

COMPLAINT INVESTIGATION REPORT

Complaint Number: 20.21.18
Complaint Investigator: [Redacted]
Date Complaint Filed: June 16, 2021
Date of Report: July 11, 2022

Introduction

Three separate complaints were filed involving similar issues; and merged for purposes of the investigation. All Students at issue were receiving special education and related services within the non-public school they attended prior to the 2021-2022 school year. The non-public school at issue is not within the boundaries of the District in which the Students at issue reside. The non-public school was first notified in a letter dated May 21, 2021, that special education and related services would no longer be provided on-site at the non-public school beginning with the start of the 2021-2022 school year. In a letter dated May 24, 2021, the Parents were informed that the District would no longer be providing special education or related services at the non-public school, but would be transporting the Students to the District schools for receipt of special education and related services. This plan would begin at the start of the 2021-2022 school year. Individual IEP meetings would be held the week of August 9, 2021. Following email correspondence between the District and one of the Complainants, a request to amend the complaint was received. An additional issue was added to the complaint and additional time provided for a response from the District.

Issues Investigated

1. Did the District consult with the private school administrators and/or with parents prior to the decision to change the location for provision of special education services from the private school to a District facility in violation of 92 NAC 51 § 015.03D1d(3)?
2. Did the District provide the parents with an opportunity to participate in the development of an IEP before making any decisions about the provision of students' special education services in violation of 92 NAC 51 §§ 015.01B3; 009.01A and 007.07A8?
3. Did the District fail to provide a prior written notice (PWN) or other written explanation of the District's plan to change the location of special education services from the private school to a District facility in violation of 92 NAC 51 §§ 015.03D1e and 009.05A1?

4. Were the students denied a free appropriate public education (FAPE) when the decision was made by the District to change the location for provision of special education services in violation of 92 NAC 51 § 015.0311?
5. Did the District not act in good faith while attempting to schedule a mediation of issues in Complaint 2021-18 and used the mediation process to delay the investigation with the intent to proceed with the decision to change the location of special education services in violation of 92 NAC 51 § 009.12B2?

Documents Reviewed by Investigator

From the Complainant

- Letter of Complaint and all attachments from Parent A (received by NDE June 16, 2021)
- Letter of Complaint from Parent B (received by NDE June 23, 2021)
- Email correspondence between District and Complainants
- Email correspondence between Parent A and the Complaint Investigator (July 14, 2021; July 26, 2021)
- Phone interviews with Parent A (June 29, 2021; July 8, 2021; July 20, 2021; July 27, 2021)
- Phone/Zoom interview with Parent B (July 1, 2021; July 23, 2021)
- Letter of Complaint from Parent C (received by NDE August 5, 2021)

From the School District

- District response dated and received on July 14, 2021
- Student's IEPs, MDTs,
- Letter to administrator of non-public school
- Nebraska guidance on parentally placed non-public school students
- Sample forms from consultations with non-public schools
- Website and newspaper notices for consultation meetings
- District response to amended complaint received via email on July 22, 2021

Findings of Fact

Nebraska law provides that parents of parentally placed non-public school students who qualify for special education and special education related services may either receive equitable services from the public school district where the non-public school is physically located or may elect to receive a free appropriate public education (FAPE) from the public school district where the student resides. (92 NAC 51 § 015.03C1b.)

Public school districts are only required to hold consultation meetings with representatives of non-public schools and the parents attending such non-public schools for those non-public schools and parents located within the boundaries of the public school (92 NAC 51 § 015.03D1). There is no requirement to hold a consultation meeting with students who are receiving FAPE from the resident district.

Parentally placed nonpublic school children who have chosen to receive FAPE from their resident district must have their IEP developed and implemented in accordance with 92 NAC 51 § 007.92 and NAC 51 § 015.03C1a(1).

Prior written notice must be provided for any proposed change to identification, evaluation, or educational placement of a child or the provision of a free appropriate public education in accordance with section 009.05B. (92 NAC § 009.05A1.)

The IEP should include the date that services will begin and any modification in services along with the frequency, location, and duration of those services and modifications, 92 NAC 51 § 007.07A8.

Parents of children with a disability must be afforded the 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. (92 NAC 51 § 009.01A.)

Prior to the 2021-2022 school year, the students at issue received all special education and related services at the non-public school.

