance accessing communication device
 - b. In the Parent Concerns section of the IEP, the following Parent concern is documented, The Student IEP states that "[the Student] will participate with general education peers when appropriate," which is vague and in addition, [the Student] is not being given the opportunity to participate with general education peers. [The Student] is not being educated in the Least Restrictive Environment because there are many times when [the Student] could engage with non-disabled peers throughout the day that are not made available.
2. In the IEP section entitled, "Student's Educational Needs," [The Student] will receive modified human growth and development

- instruction and ongoing assistance to support understanding of [the Student's] personal health and safety needs.
3. 1:1 Adult Support:
 - a. With regard to the 1:1 support specifically stated in the IEP, the daily schedule developed by the District only includes the following blocks of 1:1 support from a para: 11:55-12:40 (A and B Days), 1:38-2:55 (A Days), 8:00-9:15 (B Days). This is approximately 2 hours of the Student's 7 hours and 25 minutes of daily virtual attendance (Daily Schedule provided by the District).
 - b. The Student's teacher reports, "Part of the misunderstanding is that the IEP states that it is a para. Generally, it is the classroom teacher doing that. [The Student] hasn't had a para assigned to her 1:1, but I am with her fulfilling the things in the IEP that the educational para would provide." (School Staff Interview, March 18, 2021)
 4. Participation with General Education Peers:
 - a. The Parent concerns with regard to LRE were addressed by including the Student in general education physical education and music classes for a total of 7.5 hours per week.
 - b. The Student's teacher indicated that the roll call routine, opportunities have been included for the Student to interact with classmates and opportunities to interact with general education peers are provided in the general education class. (School Staff Interview, March 18, 2021)
 - c. According to the Parent with regard to the special education setting, "The Student's social interactions are limited. During roll call a student will call the Student's name and ask how [the Student] is doing. The Student then has a chance to respond. Besides a student saying 'hi' every once in a while, or observing the Student, there is no interaction." (Parent Interview, March 18, 2021)
 - d. According to the Parent, with regard to the general education setting, "I have never witnessed the Student interact with general education peers." (Parent Interview, March 18, 2021)
 5. Human Growth and Development:
 - a. According to the school principal, human growth and development instruction is part of the core curriculum provided to all 6th graders in the district. (School Staff Interview, March 18, 2021)
 - b. The Student was not provided this instruction as a 6th grader. (School Staff Interview, March 18, 2021)
 - c. The Parent raised this as a pressing concern in the IEP meetings held to develop the current IEP. (IEP dated November 20, 2020)

- d. The District has arranged to provide a modified version of the content to the Student by the school nurse beginning March 15, 2021. (Letter of Response dated March 8, 2021)

Summary and Conclusions

The IEP states that the Student will be provided individual and 1:1 support from a District employee to ensure that the Student's needs are met. The Student has not been provided this service as outlined in the IEP.

Further, the Student's ability to interact with general education peers as the LRE has not been met by placing the Student virtually in a class where general education students are participating in-person while without providing thoughtful opportunity for the Student to interact and participate in instruction with nondisabled peers.

A Dear Colleague Letter, "Dear Colleague: Virtual Schools. USDE. 2016-8-5. provided by the U.S. Department of Education addresses the responsibility of the LEA to provide FAPE within a virtual model. These responsibilities include, but are not limited to, implementing the requirements in 34 CFR §§ 300.114 through 300.117 regarding education in the least restrictive environment.

Finally, the District has developed a plan to deliver human growth and development curriculum to the student during the spring of 2021. Given that this curriculum required significant modification and the involvement of multiple service providers, the provision of these services appears to be timely, and has now been completed.

Based on the evidence, the District has not provided the 1:1 support services outlined in the Student's IEP dated November 21, 2020, nor has the District adequately addressed the Student's least restrictive environment. While the District appears to have met requirements of 92 NAC 51-009.04A3 with regard to timely implementation of special education and related services, since the development of the Student's new IEP, the District has failed to fully implement the requirements of 92 NAC 51-007.02 with regard to providing services in accordance with the Student's IEP or 92 NAC 51-008.01A with regard to the Student's least restrictive environment and corrective action is required.

Based on the above findings, the District failed to fully implement the requirements of 92 NAC 51-007.02. Thus, the following **corrective action is required**.

Corrective Action

1. The District shall convene a facilitated IEP meeting no later than May 15, 2021 to identify the Student's specific needs as remote learner, not

- only academically, but socially, and physically. A new IEP shall be developed that ensures the Student is afforded meaningful participation in a remote environment in all educational activities throughout the Student's school day and that all the Student's academic, social, and physical needs are being met. Whether or not the Student needs 1:1 support from a paraprofessional while in the remote learning environment, and what this individual's specific role is shall be specifically outlined.
2. The Student's IEP team shall review the Student's need for recovery services as a result of the Student's IEP not addressing the needs specific to remote instruction.
 - a. An IEP team, including the Parent, shall determine what recovery services are needed to allow the Student to be at the skill level the Student would have been at had the Student participated in-person and determine a schedule for those recovery services to be provided during the remainder of the 2020-21 school year and beginning of the 2021-22 school year.
 - b. Recovery services shall be completed by October 1, 2021. 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 recovery services declined or not utilized by October 1, 2021 shall be deemed waived (assuming the District has made a good faith effort to timely commence and provide all recovery services).
 - c. The schedule for recovery services and the nature of those services shall be provided to NDE within 10 days from the date of the facilitated IEP meeting, but no later than May 31, 2021.
 - d. Service provider logs verifying completion of all recovery services must be submitted to NDE monthly until the service is complete and all service has been verified.
 3. Once the Student returns to in-person instruction, the IEP team shall again convene to develop an IEP suited to meeting the Student's needs in the in-person learning environment.

Notice to District

Unless otherwise indicated, the corrective action specified must be completed within sixty (60) calendar days of the date of this report. Documentation must be submitted as soon as possible following the completion of the corrective actions. All documentation of correction must be sent to:

Jo Gunderson, Complaint Investigator Specialist

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