On May 24, 2021, the District provided notice that the location of the special education and related services would be provided at an identified elementary, middle, or high school depending on the student's grade level and stated the District would be responsible for transportation to the designated school. The letter also provided that the Parents would be invited to individual IEP meetings "to denote the change in service location" the week of August 9, 2021.

On May 5, 2021, the District published a notice in the Suburban Newspaper providing public notice to parents and representatives of nonpublic schools within the District boundaries of a meeting to be held on May 12, 2021 to develop the plan for special education services for the 2021-2022 school year and posted notice to their website.

Issue #1

Did the District consult with the private school administrators and/or with parents prior to the decision to change the location for provision of special education

services from the private school to a District facility in violation of 92 NAC 51 § 015.03D1d(3)?

92 NAC 51 §015.03D1 states:

015.03D Consultation

015.03D1 To ensure timely and meaningful consultation, a school district or approved cooperative must consult with representatives of nonpublic schools located in the school district or approved cooperative and representatives of parents of parentally-placed nonpublic school children with disabilities attending such schools during the design and development of special education and related services (FAPE and equitable services) for the children regarding the following: (emphasis added)

The Complainant's Position

The Students at issue attended a non-public school within the District and were special education eligible. The IEPs for all of the Students were due after the start of the 2021-2022 school year. During the 2020-2021 school year, the Students received their special education services on site at the non-public school by a District contracted special education teacher. On May 21, 2021, the administrator from the non-public school the Students attended was informed by letter that special education and related services would no longer be provided at the non-public school; Students would be transported to the local public school. There would no longer be a special education teacher on site at the non-public school. On May 24, 2021, the Parents were notified that special education and related services would no longer be provided at the non-public school. The last day of school for the 2020-2021 school year was May 27, 2021. Part of the Parents' decision making for choosing the non-public school was that their Students would receive special education services on-site. One of the Parents contacted the District about the plan and was told the decision was because of budget concerns, lack of bus drivers and special education staff. The District did not consult with the non-public school administrator or with the parents prior to making this change. The District planned to schedule IEP meetings for the week of August 9, 2021 to reflect the change in location and

need for transportation as a related service; the meeting would not include a discussion about the change in location or potential impact of that change, that was going to happen. (Letters of Complaint dated June 16, 2021; June 23, 2021; August 5, 2021).

The District's Position

The non-public school that the Students attended was not within the boundaries of the District. The District was not obligated to have a consultation meeting with non-public schools that are not within the boundaries of the District.

Nevertheless, the District provided notice on its website and published notice of the consultation meeting for schools within its boundaries. (Letter of Response dated July 14, 2021).

Investigative Findings

All three Students were residents of the District for school enrollment purposes. The non-public school where the Students attended was not within the boundaries of the District, but was within an adjoining district.

The District advertised a consultation meeting in the community newspaper on May 5, 2021. The consultation meeting occurred, as announced on May 12, 2021. Only 2 individuals attending the meeting; a member from the District and a member from a nonpublic school within the District boundaries.

The consultation meeting agenda stated that:

"...(children who attend a nonpublic school outside of the attendance boundaries of [District] but live within [District] attendance boundaries) at the choice of the parent, will either be served through their home district on an IEP or through the district the nonpublic school is located, on an equitable services plan".

The Parents of the Students at issue have elected to receive FAPE from the District. These Students had valid IEPs at the start of the 2021-2022 school year.

The non-public school staff had participated in all IEP meetings for these Students.

The non-public school was informed of the decision to change location of special education and related services by a May 21, 2021, letter. The Parents were informed by letter on May 24, 2021, that location of services would change.

Summary and Conclusions

The District was under no obligation to hold a consultation meeting with the Parents at issue nor the nonpublic school because the nonpublic school is not located within the boundaries of the District.

The District did advertise for and hold a consultation meeting with the nonpublic schools within its boundaries and representatives of parents of parentally-placed nonpublic school children with disabilities as required by Rule 51.

Based on the information contained discussed above, the District has implemented the requirement of 92 NAC § 51-015.03D1d thus **no corrective action** is required.

Issue #2

Did the District provide the parents with an opportunity to participate in the development of an IEP before making any decisions about the provision of students' special education services in violation of 92 NAC 51 §§ 015.01B3, 009.01A, and 007.07A8?

92 NAC 51 § 007.07A8 states:

007.07A8	The projected date for the beginning of the services and modifications described in 92 NAC 51-007.07A5 and the anticipated frequency, location, and duration of those services and modifications;
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92 NAC 51 § 009.01A states:

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.
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92 NAC 51 § 015.01B3 states:

015	Children with Disabilities Attending Nonpublic Schools
015.01	Children Placed In or Referred To a Nonpublic School or Facility by the School District or Approved Cooperative As a Means of Providing Special Education and Related Services

- 015.01B The school district or approved cooperative is responsible for initiating and conducting meetings for the purpose of developing, reviewing and revising an IEP for a child with a verified disability.
- 015.01B3 If the nonpublic school or facility initiates and conducts these meetings, the school district or approved cooperative shall ensure that the parents and nonpublic representative:
- 015.01B3a Are involved in any decision about the child's IEP; and
- 015.03Bb Agree to any proposed changes in the IEP before those changes are implemented.

Complainant's Position

The Parents were invited to, attended and participated in the annual IEP meeting for each of their Students. The IEPs for the Students were developed during the 20-21 school year. The IEPs at issue provided that special education and related services would be provided on-site with a special education teacher from the District. The Parents were notified, in a letter dated May 24, 2021, that services for the 21-22 school year would be provided at District schools and District would transport. The Parents were informed that IEP meetings would be held the week of August 9, 2021 to amend the location of services on the IEP. (Letters of Complaint dated June 16, 2021; June 23, 2021; August 5, 2021).

During the 20-21 school year, the special education teacher contracted with the District to provide special education services three days a week at the non-public school. The teacher retired at the end of the 20-21 school year. The District did not attempt to contract for a replacement special education teacher. The District did not meet or discuss the location change with the

Parents nor did the District consider potential impacts the change in location might have on the Students' education or progress made prior to the decision in the May 24, 2021 letter. Parents were very concerned how this change in location would impact on their Students' educational program and progress. Students A and B were eligible under OHI; transitions were difficult for these two Students. The Students' potential meltdowns that often happened with transitions would limit any learning that day for the Students. Also, the Students would be missing a significant amount of instructional time taking into consideration the amount of time it would take to wait for the bus, travel to the new school, receive services and return to the non-public school on the bus. The Students were already struggling with learning which was why they were special education eligible and their individual needs were not being addressed with this change in location of services. Observations were a part of one Student's IEP, yet the observations would not be occurring and would be impossible if the special education provider was never at the Student's school. One Parent contacted the special education director, but nothing was resolved. The Director stated this decision was, in part, for budgetary needs, lack of bus drivers and special education providers. The special education teacher that was at the non-public school retired last year and the District did not have another available special education provider for the non-public school. (Letters of Complaint dated June 16, 2021; June 23, 2021; August 5, 2021).

District response

The non-public school was not within the boundaries of the District. The District stated that the location of services was a District decision. Staffing limitations impacted the ability to provide special education services in District schools. The District has been seeking certified special education teachers but have not been able to hire the number needed for District schools. The District was willing to provide door to door bus transportation and noted it was a five-minute drive. (Letter of Response dated July 14, 2021).

Investigative Findings

The relevant Students were special education eligible and had IEPs developed and implemented by the District. The District has provided special education and related services through IEPs to the special education eligible Students at the non-public school. The Students IEPs, which were developed at IEP meetings during the 20-21 school year, listed on site special education and related services on their IEPs that were developed.

Summary and Conclusions

The District developed and maintained an IEP during the 20-21 school year for each of the Students at issue in compliance with the applicable regulations.

The District sent notice of its intent to hold new IEP meetings to “denote the change in service location.” It is premature to determine whether any potential changes to the IEP’s at issue, will or will not be in compliance with Rule 51.

Section 015.01B3 does not apply because as previously stated, the nonpublic school at issue is not within the District’s boundaries. As a result, the District fully complied with the relevant previously cited regulations regarding the most recent IEP.

It is premature to determine whether the Parents at issue will be provided meaningful parental participation in educational placement and services that will be offered.

The District must schedule and hold IEP meeting with respect to each of the Students and fully comply with sections 007 and 008 with the anticipated change in the location of services. However, no such meeting had occurred at the time these complaints were filed. Thus, **no corrective action** is required.

Issue # 3

Did the District fail to provide a prior written notice (PWN) or other written explanation of the District’s plan to change the location of special education services from the private school to a District facility in violation of 92 NAC 51 §§ 015.03D1e and 009.05A1?

92 NAC 51 § 009.05A1 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 district or approved cooperative:

009.05A1 Proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education.

92 NAC 51 § 015.03D1e states:

015.03D Consultation

015.03D1e If the school district or approved cooperative disagrees with the views of the nonpublic school

officials on the provision of services or the types of services (whether provided directly or through a contract), the school district or approved cooperative will provide to the nonpublic school officials a written explanation of the reasons why the school district or approved cooperative chose not to provide services directly or through a contract.

Complainant's Positions

The Parents were notified about the District's plan on May 24, 2021. The non-public school was first notified on May 21, 2021. The Parents and non-public school administrator contacted the District about the decision. Neither the Parents or the non-public school were provided an opportunity to discuss the provision of services at the non-public school nor provided a written explanation of the reasons for the change. This change in location of special education services was a change in the provision of FAPE as outlined on their Students' IEPs. Parents were not provided with a prior written notice (PWN) outlining the change or reasons for the change and other factors considered. They were denied their procedural safeguards when they were not provided with a PWN after the District made the unilateral decision without the input from the parents or non-public school. Repeated requests from the District to discuss or reconsider the decision were rebuffed. (Letters of Complaint dated June 16, 2021; June 23, 2021; and August 5, 2021).

District Response

Since the decision to change the location of services was a District decision and was not a proposal to change the identification, evaluation, educational placement or provision of a free appropriate public education, there was no need for a prior written notice (PWN). The Parents and non-public school personnel were notified by letters of the plan to change locations at the start of the 2021-2022 school year. All Students affected would have IEP meetings prior

to the start of the 21-22 school year where the location of services would be addressed and PWNs would be provided after the IEP meetings. (Letter of Response dated July 14, 2021).

Investigative Findings

Student A's IEP was in full force and effect until January 26, 2022

Student B's IEP was in full force and effect until March 23, 2022

Student C's IEP was in full force and effect until April 15, 2022

To determine whether prior written notice was required, the first inquiry is to determine whether such notice is required. For the District to have been required to provide such written notice, the change must have been regarding the identification, evaluation, educational placement or the provision of a free appropriate public education. In this case, there is no dispute that the change did not impact the identification or evaluation for these three students.

Therefore, we turn to whether there was an educational placement change.

Educational placement is that which is set forth in the student's IEP. *Oliver C. v. State Dep't of Education*, 762 Fex.Appx. 413 at 415 (2019)(citations omitted). : "A change in location alone does not qualify as a change in 'educational placement'. Rather, a change in placement occurs 'when there is a significant change in the student's program.'" Further, "[a] transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a change in placement, whereas an expulsion from school or some other change in location made on account of the disabled child or his behavior has usually deemed a change in educational placement..." *Hale v. Poplar Bluffs Hale Dist.*, 280 F.3d 831 (2002). Changes in location of services for fiscal reasons or other concerns unrelated to the individual student, are not usually changed in educational placement. *J.A. ex rel. T.L. v. Moorhead Public Sch.*, ISD No. 152, 2015 U.S. Dist. LEXIS 21152, 2015 WL 756885.

The next inquiry then it whether the change in the location was changed the provision of FAPE.

For the IEPs for Students A and B, the measurement of progress on goals to complete the required quarterly reports require observation by both the classroom teacher and special education teacher in some cases, an observation by a speech/language pathologist is also required. Any potential change in how progress will be report is an IEP team decision. Because a new IEP hasn't been held to discuss these changes, a PWN is not yet required.

Summary and Conclusions

Section 015.03D does not apply for the reasons previously stated.

The District is required to provide notice in writing any time the District proposes to initiate or change “the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education;”. 92 NAC 51 §009.05A1

The District provided notice in writing to the parents at issue identifying the proposed change in location of services. The District’s response did not identify any specific information regarding these specific students nor the services that each individually was entitled to under their current IEP’s. The District must schedule and hold IEP meeting with respect to each of the Students and fully comply with sections 007 and 008 with the anticipated change in the location of services. However, no such meeting had occurred at the time these complaints were filed.

For the reasons described above, the District has implemented the requirements of 92 NAC 009.05A1. Thus, the following **no corrective action** is required.

Issue #4

Were the Students denied a free appropriate public education (FAPE) when the decision was made by the District to change the location for provision of special education services in violation of 92 NAC 51 § 015.0311?

92 NAC 51 § 015.0311 states:

015.031 Location of Services and Transportation

015.0311 Services (equitable or FAPE) to parentally-placed nonpublic school children with disabilities may be provided on the premises of nonpublic, including religious, schools, to the extent consistent with law.

Complainant's Positions

The Parents claimed that the unilateral decision to change the location of special education services for their Students was not considering the impact it would have on the Students’ education and educational progress. Students A and B were eligible under OHI and both had ADHD diagnoses. For both Students, transitions were difficult, moving to another school in the middle of the day would be disruptive and prevent educational progress. The lack of a special education teacher on site would not ensure the appropriate implementation of the IEPs for Students A and B. (Letter of Complaints dated June 16, 2021 and June 23, 2021).

District's Response

The District asserted that location of services was in the purview of the District. The Students were not deprived of special education services nor were they denied a FAPE. (Letter of Response dated July 14, 2021).

Investigative Findings

The change of location of services has not been implemented yet, nor has there been any evidence of the negative impact that a change of location would cause to any of the Students. The District has not yet held IEP meetings to discuss the potential impact the change of location would mean to the Students.

Summary and Conclusions

The determination of whether there has been a denial of FAPE requires consideration of two components: substantive and procedural. The question one must answer to determine the substantive standard is whether the IEP was "reasonably calculated to allow the child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District. RE-I*, 137 S.Ct. 988 (2017). The change in location has not been implemented yet, nor has the IEP been amended. The plan was to have an IEP meeting before the start of the school year and the location change will start at the beginning of the 21-22 school year. The determination of a substantive violation would be premature.

In this case, as identified in Issue 4, there no is procedural violation. For a procedural violation to amount to a denial of FAPE there must be a loss of an educational opportunity, and infringement on parental participation, or loss of educational benefit. *J.L. v. Mercer Island School District*, 592 F3d 938, 951 (9th Cir. 2010). Due to the lack of evidence that a prior written notice is needed at this time, this case does not yet rise to the level of a denial of FAPE. Thus, **no corrective action** is required.

Issue #5

Did the District not act in good faith while attempting to schedule a mediation of issues in Complaint 20.21.18 and used the mediation process to delay the investigation with the intent to proceed with the decision to change the location of special education services in violation of 92 NAC 51§ 009.12B2?

92 NAC § 51-009.12B2 states:

009.12 Mediation

009.12B The procedures shall ensure that the mediation process:

Complainant's Positions

During the process of attempting to schedule the mediation, Parent A requested the mediation before the proposed August 2021 IEP meeting or asked to stay the implementation of the plan until after mediation could be completed; this was denied. Parent A also requested to not have attorneys present at the mediation; this too was denied. As a result, Parent A requested to amend the Complaint to include an issue that District was not acting in good faith in scheduling the mediation. The Parents claimed the District acted in bad faith to delay or deny the parents' rights when the District would not consider any of parents' requests with respect to mediation. The Parents believed that the District's actions demonstrated that the plan was going to be implemented regardless and that is why the District would not engage in mediation. The upcoming IEP meeting was all or nothing; Parents had to accept the change in location or their child would not receive special education services. No other considerations would be addressed at that IEP meeting. (Email correspondence between Parent A and the Complaint Investigator July 14, 2021 and July 26, 2021).

District's Response

Mediation was a voluntary proceeding to which both sides must agree. The District wanted their attorney present for the mediation, did not want to delay the IEP meeting and wanted a say in the mediation date. The Parents wanted these demands met before the District would attempt mediation. When the District would not agree to the demands, the Parents claimed the District was acting in bad faith.

Investigative Findings

The District had a right to insist on having their attorney present at mediation. Mediation is voluntary.

Summary and Conclusions

Mediation was a voluntary process and both parties did not agree to mediation. There is nothing in this record that supports the District acted in bad faith when attempting to schedule mediation. The District chose not to participate and their reasons were within their discretion. There was no violation of Rule 51 or Part B of IDEA.

Notice to District

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